

OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic



This report is part of ODIHR's ongoing efforts to respond to human rights challenges caused by the COVID-19 pandemic throughout the OSCE.

Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR)
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ISBN 978-3-903128-55-2

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CONTENTS

FOREWORD	5
INTRODUCTION	7
EXECUTIVE SUMMARY	11
PART I. STATES' OBLIGATIONS IN A TIME OF EMERGENCY	19
I.1 STATES OF EMERGENCY AND OTHER EMERGENCY MEASURES	20
I.1.A SUMMARY OF RELATED INTERNATIONAL STANDARDS AND OSCE COMMITMENTS	20
I.1.B OVERVIEW OF MEASURES ADOPTED BY PARTICIPATING STATES	25
I.1.C AREAS OF CONCERN AND GOOD PRACTICES	33
I.1.D OVERSIGHT OVER STATES OF EMERGENCY AND RELATED EMERGENCY MEASURES	42
I.2 ACCESS TO INFORMATION	52
I.3 DIGITAL TECHNOLOGIES AND ELECTRONIC SURVEILLANCE	57
PART II. IMPACTS ON DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS	64
II.1 DEMOCRATIC INSTITUTIONS AND PROCESSES	65
II.1.A FUNCTIONING OF PARLIAMENTS	65
II.1.B DEMOCRATIC LAW-MAKING	69
II.1.C JUSTICE INSTITUTIONS	74
II.1.D ELECTIONS AND ELECTION OBSERVATION	79
II.1.E NHRIS AND HUMAN RIGHTS DEFENDERS	86

II.2 SPECIFIC HUMAN RIGHTS CHALLENGES	92
II.2.A FREEDOM OF MOVEMENT	92
II.2.B FREEDOM FROM TORTURE AND ILL-TREATMENT AND ARBITRARY DEPRIVATION OF LIBERTY	99
II.2.C FREEDOM OF ASSEMBLY	106
II.2.D FREEDOM OF ASSOCIATION	111
II.2.E FREEDOM OF RELIGION OR BELIEF	116
II.2.F THE RIGHT TO A FAIR TRIAL AND MONITORING OF TRIALS	120
II.3. INEQUALITY, DISCRIMINATION AND MARGINALIZATION	126
II.3.A HATE CRIMES AND DISCRIMINATION	126
II.3.B GENDER INEQUALITY AND DOMESTIC VIOLENCE	136
II.3.C ROMA AND SINTI	141
II.3.D MIGRATION	147
II.3.E VICTIMS AND SURVIVORS OF TRAFFICKING IN HUMAN BEINGS	152
CONCLUDING OBSERVATIONS AND ODIHR'S OFFER OF ASSISTANCE	158
ANNEXES	161
1. ADDITIONAL INFORMATION ON STATES OF EMERGENCY OR EQUIVALENT STATUS, WITHOUT SEEKING DEROGATIONS	161
2. ADDITIONAL INFORMATION ON STATES OF EMERGENCY OR EQUIVALENT STATUS, WITH DEROGATIONS NOTIFIED TO THE UNITED NATIONS OR/AND THE COUNCIL OF EUROPE	162
3. STATES OF EMERGENCY AND OTHER EMERGENCY MEASURES IN FEDERAL STATES	163

STILL PENDING

FOREWORD

The Covid-19 pandemic has been a formative experience of all humanity, perhaps the biggest since the era of globalization began. For the OSCE region, which saw infections and fatalities grow across countries and continents in the first half of 2020, it continues to be both disruptive and destabilizing. For some time, the pain of losing lives that could not be mourned in person took precedence. However, the effects of the pandemic and their implications for our societies are more far-reaching than anticipated and will last well into the coming decade. Indeed, we are only just beginning to make sense of the magnitude of the crisis, as we move beyond mitigating the impact to developing concepts and models for the time “after the pandemic.”

The OSCE was established at a time of global transformation to support and strengthen human security across the Northern Hemisphere. The 57 countries of the OSCE region now number more than 1.2 billion people, and in our interconnected world, policies and practices developed and applied here have global significance.

In its founding documents, OSCE participating States recognized the essential role of human rights, the rule of law and democratic institutions for our common security and the prosperity of our peoples. The pandemic has put these commitments to the test in a short space of time. As scientists worked to collect data and get a better understanding of this new common threat facing humanity, governments had to act quickly. For elected officials across the region, and indeed worldwide, this was an unprecedented challenge of leadership, co-ordination and communication.

Within a matter of weeks, the majority of states across the OSCE region declared various kinds of emergency regimes, ordering lockdowns, shutting down transport links, closing borders and imposing states of emergency. This action was taken to protect people and halt the exponential growth of the new threat, whose nature we still do not fully understand. Some countries enforced strict stay-at-home orders, while others decided on a more consensual approach, but all depended on the

understanding and solidarity of citizens as they struggled to adapt to the new reality.

The sudden changes to our lives affected people differently, but as so often, those already vulnerable have been harmed disproportionately. This refers to people in greater danger of becoming seriously ill with the disease, such as the elderly, the poor, or those with pre-existing medical conditions. But it also includes those who have suffered from the secondary effects of the pandemic as millions lost their jobs, were isolated from friends and families, trapped with abusive partners, or became victims of hate crime as prejudices tipped over into discrimination and sometimes violence.

While much of this has been recognized by states and a great deal has been done to counter this negative impact, the challenges across the region will last for years, if not decades, and will have to be guided by the global goals of “leaving no one behind and reaching those furthest behind first.”

This report aims to help states learn lessons from the current pandemic in order to strengthen their institutions ahead of future challenges – not only potential health emergencies, but also the growing threat of climate change, as well as human-made conflicts. It begins with an overview of obligations when declaring a state of emergency and any attendant restrictions on fundamental freedoms and human rights, and goes on to describe the impact of the emergency measures implemented around the OSCE region on democratic institutions and human rights. It is hoped that the detailed recommendations contained in the report will be adapted for use in the different countries across the region, now and in the time to come.

The effectiveness of the response to the pandemic has been determined above all by the level of trust in the society, the commitment of political leaders to learn, collaborate, consult, and take principled decisions in times of uncertainty. This openness and commitment to the common good often decided the degree of public trust in leaders and institutions, which in turn affected

citizens' willingness to comply with the major restrictions to their daily lives. The pandemic can therefore be seen not only as a misfortune, but also as an opportunity. An opportunity to rebuild confidence within our societies, renew the social contract within our nations, and to foster collaboration between states and citizens, while restoring the faltering trust between states

at a time when international co-operation, integrity and commitment to common values is so sorely needed. This is our common responsibility, for the benefit of us, the people.

Ingibjörg Sólrún Gísladóttir

STRIKESURSEI

INTRODUCTION

On 30 January 2020, the World Health Organization (WHO) declared a Public Health Emergency of International Concern (PHEIC) as the novel coronavirus SARS-Cov-2 spread across the world. It quickly became a global crisis, threatening human security, endangering international trade and co-operation, and affecting human rights, fundamental freedoms and the stability of democratic institutions worldwide.

The virus was first detected in the OSCE in January, and quickly spread to countries across the region.¹ By early June 2020, when around 400,000 patients had died from Covid-19 around three quarters were from OSCE participating States.² Faced with the rapid expansion of the disease in February and March, participating States found themselves having to take quick decisions to protect the health and safety of the population.

This enormous responsibility to take all necessary measures to prevent and mitigate the health emergency stems from states' obligations to guarantee the human rights to life and health of the population. At the same time, states needed to balance the emergency measures with their impact on fundamental freedoms, human rights, and economic well-being all while avoiding excessive collateral damage and secondary harm.

Ever since the PHEIC was declared, the WHO has been providing recommendations on how to best limit the spread of the disease, and these have supported the justification for the restrictive measures introduced in many places. While all states received the same information and recommendations from the WHO, their public health responses have differed significantly. However, it gradually became clear that overcoming

the pandemic and maintaining the confidence of the general public required a fast and consistent response that was above all based on effective co-operation. At the national level, governments needed to work together with scientists, health agencies, local authorities and civil society, while at international level, consultation with other governments and trustful collaboration within the framework of international organizations was vital to protect the health, security, and rights of all citizens.

The OSCE's comprehensive security approach rests on the three pillars of the political and military, the economic and environmental, and the human dimension. ODIHR is the largest of the OSCE's institutions responsible for the human dimension, and the OSCE commitments in this area give it a special responsibility to serve as a clearing house for information on states of emergency and other aspects relevant to the Covid-19 response. However, ODIHR's role since the outbreak of the pandemic has been far more extensive, as it has also been called upon to provide a broader overview of the human dimension challenges that present a threat to comprehensive security.

30 years ago in Copenhagen, the OSCE's participating States expressed their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government, and reaffirmed that the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace. They also emphasized the fact that the rule of law does not only refer to a formal legal framework, but also to the concept of justice based on the full acceptance of human dignity.

The implementation of human dimension commitments has presented an increasing challenge for many years now. The anniversaries of the Charter of Paris and the Copenhagen Document this year offer an opportunity to recall the roots of the human dimension commitments and renew the optimism of that period of global transformation three decades ago. Taken together with the context of the current pandemic and linking the crisis management that has evolved in recent months to

1 The first cases of Covid-19 were initially confirmed in **Italy** and **Spain** on 31 January. Later, it emerged that it had spread to **France** and the United States even earlier.

2 Within the OSCE region, by early June 2020, roughly half of the people officially recorded as having died with Covid-19 were in the **United States** and the **United Kingdom**, with the combined number of casualties in **Italy, France, Spain, Belgium** and **Germany** making up another third. Source: WHO.

the human dimension of comprehensive security, there are clearly valuable lessons to be learned that can help prepare the OSCE well for the coming years.

The detailed overview of measures taken to manage the public health crisis that are provided in this report aims to help states compare and learn from each other concerning the difficult choices they have been making to balance human rights and fundamental freedoms with the exigencies of the pandemic. This report builds upon and complements the work undertaken within the framework of other international organisations, first and foremost the United Nations, but also other regional bodies such as the Council of Europe, the EU, and others, as well as the work undertaken by civil society throughout the OSCE region.

This report highlights the relevance of the OSCE's human dimension commitments to addressing the current crisis. However, while some emergency measures may still be in place at the time of publication, many of them will have been lifted. An effort has therefore been made to identify ways in which ODIHR and the OSCE as a whole can increase their ability to support participating States in the future.

ODIHR is mandated to gather and analyse factual information on the state of implementation and to conduct programmes that assist States to develop and uphold a democratic culture that respects and promotes the ideals expressed in the OSCE human dimension commitments. The ODIHR's assistance to states generally falls into four categories: (i) disseminating knowledge of the commitments; (ii) monitoring and reporting on implementation of commitments; (iii) providing technical assistance to enhance their implementation; and (iv) organizing and holding human dimension meetings to allow for collective review of implementation.³

The general monitoring mandate of the Office encompasses the entirety of the human dimension, although it focuses on areas not covered by the mandates of either the High Commissioner on National Minorities or the Representative on Freedom of the Media. There are

also large OSCE field operations in some places with a human rights monitoring mandate. The institutions of the OSCE alone, however, cannot substitute a broad understanding that implementing human dimension commitments is the collective responsibility of all participating States.⁴

ODIHR was designated by the Concluding Document of Helsinki (1992) as the OSCE's clearing house for information on states of public emergency. After SARS-Cov-2 was designated a pandemic, ODIHR issued *notes verbales*⁵ to participating States recalling their specific obligations, in particular to paragraphs 24 and 25 of the Copenhagen Document (1990) and paragraph 18 of the Moscow Document (1991), which stipulate that participating States must notify ODIHR when a state of emergency is declared or lifted, as well as of any derogation made from the state's international human rights obligations resulting from the state of emergency.

When OSCE participating States introduced various kinds of emergency regimes in response to the pandemic, ODIHR was on hand to remind them of their commitments. At the same time, it started to collect relevant information to be shared between states and used in the development of national responses. ODIHR also offered all possible support within its mandate in dealing with related human dimension issues, including the review of legislation or policies related to declaring a state of emergency, as well as legislation impacting human dimension commitments.

The present report contains information received from participating States, as well as other pertinent information collected by ODIHR using a variety of sources. This includes personal first-hand testimonies, primarily through personal (online) interaction with partners, including governments, international organizations, academic bodies and analytical centres, civil society and people living in OSCE states. Media reports from credible sources were also drawn upon, and information received was corroborated to the extent possible. The examples and specific incidents mentioned in this report serve to illustrate the broader trends impacting

³ See, **Common Responsibility, Commitments and Implementation**, ODIHR Report to the Ministerial Council in Brussels, 2006

⁴ *Ibid.*

⁵ Notes Verbales to all participating States were issued on 20 March, 9 April, 30 April, 22 May and 16 June 2020.

the human dimension across the OSCE region, and are not intended to single out specific participating States for violations of their commitments or their obligations in international human rights law.⁶ Likewise, specific challenges highlighted with examples from participating States do not represent an exhaustive list, but rather serve to provide an illustration in cases where ODIHR has received relevant information. It is understood that states will report to the respective treaty bodies and other mechanisms according to their specific legal obligations, and will thus account for how they have upheld human rights and fundamental freedoms during the pandemic.

While the report does address in detail particular challenges in conflict affected regions in the OSCE area, reliable information has been limited. Obtaining information about these regions from other credible sources such as independent civil society has also been challenging. Consequently, further efforts in this regard need to be taken as many people living in these areas are likely to have been disproportionately affected by the pandemic and its aftermath.

The report contains references to sources wherever public material was referred to, and they can be directly accessed through the hyperlinks included in the electronic version of this report. Where country examples are mentioned without a specific event or source due to space constraints, ODIHR is in possession of more detailed information and documentation.

The report is organized into two parts, which are further divided into sections and subsections. **Part I** presents an overview of state obligations when declaring a state of emergency and derogating or otherwise restricting fundamental freedoms and human rights, and related questions of oversight and transparency. **Part II** describes the various impacts of these measures on democratic institutions and human rights. The first

section addresses the implications on democratic institutions and processes, for example the functioning of parliaments, democratic law-making, justice institutions, elections and election observation, the role of human rights defenders, and national human rights institutions. Next it analyses how specific fundamental rights and freedoms have been affected (freedom of movement, freedom from arbitrary detention and torture, the freedoms of assembly, association, religion and belief, as well as the right to a fair trial). Finally, it examines the disproportionate impact of the pandemic on some groups and segments of the population more closely, focusing particularly on hate crime and discrimination, discrimination and violence against women, and groups such as Roma and Sinti, migrants and refugees, and victims of trafficking in human beings. Although addressed in a larger context throughout the report, the right to education and the right to health are not specifically addressed under the thematic chapters.

This structure follows and corresponds with the ODIHR's programmatic strategy, which comprises (i) democratic institutions that are based on human rights and the rule of law, participatory and representative, accountable and trusted; (ii) the advancement of human rights and democracy through civil society; and (iii) the promotion of societies that are equal, inclusive, resilient and free from all forms of discrimination and marginalization.

Recommendations are generally addressed to participating States, or to specific institutions or authorities as mentioned, for instance courts or national human rights institutions. The recommendations should be understood within the context of each given country. Some are for immediate action in countries in a state of emergency, lockdown or other restrictions. Others are intended for states emerging from a state of emergency and help them prepare for future emergencies. Since the impact and emergency measures taken by participating States differ significantly, no distinction is made between short-, medium- and long-term recommendations. It is therefore advised to read the recommendations with flexibility, allowing them to be adapted to the different situations states find themselves in. ODIHR is pleased to offer its assistance to support individual states further should it be requested.

6 Examples are provided from most participating States. Where the European Union is referred to as an entity it is with the understanding of its sui generis nature in international law and the fact that its institutions exercise legislative, executive and judicial powers that may affect the enjoyment of human rights in the OSCE region, albeit without the EU being formally obliged to adhere to the OSCE commitments as such.

A note on the terminology:

The terminology used in this report follows general usage, although no formal standard has been developed in all instances. Wherever possible, the official terminology of the WHO is used, although nothing should be inferred or interpreted as being in contradiction with any official health authorities. It is noted that the novel coronavirus itself is referred to as SARS-Cov-2, whereas the disease it causes in people infected is referred to as Covid-19. When reference is made to “lockdown”,

“stay-at-home-orders”, “quarantine”, “social/physical distancing”, “PPE/masks/face covering”, “testing and tracing”, this is always intended to be understood in accordance with official WHO terminology. Since the terminology used in different languages in different participating States varies and is not always consistent, and since colloquial terms do not always correspond to scientific definitions, an understanding is assumed that the meaning of such terms must be sufficiently contextualized to use them in referring to specific country situations.

STRIPE SURS

EXECUTIVE SUMMARY

OSCE participating States faced an unprecedented challenge when trying to protect the health and safety of the population and prevent the spread of the coronavirus. In response, more than third of participating States declared an official “state of public emergency” and almost all others adopted emergency regimes of different intensity, or other restrictive measures. While not all states that declared a state of emergency sought derogations from international human rights standards, derogations were made to the freedom of assembly and association, freedom of movement, right to liberty and a fair trial as well as rights to privacy, education and property. However, the pandemic has shown that whether or not a state has declared a state of emergency and chosen to derogate is not necessarily an indicator of the severity of the emergency powers in effect. Still, formally declaring a state of emergency or equivalent status generally triggers greater safeguards, oversight and necessary limitations in the duration of exceptional powers.

In the Moscow Document (1991), participating States committed to notifying ODIHR when a state of emergency is declared, as well as of any derogation made from the state’s international human rights obligations. In line with this commitment, 28 states informed ODIHR of emergency measures taken in the context of the pandemic. In fulfilment of its mandate as the OSCE’s clearing house for information on states of public emergency, ODIHR notified participating States on four occasions of the information received and, in this vein, prepared this report. Though adopting relatively similar restrictive measures, states came to different conclusions regarding the need to declare a state of emergency and to derogate from international treaties, indicating a lack of common understanding with respect to the scope of the requirements under international law.

International standards provide that derogations and restrictive measures that similarly interfere with the exercise of human rights and fundamental freedoms should be temporary and proportionate to the aim of such measures, and necessary and limited in duration to that which is strictly required by the exigencies of the

situation. While the pandemic has shown how difficult it is to draw the exact line between what is necessary and proportionate and what is not, states generally adopted very stringent emergency measures and extended them over several weeks or months. More efforts could have been made to weigh and balance other interests and consider less restrictive measures, if not at the outset, at least at a later stage. The proportionality of the emergency measures needs to be ensured over time and can shift as circumstances evolve and knowledge about the pandemic develops. ODIHR noted that many states made efforts to amend measures that had become unnecessary or disproportionate. Further, several courts held that the continued application of certain emergency measures to be disproportionate, for example the continued ban of assemblies with more than 10 people, or the continued absolute prohibition of gatherings in places of worships when gatherings were otherwise eased.

In line with the commitment to lift a state of public emergency as soon as possible and ensure it will not remain in force longer than strictly required by the exigencies of the situation, the legal frameworks of most of the participating States that declared a state of emergency or equivalent status generally provide for a maximum duration of the exceptional legal regime. Most of legal frameworks also contain sunset clauses ensuring that all legal acts and measures taken during that period cease to have effect at the end of the emergency. In the few instances where safeguards to ensure emergency measures are limited in duration were not in place, concerns arose about the prolongation of restrictions to human rights and fundamental freedoms after the exigencies of the emergency necessitate such limitations.

In many states, the response to the pandemic has involved the adoption of numerous pieces of complex legislation, regulations and administrative decisions, at times both at the central and local levels. These acts were often quickly drafted, adopted with little or no public debate, and in a short period of time repeatedly amended, resulting in a large degree of uncertainty that affected the implementation of the measures and

prevented a clear legal understanding of the relationship between the different measures. On several occasions, further confusion was brought by the executive announcing additional rules or exceptions not necessarily reflected in legal texts. In some cases, especially at the initial stages of the crisis, restrictive and other measures were adopted without legal basis or not in accordance with procedural requirements set in the constitution or law.

A state of public emergency or other measures adopted to respond to the Covid-19 outbreak should be guided by the principle of non-discrimination. While there may not be many cases of direct discrimination on such grounds in the emergency legislation or administrative orders, emergency legal frameworks and restrictive measures have often resulted in indirect discrimination, causing unequal treatment or a particular negative impact on certain groups when put into practice. Because Covid-19 disproportionately affects older people, and because a large majority of fatal victims of the disease are of advanced age, many countries introduced special regimes with varying success to protect them, some of which may have prevented their equal treatment. States also generally failed to introduce measures or promote policies and programmes to address the specific needs of women; however, while the initial emergency legislation or measures may have been gender and diversity blind, later amendments or extension have at times introduced more gender and diversity-sensitive provisions.

OVERSIGHT OF EMERGENCY MEASURES

States of emergency and emergency powers can also impact constitutional norms pertaining to the separation of powers, invariably consolidating power in the executive. In line with the commitment to ensure effective oversight, in most participating States, parliaments must be immediately notified of declarations of state of emergency (or the equivalent) made by the executive. Parliaments may revoke or may need to approve the declaration, or parliament's authorization may be required for an extension of the emergency status. At times, there is also a mechanism to ensure that the parliament reviews or approves implementing measures adopted by the executive. However, where emergency measures, even those of the same magnitude, were

introduced outside of the framework of a state of emergency, parliamentary oversight was not guaranteed to the same degree. Further, some parliaments may not have been fully able to exercise effective oversight of the state of emergency or related measures because their activities were suspended or considerably reduced due to the pandemic. Courts also provide essential judicial oversight, however, the partial or complete closure of courts in certain states impeded access to an effective remedy, be it for challenging restrictive measures or for other matters, especially those to protect the exercise of non-derogable and absolute rights.

TRANSPARENCY AND ACCESS TO INFORMATION

States have committed, in the context of a state of emergency, to inform their citizens, without delay, about which measures have been taken. However, during the pandemic, the right to seek information has been affected by legal or *de facto* limitations because states suspended or extended deadlines for the processing of requests or prioritized certain requests for logistical reasons, and effective access has not always been consistently upheld. While public trust in the institutions adopting measures and readiness to follow guidelines is dependent on the level of transparency and public access to information on relevant data and statistics, as well as the decision-making processes, almost all states needed to make further efforts to ensure transparency. In particular, concerns about access to information for persons with disabilities were noted when information is provided on platforms and formats to which persons with disabilities may have limited access. States have also committed to maintain freedom of expression and freedom of information, and not to adopt measures aimed at barring journalists from the legitimate exercise of their profession other than those strictly required by the exigencies of the situation. Still, some states imposed restrictions to access to public information, on the dissemination of information about the pandemic and monopolized the flow of public health information. There have also been cases when participating States adopted or amended legislation to criminalize the dissemination of so-called "false information" about the pandemic. While public authorities may have a genuine need to combat information that threatens public health, such a goal is best achieved by

ensuring access to independent and pluralistic sources of information.

DIGITAL TECHNOLOGIES AND ELECTRONIC SURVEILLANCE

Data collection, statistical analysis and surveillance are effective instruments of epidemiological control, and in the OSCE region, 38 states introduced some form of enhanced electronic surveillance measures in the context of the emergency. In 28 states mobile applications aimed at collecting and analysing individuals' private information, geographic location, or related health data of those under epidemiological supervision were developed and are already in use. However, the use of technological solutions for outbreak analysis, proximity or contact tracing, and as symptom tracking tools, carries significant risks for the right to privacy and personal data protection and the exercise of other fundamental freedoms, especially for individuals in vulnerable situations or marginalized groups. This risk is even greater when the use of such technologies is not temporary, transparent, voluntary at each step, reliable, free of commercial interest and proportionate to their primary purpose. To address this risk there have been state and intergovernmental efforts to ensure the transparency of all technology and surveillance measures. Likewise, data protection agencies in some states have been proactive in raising awareness and providing guidance on appropriate use.

FUNCTIONING OF PARLIAMENTS

In most OSCE participating States, parliaments were able to continue functioning or resumed functions after a short interruption and, as a result, played a crucial role in shaping states' responses to the crisis, by guaranteeing the proper representation, effective oversight, and the inclusive and transparent adoption of legislative measures. To continue functioning in the face of the challenges posed by the pandemic, many national parliaments took some or all of the following steps: amended rules or procedures to allow for certain alternative arrangements in their work; limited the number of plenary sessions and committee meetings revising the calendar and streamlining the work of the parliament; adopted measures to limit the thematic span of their work; reduced the number of deputies having to physically

attend plenary sessions and committee meetings; and introduced innovations and technological solutions allowing legislatures to operate remotely and virtually. Only a few legislatures were properly equipped prior to the crisis, and many others had legal or constitutional barriers to prevent such practices, but still many parliaments provided for much of their work to be carried out online. While this is anticipated to have a lasting impact on how parliaments function in the future, remote debates still fall short of replacing in-person practices. States must ensure meaningful discussions, inclusive law-making, space for reaching political compromises and safeguard the voice of the parliamentary oppositions. A limited number of parliaments have been severely impacted – directly or indirectly – by the pandemic, ultimately undermining their regular functioning. Despite differences in context and measures being adopted, these cases have raised concerns regarding the rule of law and the balance of powers, depriving decision-making processes of parliamentary checks or oversight.

DEMOCRATIC LAW-MAKING

Many states made use of expedited procedures, through which legislation was swiftly proposed and adopted in order to respond to imminent or pressing societal needs, to adopt emergency measures. Although expedited procedures are often intended for situations such as those faced in the context of the pandemic, the widespread use of such procedures decreased the transparency, inclusiveness and accountability that should guide the overall process to ensure that laws are legitimate and accessible. ODIHR noted that expedited processes to adopt pandemic related legislation often lacked consultations, and sometimes a complete absence of meaningful parliamentary debate on the proposed legislation, which further distorted allocations of legislative power between the executive and legislature. There were instances during the pandemic when states applied accelerated procedures, fast-tracking legislation for purposes other than emergency response or proposing contentious legislation, with only cursory reference to the emergency context, for example on pensions, migration and media freedom. Accelerated law-making procedures also resulted in omitting other aspects of regular legislative processes, such as public consultations and impact assessments and did not sufficiently consider the differentiated impact of emergency

rules on different parts of society. However, ODIHR has noted instances where parliaments took on an effective oversight function in scrutinizing proposed legislation where governments would otherwise be granted far-reaching authority on matters that require parliamentary control and adding safeguards to proposed legislation and necessary temporal and other limitations.

JUSTICE INSTITUTIONS

The pandemic posed particular challenges for states to uphold their commitments to guarantee the rule of law remains in force at all times, even during a state of public emergency, as courts partially or fully closed in most participating States. For courts to fulfil key functions related to the right to a fair trial by an independent and impartial court, the right to judicial control of deprivation of liberty and the right to an effective remedy, many participating States suspended, interrupted or expanded procedural deadlines and statutes of limitation and courts had to prioritize certain matters. In general, states were not prepared for widespread court closures and did not have regulations in place to govern access to justice in such circumstances and in many places, courts dealt with overlapping and contradictory regulations. The pandemic demonstrated the limitations faced by judges and court officials to work remotely using digital technology for communication, to file motions and conduct proceedings. Concerns also arose in a number of states regarding the use of videoconference hearings where not all trial parties had adequate access to and familiarity with the respective technology. Still, courts had to provide uninterrupted access in urgent legal matters, in particular for vulnerable people in cases of domestic violence, trafficking in human beings, detention and torture related situations, and remedy for cases emerging from excessive or discriminatory emergency measures. Even where courts remained open in principle, they worked with limited capacity and physical access to court buildings was restricted significantly in many places. Consequently, individuals faced considerable challenges in access to justice in civil, criminal and administrative procedures.

ELECTIONS AND ELECTION OBSERVATION

Most elements of an electoral process come under pressure in the conditions of states of emergency or

similar measures, and they have been significantly affected during the pandemic. This included the predictability of election dates, fulfilling conditions for registering as candidates, full opportunities for political actors to campaign in a meaningful way, the preparedness of election administrations, and the provision of unimpeded access for voters. On the whole, the normal conduct of elections in compliance with OSCE commitments has been put at risk by the pandemic and, in particular, the measures taken in response. Further, the effects of the limitations imposed on the exercise of a number of fundamental rights reconfirmed that elections do not take place in the vacuum and freedoms of assembly, expression and movement are essential for genuine democratic elections. Some of the decisions to either postpone elections, suspend the conduct of an already ongoing process, or to hold elections in a challenging environment, raised questions as to whether a reasonable assessment was made vis-à-vis other state obligations, including safeguarding the right to health. This put an additional spotlight on the importance of genuine public debate and inclusive and transparent decision-making processes on matters of public concern. In some cases steps have been taken to amend the rules for elections in an expedited manner, which has increased risks to the fulfilment of OSCE commitments and may disproportionately affect politically disadvantaged groups, such as women, persons with disabilities and national minorities. Regarding observation, while certain temporary adaptations to the way observers work might be necessary, the principle of transparency that the observers serve to uphold might also be challenged if full access to all stages of the process is not guaranteed. New trends that emerged in the public discussion are, greater attention to the constitutional and legal frameworks governing the principle of periodic elections in crisis situations, a heightened interest in alternative voting methods, an increase in understanding that the ability to effectively enjoy fundamental rights is key for genuine elections, and the reaffirmation of the crucial role that election observers – citizen and international – play in the process.

NATIONAL HUMAN RIGHTS INSTITUTIONS AND HUMAN RIGHTS DEFENDERS

The pandemic highlighted the essential role of National Human Rights Institutions, as independent statutory

bodies protecting and promoting human rights and integrity and providing oversight, as well as human rights defenders, whether they advocate for transparency, justice or the rights of marginalized or vulnerable groups. During the pandemic, human rights defenders have raised public awareness about human rights issues, have challenged reprisals and retaliation targeting activists and whistle-blowers; and have exposed gaps in states' responses to the health emergency. However, ODIHR has received a number of reports of threats and attacks targeting human rights defenders, including allegations of physical and verbal attacks, along with death threats, for reporting on the pandemic or for requesting information of public interest related to the pandemic. Judicial harassment and detention of human rights defenders, including journalists, in retaliation for expressing critical views or reporting on irregularities concerning a government's response to the pandemic was also noted. Individuals of diverse professional backgrounds acted as whistle-blowers to uncover information about human rights abuses and the mismanagement of public resources. In a number of cases these whistle-blowers are facing criminal investigations or have been detained as a result. NHRIs continued monitoring the implementation of human rights obligations, informing the public about their rights and holding governments to account when violations occur. However, emergency measures in many states have significantly impacted the ability of NHRIs to carry out their mandate and preserve their independence.

FREEDOM OF MOVEMENT

Restrictions on the freedom of movement included the closing of land borders, airports and ports; restrictions of movement between cities and/or regions; quarantining of cities or regions; imposition of quarantines at borders or in one's home; permission for internal movement only for specific purposes; and curfews. There have also been specific restrictions for certain categories of people, in particular older people. The speed in which international movement restrictions were introduced across the region left some people, including migrants, tourists and other travelers stranded at airports and land borders. Further, many states provided unclear guidelines or insufficient information about border restrictions, often impacting non-citizen residence permit holders. Most participating States introduced

enforcement measures to discourage breaking of lockdowns, curfews or quarantines, some with extreme punitive measures, including imprisonment of up to five years or extremely high fines. While the aim of internal restrictions on movement was generally to protect the health and safety of the population, including those most vulnerable, excessive restrictions may have led to violations of other rights, which may not be proportional to the aim nor necessary, as other less intrusive measures could have achieved the same result. For example, complete curfews for certain groups such as older people, pregnant women or youth, in several states, left them completely reliant on state or volunteer services to obtain medicine, food and other essential items, or socially isolated, even when they are healthy and able.

FREEDOM FROM TORTURE AND ILL-TREATMENT

The pandemic not only brought to light the pre-existing shortcomings in penitentiary systems or other places of deprivation of liberty, such as overcrowding, lack of or insufficient access to healthcare or unsanitary conditions of detention, it also posed additional challenges to the fight against torture. Persons deprived of their liberty are particularly vulnerable to infectious diseases and reports from across the OSCE region indicate that overcrowded prisons severely limit the ability of prisoners to physically distance themselves from one another. Further, a lack of personal protective equipment for prisoners, as well as staff, but also access to testing, water and hand sanitizer has been noted in many states. There are already numerous legal challenges in the OSCE region, arguing that states are failing to protect the health and safety of prisoners because of conditions of detention, coupled with the heightened risks that the disease poses to often overcrowded prison populations, which could amount to inhuman or degrading treatment. In addition, many states have implemented restrictive measures in prisons, temporarily suspending physical visits from family, friends and sometimes even lawyers, despite the fact that the denial of family visits can be considered ill-treatment in itself. The prevention of torture, in particular in settings where people are deprived of their liberty, but also the investigation, prosecution and punishment of such acts has suffered a setback during the current pandemic. This is in part because independent monitoring and

oversight of places of detention, one of the key safeguards against torture and other ill-treatment, has been either completely suspended or is only partially functional in the majority of states. Still, cases of excessive use of force by state officials to enforce emergency measures were reported in a number of participating States, which is incompatible with the absolute prohibition of cruel, inhuman or degrading treatment.

FREEDOM OF ASSEMBLY

The freedom of peaceful assembly is instrumental in enabling the full and effective exercise of other civil and political rights. The pandemic posed particular challenges to states in this regard, as large gatherings and crowds have been identified as particularly prone to facilitate transmission of the virus. During the pandemic, freedom of assembly was restricted in most participating States for generally around three months. In some, all public assemblies were banned. In others, assemblies were restricted to a certain number of participants, or with an obligation for participants to adhere to hygiene measures. The right to effective remedy to challenge bans or restrictions on assemblies is an important safeguard against unjustified restrictions and on several occasions courts struck down emergency regulations or individual orders. During the pandemic, ODIHR has noted instances of unnecessary or excessive use of force by law enforcement in several participating States, contrary to the principles of legality, necessity and proportionality in use of force. While online forms of mobilization and protest cannot be considered a full substitute to the freedom of assembly as is guaranteed by human rights norms and standards, it is crucial that “new or alternative” ways to gather are respected to allow for debate and the joint expression of opinions. Assembly monitoring has a crucial role in ensuring stronger respect for this fundamental right, however, across the region, all major actors in this regard have faced difficulties and limitations to their monitoring activities during the pandemic, except for assemblies happening online.

FREEDOM OF ASSOCIATION

Restrictions on the freedom of expression and access to information imposed by number of states during the pandemic undermined the watchdog function of civil

society, sidelined critical voices and limited their capacity to reach decision-makers and impact policies. In several OSCE participating States prior to the pandemic, associations already faced constraints that included legal and administrative barriers hindering certain types of organizations to receive funds, both domestic and foreign, blanket restrictions on foreign funding or the introduction of new more stringent reporting and disclosure obligations. A few states sought to tighten legislation regulating associations in the midst of the pandemic. The role of civil society as partners of governments when developing emergency policy and legislative responses, disseminating information accessible to all, and providing support and services to marginalized communities was reinforced during the pandemic. This key role would have been better protected had associations, particularly those serving marginalized communities and vulnerable persons, been considered essential in all states and therefore exempt from some restrictions that prevented them from continuing operations and new associations forming during the pandemic.

FREEDOM OF RELIGION OR BELIEF

Since religious activities typically involve the gathering of larger groups of people, the imposition of preventive measures related to Covid-19 has had a profound impact on the ability of individuals and communities to manifest their religion or belief across the OSCE region. Most religious or belief communities have complied with restrictive measures or have adopted voluntary restrictions on their activities and many have contributed to educating their communities about the virus and providing social assistance to vulnerable people. Still some communities refused to comply and challenged physical distancing guidelines or insisted that religious activities continue in person. ODIHR noted examples of co-operation between state authorities and religious or belief communities to undergo careful legal assessments of initial bans on public worship and review guidelines. Unfortunately, toxic narratives espoused by state and non-state actors in certain participating States emerged, blaming religious communities for the spread of the virus. Further, in a few participating States there were incidents of law enforcement raiding the homes of individuals belonging to non-registered religious or belief communities; actions that were considered by some to amount to harassment.

THE RIGHT TO A FAIR TRIAL

All participating States have made significant commitments to respecting and protecting the right to a fair trial. Even in times of emergency this includes the prohibition of retroactive criminalization; the right of detained persons to be brought promptly before a judge; the presumption of innocence; the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; and the right to a hearing within a reasonable time. Participating states have faced challenges upholding the fundamental principles of a fair trial in the context of the current pandemic, in particular in guaranteeing the public nature of hearings; in ensuring that defendants have the facilities and ability to communicate confidentially with their lawyer to properly prepare their case; and be present at the hearing and examine witnesses. These are all difficult through the use of information and communication technologies during remote hearings while courts were partially or fully closed. While some states broadcasted hearings, ODIHR received reports about substantial limitations of the right to a public hearing, impacting transparency and the ability of trial monitors and the media to observe the process. Further, emergency legislation generally lacked sufficient clarity for court officials to ensure the observance of the right to a fair trial.

HATE CRIMES AND DISCRIMINATION

OSCE participating States have committed to addressing discrimination and hate crime but the pandemic added new layers of complexity to this already difficult task by exacerbating intolerant discourse and the racist scapegoating of minorities. The proliferation of reports from across the region highlight pandemic related hate-motivated attacks and various forms of online intolerance and discrimination that was fueled by movement restrictions. In this period, a significant amount of intolerance and discrimination was directed towards persons perceived to be of Asian descent, while migrants were also frequently singled out. Ageist discourse also appeared, which referred to older people as less deserving of societal solidarity and state protection. The pandemic also had a disproportionate impact on persons with disabilities who faced difficulties in accessing healthcare in some states and feared discrimination. Organized hate groups whose activities

consistently display hostility towards protected groups, appeared to exploit the public emergency by spreading intolerant discourse and conspiracy theories, assigning blame to different minority communities. The work of civil society organizations addressing hate crime and discrimination was further hampered by physical distancing and other state-imposed restrictions due to the pandemic. Some states, however, recognized the need for special support to minority communities and announced new health-care support for indigenous communities amid the pandemic or carried out other symbolically important acts to signal inclusiveness and tolerance.

GENDER EQUALITY AND DOMESTIC VIOLENCE

In the majority of participating States across the OSCE region, women have not been sufficiently engaged in shaping states' responses to the pandemic. Women have been under represented in Covid-19 related decision-making bodies and limited gender analysis was conducted within crisis response and recovery planning, resulting in policies that exacerbated existing gender inequalities and discrimination. The emergency measures have often led to adverse social and economic consequences, including unemployment of part-time, low-income and informal workers, which along with the shut-down of schools and institutions, largely disproportionately affected women. Further, the risk to healthcare workers disproportionately affected women, as women constitute a majority of employees in healthcare and frontline services sectors. Confined living conditions due to lockdowns and self-isolation regimes, coupled with increased financial stress, unemployment and strained community resources, have compounded pre-existing violence against women, and intensified exposure to abuse at the hands of an intimate partner or family member. At the same time, opportunities to seek and receive vital support were reduced as public services normally available to victims of violence, including health services, police interventions, judicial remedies and sheltering services have been affected by disruptions. In some cases, pressure on referral mechanisms available to victims of violence, in addition to restrictions of movement, has been lethal for women, with a documented rise in reported cases of domestic violence.

ROMA AND SINTI

States have not taken sufficient measures in line with the commitments they made in the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area and subsequent Roma-focused Ministerial Council Decisions to prevent surges in racism and discrimination against Roma and Sinti people during the pandemic. Since the outbreak, ODIHR has received reports of a number of measures adopted by States and local authorities that can be considered discriminatory towards Roma and Sinti communities, including targeted community-wide testing administered by the military, discriminatory lockdown and quarantine measures and full lockdowns of entire large communities where only a handful of individuals were infected. Many Roma live in informal settlements, in overcrowded and substandard conditions. This, combined with widespread poverty and linguistic challenges, make this population particularly vulnerable and hard to reach. Discriminatory and disproportionate lockdown measures have also severely affected economic opportunities for Roma, who often depend on informal and unsteady work. Emergency measure that included the closing of schools, moving all education online, and expecting students to study and participate in classes from home, excluded tens of thousands of Roma students from educational processes as they generally lack the minimum requirements for such learning. Some states and municipalities with the help of Council of Europe provided special assistance packages to Roma communities.

MIGRATION

The unprecedented restriction on movement that states imposed in response to the pandemic had a significant impact on migrants. The closure of international borders impacted international mobility and, as such, migrants' ability to return home or to take up employment. Several states automatically extended the residence permits of migrants in their territory for the duration of the health emergency, including regularization for migrants working in the agriculture and domestic work sectors, or relaxations of employment restrictions in the healthcare sector. Border crossing points that are already risk areas for migrants in normal times, emerged

as particularly vulnerable flashpoints for many migrants during the pandemic. Reports from civil society highlighted the continued use of illegal pushbacks and incidents of violence during the pandemic. Immediately following border closures, access to asylum procedures was limited in many countries. However, after an initial period of suspension and halting of asylum procedures, many countries found ways to resume processing applications. The pandemic has also brought to light challenges in terms of physical distancing and hygienic measures present at collective centres that are often subject to overcrowding. While in a few states, entire reception centres were locked down and the movements of residents curtailed, a number of states put in place measures to address the risk of transmission in collective centre settings and other states opted for the release of detainees.

VICTIMS AND SURVIVORS OF TRAFFICKING IN HUMAN BEINGS

The pandemic increased the vulnerability of at-risk groups to trafficking in human beings and impacted the ability of states to prevent and address the crime of trafficking in human beings, from the identification of victims, their access to services, protections and redress. Victims of trafficking were at increased risk of control, violence and isolation by their exploiters and had reduced access to assistance. Survivors of trafficking were also profoundly impacted by the psychological effect of lockdown and self-isolation measures and some survivors reported an increase in domestic violence, economic insecurity, and fear of traffickers being released from prison due to Covid-19. Law enforcement agencies in the OSCE region reported increased grooming and exploitation of children through the Internet, as well as an exponential growth of child sexual exploitation material shared online showing that emergency measures contributed to the vulnerability of children to trafficking. ODIHR and UN Women conducted a survey of non-governmental anti-trafficking stakeholders and survivors of trafficking that revealed the vulnerabilities of at-risk groups, victims and survivors and difficulties National Referral Mechanisms faced to function effectively during the pandemic.

PART I.

States' obligations in a time of emergency

States responded to the need to protect the health and livelihoods of the population in a variety of ways. Whether states declared a state of emergency, instituted some other form of emergency regime or adopted restrictive measures, these responses carried with them responsibilities to protect fundamental freedoms and human rights. In the following sections, an overview is provided on what measures states took in response to the pandemic and how states met their responsibilities to ensure the measures were necessary, proportional, limited in duration and clearly outlined in law. These sections also look at how states met their commitments to ensure proper oversight of the state of emergency and related measures and that throughout the process the right to access to information is respected. Further this part analyses the risks, particularly with regards to the right to privacy and other fundamental freedoms that data collection, statistical analysis, surveillance and the use of new technologies carries.

In this part of the report, ODIHR endeavours to provide a thorough analysis of the international standards

and OSCE commitments relevant in times of emergency. The analysis looks at the obligations states have when derogating or otherwise restricting fundamental freedoms and human rights and the impact that such restrictions had on non-derogable and absolute rights. Further, the section explores what states did or could have done to ensure that emergency measures respected the principle of non-discrimination. Examples from across the OSCE region are provided to illustrate the thematic trend analysis and highlight areas of concern, as well as indicate what may be considered good practices. In accordance with relevant OSCE commitments to mainstream a gender perspective into all policies, measures and activities, this section also takes into account the potentially different impact on women and men.

Finally, each section concludes with a series of recommendations, to support participating States in their efforts to ensure they fulfil their commitments and respect human rights in their responses to the Covid-19 pandemic and other emergency situations.

I.1 STATES OF EMERGENCY AND OTHER EMERGENCY MEASURES

I.1.A SUMMARY OF RELATED INTERNATIONAL STANDARDS AND OSCE COMMITMENTS

In light of the pandemic, a significant number of OSCE participating States have introduced emergency and/or other measures that affect human rights and fundamental freedoms in an unprecedented manner. In response, more than a third of the participating States have officially proclaimed a “state of public emergency” as envisaged by international law, while others introduced other emergency regimes of different intensity, or have adopted other legislative and policy restrictive measures without formally declaring such emergency.⁷ Some states have considered that the breadth of the restrictive measures adopted to respond to this health emergency is of such magnitude that such measures constitute exceptions to, rather than permissible restrictions upon, international human rights standards, and have therefore sought to derogate from certain of their international human rights obligations.

The responsibility of states to take all necessary measures to mitigate and suppress the disease through effective public health systems, harm reduction, response and prevention come from their obligations to guarantee the human rights to life and health of their population. However, state responses to the pandemic, have had an impact on various other human rights and fundamental freedoms, including the rights to freedom

of movement and freedom of peaceful assembly, to education, to a fair trial, to participate in public affairs, to respect to private and family life, and to freedom of expression and access to information. The pandemic has shown how difficult it is to draw the exact line between what is necessary and proportionate and what is not. In particular, the considerable uncertainty about the virus’s true threat has made decisions about when to react and to what extent challenging. Moreover, the impacts have been different to various groups of people, exacerbating vulnerabilities and deepening inequality. State responses have also impacted the work of key state institutions, frequently shifting the balance of power in favour of the executive.

More than one third of the participating States officially declared a “state of public emergency” as envisaged by international law, while others introduced other emergency regimes of different intensity, or have adopted restrictive measures through legislation and policy.

States of public emergency or other measures adopted in response to the pandemic should be guided by human rights and democratic principles, as well as the rule of law and should not, under any circumstances, be an excuse to introduce undue or disproportionate restrictions to international human rights standards and OSCE commitments. Indeed, international human rights standards remain applicable even in times of international or non-international armed conflicts,⁸ and even

7 For the purpose of this Report, the wording “state of public emergency” mentioned in the Moscow Document (1991) and Copenhagen Document (1990) is used interchangeably with the term “state of emergency” which features more prominently at the international level. Because the precise terminology used in respective national legal systems differs significantly and there is no single standard criteria of what qualifies as a “state of emergency” or procedures that lead to its proclamation, the term “status equivalent to a state of emergency” is also used to cover special urgent and temporary legal regimes of a general nature that usually allow for a rapid shift of powers towards the executive, subject to procedural and substantive safeguards, and general suspension of or restrictions to certain human rights and fundamental freedoms.

8 See the case-law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human rights law; e.g., the Advisory Opinion of the International Court of Justice on **The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory** of 9 July 2004, para. 106; see also ECtHR, **Hassan v. United Kingdom** (Application no. 29750/09, judgment of 16 September 2014), para. 77.

more so during other types of emergency, subject only to the derogation or restriction clauses contained in international human rights treaties and OSCE commitments. In any case, any such interference with human rights and fundamental freedoms should be temporary and proportionate to the stated aim of such measures, and only to the extent necessary and for the duration of the public emergency.

1. DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS STANDARDS

International human rights standards foresee the possibility, under certain strict conditions, for derogations from international human rights obligations in times of public emergency “threatening the life of a nation.”⁹ OSCE commitments envision derogations during a “state of public emergency” that is “justified only by the most exceptional and grave circumstances.”¹⁰ Two key international human rights instruments applicable in most participating States contain derogation clauses, namely Art. 4 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Other key international human rights conventions, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), the UN Convention on the Rights of the Child (CRC), UN Convention on the Rights of Persons with Disabilities (CRPD), and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), do not contain express derogation clauses and remain applicable in emergency situations.¹¹

⁹ Art. 4 para. 1 of the ICCPR; and Art. 15 para. 1 of the ECHR.

¹⁰ See Copenhagen Document (1990), para. 25; and Moscow Document (1991), para. 28.1.

¹¹ States remain obligated to respect (refrain from interfering with the enjoyment of the right), to protect (prevent others from interfering with the enjoyment of the right) and to fulfil (adopt appropriate measures towards the full realization of) economic, social and cultural rights and to eliminate any discrimination irrespective of the resources they have. With respect to obligations in connection with economic, social and cultural rights under international human rights treaties,

The impact derogations may have on human rights and fundamental freedoms in emergency situations is clearly distinct from restrictions or limitations normally allowed under the ICCPR and the ECHR. Derogation clauses afford states, in exceptional circumstances, the possibility of temporary departure from certain international human rights obligations, in a proportional and legally clear manner, beyond the normally acceptable standard. In particular, there is a stringent test of what is “strictly required by the exigencies of the situation” established by the ICCPR, ECHR and OSCE human dimension commitments for states seeking derogations. The test implies that derogation measures suspending rights should be avoided when the situation can be adequately dealt with by establishing necessary and proportionate restrictions or limitations that are normally permitted by international treaties for the maintenance of public safety, health and order.¹² In these cases, participating States specifically committed to “endeavour to refrain from making derogations” even where international conventions provide for derogation.¹³

Despite some differences in interpretation and application by the UN Human Rights Committee (UN HRC) and the European Court of Human Rights’ (ECtHR), the derogation clauses generally require the following overall conditions to be fulfilled for states to validly seek to derogate, as also elaborated in the Copenhagen (1990) and Moscow (1991) Documents:¹⁴

- The existence of an extraordinary situation posing a fundamental, real and current or imminent threat to a country;¹⁵

the principle of “progressive realization” qualifies the obligations in relation to the availability of resources and thus the prevailing circumstances. Still, 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 and to eliminate any discrimination irrespective of the resources they have, remain in effect even during situations of emergency.

¹² UN Human Rights Committee (CCPR), **Statement on derogations from the Covenant in connection with the COVID-19 pandemic**, UN Doc. CCPR/C/128/2, 24 April 2020, para. 2.

¹³ Moscow Document (1991), para. 28.7.

¹⁴ See Copenhagen Document (1990), para. 25; and Moscow Document (1991), para. 28.

¹⁵ Art. 4 para. 1 of the ICCPR and Art. 15 para. 1 of the ECHR refer to a public emergency “threatening the life of the nation”. While such a notion has been defined by the ECtHR as “an exceptional situation of crisis or emergency

NON-DEROGABLE RIGHTS UNDER ART. 4 OF THE ICCPR AND ITS PROTOCOLS (IF RATIFIED)

Prohibition of discrimination solely on the ground of “race, colour, sex, language, religion or social origin” (Art. 4 para. 1)

Right to life (Art. 6)

Prohibition of execution (Art. 1 para. 1 of the Second Optional Protocol)

Prohibition of torture or cruel, inhuman or degrading treatment or punishment (Art. 7)

Prohibition of slavery and servitude (Art. 8)

Prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (Art. 11)

Principle of legality in the field of criminal law (Art. 15)

Recognition of everyone as a person before the law (Art. 16)

Freedom of thought, conscience and religion (Art. 18)

- The temporary nature of the emergency and of the derogation;
- Certain procedural requirements that need to be followed by the state in terms of declaration and public proclamation in accordance with provisions in law, and informing ODIHR and formally notifying the UN and the Council of Europe;
- The clarity and accessibility of the derogating measures;
- The existence of safeguards and oversight mechanisms, including to ensure the constant

which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed,” (see e.g., ECtHR, *Lawless v. Ireland* (No. 3) (Application no. 332/57, judgment of 1 July 1961), para. 28), this notion remains rather uncertain and the ECtHR has generally left a wide margin of appreciation to the respective countries (see e.g., ECtHR, *Aksoy v. Turkey* (Application no. 21987/93, judgment of 18 December 1996), para. 68). The UN HRC does not provide a clear definition and notes that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation,” emphasizing that careful justification needs to be provided if derogations are sought in situations other than an armed conflict (see CCPR, **General Comment no. 29 on Art. 4 of the ICCPR**, para. 3).

NON-DEROGABLE RIGHTS UNDER ART. 15 OF THE ECHR AND ITS PROTOCOLS (IF RATIFIED)

Right to life, except in respect of deaths resulting from lawful acts of war (Art. 2)

Abolition of the death penalty in time of peace and limiting the death penalty in time of war (Protocol No. 6)

Complete abolition of the death penalty (Protocol No. 13)

Prohibition of torture or inhuman or degrading treatment or punishment (Art. 3)

Prohibition of slavery or servitude (Art. 4 para. 1)

No punishment without a law (Art. 7)

Ne bis in idem principle (Art. 4 of Protocol No. 7)

review of the necessity of maintaining a state of emergency and any measures taken under it;¹⁶

- The strict necessity and proportionality of derogating measures in terms of their temporal, geographical and material scope, to deal with the exigencies of the situation, while excluding certain non-derogable rights from their scope of application;
- The measures must not be inconsistent with other obligations arising under international law, including international humanitarian law and international refugee law; and
- The non-discriminatory character of the derogating measures in law and in practice.

OSCE commitments specifically state that derogation cannot be sought for the following “rights from which there can be no derogation” according to relevant international instruments¹⁷ (see table above).

16 Parliamentary Assembly of the Council of Europe (PACE), **Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Art. 15 of the European Convention on Human Rights**, para. 19.4.

17 Copenhagen Document (1990), para. 25; and Moscow Document (1991), para. 28.6.

Additionally, some other rights have been recognized, mainly by the UN HRC, as not being subject to derogation, including the right to an effective remedy since it is inherent to the exercise of other (non-derogable) human rights,¹⁸ the fundamental principles of a fair trial,¹⁹ the fundamental guarantees against *arbitrary* detention²⁰ and the principle of *non-refoulement*, which is absolute and non-derogable.²¹

OSCE commitments provide further guidance concerning declarations of state of emergency specifically. The Moscow Document (1991) introduces several requirements and conditions for the declaration of a state of emergency, which may be proclaimed “only by a constitutionally lawful body” mandated to do so, and when this is done by executive authorities, “that decision should be subject to approval in the shortest possible time or to control by the legislature.”²² It should also be proclaimed “officially, publicly, and in accordance with provisions laid down by law.”²³ The UN HRC also requires that states “act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers”,

while noting that the official proclamation “is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.”²⁴ In other words, prior official proclamation in accordance with the provisions of the national constitution (or lower legislation as the case may be) is generally considered an essential condition for seeking derogations, though the ECHR does not explicitly require it as a precondition for a derogation.²⁵ Finally, the Moscow Document explicitly states that *de facto* imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible.²⁶

Furthermore, even in times of emergency, overall respect for rule of law principles should be ensured.²⁷ As expressly stated in the Moscow Document (1991), states of emergency “may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms”.²⁸ The ECtHR has also emphasized that even in a state of emergency, “any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.”²⁹ This means that the fundamental safeguards of the rule of law, in particular constitutionality and legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency.³⁰ Due democratic

18 See CCPR, **General Comment no. 29 on Art. 4 of the ICCPR**, paras. 14–15.

19 CCPR, General Comment no. 29, para. 76; and General Comment no. 32 (2007), para. 6. These would include the right to be tried by an independent and impartial tribunal (CCPR General Comment no. 32 (2007), para. 19); the presumption of innocence (CCPR General Comment no. 32 (2007), para. 6); the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful, right to habeas corpus (CCPR, General Comment no. 29, para. 16; and **General Comment no. 35, Art. 9 (Liberty and security of person)**, para. 67).

20 CCPR, **General Comment no. 35, Art. 9 (Liberty and security of person), paras. 66–67, which includes** the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.

21 See UN General Assembly, **Resolution A/RES/51/75**, 12 February 1997, para. 3. See also UN High Commissioner for Refugees (UNHCR), **Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**, 26 January 2007, paras. 12 and 20; ECtHR, *Chahal v. United Kingdom* [GC] (Application no. 22414/93, 15 November 1996), para. 80; and *Saadi v. Italy* [GC] (Application no. 37201/06, 28 February 2008), para. 137).

22 Moscow Document (1991), para. 28.3.

23 Moscow Document (1991), para. 28.3.

24 See CCPR, General Comment no. 29, para. 2.

25 The case law of the ECtHR is relatively lenient in that respect, referring to the wide margin of appreciation of states; the Court has thus accepted various types of declarations by governments which were formal in character and whereby governments made public their intention to derogate – without further inquiring about compliance with constitutional provisions (see e.g., ECtHR, *Brannigan and McBride v. United Kingdom* (Application nos. 14553/89 and 14554/89, judgment of 25 May 1993), para. 73).

26 Moscow Document (1991), para. 28.4.

27 See e.g., CCPR, General Comment no. 29, para. 2.

28 Moscow Document (1991), para. 28.1.

29 See e.g., ECtHR, *Hasan Altan v. Turkey* (Application no. 13237/17, judgment of 20 March 2018), para. 210; *Şahin Alp v. Turkey* (Application no. 16538/17, judgment of 20 March 2018), para. 180.

30 See e.g., PACE, **Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Art. 15 of the European Convention on Human Rights**, para. 3.

process, including separation of powers, as well as political pluralism and the independence of civil society and the media, must also continue to be respected and protected.

2. LIMITATIONS TO INTERNATIONAL HUMAN RIGHTS STANDARDS

When no derogation is sought, any restriction to the above-mentioned rights must comply with the requirements provided in international human rights instruments, i.e., (i) be “prescribed by law” and as such be clear, accessible and foreseeable;³¹ (ii) pursue a “legitimate aim” provided by international human rights law for the right in question; (iii) be “necessary in a democratic society”, and as such respond to a pressing social need and be proportionate to the aim pursued; and (iv) be non-discriminatory. These requirements are also applicable to derogations.

Some non-derogable rights may be subject to limitations.³² However, there are rights that are absolute, i.e., rights that can never be suspended or restricted under any circumstances, even in a context of an emergency. Absolute rights include the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment,³³ from slavery and servitude, from imprisonment for inability to fulfil a contractual obligation, the prohibition of genocide, war crimes and crimes against humanity, the prohibition against the retrospective operation of criminal laws, the right to recognition before the law, the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to

challenge the legality of the detention,³⁴ and the principle of *non-refoulement*.³⁵ State obligations associated with the core obligations of the right to health, but also the rights to food, housing, social protection, water and sanitation, education, an adequate standard of living and to be free from discrimination also remain in effect even during situations of emergency.³⁶ Finally, international humanitarian law shall be respected in all circumstances.³⁷

31 Laws should be defined with sufficient clarity, so as to enable an individual to foresee the consequences of his or her actions and thereupon regulate his or her conduct accordingly.

32 For example, the right to freedom of religion or belief in Art. 18 of the ICCPR is non-derogable under Art. 4 para. 2 of the ICCPR but may be subject to limitations in accordance with Art. 18 (3) of the ICCPR.

33 Art. 2 para. 2 of the UN Convention against Torture specifically states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” See also OSCE Copenhagen Document, para. 16.3.

34 See Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), para. 5; **Report of the Working Group on Arbitrary Detention to the UN Human Rights Council**, A/HRC/22/44, 24 December 2012, paras. 42–51; **General Comment no. 35** on Art. 9 of the ICCPR (Liberty and security of person), para. 67.

35 See Art. 4 of the 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (CAT), which contains an absolute prohibition of refoulement for individuals in danger of being subjected to torture. See also CCPR, **General Comment no. 20 on Art. 7 of the ICCPR**, 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Art. 3 of the ECHR, see e.g., *Soering v. United Kingdom* (Application no. 14038/88, judgment of 7 July 1989), para. 88; and *Chahal v. United Kingdom* [GC] (Application no. 22414/93, judgment of 15 November 1996), paras. 80–1.

36 See UN OHCHR, *Emergency Measures and Covid-19: Guidance* (27 April 2020). See also CESCR, *General Comment no. 3 on the Nature of States Parties’ Obligations* (1990), para. 10; and *General Comment no. 14* (2000), para. 43. These minimum core obligations include minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger (CESCR, *General Comment no. 12 on the Right to Adequate Food* (1999), paras. 6 and 8); essential primary health care, including essential drugs (CESCR, *General Comment no. 14* (2000), para. 43); essential basic shelter and housing, including sanitation (CESCR, *General Comment no. 3* (1990), para. 10; and *General Comment no. 15* (2003), para. 37) and the right not to be arbitrarily evicted from one’s house (CESCR, *General comment no. 7* (1997), para. 8); access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease (CESCR, *General Comment no. 15* (2003), para. 37).

37 See the four 1949 **Geneva Conventions**, Common Art. 1, which states that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

I.1.B OVERVIEW OF MEASURES ADOPTED BY PARTICIPATING STATES

The pandemic has been unparalleled in its scale and impact and even though the scope and effect of the epidemic vary from one country to another, it has led to an unprecedented number of proclaimed public emergencies and derogations from international human rights standards notified to the UN, the Council of Europe and the OSCE/ODIHR in a very limited time. At the same time, whether a state has declared a state of public emergency and chosen to derogate from an international human rights treaty is not necessarily an indicator of more severe emergency powers in effect in comparison with a state not declaring an emergency nor derogating.

Whether a state has declared a state of emergency and chosen to derogate from an international human rights treaty is not necessarily an indicator of the severity of the emergency powers in effect.

The Moscow Document (1991) requires participating States to inform the relevant institution, i.e., ODIHR,³⁸ about the declaration of a state of emergency and of potential derogation to international human rights obligations.³⁹ This refers to both national-level measures affecting the entire territory, or partial ones, including those declared by sub-national authorities if they may impact the state's ability to fulfil its human rights obligations. Following its *note verbales* of 29 March 2020, ODIHR issued four *note verbales* on 9 and 30 April, 22 May, and on 16 June to participating States to inform them of relevant measures adopted in other countries and encourage them to notify ODIHR as required by the Moscow Document (1991). As of 15 June 2020, twenty-eight participating States had informed ODIHR of emergency measures adopted. Fourteen states communicated having declared a nationwide state of emergency or equivalent status, while only some provided

information on derogations.⁴⁰ However, not all states that declared a state of emergency have sought derogations from international human rights standards.

Some countries do not provide for a system for formally declaring a "state of emergency" or the equivalent in their constitutions,⁴¹ or envisage them for specific types of emergencies not including epidemics or health emergencies.⁴² They have generally relied on existing primary legislation regulating state response to communicable diseases or epidemics or other mechanisms conferring on the executive special powers to deal with exceptional circumstances.

II. RESTRICTIVE MEASURES OR SPECIAL STATUS NOT AMOUNTING TO A STATE OF EMERGENCY

Certain states have adopted restrictive measures without declaring a state of emergency or an equivalent status, mainly through existing or newly adopted or amended primary legislation to respond to communicable diseases, epidemics or disasters.⁴³ Such legislation

40 Andorra, **Armenia**, Bosnia and Herzegovina (state of emergency only in Republika Srpska), **Bulgaria**, Canada (state of emergency or other public health emergency status in provinces, territories and certain cities), Cyprus, **Czech Republic**, Denmark, **Estonia** ("Emergency Situation"), **Finland**, **Georgia**, **Latvia** ("Emergency Situation"), Lichtenstein, **Luxembourg** ("State of Crisis"), Malta, **Moldova**, Netherlands, **North Macedonia**, Poland, **Portugal**, **Romania**, **San Marino**, **Serbia**, Slovenia, Spain, Sweden, Switzerland (in **bold underlined**, those which declared a nationwide state of emergency or equivalent).

41 For instance, Belgium, Denmark, Iceland, and San Marino. In France, the "state of emergency" is not provided in the 1958 Constitution but in law nr. 55–385 of 3 April 1955, as amended.

42 For instance, in **Sweden** (Chapter 15), **Cyprus** (Art. 183(1)), **France** (Art. 16 and 36), **Greece** (Art. 48), **Ireland** (Art. 28.3.3°), **Latvia** (Art. 62), **Lithuania** (Art. 144), the constitution only provides for the declaration of state of emergency in times of war, imminent danger of war or similar threats to the nation, its institutions, or territorial integrity, or is generally interpreted as such (**Malta**). In **Italy**, Parliament has the authority to declare a state of war (Art. 78) but delegation of powers to the government is possible in case of necessity and urgency as per Art. 77 of the Constitution.

43 These include, for instance, **Azerbaijan**, **Croatia**, **Cyprus**, **Denmark**, **Iceland**, **Lichtenstein**, **Mongolia**, **Sweden**, **Turkey**, which mainly relied on existing sanitation, health safety and/or disaster legislation that gives the authority to put in place restrictive measures. **Monaco** adopted various ministerial decisions pursuant to the 2016 Law on

38 As per the 1992 Helsinki Document, para. 5 (b).

39 Moscow Document (1991), para. 28.10.

generally confers on the executive the ability to act or legislate more rapidly and allows certain restrictions to specific human rights and fundamental freedoms. Some of these countries have actually adopted rather few legally binding restrictive measures, relying primarily on recommendations made to the population.⁴⁴ Some states have relied on specific constitutional provisions allowing in extraordinary circumstances a temporary delegation of the power to legislate to the executive subject to certain safeguards, such as ratification by the parliament within a specific (rather short) time-frame.⁴⁵ Some countries that initially did not adopt legally-binding restrictive measures, have, at a later stage, introduced *ad hoc* mandatory restrictions or adopted legislation or decrees of rather limited scope.⁴⁶ Ten par-

ticipating States informed ODIHR about such restrictive measures or other special statuses not amounting to a “state of emergency” to respond to the pandemic (see also below for federal states).

2. STATES OF EMERGENCY OR EQUIVALENT WITHOUT DEROGATIONS

Ten participating States declared a state of emergency or an equivalent status provided in the constitution or specific law, without seeking derogations. These states considered that the restrictive measures amounted to (normal) limitations to international human rights standards.⁴⁸ Some of these states have also adopted specific laws to further regulate the measures adopted during their state of emergency or to introduce additional restrictions not necessarily envisioned in existing legislation granting emergency powers.⁴⁹ Apart from Italy, the states of emergency lasted between one and a half to three months and some of these countries later transitioned to a lower-level emergency status.⁵⁰ Six

National Security. Some states declared some forms of special public-health related status, not amounting to a “state of emergency”, based on existing or newly adopted primary legislation, and not on the constitution, such as **Andorra** (“Health Emergency”), **France** (“State of Health Emergency”), **Lithuania** (“Quarantine”), **Malta** (“Public Health Emergency”), **Montenegro** (“Coronavirus Epidemic posing a Nationwide Threat”), **Netherlands** (“‘A’ Disease” under the 2008 Public Health Act), **Poland** (“State of Epidemic Threat”), **Slovenia** (“Epidemic”), **Switzerland** (“Extraordinary Situation” under the Epidemics Act) and **Ukraine** (“Emergency Situation”). Certain countries adopted specific temporary legislation to respond to the Covid-19 pandemic (e.g., **Ireland**, **Norway** and the **United Kingdom**). In **Kosovo**, the government implemented containment measures as of 12 March, and initially imposed travel restrictions and a national curfew, but on 31 March, the Constitutional Court declared these measures invalid effective 13 April, though tightened restrictions on movement were introduced afterwards. [OSCE disclaimer: “Any reference to Kosovo, whether to the territory, its institutions, or population, is to be understood in full compliance with United Nations Security Council Resolution 1244”].

44 For instance, **Sweden** and **Ireland**.

45 These include e.g., **France** (the Law n° 2020-290 of 23 March 2020 to deal with the Covid-19 pandemic, which introduced a new special “State of Health Emergency” in the Public Health Code, and also authorized the government to legislate by ordinances in certain listed matters, subject to the ratification by Parliament within three months); and **Greece** (Acts of Legislative Content were adopted by the President upon the proposal of the cabinet, as contemplated by the Constitution, subject to ratification by the Parliament within forty days).

46 For example, testing suspected cases and isolation of confirmed infected people and those they had contact with, and obligatory 14-day self-isolation for people arriving from affected countries (**Belarus**); mandatory use of masks and social distancing in public places (**Tajikistan**); screening and quarantine measures, temporary closure of passenger traffic, physical distancing, closure of cafes, restaurants

and entertainment centres (**Turkmenistan**); quarantines, closure of boarders and schools, suspension of public transportation, and other restrictions; the introduction by the President of stricter penalties for dissemination of false information about the virus (**Uzbekistan**).

47 **Andorra**, **Cyprus**, **Denmark**, **Lichtenstein**, **Lithuania**, **Malta**, **Netherlands**, **Poland**, **Slovenia** and **Sweden**.

On 19 June, **Lithuania** notified ODIHR of the end of the quarantine regime, which lasted three months, and on 1 July, Malta informed ODIHR about the end of the Health Emergency.

48 Including **Bulgaria**, **Czech Republic**, **Finland**, **Hungary**, **Italy**, **Kazakhstan**, **Luxembourg**, **Portugal**, **Slovakia** and **Spain** (see Annex 1 for further information).

49 For example, **Bulgaria** (a specific *Law on Measures and Actions during the State of Emergency* on 23 March 2020); **Finland** (most of the restrictive measures were adopted through emergency Decrees on the basis of the Emergency Powers Act and subsequently upheld by the Parliament, though the closure of restaurants necessitated a separate Act of Parliament 153/2020). Of note, **Andorra** adopted on 23 March 2020 a new Law 4/2020 on States of Alarm and Emergency, though it has not been used in the context of the Covid-19 pandemic to date.

50 For instance, **Bulgaria** (2 months), **Czech Republic** (slightly more than 2 months), **Finland** (3 months), **Hungary** (more than 3 months), **Kazakhstan** (slightly less than 2 months), **Luxembourg** (3 months), **Portugal** (1.5 month), **Slovakia** (90 days), **Spain** (90 days). On 14 May, **Bulgaria** transitioned to a one-month “nationwide epidemic situation”; as of 3 May, a “state of calamity” ensued in **Portugal**; as of 18 June, **Hungary** transitioned to an open-ended state of healthcare emergency.

participating States informed ODIHR about the declaration of a state of emergency or equivalent status, and some did so when the restrictions were lifted. Some of these states emphasized that they consider the restrictive measures adopted to be covered by the normal restriction clauses (see also below on federal states).⁵¹

In some federal states, federal authorities declared a state of emergency (e.g., United States of America) or did not (e.g., Austria, Belgium, Canada, Bosnia and Herzegovina, Germany, Russian Federation, Switzerland), some that did not declare a state of emergency, activated a federal mechanism of crisis management. In most cases, when provided for in applicable legislation, their federated entities declared a state of emergency or other emergency regime, such as a state of natural disaster or high-alert regimes. Bosnia and Herzegovina, Canada and Switzerland specifically informed ODIHR about the emergency measures adopted at both the federal level and in federated entities to respond to the pandemic, and their lifting (Bosnia and Herzegovina). In some cases, even administrative entities below the level of federal constituent units, such as counties, regions or cities, adopted measures that amount to or were even specifically declared to be emergency situations. For lack of detailed information of such cases and the large variety of specific local contexts, this report cannot address such cases, but it should be assumed that the human rights obligations related to legality, necessity and proportionality, as well as non-discrimination, equally apply to such local arrangements.

⁵¹ **Bulgaria, Czech Republic, Finland, Luxembourg, Portugal and Spain.** As of 15 June 2020, **Bulgaria, Czech Republic and Portugal** have informed ODIHR about the lifting of the state of emergency.

3. STATES OF EMERGENCY OR EQUIVALENT WITH DEROGATIONS

Eleven participating States declared a state of emergency or an equivalent status, and sought derogations from international human rights standards, thus considering that the measures adopted go beyond (normal) restriction clauses.⁵² Out of these States, nine notified ODIHR of a declaration of a state of emergency as required by the Moscow Document (1991) (para. 28.10), though only six provided information on derogations.⁵³

Most of these countries lifted their state of emergency or equivalent after one and a half to three months, but only Albania, Estonia, Latvia, Moldova, North Macedonia and Romania informed the UN and/or the Council of Europe about lifting these.⁵⁴ Some of them transitioned to a lower level emergency status (e.g., “state of alert” in Romania, “emergency regime and quarantine” in certain areas in the Kyrgyzstan). The state of emergency in Georgia was lifted but emergency legislation maintaining certain restrictions was introduced and derogations were extended until 10 July 2020. Only Estonia, Romania, and Serbia informed ODIHR about the lifting of the state of emergency. San Marino, which does not have a system for formally declaring a “state of emergency”, informed ODIHR that some restrictive measures were eased, but the health emergency status and other restrictions remain “until the end of the health emergency”.

⁵² **Albania, Armenia, Estonia, Georgia, Kyrgyzstan, Latvia, Moldova, North Macedonia, Romania, San Marino and Serbia** (see Annex 1 for further information).

In **Kyrgyzstan**, derogations were sought for the cities and districts where a state of emergency was declared, i.e., the cities of Bishkek, Osh and Jalal-Abad and the Nookat and Kara-Suu districts of the Osh region and in the Suzak district of the Jalal-Abad region from 25 March until 15 April, and then later extended until 10 May in the cities of Bishkek, Osh and Jalal-Abad, as well as in the At-Bashinsky district of the Naryn region.

⁵³ **Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania, San Marino and Serbia.**

However, **Estonia, North Macedonia and Serbia** did not explicitly inform ODIHR about derogations.

⁵⁴ For example, **Albania** (3 months), **Estonia** (slightly more than 2 months), **Georgia** (2 months), **Kyrgyzstan** (1,5 month), **Latvia** (close to 3 months), **Moldova** (60 days), **North Macedonia** (3 months and one week), **Romania** (60 days), **Serbia** (7 weeks).

As of 1 July 2020, the following Participating States had declared a state of emergency or an equivalent status and have notified that they derogate from the ECHR or/and the ICCPR:

COUNTRIES	DEROGATIONS FROM THE ECHR								DEROGATIONS FROM THE ICCPR							
	Art 5 Liberty	Art 6 Fair Trial	Art 8 Privacy	Art 10 Expression	Art 11 Assembly Association	Art 1 Property	Art 2 Prot 1 Education	Art 2 Prot 4 Movement	Lifting of derogations	Art 9 Liberty	Art 12 Movement	Art 14 Fair Trial	Art 17 Privacy	Art 21 Assembly	Art 22 Association	Lifting of derogations
Albania			+		+	+	+	+	+	No derogation from the ICCPR						
Armenia* (1)	?			?	?	?		?		+	+			+		
Estonia**	+	+	+		+	+	+	+	+	+	+	+	+	+	+	+
Georgia* (2)	+	+(2)	+		+	+	+	+	+	+	+	+(2)	+	+		
Kyrgyzstan (3)	Not applicable									+(3)			+(3)			
Latvia*			+		+		+	+	+(4)	+		+	+			+(4)
Moldova* (5)					+		+	+	+(5)	+				+		+(5)
North Macedonia**			+		+		+	+		No derogation from the ICCPR						
Romania* (6)			?		?	?	?	?	+	+		+	+			+
San Marino* (7)					?			?		+				+	+	
Serbia**	Not specified								No derogation from the ICCPR							

* the state has informed ODIHR about the state of emergency (or equivalent) and the derogations.

** the state has informed ODIHR about the state of emergency (or equivalent) but not explicitly about the derogations to the ECHR and/or the ICCPR.

In blue (?): when the derogation to certain articles of the ECHR and ICCPR were implied from the legal texts attached to the notifications to the Council of Europe or from information communicated to ODIHR.

- (1) The provisions for which Armenia is seeking derogation were not explicitly stated in the notification to the Council of Europe though this was implicit from the attached decision, which referred to several rights, including the rights to personal liberty, freedom of movement, freedom of assembly, right to ownership, and freedom of expression and access to information (by prohibiting separate publications and reports through the mass media). The information communicated to ODIHR mention derogations from the right to liberty, freedom of movement, freedom of assembly and "other rights the limitation of which is foreseen during a state of emergency by the Constitution".
- (2) The initial information provided by Georgia to ODIHR did not mention derogations but the latest *note verbale* of 25 May lists the derogations to the specific articles of the ECHR and of the ICCPR. The initial notifications to the Council of Europe and to the UN did not mention the derogation to the right to a fair trial (Art. 6 of the ECHR and Art. 14 of the ICCPR) though it is stated in the latest notifications to the Council of Europe dated 25 May and to the UN dated 23 May, also extending the derogations until 15 July 2020.
- (3) The derogation is sought only for the indicated territories (cities and districts) of Kyrgyzstan where a state of emergency has been declared.
- (4) Latvia notified the Council of Europe of the lifting of the derogations from Art. 11 of the ECHR (on 14 May), from Art. 2 of Protocol 1 to the ECHR (on 2 June) and from the remaining provisions (on 10 June) and notified the UN of the lifting of the derogation from Article 21 of the ICCPR (on 13 May) and from the remaining provisions (on 9 June).
- (5) Moldova informed ODIHR that it would notify the Council of Europe and the UN about derogations, without specifying the material scope of such derogations.
- (6) Romania had initially not informed ODIHR about the derogations, though it did later on.
- (7) San Marino informed ODIHR about derogations to freedom of movement, freedom of assembly and freedom of association, though this was not explicitly mentioned in the notification to the Council of Europe.

Official and public proclamation of the state of emergency

In the cases outlined above, states of emergency or equivalent statuses have all been officially and publicly proclaimed. However, at times, official declarations may have been preceded by restrictive measures of such a magnitude that they probably should have been adopted during an officially proclaimed state of emergency or equivalent to fall under parliamentary scrutiny. Similarly, even after the lifting of states of emergency, in some cases, some very stringent measures remain applicable, without the safeguards that such a regime would generally guarantee.

Notification of ODIHR, the United Nations and the Council of Europe

Art. 4.3 of the ICCPR, requires states, when notifying the UN, to inform “of the provisions from which [a State Party] has derogated”.⁵⁵ The eight participating States that have notified the UN have specified the articles of the ICCPR being derogated from. In notifications of derogations from the ECHR, four states (Armenia, Romania, San Marino and Serbia) do not explicitly state the human rights being derogated from – though they may have attached the underlying legal texts. This appears contrary to the aim of Art. 15 of the ECHR to maximise the transparency of the emergency powers and the human rights norms that have been derogated from, ultimately to ensure enhanced international oversight.⁵⁶ Further, three states (Albania, North Macedonia

and Serbia) which sought derogations from the ECHR have not notified the UN about any similar derogation from the ICCPR, despite substantial overlap in rights protected by both conventions. Moreover, states seeking to derogate should also inform the UN about their derogations to the ECHR, which none of the three countries have done.⁵⁷

Furthermore, while paragraph 28.10 of the Moscow Document (1991) requires participating States which declared a public emergency to inform ODIHR of this decision, “as well as of any derogation made from the State’s international human rights obligations”, only Armenia, Georgia, Latvia, Moldova, Romania and San Marino have explicitly done so.

Material scope of the notified derogations

All states that have notified the UN and the Council of Europe have sought to derogate explicitly or implicitly from the rights to freedom of peaceful assembly and to freedom of movement. Other rights most affected by derogations are primarily the rights to education and privacy, and to a lesser extent, the rights to property, liberty and security, and to a fair trial. Armenia’s notification to the Council of Europe also included provisions on restrictions to mass media that were later repealed.

Right to liberty and security of the person – Three states (Armenia, Estonia and Georgia) have derogated from the right to liberty and security of the person under Art. 9 of the ICCPR and Art. 5 of the ECHR. This is notwithstanding the fact that measures to enforce physical distancing, such as requirements to stay at home for long periods of time and the criminalization of non-essential leaving of one’s home, may actually trigger Art. 9 of the ICCPR and Art. 5 of the ECHR. Whether these measures constitute a deprivation of

55 See CCPR General Comment no. 29, para. 17, where the CCPR considers this essential “not only for the proper discharge of its functions, and in particular for assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant.” See also 1984 **Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR**, para. 45 (a).

56 Art. 15.3 of the ECHR requires states to “keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor.” However, in the decision of the Commission in the *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), Commission report of 5 November 1969, the Commission – as distinct from the ECtHR- did not find that Art. 15.3 required the state to identify the provisions from which it was derogating; and in ECtHR, *Hasan Altan v. Turkey* (Application no. 13237/17, judgment

of 20 March 2018), para. 89, the ECtHR accepted that the formal requirement had been satisfied even if Turkey had not mentioned the specific provisions of the Convention for which it sought a derogation.

57 The UN HRC interprets state’s obligation to report about the derogations from the ICCPR (under Art. 40 of the ICCPR) to cover the duty to inform “on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency” (see CCPR General Comment no. 29, para. 10).

liberty or a restriction to freedom of movement depends on the specificities of the measures enacted and the distinction is “merely one of degree and intensity, and not one of nature or substance”.⁵⁸ A restriction on freedom of movement therefore can constitute a deprivation of liberty if it crosses a specific threshold of interference, taking into consideration various criteria such as the type, duration, effects and manner of implementation of the measure in question, including the availability of adequate safeguards.⁵⁹ As mentioned above, the fundamental guarantees against arbitrary detention are considered to be non-derogable and absolute.⁶⁰ It is unclear, however, from the notification by Armenia, Estonia and Georgia to what extent the right to liberty and security is being restricted or suspended and whether emergency measures impact the fundamental guarantees against arbitrary detention, which should still be respected, even though they have sought derogations from the right to liberty (see the sections on Freedom of Movement and Detention).

Right to a fair trial – In addition, Estonia and Georgia have notified about derogations from the right to a fair trial. It is worth emphasizing that the fundamental principles of a fair trial have been recognized as being non-derogable.⁶¹ It is unclear from the notification to

what extent the right to a fair trial is being restricted or suspended and whether emergency measures impact the fundamental principles of a fair trial. In that respect, the ECtHR has previously held that the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that the detained person was left completely at the mercy of those holding him/her, and that the derogation was therefore disproportionate and constituted a violation of Art. 5 para. 3 of the ECHR (see the sections on Functioning of the Justice System and the Right to a Fair Trial).⁶²

Freedom of Expression – The UN Human Rights Council has suggested that a derogation from the freedom of expression (Art. 19 of the ICCPR, Art. 10 of the ECHR) might not be possible because this right is interlinked with freedom of opinion, from which there can never be a necessity to derogate even during an officially declared state of emergency.⁶³ Armenia’s notification to the Council of Europe contained provisions regarding the “prohibition of separate publications and reports through mass media,” but did not expressly mention the derogation of this right. These provisions were later repealed by a government decree.

Conflict-affected and non-government-controlled areas

In conflict-affected or non-government-controlled areas, those in control of these areas declared states of emergency and/or adopted *ad hoc* restrictive measures, though they were generally rather slow to do so.⁶⁴

58 See ECtHR, *Guzzardi v. Italy* (Application no. 7367/76, judgment of 6 November 1980), para. 33. See also CCPR, **General comment no. 35, Art. 9 (Liberty and security of person)**, 16 December 2014, CCPR/C/GC/35, para. 5, which states that “[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under Art. 12”.

59 ECtHR, *Engel v. Netherlands* (Application no. 5100/71, judgment of 8 June 1976).

60 CCPR, **General comment no. 35 on Art. 9 (Liberty and security of person), paras. 66–67, which includes** the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.

61 CCPR **General Comment no. 29**, para. 16; and **General Comment no. 32 on Art. 14 (Right to equality before courts and tribunals and to fair trial)** (2007), para. 6. These would include the right to be tried by an independent and impartial tribunal (CCPR, **General Comment no. 32** (2007), para. 19); the presumption of innocence (CCPR, **General Comment no. 32** (2007), para. 6); and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to habeas corpus (CCPR, **General Comment no. 29**, para. 16; and **General Comment no. 35** on Art. 9 of the ICCPR, para. 67).

62 See e.g., ECtHR, *Aksoy v. Turkey* (Application no. 21987/93, judgment of 18 December 1996), para. 83.

63 CCPR, **General comment No. 34: Art. 19: Freedoms of Opinion and Expression**, UN Doc. CCPR/C/GC/34, para. 5.

64 Those in control of the left bank of the Moldovan region of Transnistria declared a state of emergency from 17 March, later extended until 1 June 2020, and introduced a fourteen-day quarantine upon locals returning from the right bank. Those in control in non-government-controlled areas of eastern and southern Ukraine declared “high alert” regimes in mid-March and mandatory quarantine at the end of the month while banning non-residents from entry, though some of the measures were later eased. While restrictive measures were introduced in South Ossetia, a strict-lockdown was not enforced apart from the quarantine or self-isolation for persons suspected to be infected. In Abkhazia physical distancing and other measures were in place, while a state of emergency was in effect only from

Despite the UN Secretary General's call for a global ceasefire on 23 March,⁶⁵ violations of ceasefires have been reported.⁶⁶ Given the overall lack of credible epidemiological information from such areas, it is difficult to assess on what basis the introduction of restrictions was justified. Irrespective of the legal qualifications of existing conflicts in international humanitarian law, authorities or bodies exercising control over a territory shall comply with international human rights standards, including the core minimum right to health enshrined in Art. 12 of the International Covenant on Economic, Social and Cultural Rights which refers to the "the prevention, treatment and control of epidemic diseases". Additionally, all parties to a conflict shall ensure safe and rapid unimpeded access to impartial humanitarian organizations to provide assistance and protection to the population in conflict-affected areas.⁶⁷ In that respect, it is especially concerning that movement between government-controlled areas and non-government-controlled areas has generally been banned, thus limiting access to essential commodities, health and other services, and benefits, especially those for elderly people, domestic violence survivors, persons with

disabilities and other marginalized groups (see section on freedom of movement in Part II.2).⁶⁸

Considerations related to declaring an emergency

Whether or not to declare or not to declare a state of emergency There are no clearly established standards under international law as to whether and when a state should declare a state of emergency when responding to or preventing the consequences of a crisis. While states may have various reasons to avoid declaring a state of emergency, introducing far-reaching restrictions without formally acknowledging extraordinary circumstances through a state of emergency or equivalent status, risks normalizing such emergency powers and restrictions, without the procedural and substantive safeguards, especially in terms of limited duration and oversight mechanisms. In practice during the pandemic, though adopting relatively similar restrictive measures, states came to different conclusions regarding the need to declare a state of emergency and to derogate from international treaties. This indicates a lack of common understanding with respect to the scope of the requirements under international law.

28 March until 20 April, including a curfew. As of the time of writing of this report, in both Abkhazia and South Ossetia, movement across the administrative boundary lines to and from Tbilisi-administered territory (TAT) is prohibited while crossings to and from Russian Federation are likewise suspended (certain exceptions apply).

65 UN Secretary General, **Appeal for Global Ceasefire** (23 March 2020). In the context of the Geneva International Discussions (GID), the Co-Chairs from the EU, OSCE and UN made corresponding statements respectively, stressing that "... in the spirit of the call of UN Secretary General Guterres, (we) strongly urge all the GID participants to set aside differences and to refrain from actions that could lead to increased tension." They also urged, inter alia, "all GID participants to do their utmost to protect vulnerable conflict-affected populations, especially women, men and children in areas facing particular isolation." In the context of the Nagorno-Karabakh conflict, the Co-Chairs of the OSCE Minsk Group on 19 March appealed "to the sides to reaffirm their commitment to observe the ceasefire strictly and refrain from any provocative action that could further raise tensions during this period."

66 See e.g., the OSCE Special Monitoring Mission to Ukraine (SMM) **Daily Reports**.

67 ICRC, Customary International Humanitarian Law, **Rule 55 on Access for Humanitarian Relief to Civilians in Need**.

Though adopting relatively similar restrictive measures, states came to different conclusions regarding the need to declare a state of emergency and to derogate from international treaties. This indicates a lack of common understanding with respect to the scope of the requirements under international law.

There may be many reasons for not declaring a state of emergency,⁶⁹ especially if the existing legal framework

68 See OSCE SMM **Daily Reports**; UN Office for the Coordination of Humanitarian Affairs, **2020 Ukraine Emergency response Plan for the covid-19 Pandemic**, pages 7–9; **Statement of the Head of the OSCE Mission to Moldova** (30 April 2020); UN Resident and Humanitarian Coordinator for Georgia, **Situation Reports**; Co-Chairs of the OSCE Minsk Group 19 March. Co-Chairs of the Geneva International Discussions issued a statement on 31 March and 18 April 2020..

69 For instance, constitutions may not give states the power to declare a state of emergency (e.g., **Belgium, Denmark,**

already allows for restrictive measures to be swiftly adopted to deal with a pandemic. At the same time, it is questionable whether the ordinary legal framework should allow restrictive measures of such a magnitude as those implemented in the context of the pandemic (see Part II.2 and the comments on absolute rights below). While some countries may have had to declare a state of emergency to introduce stringent restrictions, such as a blanket curfew or store closures, others allegedly avoided it mainly for convenience due to the constraints it triggers, for instance in terms of limitations to organizing elections and/or amending the constitution.⁷⁰

In any case, analysis of the various measures enacted demonstrates that whether or not a state has declared a state of emergency gives no indication of the severity of the measures it enacted in response to the pandemic. Many states, for example, have enacted measures to enforce stay-at-home orders, physical distancing rules, closure of businesses, and quarantining powers similar to those states that have formally declared a state of emergency. The legislatures in these states acted similarly to the legislatures in contexts where a state of emergency was formally declared – at times deferring to the executive or conferring it with new powers to swiftly make laws or regulations (see the section below on parliamentary oversight). Under ordinary circumstances, fundamental rights and freedoms may only be limited by an act of parliament, but a state of emergency or equivalent status often empowers the executive to define the scope of restrictions to certain enumerated rights and freedoms by decree or administrative act, thus justifying the need for enhanced scrutiny and oversight, including (subsequent) approval or endorsement by parliament.

Iceland), or at least not to respond to an epidemic/pandemic (Sweden, Cyprus, France, Greece, Ireland, Lithuania, Malta); the government may not feel that the crisis is of sufficient magnitude to warrant a declaration of a state of emergency; the government may not wish to send the signal that it is departing from constitutional obligations such as human rights and the separation of powers or other political considerations.

⁷⁰ For instance, Poland (see ODIHR, **Opinion on the Draft Act on special rules for conducting the general election of the President of the Republic of Poland ordered in 2020 (Senate paper No. 99)** (27 April 2020), para. 17).

In light of the above, irrespective of whether a state of emergency is declared or not, any measures restricting human rights and freedoms must be subject to the same degree of scrutiny as *formally and publicly declared* states of emergency. It is essential that the legal framework regulating a state's response to health emergencies should clearly define the emergency powers and procedures and provide for strong substantive and procedural safeguards and effective oversight mechanisms, ensuring that exceptional powers are strictly limited in time to deal with such an exceptional situation. Indeed, it may be the case that these measures have a greater propensity of becoming permanent owing to the lack of temporariness of a declared state of emergency. Still, formally declaring a state of emergency or equivalent status (when powers normally provided by legislation to the executive are no longer sufficient) generally triggers greater safeguards, oversight and necessary limitations in the duration of exceptional powers, though the practice has shown that the use of states of emergency may also be abused.

To derogate or not to derogate – The breadth of the restrictive measures adopted raises the question whether they constitute exceptions to, rather than permissible restrictions upon, international human rights standards, thus requiring a formal derogation and notification to the UN, the Council of Europe, and ODIHR. In practice, not derogating from the ICCPR and ECHR does not necessarily mean that the measures enacted to confront the pandemic were less impactful on human rights than those enacted by states who did derogate. Spain, for example, did not derogate from the ICCPR and ECHR though it declared a “State of Alarm” and had in operation one of the strictest lockdown regimes in the Council of Europe area with children, for example, confined in their homes for 43 days with no exit allowed.⁷¹ Failure to derogate risks normalizing far-reaching powers and restrictions that should remain exceptional and strictly limited to the duration of the state of emergency, as well as setting a precedent for future emergencies or crises.

⁷¹ See EU Fundamental Rights Agency, **Country Study for Spain – Coronavirus pandemic in the EU – Fundamental Rights Implications** (4 May 2020), page 3.

I.1.C AREAS OF CONCERN AND GOOD PRACTICES

1. LACK OF LEGAL CERTAINTY AND ACCESSIBILITY OF THE EMERGENCY MEASURES

In most countries, the response to the pandemic has involved the adoption of numerous pieces of complex legislation, regulations and administrative decisions, at times both at the central and local levels. These acts were often poorly drafted, adopted with little or no public debate, and underwent multiple amendments in very little time.⁷² Effectively this resulted in a large degree of uncertainty affecting the implementation of the measures and preventing a clear legal understanding of the relationship between the different measures and their effects. This is not in line with the principle of legal certainty, whereby legal provisions should be clear and precise so that individuals may ascertain unequivocally which rights and obligations apply to them and regulate their conduct accordingly.⁷³ On several occasions, additional confusion was brought by executives publicly

72 For instance in, **Austria** (in the first weeks, the government introduced revisions of more than 70 statutory laws without public debate); **Czech Republic** (between 12 March and 12 May, the government issued 65 resolutions linked to the pandemic, while the Ministry of Health adopted further measures); **France** (two days after the adoption of the health emergency Law n° 2020-290 of 23 March 2020, twenty-five ordinances of various Ministries were adopted by the Council of Ministers, and twelve more within the next week); **Greece** (as of 16 April, Greece had issued 5 Acts of Legislative Content and 136 Ministerial Decisions concerning the pandemic); **Italy** (after the decree-law of 23 February issued by the President of the Council of Ministers, multiple legislative and administrative measures were passed and enforced at the national, regional, and local levels); **Russian Federation** (various packages of regulations/orders, measures and recommendations were adopted at the regional and local level as well as by order of the Presidium of the Coordinating Council under the Government); **United Kingdom** (the Coronavirus Bill – 359 pages – was published on 19 March and fast-tracked to receive royal assent four parliamentary days later on 25 March); **Slovenia** (after the change of government, 18 decrees to respond to the Covid-19 pandemic were adopted in seven days); and **Serbia** (following the governmental regulation prescribing the first restrictive measures, 26 other measures were adopted shortly after, some of which were amended over ten times).

73 See e.g., ECtHR, *The Sunday Times v. the United Kingdom* (No. 1) (Application no. 6538/74, judgment of 26 April 1979), para. 49; and Venice Commission's **Rule of Law Checklist** (2016), para. 58

announcing additional rules or exceptions not necessarily reflected in legal texts.⁷⁴ Also, in certain instances, the underlying legal texts have not been published,⁷⁵ so they are not publicly accessible in contradiction with rule of law principles.⁷⁶ A number of countries used the public policy technique of 'nudging' without legally requiring, which often was still interpreted by the people as legal restrictions and therefore contributed to a lack of legal certainty and inconsistencies in application.

At times, especially at the initial stages of the crisis, restrictive and other measures were adopted *without legal basis* or not in accordance with procedural requirements set in the constitution or other legal texts. Occasionally, contrary to basic rule of law principles, some parliaments adopted measures with retroactive applicability to justify or regularize measures and actions taken by the executive or other entities before the entry into force of the law.⁷⁷ Also, some states have relied on their primary legislation on public order or prevention of communicable diseases or epidemics to apply restrictions on the whole population, whereas some of these laws are designed to apply in an individualized manner to target specific individuals suspected of being infected, but not to impose general lockdown or other measures on everyone.

In other cases, rather vague, overly broad and at times open-ended legal bases have been used for enacting lockdowns and other restrictive measures.⁷⁸ As a result, at times far-reaching and potentially arbitrary powers

74 For instance, in **Austria**, the **Czech Republic** and the **United Kingdom**.

75 For instance, in **Turkey** all measures were taken with administrative decisions generally in the form of presidential or ministerial circulars, which were not published in the Official Gazette, except for one decision declared by the President. In **Italy**, the decree-law no. 6 of 23 February did not provide for the publication of the acts adopted by the President of the Council of Ministers, the requirement was then included in the decree-law of 25 March.

76 See Venice Commission's **Rule of Law Checklist** (2016), Section II.B.1.

77 See Venice Commission's **Rule of Law Checklist** (2016), para. 62.

78 For instance, **Georgia, Hungary, Iceland, Ireland, Poland**. In **Romania**, the Constitutional Court expressly considered that administrative misdemeanours applicable to violation of restrictive measures adopted in the context of the Covid-19 pandemic are too broad, their elements

were conferred to the executive to respond to the crisis, including normative powers. This also generally led to inconsistent application of restrictions in practice within a country.⁷⁹ Initial legal shortcomings have sometimes subsequently been rectified, for instance in Italy and Malta.⁸⁰ The lack of legal certainty is especially concerning when this involves criminal legislation, which needs to comply with the more stringent principle of specificity enshrined in Art. 15 of the ICCPR and Art. 7 of the ECHR.⁸¹ For instance, several countries have introduced and/or applied provisions to criminalize the dissemination of so-called “false information” or “false news” about the pandemic.⁸² The very concept of “false information” is inherently vague and ambiguous and therefore unlikely to comply with the principle of specificity of criminal law in all circumstances when invoked (see sections on Access to Information and Freedom of Association).⁸³

are unclear and as a whole the sanctioned behaviour is not predictable.

79 Especially concerning freedom of movement, for instance in **Belgium, France, Portugal** and the **United Kingdom**.

In **Romania**, the Constitutional Court expressly found that administrative misdemeanours applicable to violation of restrictive measures adopted in the context of the Covid-19 pandemic are too broad, their elements are unclear and as a whole the sanctioned behaviour is not predictable.

80 In **Italy**, the decree-law no. 6 of 23 February included an open-ended residual clause authorizing the President of the Council of Ministers to adopt “any containment and management measures adequate and proportionate to the evolution of the epidemiological situation”, which was later changed to a closed list by decree-law of 25 March. In **Malta**, Art. 27(c)(v) of the Public Health Act allowed the Superintendent of Public Health to make, amend and revoke orders prescribing measures “to guard against or to control dangerous epidemics or infectious disease” and “prescribing such other matter as the Superintendent may deem expedient for the prevention or mitigation of such disease”, a provision later amended to limit the potential for arbitrariness.

81 Criminal offences and the relevant penalties must be clearly defined by law, meaning that an individual, either by himself/herself or with the assistance of legal counsel, should know from the wording of the relevant provision which acts and omissions will make him/her criminally liable and what penalty he or she will face as a consequence; see e.g., ECtHR, *Rohlena v. the Czech Republic* [GC] (Application no. 59552, judgment of 27 January 2015), paras. 78–79.

82 For instance, **Azerbaijan, Hungary, Kazakhstan, Kyrgyzstan, Romania, Russian Federation, Spain, Turkey, Uzbekistan**.

83 See e.g., International Mandate-holders on Freedom of Expression, **2017 Joint Declaration on Freedom of**

More generally, where a state of emergency or equivalent status has not been proclaimed, the constitutional-ity of executive action at the national and local levels to limit fundamental rights to such an extraordinary extent may be questionable, especially when the constitution expressly states that restrictions to human rights and fundamental freedoms have to be provided by law.⁸⁴ As addressed above, restrictions of such a magnitude should generally be accommodated under a special temporary legal regime, such as a state of emergency, especially when they seem to *de facto* amount to a suspension rather than a restriction to certain human rights.⁸⁵ This is especially so where the executive may have exceeded the material scope of the restrictions to human rights foreseen in the law or when the constitution or legislation is clear about the fact that the specific legal regime used shall not trigger the limitation or suspension of human rights or freedoms.⁸⁶

In some countries, some emergency measures were taken by extra-legal bodies, which did not necessarily have the legitimacy or competence to adopt broad measures of such a magnitude, especially restrictions to human rights and fundamental freedoms.⁸⁷ This

Expression and “Fake News”, Disinformation and Propaganda, 3 March 2017, para. 2 (a).

84 For instance, in **Belgium, Ukraine, Russian Federation, Lithuania** and the **Netherlands**.

85 For instance, when strict lockdown measures with little or no exceptions, sometimes accompanied with curfew and/or excessive administrative or criminal sanctions, have been introduced, it may be argued that these constitute suspensions rather than mere restrictions of fundamental rights.

86 For instance in **Ukraine** (countrywide “emergency situation” as of 25 March is supposed to be a temporary legal regime that “does not limit the constitutional rights of citizens” as opposed to when a “state of emergency” or “martial law” are declared, which are the only two situations where Art. 64 of the Constitution of Ukraine does not prohibit restrictions on human rights); **Spain** (Art. 55.1 of the Spanish Constitution establishes that only in the states of exception and siege can some fundamental rights be suspended, but not in the “state of alarm”, which was declared to respond to the Covid-19 pandemic, during which fundamental rights can only be limited).

87 For example, in **Croatia** (the Civil Protection Headquarters, under the Ministry of the Internal Affairs, was designated as the main co-ordinating body during the period of execution of measures for outbreak prevention and adopted most of the restrictive measures); and **Slovenia** (the crisis was initially managed through “Crisis Headquarters”/“Crisis Unit”, which is not contemplated in the Communicable Diseases

is especially problematic as such entities were often established with no legal basis and, thus, had no defined composition, competences and accountability. Further, experience from this pandemic has shown that where the executive bases their decisions on the recommendations or guidance of *ad hoc* experts or scientific bodies, as in France and Turkey, extra effort is needed to ensure transparency of the decision making process particularly regarding the composition, appointment modalities and accountability rules of *ad hoc* bodies.⁸⁸ In this regard, even reliance on established institutional arrangements for public health advice have been criticized for lack of guarantees of independence and transparency, for instance the Scientific Advisory Group for Emergencies of the United Kingdom.

2. DURATION OF DEROGATIONS, STATES OF EMERGENCY, OTHER EMERGENCY MEASURES AND SUNSET CLAUSES

Duration of derogations – By definition the duration of an emergency is hardly predictable. However, UN HRC General Comment no. 29 expressly states that measures derogating from Art. 4 of the ICCPR “must be of an exceptional and temporary nature”.⁸⁹ The UN HRC has also expressed concerns in cases of states of emergency without time-limits or which extended over a long period of time, without an effective review mechanism.⁹⁰ When notifying of derogations, almost all participating States have provided for a specific

temporal limit either explicitly or in the attached legal texts.⁹¹ Serbia, which only sought derogations from the ECHR, did not specify any time-limit in its notification to the Council of Europe, although the Constitution sets a maximum duration of 90 days and, in fact, the derogations were lifted after seven weeks.

Legal frameworks of most of the countries that declared a state of emergency or equivalent status generally provide for a maximum duration for this exceptional legal regime.

Extension of derogations – The extension of the temporal, geographical and material scope of derogations are subject to the same procedural requirements – i.e., informing the relevant international and regional human rights bodies.⁹² While an emergency may persist over time, the UN HRC and the ECtHR generally require that adequate safeguards be in place to avoid the extension of derogations over long period without justification, such as mechanisms to assess the necessity and proportionality of a state of emergency and derogations in light of evolving circumstances.⁹³

Act and was formed by the government to co-ordinate the response to the Covid-19 pandemic, but was disbanded on 24 March 2020 due to controversies.

88 For instance, in **France** (a scientific council was established without a legal basis at the request of the President to advise the Executive, thus side-lining the institutional framework for consultation and health expertise on the epidemic risks provided for in the Public Health Code); in **Turkey** (in addition to Public Health Councils under the law on the Protection of Public Health, new “Provincial Pandemic-Councils” were founded in all provinces, though the legal duties and authorities of these councils are not specified in any laws or presidential decrees).

89 See CCPR General Comment no. 29, para. 2.

90 See e.g., UN OHCHR, **Chapter 16 on the Administration of Justice During States of Emergency, in “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers”**, pages 823–824. See also e.g., **Paris Minimum Standards of Human Rights Norms in a State of Emergency** (1984).

91 In their initial notifications: **Armenia** (30 days to the Council of Europe and the UN), **Estonia** (until 1 May – to the Council of Europe and the UN), **Georgia** (30 days – to the Council of Europe and the UN), **Kyrgyzstan** (until 25 March – to the UN), **Latvia** (until 14 April 2020 – to the Council of Europe and the UN), **North Macedonia** (30 days to the Council of Europe), **Moldova** (60 days – until 15 May, to the Council of Europe and the UN), **Romania** (30 days – to the Council of Europe and the UN), **San Marino** (until 20 April 2020 to the Council of Europe and until 4 May to the UN, since it was notified later). In attached text: **Albania** (30 day in the initial notification to the Council of Europe).

92 See e.g., CCPR General Comment no. 29, para. 17; and ECtHR, *Sakik and Others v. Turkey* (Application nos. 87/1996/706/898–903, judgment of 26 November 1997), para. 39.

93 See e.g. ECtHR, *A. v. United Kingdom*, (Application no. 3455/05, judgment of 19 February 2009), para. 178. where the ECtHR held that derogating measures reviewed on an annual basis by the Parliament could not be said to be invalid on the ground that they were not “temporary”; and ECtHR, *A. v. United Kingdom*, (Application no. 3455/05, judgment of 19 February 2009), para. 178. See also PACE, **Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Art. 15 of the European Convention on Human Rights**, para. 19.4

In case of extensions of derogations, due justification and clear explanation of the additional measures taken should be included in any new notifications to support their continued necessity and proportionality.⁹⁴ In that respect, when states notified the UN and the Council of Europe of extensions of derogations, little information was provided as to the justification for the need to extend the derogation. In Georgia, the prolongation of derogations until 15 July even though the state of emergency had been lifted on 22 May has been criticized as it removes the restrictions from the scope of the safeguards provided under a state of emergency, especially parliamentary scrutiny.⁹⁵

Even in cases when states did not derogate from their international human rights obligations, the commitment made in the Moscow Document (1991) that “the state of public emergency will be lifted as soon as possible and will not remain in force longer than strictly required by the exigencies of the situation,” remains relevant.⁹⁶ It is, thus, welcome that the legal frameworks of most of the countries which declared a state of emergency or equivalent status generally provide for a maximum duration for this exceptional legal regime.⁹⁷ Most of them also contain sunset clauses i.e., that all legal acts and measures taken during that period would cease to have effect at the end of that state.⁹⁸ However, Hungary’s

Containment of Coronavirus Act allowed the emergency regulations of the government to remain in force for an unforeseen period – until the end of the state of danger, noting that the decision on ending the state of danger was within the sole discretion of the government, which raises concern.⁹⁹ The latest Decree-Law of 31 May 2020 in San Marino provides restrictive measures that will last “until the end of the health emergency,” which is similarly problematic.

Even in countries where no state of emergency was introduced, many included clear sunset clauses in specific emergency legislation meaning that they are not expected, or designed, to create any permanent change.¹⁰⁰ When relying on existing legislation to fight communicable diseases and epidemics however, the legislation at times does not provide for clear limitations in terms of duration of the emergency measures, even if they *de facto* involve curtailment of human rights.¹⁰¹ Further, there are concerns in certain states about possible permanent changes to legislation brought by the executive following the introduction of emergency powers or using emergency procedures, to introduce provisions that will remain in force even after the end of the emergency.¹⁰² Finally, it must be emphasized that

94 See CCPR General Comment no. 29, para. 17.

95 In **Georgia**, the state of emergency was declared by the President on 21 March 2020 and approved by the Parliament on the same day, and was extended twice until 22 May inclusive when it ended; on the same day, the Parliament urgently adopted the amendments to the Law on Public Health granting Government the power to design and implement quarantine measures without parliamentary oversight and amendments to the Criminal Procedure Code which established remote court hearings.

96 Moscow Document (1991), para. 28.3.

97 For example, in **Italy** (the temporary nature of the measures, limit of six months, was clearly indicated in the Council of Ministers’ declaration of a public health state of emergency of 31 January, while the law on civil protection limits public emergencies to a maximum period of one year, extendable for another year); **Kazakhstan** (maximum 30 days extendable by presidential decree); **Latvia** (an emergency situation may be declared for a predefined time period, but no more than three months as per the Law on Emergency Situation and State of Exception).

98 For instance, in **Georgia** (Art. 71 para. 3 of the Constitution states that during a state of emergency, presidential decrees that have the force of the organic law, shall be in force until the state of emergency has been revoked);

Kazakhstan (Art. 21 of the 2003 Law on State of Emergency as amended); **Luxembourg** (the Constitution foresees a general sunset clause according to which all measures taken on the ground of Art. 32(4) would cease to have effect at the end of the state of crisis).

99 See ODIHR Director’s **statement** of 30 March 2020 on **Hungary** emergency legislation.

100 For example, in **France** (the new chapter on “State of Health Emergency” of the Public Health Code introduced by the Law n° 2020-290 of 23 March 2020 is applicable only until 1 April 2021); **Germany** (sunset clauses are entrenched under the federally applicable Infectious Disease Prevention Act, but courts have had to step in to require sunset provisions and regular democratic review of the legislation of particular Länder); **Ireland** (adoption of specific legislation on Covid-19, with a sunset clause of 9 November, which can be extended); the **United Kingdom** (section 89 of the Coronavirus Act (2020) provides that the majority of the provisions will expire after two years).

101 For example, in **Iceland** (Art. 12(2) of the Infectious Diseases Act, the main basis for all of the measures, does not mention time limits for the Minister of Health’s powers); **Poland** (the end-date of certain measures is unclear).

102 For example, in the **Russian Federation** (the provisions introducing administrative and criminal liability for “public dissemination of knowingly false information about circumstances posing a threat to the lives and security of citizens and/or about the government’s actions to protect the

time limits alone are not sufficient given the history of emergency powers becoming perpetuated. Rather, they *must* be accompanied by opportunities for parliamentary and judicial oversight to ensure this temporariness.

3. PROPORTIONALITY OF EMERGENCY MEASURES

Generally, a restriction impacting fundamental freedoms is unlikely to be proportionate if the same result could have been attained equally well by other known measures that were less restrictive of fundamental freedoms. Due to the novelty of the coronavirus and the uncertainties about its spread, infectiousness and transmissibility, states faced a major dilemma when deciding on what would be the optimally effective restrictive measures with minimal harmful side-effects. The time constraints at the outset of the pandemic made this deliberation over the proportionality of measures additionally difficult, as delay itself could cause harm during this pandemic. As a result, authorities generally adopted very stringent emergency measures and extended them over several weeks or months without properly weighing and balancing other interests, including the impact on human rights, especially of the most vulnerable and marginalized persons, and economic interests. Likewise, sufficient consideration was not given to less restrictive measures, if not at the outset, at least at a later stage. While there is no doubt about the efficiency and necessity of physical distancing to contain the pandemic and self-isolation as a crucial measure for slowing virus transmission, the precise manner in which to achieve such distancing, without excessively infringing on rights and freedoms, remained unclear and was specific to particular local contexts. The WHO generally advocated for timely and strict distancing measures, in addition to ramping up testing and contact tracing, but has also noted that the threat of criminal sanctions for ensuring compliance with public health interventions to prevent

population” will remain part of the legal system even when the pandemic is over); in **Estonia** (the emergency legislation package also included new, unrelated or only remotely linked provisions – for instance, changes to the pension system and stricter controls on migration, which will remain applicable even after the end of the emergency situation). Other countries have introduced permanent changes in legislation to criminalize “false information” about health emergencies and/or the violation of restrictive measures imposed during a health emergency, which will remain in force even after the pandemic (see below).

the transmission of infectious and communicable diseases may not be the most effective.¹⁰³

Authorities generally adopted very stringent emergency measures and extended them over several weeks or months without properly weighing and balancing other interests. The impact on human rights, especially of the most vulnerable and marginalized people, and economic interests were not given sufficient consideration. If considered, less restrictive measures may have been found more appropriate, if not at the outset, at least at a later stage.

Many concerns have been raised regarding the lack of proportionality of certain restrictive measures imposed on the whole population. One of the most concerning developments has been the criminalization of breaking pandemic-related measures, often with penalties that are disproportionate, such as excessive fines compared to the country’s median wage and imprisonment, at times for relatively mild offences such as not wearing a mask in public places.¹⁰⁴ Similarly, sanctions for

103 See WHO, **Advancing the Right to Health: the Vital Role of Law** (2017), Chapter 10, p. 156.

104 For instance, though not exhaustive, in **Albania** (3 to 8 years imprisonment for violation of preventative measures having serious consequences for the health and life of the population; 2 to 3 years imprisonment when breaking quarantine); **Bulgaria** (fine ranging from 10,000 to 50,000 leva (approx. EUR 5,100 to 25,500), or up to five years imprisonment for violation of quarantine rules); **Canada** (fine of up to \$750,000 (approx. EUR 500,000) and/or imprisonment for up to six months for violating the 14-day quarantine, and up to \$1 million levy and 3 years imprisonment for those who put others at risk); **Czech Republic** (fine of up to CZK 3 million (approx. EUR 107,000) for violating self-quarantine when coming back from a high-risk country); **France** (fine up to EUR 3,750 and six months imprisonment for three lock-down violations within 30 days); **Georgia** (administrative fine of approx. EUR 900 for natural persons and of EUR 4,500 for legal persons for violating the rules of isolation and quarantine and if committed repeatedly, up to three years imprisonment; up to three to six years imprisonment for repeated violations of rules of the emergency regime); **Hungary** (up to eight years imprisonment for persons interfering with the operation of a quarantine or isolation order); **Latvia** (maximum fine was raised from EUR 700 to EUR 2,000 for natural persons, and from EUR 2,800 to EUR 5,000 for legal persons for violation of the rules of epidemiological

disseminating so-called “false information” about the pandemic often involve severe sanctions – including imprisonment (see section on Access to Information).

The proportionality of extremely strict and lengthy lockdown regimes imposed by some countries on certain categories of the population, with a complete prohibition to exit their homes or only for a few hours weekly may also be questionable.¹⁰⁵ This particularly relates to a categorization by age, such as children and elderly people. It also relates to certain categories of people living in defined areas, such as Roma settlements or migrant facilities. (See respective sections in Part II.3). Also, the requirement of prior authorization before leaving one’s home may also appear excessive.¹⁰⁶ Similarly,

safety); **Poland** (administrative fines up to 30,000 PLN (approx. EUR 6,600) for certain violations of the restrictive measures, including quarantine); **Romania** (from six months up to seven years of imprisonment for offenses related to the health emergency, as per Article 352 of the Penal Code); **Russian Federation** (up to seven years imprisonment breaking quarantine rules, introduced by Federal Law No. 98-FZ dated 1 April 2020); **Tajikistan** (between two and five years imprisonment for first-time offenders who spread the disease in a negligent manner, with up to 10 years in case of repeated offence, as introduced by a law passed on 10 June; anyone not wearing a mask in public or failing to respect physical distancing can be fined up to EUR 25); **Uzbekistan** (15-day jail terms and heavy fines for being out without an essential reason or not wearing a face mask, in the latter 1,115,000 Soms (approx. EUR 100) as per the recently amended Article 53 of the Code of Administrative Responsibility).

105 For example, in **Spain** (children were confined in their homes with no exit allowed for 43 days; see EU Fundamental Rights Agency, **Country Study for Spain – Coronavirus pandemic in the EU – Fundamental Rights Implications** (4 May 2020), page 3); **Azerbaijan** (persons over age 65 have been allowed outside their homes on 18 May for the first time since 24 March); **Serbia** (complete confinement of individuals aged 65 and over to their homes for over a month, except for a few hours during the week on Sundays; and for the rest of the population, the curfew was generally in force every day from 5 p.m. to 5 a.m., except on Saturdays when it ran from 3 p.m. to 5 a.m.). In **Bosnia Herzegovina**, the curfew for persons younger than 18 and above 65 has been lifted in line with a ruling from the Constitutional Court.

106 For example, in **Azerbaijan**, the Decision of the Cabinet of Ministers dated 2 April 2020, on additional measures to prevent the spread of coronavirus infection in the territory of the Republic of Azerbaijan, introduced a system of permission to leave the place of residence by SMS for a limited list of essential trips. Several other countries applied similar measures.

strict and lengthy mandatory quarantine regimes may be considered disproportionate.¹⁰⁷

Several national courts or other independent bodies have found certain emergency measures to be disproportionate, for example: the complete prohibition of movement of persons below 18 years old and above 65 years old;¹⁰⁸ the procedure for all matters to have one judge hear cases rather than a panel;¹⁰⁹ the collection of data via coronavirus contact-tracing application;¹¹⁰ the complete ban on traveling to the coast;¹¹¹ and a non-time-limited restriction on freedom of movement.¹¹²

The proportionality of the emergency measures needs to be ensured over time and the outcome of a proportionality analysis can shift as circumstances evolve and knowledge about the coronavirus develops. Any measures that become unnecessary or disproportionate must be adapted or removed. In that respect, several courts have held that the continued application of certain emergency measures was disproportionate, for

107 See e.g., ECtHR, *Kuimov v. Russia* (Application no. 32147/04, judgment of 8 January 2009), para. 96, where the Court held that the quarantine should be “a temporary measure, to be discontinued as soon as circumstances permit” and that “severe and lasting restrictions which are of a long duration are particularly likely to be disproportionate to the legitimate aims pursued”.

108 See e.g., **Bosnia and Herzegovina**, Constitutional Court Decision **AP 1217/20** of 22 April 2020, which noted that the measure did not meet the requirement of proportionality since the challenged provisions did not disclose the basis for the assessment of the Federal Civil Protection Headquarters that the targeted groups face a greater risk of being infected or spreading the infection with SARS-CoV-2, did not show that the authorities consider the possibility of introducing more lenient measures, were not time-limited and there was not a mechanism for regular review to assess their continued necessity and ensure that they are eased or terminated as soon as the situation allows for it.

109 See e.g., **France**, Council of State’s **Ordinance** of 8 June.

110 E.g., on 12 June, **Norway’s** Data Protection Authority issued a **decision** banning data processing associated with Covid-19.

111 See e.g., in **Germany**, on 10 April, Greifswald Higher Administrative Court found that the state ban on travel to the coast, islands and lakes represented a disproportionate encroachment on personal freedom.

112 See e.g., in **Slovenia**, where the Constitutional Court’s **order** U-I-83/20-10 of 16 April 2020 reviewed the validity of the Governmental decree restricting freedom of movement “until cancellation” and considered that it was not limited in temporality and therefore disproportionate.

instance the continued ban of assemblies of more than 10 individuals,¹¹³ or the continued absolute prohibition of gatherings in places of worships whereas gatherings elsewhere were eased.¹¹⁴

4. GENDER- AND DIVERSITY-BLINDNESS OF EMERGENCY MEASURES

A state of public emergency or other measures adopted to respond to the Covid-19 outbreak shall be guided by the principle of non-discrimination.¹¹⁵ According to Art. 4 para. 1 of the ICCPR and the Moscow Document (1991), derogating measures shall “not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority”.¹¹⁶ While there may not be many cases of direct discrimination on such grounds in the emergency legislation or administrative orders, emergency legal frameworks and measures (or lack thereof) have often resulted in indirect discrimination, resulting in unequal treatment or particular negative impact on certain groups when put into practice (see also the sections on Roma and Sinti, gender equality, discrimination, and trafficking in human beings in Part II.3).¹¹⁷ While age is not explicitly listed in the grounds for discrimination, a blanket ban for people over a certain age to exit their homes,¹¹⁸ may constitute discrimination if not justified and the prioritization of access to health care for people under a certain age limit is a violation of the prohibition of discrimination.

Emergency legal frameworks and measures (or lack thereof) have often resulted in indirect discrimination, resulting in unequal treatment or particular negative impacts on certain groups in practice.

Because Covid-19 disproportionately affects the elderly, and because a large majority of fatal victims of the disease are of advanced age, many countries introduced special regimes with varying success to protect the elderly, in particular those residing in nursing homes. There were instances when intensive care was reserved for younger, otherwise healthier people, with older people falling ill from Covid-19 considered to have a lower likelihood of survival. This brought up painful moral dilemmas and decisions on prioritizing while conducting triage, for which few were prepared at this scale. It should be emphasized that the dignity of life and the right to life are equal rights held by all human beings, regardless of age or physical capacities, and that any suggestion to “sacrifice the elderly” is incompatible with universal human rights.¹¹⁹ States have to be particularly mindful that health care and medical services are equally accessible and actually provided, not only refraining from discriminating in terms of gender, ethnic origin or minority status, but also in terms of age.

Most of the emergency and preventive response measures, such as stay-at-home orders, self-isolation, home quarantine or physical distancing, may be difficult or impossible to implement or put into practice, for instance for people who are homeless, persons with disabilities, people living in institutions or in custody and older people. Also, the mandatory closure of non-essential services and the implementation of quarantines, curfews or similarly restrictive measures can mean interruptions in vital support and assistance services for many persons with disabilities, as well as for older adults, potentially leading to abandonment, isolation and risk of forced institutionalization, as well as of becoming victims of abuse and violence.

113 See e.g., **France**, Council of State's **Ordinance** of 13 June, para. 14.

114 See e.g., **France**, Council of State's **Ordinance** of 18 May.

115 ° See, **No exceptions with COVID-19: “Everyone has the right to life-saving interventions – UN experts say**, OHCHR, 2020.

116 Moscow Document (1991), para. 28.7.

117 See the case of the Georgian Orthodox Church, where authorities have not addressed the lack of compliance with emergency laws and mandatory recommendations by remaining open across the country and continuing to hold ceremonies.

118 For instance, in **Azerbaijan** (persons over age 65 were allowed outside their homes on 18 May for the first time since 24 March); and **Serbia** (complete confinement of individuals aged 65 and over to their homes for over a month, except for a few hours during the week on Sundays). In **Bosnia Herzegovina**, the curfew for persons younger than 18 and above 65 has been lifted in line with a **ruling** from the Constitutional Court.

119 See e.g., the **Statement** by the Council of Europe Commissioner for Human Rights Dunja Mijatović of 24 March.

Stay-at-home orders, isolation or quarantine have increased the risk of domestic violence, specifically impacting women, children and older people. A majority of governments failed to take sufficient preventive measures, though in certain countries at a later stage, specific legislative provisions or other support were introduced to address women's rights and the needs of the most marginalized individuals or groups (see section on Discrimination Against Women, Gender Inequality and Domestic Violence in Part II.3).

Emergency measures have often led to unemployment of part-time, low-income and informal workers, which, along with the shut-down of schools and institutions, has disproportionately affected women.¹²⁰ Public authorities have generally failed to introduce measures or promote policies and programmes to address the specific needs of women and minimize the economic impact on women in the informal sector and those in a situation of economic precariousness due to the pandemic. In addition, there may also be some barriers preventing access to preventive public health information and to information on emergency restrictive measures, especially for persons with disabilities, persons belonging to national, ethnic and religious minorities, non-nationals who do not necessarily speak the official language, those with limited or no ability to read or with no Internet access. Such barriers should be taken into consideration by public authorities when communicating about the pandemic and emergency responses to the public. (See the section on Access to Information). In some countries, while the initial emergency legislation or measures may have been gender- and diversity-blind, later amendments or extension have at times introduced more gender and diversity-sensitive provisions.¹²¹

120 See e.g., OHCHR, **Guidance on Covid-19 and Women's Human Rights**.

121 For example, the Law of 11 May 2020, extending the state of health emergency in **France**, introduced new provisions specifically regulating the situation of victims of domestic violence in the context of quarantine, isolation and stay-at-home measures. Certain countries, such as **Ireland, France, Greece, Slovakia** and **Poland** have automatically extended the validity period of residence permits for foreigners. **Portugal** provided immediate protection of vulnerable individuals, such as migrants and asylum-seekers, with pending applications, by considering them in a regular situation until 30 June, which granted them access to fundamental rights such as healthcare, housing, and social support; **Poland** has also provided that foreigners

5. STATES OF EMERGENCY AND RELATED MEASURES AND ABSOLUTE RIGHTS

Emergency measures within or outside the scope of a state of emergency shall not impact absolute rights i.e., rights that can never be suspended or restricted under any circumstances, even during a declared state of emergency. In practice however, irrespective of whether a state has sought delegations, their responses to the pandemic have, in effect, impacted absolute rights. As such, failing to take additional protective measures for individuals whose absolute rights are impacted may amount to a violation of the respective international human rights standards.

In some countries, while the initial emergency legislation or measures may have been gender- and diversity-blind, later amendments or extension have at times introduced more gender and diversity-sensitive provisions.

Absolute Prohibition of Torture and other Ill-treatment – The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is particularly relevant in the context of the pandemic as insanitary conditions of detention, exacerbated by the heightened risks that Covid-19 poses to overcrowded prison populations, could amount to inhuman or degrading treatment. Similarly, restrictive measures that further isolate prisoners from the outside world or place them in preventive isolation or quarantine without meaningful human contact also raise concerns with regard to the absolute prohibition of torture.¹²² As such, failure to

staying in Poland permanently, including refugees and beneficiaries of subsidiary protection, will be released from the obligation to apply for new residence cards until the relevant offices restore regular service, while **France** has extended for three months the certificates of asylum application that expired between 16 May and 15 June 2020.

122 See e.g., UN Subcommittee on Prevention of Torture (SPT), **Advice relating to the Coronavirus Pandemic** (25 March 2020); and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), **Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic** (20 March 2020).

take appropriate action may constitute a violation of the UNCAT, Art. 7 of the ICCPR and Art. 3 of the ECHR (see relevant sections in Part II.2). Border closures have also impacted effective access to asylum procedures, and resulted in unsafe returns to third countries in potential contravention to the principle of *non-refoulement*, which is recognized as being absolute.¹²³ In addition, domestic violence is internationally recognized as amounting to cruel, inhuman or degrading treatment and very often to physical or psychological torture.¹²⁴ It is documented that stay-at-home obligations and other measures restricting the movement of people have contributed to an increase in domestic violence.¹²⁵ Further, restrictions in public services including the closure of shelters and limitations in interventions by police or courts to protect domestic violence or trafficking victims has made it difficult for states to fulfil their obligation to effectively prevent, protect against, respond to, prosecute and provide redress in cases of domestic violence and trafficking in human beings.¹²⁶

Prohibition of Arbitrary Deprivation of Liberty –

The prohibition of *arbitrary* deprivation of liberty is

123 See, Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (CAT), Art. 4, which contains an absolute prohibition of *refoulement* for individuals in danger of being subjected to torture. See also CCPR, **General Comment no. 20 on Art. 7 of the ICCPR**, 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into ECHR Art. 3, see e.g., *Socini v. United Kingdom* (1989), para. 88; and *Chahal v. United Kingdom* [GC] (1996), paras. 80–81.

124 See, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, **Interim Report on Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence** (12 July 2019), A/74/148, para. 10.

125 See e.g., OHCHR, **Guidance on Covid-19 and Women's Rights**, page 1.

126 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, **Interim Report on Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence** (12 July 2019), A/74/148, para. 62; and UN Committee Against Torture (CAT), **General Comment no. 2: Implementation of Art. 2 of the UNCAT by States Parties**, 24 January 2008, CAT/C/GC/2, para. 18. See also UN OHCHR, **Recommended Principles and Guidelines on Human Rights and Human Trafficking** (2010), page 81; and ECtHR, *Akkoç v. Turkey* (Application nos. 22947/93; 22948/93, judgment of 10 October 2000), para. 77.

absolute and can never be justified, even for reasons related to national emergency, public security or health.¹²⁷ This means that anyone deprived of his or her liberty shall have the possibility to bring proceedings before a court in order to challenge the legality of the detention.¹²⁸ Art. 5 (1) (e) of the ECHR specifically envisions “the lawful detention of persons for the prevention of the spreading of infectious diseases”, which may include quarantine and isolation for a reasonable duration, but only of persons who are infected and if it is “the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.”¹²⁹ As mentioned above, whether the emergency measures to respond to the pandemic constitute a deprivation of liberty or a restriction to freedom of movement depends on the specificities of the measures enacted in each country and the distinction is “merely one of degree and intensity, and not one of nature or substance.”¹³⁰

A restriction on freedom of movement, therefore, can constitute a deprivation of liberty if it crosses a certain threshold of interference, taking into consideration various criteria such as the type, duration, effects and manner of implementation, including the availability of adequate safeguards.¹³¹ As such, lengthy and extremely strict lockdown regimes, requiring people to stay at home for long periods of time with no or extremely

127 See, Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), para. 5.

128 See, Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), para. 5; **Report of the Working Group on Arbitrary Detention to the UN Human Rights Council**, A/HRC/22/44, 24 December 2012, paras. 42–51; **General Comment no. 35** on Art. 9 of the ICCPR (Liberty and security of person), para. 67.

129 See e.g., ECtHR, *Enhorn v. Sweden* (Application no. 56529/00, judgment of 25 January 2005), para. 44.

130 See e.g., ECtHR, *Guzzardi v. Italy* (Application no. 7367/76, judgment of 6 November 1980), para. 93. See also CCPR, **General comment no. 35, Art. 9 (Liberty and security of person)**, 16 December 2014, CCPR/C/GC/35, para. 5, which states that “[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under Art. 12”.

131 ECtHR, *Engel v Netherlands* (Application no. 5100/71, judgment of 8 June 1976), para. 59.

limited possibility to go out, and the criminalization of non-essential leaving of one's home may amount to deprivation of liberty. If such measures are imposed without clear legal basis, without clear time limitation or without providing for strong safeguards, this may qualify as *arbitrary* deprivation of liberty, which is prohibited by international human rights standards.¹³² For example, the quarantine rules in Ireland and Canada and compulsory hospitalization in Poland,¹³³ may not provide the safeguards necessary to prevent *arbitrary* detention, including a maximum duration of containment and procedures to prevent arbitrary application, including review by a court.¹³⁴ Also, the automatic prolongation of pre-trial detention without the intervention of a judge and without access to a lawyer provided by some countries may also constitute an *arbitrary* deprivation of liberty.¹³⁵ (For more, see section on Torture and Detention in Part II.2)

I.1.D OVERSIGHT OVER STATES OF EMERGENCY AND RELATED EMERGENCY MEASURES

In this section, an overview is given about how parliaments, judiciaries and other bodies of accountability provided oversight specifically of state of emergency declarations and related measures. In Part II.1, broader analysis of the implications of such measures on the functioning of democratic institutions and processes is provided.

Participating States have specifically committed to provide for, in law, control over the decision to impose a state of public emergency, as well as over the regulations related to the state of public emergency and the implementation of such regulations, and to ensure that “the legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency.”¹³⁶ International good practice provides that the derogations to human rights and from the regular division of powers in emergency situations should be limited in duration, circumstances and scope, and that parliamentary control and judicial review should continue throughout the emergency situation.¹³⁷ There should be parliamentary control and judicial review of the existence and duration of the emergency situation, and the scope of any derogation thereunder.¹³⁸ Participating States have also committed to ensure that “the normal functioning of the legislative bodies will be guaranteed to the highest possible extent during a state of public emergency.”¹³⁹

At the domestic level, states of emergency and emergency powers can impact constitutional norms pertaining to the separation of powers, in addition to human rights provisions. This impact on the separation of powers invariably sees a consolidation of power in the executive. The justification for executive supremacy in a time of public health emergency is generally the need for a swift decisive response at the outset

132 Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), paras. 10 and 18–19.

133 In **Ireland**, Section 11 of the *Health Act 2020* introduces new powers of “detention and isolation of persons in certain circumstances” by a “medical officer of health” but there is no express time-limit on the duration. In **Canada**, the *2005 Federal Quarantine Act* permits the indefinite detention of individuals who are on reasonable grounds suspected of having a communicable disease, subject to review, but only by a “review officer”, a medical practitioner designated by the minister, though the statute does not exclude judicial review and is subject to parliamentary scrutiny. In **Poland**, the COVID Act, which entered into force on 8 March does not provide for any possibility to challenge before a court of law the decision ordering compulsory hospitalization.

134 CCPR, *General Comment no. 35*, paras. 15 and 66; and CCPR, *General Comment no. 29*, paras. 4, 11 and 15–16.

135 Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), para. 14; and CCPR, *General Comment no. 35*, para. 38.

136 Moscow Document (1991), paras. 28.2 and 28.8.

137 Venice Commission, **Rule of Law Checklist**, adopted by the Venice Commission at its 106th Plenary Session (CDL-AD(2016)007-e, Venice, 11–12 March 2016), Sub-Section 2.A.6 on Exceptions in Emergency Situations.

138 *ibid.*

139 Moscow Document (1991), para. 28.5.

of an emergency. Irrespective of the model chosen, a shift towards greater powers for the executive needs to be accompanied by appropriate safeguards ensuring democratic accountability and scrutiny by other powers and the public. It is essential that mechanisms of legal and political oversight on executive power must be in place, including explicit time-limits on emergency powers, parliamentary approval of emergency powers and implementing measures, and judicial review mechanisms. It is also important that the legislature and judiciary continue to function to carry out their oversight functions throughout the public emergency, which is essential to ensure the balance of powers, especially in crisis situations.

1. PARLIAMENTARY OVERSIGHT

National parliaments need to play a crucial role in shaping the response to the pandemic, especially in terms of effective oversight of the executive.¹⁴⁰ Indeed, oversight functions conducted by national parliaments remain an essential requirement of parliamentary democracy, especially at times when states of emergency are introduced and greater powers shift towards the executive. As required by the Moscow Document (1991), “in cases where the decision to impose a state of public emergency may be lawfully taken by the executive authorities, that decision should be subject to approval in the shortest possible time or to control by the legislature.”¹⁴¹ In that respect, participating States committed to “provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.”¹⁴²

In most countries, parliaments must be immediately notified of declarations of state of emergency (or equivalent emergency status) made by the executive, and may revoke it, or parliament needs to approve the declaration, and/or parliament's authorization is required for their extension.

In most countries, parliaments must be immediately notified of declarations of state of emergency (or equivalent emergency status) made by the executive, and may revoke it, or parliament needs to approve the declaration, and/or parliament's authorization is required for their extension.¹⁴³ At times, there is also a mechanism to ensure that the parliament reviews or approves implementing measures adopted by the executive.¹⁴⁴ In a few countries, states of emergency or equivalent status have to be declared by the parliament itself,¹⁴⁵ which

143 For example, in **Albania** (the state of natural disaster was declared by the executive and was extended with the consent of the Assembly as per Article 174 para. 2 of the Constitution); **Armenia** (the National Assembly has to be convened immediately and shall approve the state of emergency and its extensions, as per Article 120 of the Constitution); **Czech Republic** (the Government shall immediately notify the Chamber of Deputies of the declaration of the state of emergency, which may revoke the government's decision to declare a state of emergency; any further extension of the state of emergency requires the approval of the Chamber of Deputies); **Georgia** (Article 71 par 2 of the Constitution of Georgia requires the presidential declaration of state of emergency to be immediately presented to the Parliament for approval); **Latvia** (the government's order declaring the emergency situation was approved by the Parliament the following day and the Parliament is exercising the oversight function over the government's decisions, as per Article 10 of the Law on Emergency Situation and State of Exception); **Luxembourg** (a state of crisis can last maximum ten days and can be extended for 3 months (maximum duration provided in the Constitution) but only with prior authorization of Parliament); **Portugal** (the decree of the President declaring a state of emergency was subject to Parliament's authorization in accordance with Article 138 of the Constitution, as was the renewal); **Spain** (each extension of the 15-day state of alarm requires the approval by the Congress of Deputies); **Romania** (the Parliament, in accordance with Article 93 of the Constitution, endorsed the state of emergency decreed by the President within three days, and later its extension).

144 For example, **Georgia** (Art. 71 para. 3 of the Constitution requires the presidential decrees adopted during a state of emergency to be approved by the Parliament or they will become null and void); **Latvia** (the decision of the Government and any amendments with further restrictions or extensions are to be notified within 24 hours to the Saeima, which is obliged to include this point into the agenda without delay and if the Saeima rejects the decision, it is repealed, and the measures introduced are to be abolished without delay); **Luxembourg** (the government shall inform Parliament on a weekly basis about the adopted measures).

145 For example, **Bulgaria** (Art. 84(12) of the Constitution); **Moldova** (Art. 66 sub-para. (m) of the Constitution of the Republic of Moldova); **Serbia** (Art. 105 of the Constitution). In **North Macedonia**, it is the Assembly that has the power to declare a state of emergency as per Art. 125(2) of the

140 Copenhagen Document (1990), para. 5.2.

141 Moscow Document (1991), para. 28.2.

142 Moscow Document (1991), para. 28.8.

may ensure a higher degree of consensus at the national level. In some countries however, the parliament is not required to review the emergency declaration itself, and only intervenes at a later stage to approve the implementing measures taken by the executive.¹⁴⁶ In some states, in response to the pandemic, there has been a delegation of powers to the executive to legislate, which is generally subject to parliamentary ratification within a limited time-frame.¹⁴⁷

One of the major concerns during the pandemic has been some parliaments' reduced ability to exercise effective oversight on the declaration of a state of emergency and/or implementing measures because their activities were suspended or considerably reduced due to the pandemic.¹⁴⁸ Modalities for continued work during the pandemic, for instance reduced hours of

parliamentary sitting have not always been conducive to effective oversight.¹⁴⁹

In a few countries, either the parliament has not been involved at all because this is not provided by the constitution or legislation, such as in Armenia, Estonia and Slovakia, or it has delegated full powers to the executive thereby *de facto* limiting the exercise of effective oversight over the emergency response by the executive.¹⁵⁰ Sometimes, even when a state of emergency is declared, the role of the parliament remains rather minimal as it is only informed about the acts of the executive without the possibility to control or repeal them, generally because the oversight is carried out by another entity such as a prosecutor-general. This is generally the case in countries where the prosecution service is still construed as an organ of "supervision", a prosecution model still prevalent among a number of post-Soviet states.¹⁵¹ Sometimes, however, such a safeguard was introduced in implementing legislation on a specific state of emergency, such as in Italy.

In some cases, as discussed above, a state of emergency or equivalent status was not declared, side-lining, in effect, the legislature and limiting accountability that its "checks and balances" role would have secured. When no state of emergency or equivalent was declared and restrictive measures were introduced

Constitution but since it was dissolved in February 2020, the President is empowered to do so, as per Art. 125(4) of the Constitution.

146 For example, **Finland** (there is no parliamentary scrutiny of the declaration of state of emergency made by the Cabinet, jointly with the President of the Republic pursuant to Section 6.1 of the Emergency Powers Act; however, the government needs to submit decrees concerning the use of powers under the Emergency Powers Act to the parliament, which decides whether they may remain in force or should be repealed); **Italy** (the approval of the declaration of state of emergency is not required and urgent temporary measures adopted by the Government shall be introduced to Parliament for transposition into law within 60 days or it shall lose effect from the beginning, as per Art. 77 of the Constitution).

147 For instance, **Andorra**, **San Marino** (urgent measures were adopted by the government through a series of decree-laws i.e., regulatory instruments adopted in case of necessity and urgency by the government and which, within 3 months and under penalty of forfeiture, has to be submitted to the Parliament for ratification); **France** (Art. 11 III of the Law n° 2020-290 of 23 March 2020 requires that ordinances be ratified by the Parliament within two months of their respective publication); **Greece** (Art. 44 of the Constitution requires ratification of acts of legislative content within 40 days).

148 For instance, **Czech Republic** (plenary of the Parliament was not in session and only a few Committee meetings were taking place remotely); **Latvia** (the parliament decided to limit the number of plenary sessions); **Serbia** (the National Assembly did not convene to declare the state of emergency and only upheld it six weeks later when it reconvened, though a week later, on 6 May, it decided to lift the state of emergency); **Slovenia** (the National Assembly is only holding extraordinary sessions, while most committee meetings have been postponed).

149 For example, in **Lithuania** (the activities of the Seimas have been limited with only one weekly ordinary sitting and urgent hearings to discuss the Government's draft legislation related to Covid-19, which is not conducive to effective oversight); **Portugal** (the Parliament adopted a deliberation maintaining face-to-face meetings but only once per week, and is operating with just one-fifth of the members (the quorum limit)).

150 For example, in **Bulgaria** (on 26 March 2020, Parliament took the decision to sit to consider "only Bills pertaining to the state of emergency" during the state of emergency, which closed the door to effective parliamentary control of executive rule-making); **Hungary** (the Section 3 of the Containment of Coronavirus Act, reserves to Parliament the ability to prevent the extension of emergency decrees, with a simple majority, whereas Art. 53.3 of the Fundamental Law provides that decrees issued in a state of emergency lose their legal force after 15 days unless Parliament affirmatively approves their continuation).

151 For example, **Kazakhstan** (Art. 44 (1) (16) of the Constitution on the presidential powers and 2003 Law on State of Emergency, as amended); and **Kyrgyzstan** (Art. 64 (9) (2) of the Constitution on the presidential powers in terms of states of emergency in individual localities).

on the basis of existing primary legislation or new *ad hoc* acts, such restrictive measures were often of the same magnitude as those adopted under a state of emergency and would therefore require parliamentary oversight. However, in such cases, the oversight role of the parliament has generally been rather minimal or non-existent.¹⁵² At the same time, in some countries, the parliament, nevertheless, has continued to exercise its *general* oversight function, for example by asking the government parliamentary questions regarding its actions and/or by setting-up dedicated parliamentary monitoring commissions in order to monitor and control executive actions. However, these mechanisms alone are not sufficient and may be less effective compared to the checks generally built into states of emergency or equivalent legal regimes.¹⁵³

Finally, parliaments should play a key role in both extending and lifting the state of emergency or equivalent status as soon as they consider that the circumstances no longer require such an exceptional regime.¹⁵⁴

152 For example, in **Austria** (the Covid-19 Measures Act does not provide rules to involve parliament in the assessment of adopted measures); **Belgium** (the two draft legislative (1 and 2) acts of 27 March 2020, which were adopted by the federal parliament granting special powers to the federal government for three months, had initially included a requirement for the government to keep the Chamber of Representatives informed about the measures taken by virtue of its special powers, though this obligation was not formalized in the final act); **Germany** (The Federal Government only has to submit an evaluation report on the measures taken until March 2021); **Montenegro** (the government adopts all measures without submitting them to the Parliament for review or approval).

153 See, for example, **Belgium** (parliamentary questions and setting up of the Covid-19 Commission); **France** (on 17 March, the National Assembly decided to create a fact-finding mission on the impact, management and consequences in all its dimensions of the pandemic); **Portugal** (setting up of a dedicated oversight committee with a majority of seats assigned to the minority parties); **United States** (setting up of a special bipartisan committee to oversee all aspects of the government's response to Covid-19 emergency); **United Kingdom** (the Joint Committee on Human Rights of the United Kingdom parliament has announced an inquiry into the human rights implications of the Government's response to the coronavirus crisis).

154 For example, **Serbia** (the National Assembly lifted the state of emergency on 6 May, only a week after finally reconvening, far before the maximum 90 days).

2. JUDICIAL OVERSIGHT

Participating States committed to ensure that “the legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency” and to “provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.”¹⁵⁵ The judicial oversight of emergency measures is required by the principles of legality and the rule of law and the “fundamental requirements of fair trial” must be ensured in emergency situations, as must be the right to an effective remedy which is inherent in international human rights obligations.¹⁵⁶

The complete shut-down of courts in certain countries has *de facto* impeded any access to an effective remedy provided by Art. 2 of the ICCPR and Art. 13 of the ECHR, be it for challenging restrictive measures introduced to respond to the pandemic or for other matters, especially those to protect the exercise of non-derogable and absolute rights (see section on Justice Systems). At times, for various reasons the highest courts were not operational even before the outbreak of the pandemic, which affected their ability to exercise their oversight functions.¹⁵⁷ Having functioning courts is also necessary to maintain a viable balance of power during a state of emergency. Because various measures may impact men and women differently, having effective judicial oversight may also safeguard against inequality.

Complete shut-down of courts in certain countries has *de facto* impeded access to an effective legal remedy.

A majority of states do not envisage in their constitutions specific modalities for seeking legal redress against declarations of state of emergency and implementing

155 Moscow Document (1991), para. 28.8.

156 See, CCPR General Comment no. 29, paras. 14 and 16, stating explicitly that only court may convict a person for a criminal offence and shall decide without delay on the lawfulness of detention, and that presumption of innocence must be respected.

157 For example, **Albania**, **Armenia** and **Moldova**.

measures, which should mean that normal judicial avenues are applicable. In some instances, Covid-19 emergency legislation included specific provisions concerning judicial review.¹⁵⁸ It is worth noting, though, that the participating States have diverse legal traditions where judicial oversight is exercised in different ways. In some countries, it is possible to challenge new legislation directly before a constitutional court or comparable institution, whereas in others, only the application of laws can be challenged in individual cases.

In some instances, judicial oversight was not effectively exercised, for instance because constitutional or other courts or similar key institutions considered the measures to be excluded from judicial review or dismissed the case because it involved an abstract review,¹⁵⁹ or due to other procedural reasons.¹⁶⁰ In other cases, such as in Austria, certain restrictive measures were introduced using general internal orders rather

than official regulations, which *de facto* prevents individuals from challenging them as such orders are not subject to judicial review. At times, cases failed on the merits when they were concerning general measures rather than individual administrative acts, essentially because public interest and the need to adopt measures to prevent infections weighed heavily on courts' assessment.¹⁶¹

At the same time, there is a large and growing body of cases filed against emergency measures across the OSCE region, which have been brought before constitutional and administrative courts. Several actions before constitutional courts were successful in challenging the constitutionality of emergency legislation or executive decrees or decisions.¹⁶² There are also several positive examples of how administrative or local courts heard cases related to the pandemic and effectively controlled the powers of the executive.¹⁶³ At

158 For example, in **France** (newly introduced Art. L. 3131-18 of the Public Health Code provides that emergency measures pursuant to such Code may be challenged before the administrative judge); **Norway** (Art. 6 of the **Temporary Statutory Law to Remedy the Consequences of the Outbreak of Covid-19** which specifically states that court can adjudicate on both the lawfulness of the individual decision that is made and of the regulation it is made under).

159 For example, in **Cyprus**, the administrative court dismissed a claim challenging the ministerial decree imposing restrictions on entry to the Republic of Cyprus for citizens and non-citizens alike, primarily because the Court considered the measures introduced by the challenged decree came within the scope of governmental acts and are as such excluded from judicial review (see **Case 301/2020** of 16 April 2020). Before the Constitutional Court of **Switzerland**, two judicial challenges against the legality of the COVID-19 Ordinance 2 of 13 March 2020, one brought to the main Administrative Tribunal and the other to the Swiss Federal Tribunal were dismissed on the basis that Ordinance 2 could not be subject to an abstract review; see Federal Tribunal's judgment of 24 April 2020, **6B 276/2020**; and Federal Administrative Tribunal's decision of 15 April 2020, **2C_280 / 2020**). In **Estonia**, no court cases have been initiated to check the constitutionality of the emergency legislation, partly because of the Estonian system generally requires establishing a concrete case of harm.

160 For instance, the Constitutional Court of **Czech Republic** refused to annul the declaration of the state of emergency and the follow-up crisis measures, for procedural reasons; the Federal Constitutional Court of **Germany** refused to grant interim measures for failure to exhaust legal remedies before administrative courts, for instance in cases challenging the prohibition of a **protest (20 March 2020)**, the **Bavarian lockdown (18 April 2020)** and **rules on contact limitation (24 April 2020)**.

161 For instance, in several decisions of the Federal Constitutional Court of **Germany (7 April, 9 April 2020, 10 April 2020)**.

162 For instance, **Bosnia and Herzegovina** (in its **decision** AP 1217/20 of 22 April 2020, the Constitutional Court considered restriction on freedom of movement for persons under 18 and over 65 years old, to constitute a human rights violation, which led to the lifting of the measures); **France** (the Constitutional Council in its **Decision n ° 2020-800 DC** of 11 May 2020 held certain provisions of the Law extending the state of health emergency to be unconstitutional, and provided interpretative reservations for some others); **Romania** (on 6 May 2020, the **Constitutional Court** declared unconstitutional Governmental decrees no.1/1999 and no.34/2020 on the regime of emergency measures stating that Presidential decree on establishment of restrictive measures should be subject to Parliamentary control and approval, and expressly declaring that restrictive measures should be established only through a law adopted by Parliament); **Slovenia** (the Constitutional Court's **order** U-I-83/20-10 of 16 April 2020 reviewed the validity of the Governmental decree restricting freedom of movement "until cancellation" and considered that it was not limited in temporality and therefore disproportionate). In **Kosovo**, on 31 March, the **Constitutional Court** declared government's decision imposing restrictions on freedom of movement, privacy and freedom of assembly invalid, considering that applicable laws do not authorize the Government to limit such constitutional rights and freedoms at the level of the entire territory and for the whole population without exception. *Please see OSCE disclaimer on page 26.*

163 For example, in **Czech Republic** (on 1 April, the **Supreme Administrative Court** ruled that the government acted *ultra vires* when it annulled by-elections to the Senate (the upper chamber of the Parliament) which were to take place

the same time, some of these rulings are only interim relief decisions, which do not analyse compliance with human rights and fundamental freedoms. For judicial oversight to be effective, especially in a crisis context, there needs to be emergency procedures to challenge controversial measures, such as the petition for protection of fundamental freedoms before the French Council of State, which generally decides cases within 48 hours. Otherwise, this may render the judicial oversight mechanism meaningless.

There are several positive examples of administrative or local courts hearing cases related to the pandemic and effectively controlling the powers of the executive.

Finally, ODIHR has noted in some countries, legislative amendments or the emergency legislation itself has reduced or sought to reduce general judicial oversight functions, for instance pertaining to privacy, surveillance and the gathering of personal data¹⁶⁴ which raises additional concerns.

at the end of March; on 23 April, the **Municipal Court in Prague** annulled some of the restrictive measures issued by the Ministry of Health emphasizing that such wide restrictions of basic rights may should have been adopted by the government as a whole on the basis of the Crisis Act and not by the Minister of Health alone; other regular courts were able to check some measures issued by the executive related to, *inter alia*, freedom of movement, which influenced the government's decision to ease some restrictions in early May); **France** (Council of State's **Ordinance** of 8 June quashing the general procedure that before the National Court of Asylum cases would be heard by a single judge rather than a panel; **Ordinance** of 13 June suspending the ban on assemblies of more than 10 individuals; and **Ordinance** of 18 May ordering the Government to lift the general and absolute ban on assembly in places of worship); **Germany** (the Federal Constitutional Court held on that the prohibition of assemblies in the city of Gießen and the refusal by the city of Stuttgart to process requests to hold protests/mass gatherings violated the right to freedom of peaceful assembly (see judgments of **15 April 2020** and of **17 April 2020**).

For example, in **Bulgaria** (amendment to the Law on Electronic Communication, implemented through the Law on Emergency, which allows the police to ask Telecommunication companies for an "immediate access" to traffic data of users, without judicial oversight); **Denmark** (the initial text of the emergency law was authorizing the police to enter the homes of citizens, suspected

3. OVERSIGHT BY NATIONAL HUMAN RIGHTS INSTITUTIONS AND CIVIL SOCIETY

By flagging human rights issues and violations in emergency times, National Human Rights Institutions (NHRIs) effectively complement parliamentary and judicial oversight mechanisms. Especially when those mechanisms are not operational or ineffective, the role of NHRIs to hold the executive to account becomes essential. Across the OSCE region, NHRIs and independent data protection authorities have been very active in providing opinions and recommendations on emergency measures and draft legislation, at times challenging the constitutionality of emergency measures, when they have the mandate to do so.¹⁶⁵ Many of their statements and recommendations call the attention of public authorities to the need to tailor emergency responses and access to information to the needs of the most marginalized and vulnerable persons, including older people, persons with disabilities, people in detention, homeless people, youth, victims of domestic violence, migrants, asylum-seekers, victims of

of being contaminated, without the authorization of a magistrate); **Slovenia** (the Government proposal of the Corona Megalaw envisaged a radical expansion of the powers of the Police, including a new power to enter a dwelling *without a court order* to pursue the objective of enforcing anti-epidemic measures, which was, fortunately, only partly adopted once it reached the National Assembly); **Poland** has introduced **important administrative fines** for breach of lockdown orders but the recourse to administrative rather than criminal measures avoids the obligation of a court hearing and the opportunity for defence.

¹⁶⁵ See, **COVID-19 and Human Rights**, ENNHRI. For instance, the Ombudsperson of **Portugal** issued several requests for information and recommendations to the executive authorities; the NHRI of **France** provided observations to the Prime Minister on human rights concerns associated with the emergency measures and issued an opinion on the Law extending the State of Health Emergency; the NHRI of **Monaco** provided an opinion on emergency legislation and recommendations to Ministry of Health and Labour on amendments to labour code, as well as submitted an Amicus Curiae Brief before the Constitutional Court; the **Commissioner for Human Rights of Poland** provided numerous guidance notes to individuals on their rights during the crisis, while also participating in law-making process and/or commenting on adopted emergency measures; the Avocatul Poporului of **Romania** challenged the constitutionality of Emergency Ordinance 34/2020 before the Constitutional Court on the grounds that its provisions on contraventions and sanctions lack clarity and predictability and that the ordinance cannot have effects on constitutional rights, freedoms and duties.

trafficking and refugees. (see also sections on Human Rights Defenders and NHRIs). Additionally, in some countries, independent commissions have been or will be set up to review and evaluate the response to the pandemic.¹⁶⁶

In a context where the parliament may not be able to exercise its oversight functions to the fullest extent, for instance due to physical distancing requirements, the oversight provided by media outlets and civil society and their freedom of expression more generally becomes especially important. However, civil society oversight has been impaired by various restrictive measures limiting their freedom of movement and access to the institutions they monitor, as well as freedom of expression and access to information, which have *de facto* prevented them from playing their role as watchdogs (see sections on Access to Information, Freedom of Association and NHRIs and human rights defenders).

4. OTHER OVERSIGHT MECHANISMS

In certain countries, the prosecutor general's office has an oversight role.¹⁶⁷ In such cases, it is essential that the said body/institution be independent or autonomous from the executive and does not substitute the role of the parliament and the judiciary to guarantee effective oversight. In other countries, public prosecutors have been playing an active role in investigating potential mismanagement of the health crisis by the government or public entities.¹⁶⁸

5. TRANSPARENCY

In the Moscow Document (1991), participating States committed, in the context of a state of emergency, to “make available to [their] citizens information, without delay, about which measures have been taken.”¹⁶⁹ Also, they committed “to maintain freedom of expression and freedom of information, consistent with their international obligations and commitments, with a view to enabling public discussion on the observance of human rights and fundamental freedoms as well as on the lifting of the state of public emergency” and not to adopt “measures aimed at barring journalists from the legitimate exercise of their profession other than those strictly required by the exigencies of the situation.”¹⁷⁰

A state of emergency should be guided by human rights and democratic principles, including transparency. Access to information, openness and transparency are necessary conditions for democratic governance and protection of human rights and should be the starting point of any response to emergencies such as the Covid-19 pandemic, especially to ensure proper and effective oversight of the emergency response. Transparency and the right to access to information during a state of emergency require that media freedom is protected, as journalism serves a crucial function during the emergency, particularly when it aims to inform the public of critical information and monitor government actions.¹⁷¹ It is therefore concerning that some countries have explicitly stated that principle of decisional transparency will not apply during the state of emergency, whereas it is a time when it is probably the most needed.¹⁷² Also, as mentioned above, con-

¹⁶⁶ For example, in **Sweden** (government announced plan for independent commission that will review government handling after the pandemic). In the **United Kingdom**, there have been calls for setting up a specific oversight mechanism to control Covid-19 powers similar to the United Kingdom's Independent Reviewer of Terrorism Legislation.

¹⁶⁷ For example, in **Kazakhstan** and **Kyrgyzstan**,

¹⁶⁸ For example, in **Sweden** (on 29 April 2020, the Swedish National Prosecutor **announced** that it is investigating a workplace environment crime after a nurse working at Karolinska University Hospital in Stockholm died of COVID-19, especially with regards to the lack of required appropriate safety equipment); in **France** (on 8 June, following the receipt of more than sixty complaints, Paris public prosecutor's office opened a preliminary investigation into the criticized management of the health crisis by the government).

¹⁶⁹ Moscow Document (1991), para. 28.3.

¹⁷⁰ Moscow Document (1991), para. 28.9.

¹⁷¹ See the **Joint Statement** of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE RFoM and the IACHR Special Rapporteur for Freedom of Expression (19 March 2020).

¹⁷² For example, in **Romania** the Emergency Ordinance no. 34 of March 26, 2020 amending and completing of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency, introduced a new provision that states: “During the state of siege or the state of emergency, the legal norms regarding decisional transparency and social dialogue do not apply in the case of draft normative acts establishing measures applicable during the state of siege or state of emergency or which are a consequence of the establishment of these states”.

trary to OSCE commitments, access to public information has been constrained in law or in practice¹⁷³ (see

the sections on Access to Information and Democratic Law-making).

173 For example, in **Hungary** the government does not provide public access to the relevant information regarding Covid-19 cases and among other things, because briefings with the Emergency Task Force are not held in person, journalists must send in questions ahead of time and the government answers only selectively; the Governmental Decree No. 179 of 2020 (V.4.) on the derogations from provisions regulating data subject requests and addressing data processing activities during state of danger makes it impossible to access data of public interest); the government in the **Netherlands** announced at the end of April that dealing with requests under access to information legislation about Covid-19-related policies would be put on hold until at least 1 June. In **Slovenia**, the government passed a law suspending most deadlines

in administrative proceedings, including those under the Public Information Access Act, thus *de facto* suspending all freedom of information requests. In the **United States of America**, the Federal Bureau of Investigation (FBI) announced in March that they would only accept freedom of information requests sent by mail not through its online portal, though this has changed since then. Other countries such as **Moldova, Poland, Serbia** and the **United Kingdom** have adopted measures or have made announcements concerning the extension of the times that public officials have to respond to freedom of information requests or may in practice delay obtaining of public information.

RECOMMENDATIONS

States of emergency and derogations

- States should clearly identify what provisions of international human rights treaties they are derogating from, especially in their notifications to the UN, Council of Europe and ODIHR and ensure the public is aware of all derogations.
- States should immediately notify ODIHR of the proclamation of a state of emergency and of the derogated provisions of international treaties.
- States of emergency should be proclaimed based on unambiguous legislation, which meets requirements of international law, clearly describes powers of the executive, legislature and judiciary and potential restriction to human rights and fundamental freedoms.
- States should ensure a regular review mechanism to assess the necessity of the persistence of a state of emergency and the necessity and proportionality of the derogation in light of evolving circumstances is in place.
- Parliaments should oversee the declaration, prolongation and termination of a state of emergency, as well as the application of emergency powers, while ensuring participation of the opposition in such oversight mechanisms to ensure wide consensus.

Emergency Powers and Measures

- States should consider carrying out an ex-post review of how national legal regimes were prepared for the measures required by the pandemic with a view to maximize their preparedness and legal framework for future crises.
- Irrespective of whether a state of emergency is declared or not, measures introduced in such an emergency period require a solid legal basis, preferably in the constitution or overarching special legislation. The underlying legal framework for emergency powers and measures shall always provide a clear definition of the emergency powers and procedures, and stringent substantive and procedural safeguards similar to the ones provided in the context of a state of emergency. Safeguards should include solid and effective

oversight mechanisms, while ensuring that exceptional powers to respond to an emergency are strictly limited in time and in scope to what is necessary to deal with such an exceptional situation.

- Any emergency legal regime should provide a maximum duration for the exceptional legal regime and for sunset clauses, so that all related legal acts and measures taken during that period would cease to have effect at the end of the emergency.
- Irrespective of the legal basis, emergency measures should not confer unfettered discretion on the executive authorities and should lay down explicit conditions and limitations and should never provide an open-ended delegation of powers.
- To ensure the proportionality of emergency measures, the public authorities should provide justification for the introduction of the measure and their extension, including on the adequacy of the measures, on the weighing and balancing of other interests (including the impact on human rights, especially of the most vulnerable and marginalized persons or groups), and showing that less restrictive measures were considered but found not to be equally effective.
- Oversight mechanisms should be in place to regularly review and ensure the temporariness, appropriateness and proportionality of the emergency legal regime and implementing measures, and that they are eased or terminated as soon as the situation allows.
- States are encouraged to refrain from overusing criminal legislation and penal sanctions to enforce compliance with health emergency measures and more generally avoid application of disproportionate sanctions.
- The emergency legal framework and implementing measures should be designed with the aim of mitigating specific risks and vulnerabilities and respecting the rights of all, including women, persons with disabilities, older people, homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI people.¹⁷⁴

Oversight Mechanisms

- States should ensure the continuous and effective functioning of the parliament and courts to carry out their oversight functions, while also ensuring transparency in decision-making and access to information.
- States of emergency or other emergency powers should be proclaimed by the legislature granting extraordinary powers to the executive or by executive decision subject to parliamentary approval.
- Effective oversight mechanisms should be embedded in the legal framework on states of emergency and on health emergencies, which should go beyond merely informing parliament and require both the approval of the declaration of emergency and implementing measures or serious restrictions, at least those that imply suspension of or seriously impact human rights and fundamental freedoms.
- States should ensure that emergency powers, the timeframe and application of the extraordinary measures are subject to periodic and effective parliamentary oversight.
- Judicial oversight should be available to review both the constitutionality and legality of the declaration of state of emergency, and the implementing measures, to evaluate the proportionality of the restrictions, as well as procedural fairness of application of the public emergency legislation.
- For judicial oversight to be effective, especially in an emergency context, there needs to be emergency procedures to challenge restrictive measures.

¹⁷⁴ The Guidance Notes on Covid-19 Response published by the UN OHCHR offer useful practical recommendations and examples of good practices, especially on **persons with disabilities, older persons, persons in detention and institutions, migrants, displaced persons and refugees, children and youth, minorities, gender, women's rights and rights of LGBTI persons.**

Transparency

- The executive should strive to ensure transparency in its decision- and law-making processes and public debate, to the extent possible given the circumstances, if not at the very initial stage, at least later on, for example by publishing the experts' opinions on which it relied to adopt emergency measures and/or broadcasting parliamentary debates and/or setting up platforms for dialogue with individuals.
- Except when certain limitations to access to information are prescribed by law, necessary and proportionate to prevent specific, identifiable harm to legitimate interests, information should be available and accessible, especially to those who will be affected by executive decisions and their implementation, as well as by those in charge of the oversight to ensure accountability.

StrijpeSURS

I.2 ACCESS TO INFORMATION

The effectiveness of public health and related emergency measures depends to a large degree on the level of awareness of the target population. At the same time, the trust of the public in institutions and their readiness to follow guidelines and regulations is dependent on the level of transparency and the access of the public to information such as data, statistics, documentation of deliberations and decision-making processes. During the pandemic and the introduction of emergency measures in participating States, the right to seek information has been affected by legal or *de facto* limitations, and effective access has not always been consistently upheld.

The ability to seek, receive and impart information effectively is part of the right to freedom of expression, which is protected under international human rights law.¹⁷⁵ Art. 19 of the ICCPR provides that this right may only be subject to such limitations that are provided by law and are necessary for the respect of rights and reputations of others and for the protection of national security, public order or public health or morals. Apart from the requirement of following a legitimate aim, limitations must be prescribed by law in a precise, certain and foreseeable manner, must be necessary in a democratic society and proportional to the aim they pursue. The scope of the right to freedom of expression includes “the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁷⁶ According to the UN Human Rights Committee, Article 19, paragraph 2, embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.¹⁷⁷ The jurisprudence of the European Court of Human Rights also highlights that denial of access to information constitutes an interference with the right to freedom of expression.¹⁷⁷ While evaluating compatibility

of the restrictions with the requirements of the ECHR, the Court applies a three-part test assessing whether restrictions are prescribed by law, aim to protect one of the interests listed in Art. 10 (2) and if they are “necessary in a democratic society” to protect that interest.

The UN Human Rights Committee’s General Comment No. 34¹⁷⁸ and several reports by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, provide further guidance on the freedom of access to information and the way an enabling legal framework should be shaped. This includes the maximum disclosure principle, the presumption of the public nature of meetings and key documents, broad definitions of the type of information that should be accessible, reasonable fees and time limits, independent reviews of refusals and sanctions for non-compliance.¹⁷⁹ The UN Special Rapporteur’s latest report on disease pandemics and the freedom of opinion and expression states that “it is not as if a health crisis, such as a pandemic, limits the importance of access to information or the role of accountability in ensuring that government operates in accordance with the best interests of its people. To the contrary, a public health threat strengthens the arguments for open government, for it is only by knowing the full scope of the threat posed by disease that individuals and their communities can make appropriate personal choices and public health decisions.”¹⁸⁰ Several OSCE

(2009), *Youth Initiative for Human Rights v. Serbia* (2013), *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* (2013).

178 **UN Human Rights Committee General Comment No. 34**, Freedom of Opinion and Expression, CCPR/C/GC/34, 21 July, 2011.

179 **Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression to the General Assembly on the right to access information** (4 September 2013), A/68/362, submitted to the UN Human Rights Council, 14th session, 20 April 2010

180 See the **Joint Statement** of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media and the IACHR Special Rapporteur

175 Art. 19 of the ICCPR and Art. 10 of the ECHR.

176 ICCPR, Art. 19.2.

177 See e.g. *Sdružení Jihočeské Matky v. Czech Republic* (2006), *Társaság A Szabadságjogokért v. Hungary*

documents reinforce participating States' international commitments on seeking, receiving and imparting information of all kinds.¹⁸¹ In the Helsinki Final Act (1975), the participating States committed to making it "their aim to facilitate the freer and wider dissemination of information of all kinds."¹⁸² In the Copenhagen Document (1990), participating States committed to safeguarding the right to freedom of expression, including the freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers."¹⁸³ The Istanbul Document (1999) reiterated the importance of the public's access to information.¹⁸⁴

It is only by knowing the full scope of the threat posed by disease that individuals and their communities can make appropriate personal choices and public health decisions.

Developments pertaining to the access to information and areas of concern in participating States fall within the following main categories: restrictions to access to public information, restrictions on dissemination of information (either by media, NGOs or individuals) about the ongoing Covid-19 pandemic and monopolizing the flow of public health information. During the pandemic, many participating States limited access to public information by, for example, stating that information requests will not be answered for a specific time period or during states of emergency or similar measures or by extending the usual deadlines set by legislation or by-laws given to public institutions for complying with information requests.¹⁸⁵ In some participating States,

access was limited on logistical grounds, for example, the fact that it was not possible to submit freedom of information requests in person.¹⁸⁶ Despite not amending applicable legislation, the pandemic has, in some participating States, led to requests not being answered within the required timeframes or at all. Some participating States also differentiated between "urgent" and "non-urgent" information requests.¹⁸⁷ Access to information for journalists has been particularly affected and regulated under a different scheme in some participating States.

Although during a state of emergency States may have legitimate reasons for introducing special rules on access to particular types of public information, blanket or indefinite suspensions are clearly disproportionate. Also, overly long deadlines covering all access to information

most deadlines in administrative proceedings, including those under the Public Information Access Act, thus *de facto* suspending all freedom of information requests. In the **United States**, the Federal Bureau of Investigation (FBI) announced in March that they would only accept freedom of information requests sent by mail not through its online portal, though this has changed since then. Other countries such as **Moldova**, **Poland**, **Serbia** and the **United Kingdom** have adopted measures or have made announcements concerning the extension of the times that public officials must respond to freedom of information requests or may in practice delay obtaining public information. In **Georgia**, using the powers granted by the Presidential Decree of 21 March on State of Emergency, the Government suspended deadlines set by legislation regarding requests for public information; in **Hungary**, under Decree No. 179/2020, issued on 4 May 2020, the period for responding to requests was extended to 45 days (instead of 15 days), which may then be extended one time for another 45 days; In **Moldova**, the Commission for Exceptional Situations, the body that co-ordinates the emergency response, extended the time permitted for responding to requests for public information from 15 days to 45 days. On 16 April, the People's Advocate (ombuds institution), which among other functions is responsible for right to information (RTI) oversight, called on the Commission for Exceptional Situations to revoke the extended deadline, arguing it was unconstitutional. **Romania** passed measures that have extended the times during which public officials must respond to freedom of information from 10 to 20 days. 186 In **Hungary**, requests for information cannot be submitted in-person or orally under Decree No. 179/2020, issued on 4 May 2020; in **Russian Federation**, the closure of many regional government bodies means it is not possible to request information. 187 **Italy's** government suspended action on requests that are "not urgent and cannot be postponed" from March 8 to May 31, but did not specify whether Covid-19-related requests fall under the "urgent" category,

for Freedom of Expression (19 March 2020); see also **Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression- Disease pandemics and the freedom of opinion and expression** A/HRC/44/49 para. 20.

181 Concluding Document of Vienna (1989), para. 34 and Copenhagen Document (1990), para. 9.1.

182 Helsinki Final Act (1975) Heading 2. "Information."

183 Copenhagen Document (1990) para. 9.1.

184 Istanbul Document (1999), para. 26.

185 For example, the government of the **Netherlands** announced at the end of April that dealing with requests under access to information legislation about Covid-19-related policies would be put on hold until at least 1 June; In **Slovenia**, the government passed a law suspending

requests can, in essence, encroach on the right to access to information as some of the submitted requests are likely to be time sensitive. This is particularly the case for requests made in relation to the pandemic response of governments and public institutions. In these cases, delaying the response to requests or putting all requests on hold without taking into consideration their subject matter or their urgency will likely make the information of limited use once it is eventually made accessible. States should therefore avoid overly broad and blanket restrictions, and ensure procedures and regulations are developed that will enable them to continue providing access to public information, including to the media, during states of emergency or similar measures.¹⁸⁸ In particular, and notwithstanding extraordinary circumstances, states should aim at providing public information related to the state's response to an emergency situation in the shortest possible time, instead of imposing overly board restrictions.

Of particular concern are restrictions related to the publishing of information about the ongoing Covid-19 pandemic. Some countries restricted access to government press conferences or limited opportunities to ask questions directly during the pandemic,¹⁸⁹ while others have specifically forbidden the media from publishing news on Covid-19 from sources other than those released officially by government.¹⁹⁰ There have been cases when participating States adopted or amended

legislation provisions, or used existing ones, to criminalize the dissemination of so-called "false information" on the pandemic.¹⁹¹ (See section on Freedom of Association and Human Rights Defenders)

While the wish of public authorities to combat information that may contribute to damaging public health is understandable during a health emergency, this goal is best achieved by ensuring access to independent and pluralistic sources of information.

States may impose certain restrictions to the freedom of expression, *inter alia*, to protect public health or the rights of others. However, they also have an obligation to demonstrate the necessity and proportionality of means chosen.¹⁹² Criminal law is one of the most intrusive forms of interference with the freedom of expression and should be applied only in exceptional circumstances. Apart from that, the dominant position of the government makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks of its adversaries and criticisms in the media.¹⁹³ While the wish of public authorities to combat information that may contribute to damaging public health is understandable during a health emergency, this goal is best achieved by ensuring access to independent and pluralistic sources of information.¹⁹⁴ Instead of

188 See, **Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression, Disease pandemics and the freedom of opinion and expression** para. 21.

189 On 7 April 2020, the government of the **Federation of Bosnia and Herzegovina** issued a decision restricting access to press conferences for the media. The decision stipulated that only three media representatives can be present at press conferences given by the Crisis Management Headquarters. In **Serbia** the government decided to hold daily press conferences on Covid-19 related updates without the physical presence of journalists. Journalists could send questions via email half an hour before the conference. Independent media outlets reported that many of the questions they sent prior to the press conference have not been answered, especially those related to public procurements and overall transparency.

190 For example, **Armenia** (Decree on the State of Emergency, adopted on 23 March, though this prohibition was lifted later, see RFoM **statement** welcoming Armenia's lifting the ban on COVID-related news from sources other than the government; and **Serbia** (Government Decision of 28 March 2020).

191 For example, **Azerbaijan, Hungary, Kazakhstan, Kyrgyzstan, Romania, Russian Federation, Spain, Turkey and Uzbekistan**. Further, in **Bulgaria**, the President partially vetoed a controversial law on emergency measures that would have introduced prison sentences for spreading false information about infectious diseases. The government of the Republika Srpska (**Bosnia and Herzegovina**) issued a decree on 18 March that prohibited causing "panic and disorder" by publishing or transmitting false news during a state of emergency, which has been withdrawn since then. See also, press releases by the OSCE Representative on Freedom of the Media on several legislative initiatives trying to stem the dissemination of "false information".

192 General Comment No. 34 on Art. 19: Freedom of opinion and expression, para. 35.

193 Castells v. Spain, 1992, para. 46.

194 See, the **press release of the OSCE Representative on Freedom of the Media on Occasion of World Press Day 2020**.

heavy-handed approaches, such as application of criminal or administrative sanctions, states should consider confronting alleged or actual disinformation by providing access to credible and comprehensive data.

Journalism plays a crucial role in the dissemination of information, particularly in an emergency, and media freedom needs to be protected if the right of access to information is to be guaranteed.¹⁹⁵ Apart from that, such provisions have a chilling effect on associations and civil society in general and are incompatible with international standards for restrictions on freedom of expression (see section on the Freedom of Association).¹⁹⁶

Moreover, a crucial aspect of ensuring access to reliable and open public health information is the effective and non-discriminatory access to readily available information of specific groups of people, including, linguistic minorities, migrants and refugees, rural or isolated communities or persons with disabilities. According to the Convention on the Rights of Persons with Disabilities (CPRD), states parties are under an obligation to ensure access to “information, communications and other services, including electronic services and emergency services” for persons with disabilities on an equal basis with others.¹⁹⁷ It is concerning that many public information awareness campaign messages about Covid-19 are on platforms and formats to which persons with disabilities may have limited access. During the pandemic, it is vital that persons with disabilities have equal access to lifesaving information to help them make informed decisions about steps they can take to protect themselves and on how they can avail

themselves of services and necessities. Governments at all levels should provide accurate, accessible and timely information about Covid-19, its prevention and services offered, as well as about the related emergency measures, movement restrictions and hygiene regulations. Telecom companies can also ensure that vital information is available in multiple formats such as SMS, audio, visual and in disability-friendly formats. Therefore, it is recommended for states to implement the WHO Guidelines on disability considerations during the Covid-19 outbreak.¹⁹⁸

GOOD PRACTICES

Some States took positive steps to ensure access to information throughout the pandemic, for example the government of Ireland has clarified that the authorities must comply with the terms of its freedom of information legislation despite the pandemic and that deadlines cannot be extended or obligations limited due to office closures¹⁹⁹ and that such laws do not permit for extending timeframes or otherwise limiting obligations on the ground of office closures due to health and safety. Some other participating States have made efforts to make public information about the Covid-19 pandemic accessible to persons with disabilities.²⁰⁰

195 See [Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Information and Expression- Disease pandemics and the freedom of opinion and expression A/HRC/44/49](#) par 30.

196 See para. 2 (a) of the [Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda](#) (3 March 2017) by the OSCE Representative on Freedom of the Media, UN Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States’ Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, that calls for the abolishment of such provisions.

197 See Art. 9 para. 1b of the Convention on the Rights of Persons with Disabilities

198 [World Health Organization “Disability considerations during the COVID-19 outbreak”](#) p 5. See also HCNM recommendations on [streamlining diversity](#) and on [short-term responses that support social cohesion](#).

199 According to the [Ireland's Freedom of Information website](#), the authorities must comply with the terms of the Freedom of Information Act, despite the pandemic. This law does not permit for extending timeframes or otherwise limiting obligations on the ground of office closures due to health and safety. The statement also provides that the website should be updated to clarify potential disruptions to the service due to reduced staffing or closures and to redirect requesters towards online channels.

200 [France](#) created customized information for persons with disabilities. The country’s main website on the pandemic has a section dedicated to persons with disabilities, including hotlines for persons with various impairments and information presented in Easy-Read format. [Germany](#), [Italy](#) and [Romania](#) have also made efforts to create communications in Easy-Read format. The Public Health Agency of [Sweden](#) too has ensured that key messages have reached the visually impaired by publishing three different brochures about Covid-19 in braille and as sound files. They have also published public health recommendations in numerous languages spoken by its immigrant communities, after it emerged that the rate of infection among immigrants was disproportionately high.

RECOMMENDATIONS

- Avoid blanket suspensions of access to information requests. Instead, governments should develop procedures and regulations that will enable them to continue to provide access to public information, including to the media, during state of emergency or similar regimes. In particular, public information related to the state's response to an emergency situation must be provided to the public without delay.
- States should refrain from adopting and repeal any offenses pertaining to the dissemination of so-called "false information" or other similar provisions and instead ensure access to independent and pluralistic sources of information.
- States should ensure access of readily available, accurate and accessible information for all groups in society, including linguistic minorities, migrants and refugees, rural or isolated communities or persons with disabilities.

STRIPOESURIS

I.3 DIGITAL TECHNOLOGIES AND ELECTRONIC SURVEILLANCE

Since the outbreak of Covid-19, various technological measures and tools have been introduced globally to help monitor and track the spread of the virus. These tools include outbreak analysis and response, proximity or contact tracing, and symptom tracking tools.²⁰¹

Despite the potential efficiency of various technological means in collecting statistical data and monitoring populations, such technologies carry their own risks, particularly with regards to the right to privacy and other fundamental freedoms. Challenges for technological solutions include complex data management and data storage requirements, sale and use of data for commercial purposes, extensive security measures combined with aggregation and anonymization of data and the possibility of unwarranted surveillance. They also carry risks for provision of incorrect medical advice based on self-reported symptoms, and the systematic exclusion of some members of society who cannot access such technologies. In addition, as pointed out by the WHO, the effectiveness of these technologies “depends largely upon the underlying technology design and implementation approach but also on other factors, such as the level of uptake and the levels of confidence and trust that a population may vest in a chosen solution.”²⁰² Therefore, digital tools can only be effective when integrated into an existing public health system that includes health services personnel, testing services and manual contact tracing infrastructure.²⁰³

Despite the potential efficiency of technological means in collecting statistical data and monitoring populations, such technologies carry their own risks, particularly with regards to the right to privacy and other fundamental freedoms.

Given the broad implications on the human dimension, ODIHR monitored the use of electronic surveillance to tackle the spread of Covid-19 in April and May 2020.²⁰⁴ ODIHR has identified challenges and concerns, as well as good practices pertaining to various electronic monitoring regimens introduced in participating States. This section analyzes trends and risks connected to the use of information technologies, identifies areas of concern and provides recommendations to states, aiming to enable an effective and human rights compliant approach.

International human rights law provides a clear framework for the promotion and protection of the rights to privacy and to protection of personal data. In the Moscow Document (1991), participating States recognized “the right to the protection of private and family life, domicile, correspondence and electronic communications.” They further affirmed that “in order to avoid any improper or arbitrary intrusion by the State in the

²⁰¹ “To increase the chances that [contact tracing] efforts will be effective, trusted, and legal, use of technology in the contact tracing space should be conceived of and planned with extensive safeguards to protect private information from the beginning.” **A National Plan to Enable Comprehensive COVID-19 Case Finding and Contact Tracing in the US**, Johns Hopkins University, 2020.

²⁰² **Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing**, WHO, May 2020.

²⁰³ *Ibid.*

²⁰⁴ Between 7 April and 11 May, ODIHR monitored the situation pertaining to the Covid-19 outbreak and the introduction of electronic surveillance measures in response to the pandemic across the OSCE region. The monitoring activity was conducted through desk research and verification of publicly available information from official communications and/or reputable media channels. The exercise focused on the assessment of how many States have introduced electronic surveillance in the context of states of emergency or otherwise, the types of surveillance methods that were introduced (i.e. mobile applications, geo-location tracking, etc.) without the assessment of a specific technology used, the nature of mobile applications that were developed as a main pandemic response measure, and how it may have affected right to privacy. Finally, ODIHR has collected information as to the impact of these measures on several vulnerable groups.

realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards.”²⁰⁵ The right to privacy is also firmly enshrined in international human rights law.²⁰⁶ In December 2013, the United Nations General Assembly adopted Resolution 68/167²⁰⁷, which raised concerns over the possible negative effect of surveillance measures, interception of communications and the collection of personal data, in particular when carried out on a mass scale, on the exercise and enjoyment of human rights, especially the right to privacy.

The pandemic has justified and indeed necessitated the introduction of emergency measures of various kinds (see section I.1 above). Many of these measures are tied to finding carriers of the virus and tracing their contacts and movements. International human rights law stresses that any surveillance measures introduced must contain safeguards from abuse and minimize interference into private life.²⁰⁸ They should, therefore: 1) be in accordance with the law, 2) pursue a legitimate aim or aims and 3) be proportionate to the aim pursued. Moreover, it is also crucial to ensure that the necessary data protection safeguards are implemented when adopting extraordinary measures to protect public health. Furthermore, the Interim Guidance of the WHO outlines several principles of ethical and appropriate use of surveillance technologies to address the pandemic, including time limitation, proportionality, data

minimization, voluntariness, transparency and clarity, privacy-preserving data storage and accountability.²⁰⁹

ODIHR monitored and analysed types of electronic surveillance (e.g., mobile applications, geolocation tracking),²¹⁰ as well as challenges, concerns, and good practices pertaining to various surveillance regimes introduced in participating States as a response to the pandemic. As of 11 May, 38 States had introduced some form of enhanced electronic surveillance measures in the context of the emergency and three more expressed the intention to do so. The most common rationale of these measures has been to monitor compliance with mandated quarantine and isolation meant to prevent the spread of the SARS-CoV-2 virus, to gather information and raise the population’s awareness about this infectious disease outbreak.

Twenty-eight states have developed and are already using various types of mobile applications aimed at collecting and analysing individuals’ private information, such as geographic location or Covid-19 related health data of those under epidemiological supervision.

In order to respond to the pandemic, participating States have developed and introduced various digital tracking technologies to manage people and identify, assess and isolate individuals who may have been exposed to the virus. Among such technologies the most widely spread are mobile applications facilitating mobile device geo-tracking.²¹¹ Twenty-eight participating States have developed and are already using various types of mobile applications aimed at collecting and analysing individuals’ private information such as geographic location or Covid-19 related health data of those under epidemiological supervision.

205 Moscow Document (1991), para. 24.

206 As set out in Art. 12 of the UDHR and Art. 17 of the ICCPR. The right to privacy is also protected from unlawful and unnecessary government surveillance by Art. 8 of the ECHR. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, complements the ECHR by setting up principles of data minimisation, proportionality, and accountability towards data controllers, as well as promotes greater transparency of data processing. See **Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data**, Council of Europe, 1981 “Convention 108”; see its modernised version, Convention 108+. Forty-seven participating States have acceded to this convention.

207 U.N. RES/68/167, The right to privacy in the digital age, 18 December 2013.

208 **International health regulations – 2nd ed.** Geneva; WHO, 2005; **Surveillance strategies for COVID-19 human infection: interim guidance**, WHO, May 2020.

209 **Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing, Interim Guidance**, WHO, 28 May 2020.

210 Geolocalization is the identification or estimation of the real-world geographic location of an object, such as a radar source, mobile phone, or Internet-connected computer terminal. The word geolocation also refers to the latitude and longitude co-ordinates of a particular location.

211 Geo-tracking: Identifying a person’s current, physical location by obtaining GPS (Global Positioning System) data from their smartphones or other GPS-enabled devices.

TYPES OF MOBILE APPLICATIONS USED BY OSCE PARTICIPATING STATES



Among different mobile applications, digital contact tracing (or proximity tracing) enabled applications²¹² have been increasingly adopted by authorities.²¹³ These applications rely on tracking systems, most often based on mobile devices proximity sensors, to determine contact between an infected person and another user.²¹⁴ Among participating States that have opted for the use of mobile applications, 20 employ them for individual contact tracing and two for monitoring groups and gatherings. Ten countries are resorting to self-diagnostic or symptom tracking applications where residents can report whether they have symptoms of infection, suspect that they contracted the infection or have recovered from it, or report that neither is the case. Unlike self-diagnostic applications, individuals or citizens reporting mobile applications developed and employed in two participating States encourage people to report fellow citizens for breaking the rules of epidemiological supervision (i.e., leaving home isolation) or commercial entities for non-compliance with precautionary or lock-down measures. Quarantine enforcement applications have been launched in five States.

Despite growing popularity among participating States, such technologies can lead to serious violations of the

right to privacy, particularly when they are not temporary, transparent, voluntary at each step, reliable, free of commercial interest and proportionate to their primary purpose.²¹⁵ The WHO, several NGOs, research centres, scientists and experts from across the OSCE region have expressed the need to examine the effectiveness of such technological solutions, as well as their legal and social impact before deploying them at scale.²¹⁶

Tracking technologies can lead to serious violations of the right to privacy, particularly when they are not temporary, transparent, voluntary at each step, reliable, free of commercial interest and proportionate to their purpose.

While enabling the downloading and use of mobile applications for the digital tracing of infected individuals, the free and informed consent of the person in question is necessary. At the same time, the use of such applications even on a voluntary basis does not suggest that the processing of personal data is necessarily based on consent. In the majority of cases, government

212 Digital contact tracing: It is a method of contact tracing relying on tracking systems, most often based on mobile devices proximity sensors, to determine contact between an infected patient and a user. It came to public prominence during the pandemic.

213 **Use of Mobile Apps for epidemic surveillance and response – availability and gaps**, Global Security, 2020

214 **The Challenge of Proximity Apps For COVID-19 Contact Tracing**, Crocker, Opsahl and Cyphers, 10 April 2020

215 **The challenge of proximity apps for COVID-19 contact tracing**, Electronic Frontier Foundation; 2020.

216 **Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing, Interim Guidance**, 28 May 2020; Muller, C, et al (2020), **'Inzake: COVID-19 tracking- en tracingsapp en gezondheidsapp'**, Letter sent to Minister-president, Minister of Health, Welfare and Sport, and Minister of Justice and Security, 13 April 2020.

officials or private entities across the OSCE region involved in the development of mobile applications did not provide adequate information on the duration of the monitoring period or on how tracing data would be collected, nor on who would have access to the health data processed in tracing activities, the method of data destruction and the purposes for which the data could be used. With the exception of some countries which clearly introduced time-bound mobile applications and provided information to the public related to data protection and safeguards such as the data retention and data storage,²¹⁷ it is still unclear how long after removing the application from the mobile device the personal information will be stored and be available for government authorities or third parties.

In several countries²¹⁸ some mobile applications were compulsory. This not only raises some equity concerns (the population's access to smartphone devices and financial resources to use them) but also poses serious risks of arbitrary collection of personal information due to the wide range of data-collection capabilities of such applications. Often, users are required to provide their names, mobile numbers and passport details. Data collection, retention and processing should be limited to the minimum necessary amount of data that are needed to achieve the public health objective and comply with the principle of data minimization. Thus, the coerced use of mobile applications can diminish trust in the system and undermine the effectiveness of public health measures.

In nine participating States, the operators of mobile network communications and banks were requested to provide citizens' location data, detailed records of telephony, internet traffic information, bank account details and transaction data on the use of electronic payment instruments (bank cards) to specific government

authorities often without the individuals' consent.²¹⁹ This measure was intended as a tracking tool for people diagnosed with Covid-19. Four states have already tested biometric bracelets²²⁰ or rings²²¹ as means to track individuals' compliance with isolation and quarantine orders.²²¹ Some states²²² conduct blanket data collection of all mobile activity including calls, messages, and related metadata (time, destination, etc.).

Several countries employed CCTV cameras equipped with facial recognition²²⁴ to enforce quarantine²²⁵ or have significantly expanded their video surveillance capabilities.²²⁶ The use of such invasive video surveillance and facial recognition systems poses serious privacy concerns as they rely on the capture, extraction, storage or sharing of people's biometric facial data often in absence of explicit consent or prior notice. Eight

219 **Europe's Other Coronavirus Victim: Information and Data Rights**, BIRN, 24 March 2020. The nine countries are **Armenia, Austria, Bulgaria, Czech Republic, Canada, Estonia, Germany, Italy, and Serbia**. To provide more information on enforcement, additional research will be required.

220 Biometric bracelets: Biometrics is the science of measuring biological signs. Biometric bracelets are devices that send data on vital bodily metrics such as skin temperature, breathing rate and heart rate, etc.

221 **Germany, Liechtenstein, Romania, and the United States**.

222 For example, **Serbia**. Mobile phone tracking and tracking of bank payments were also carried out by **Armenia, Austria, Bulgaria, Czech Republic, Canada, Estonia, Germany, and Italy**.

223 **Europe's Other Coronavirus Victim: Information and Data Rights**, BIRN, 24 March 2020.

224 Facial recognition technology is a category of biometric software that maps an individual's facial features mathematically and stores the data as a faceprint. The software uses deep learning algorithms to compare a live capture or digital image to the stored faceprint in order to verify an individual's identity.

225 As illustrated by the case from the left bank of the Moldovan region of Transdnistria: **Transnistria uses facial recognition to identify quarantine violators**, Privacy International, 2020.

226 In **Russia**, authorities were reported to have installed 100,000 new CCTV cameras, see **100,000 cameras: Moscow uses facial recognition to enforce quarantine**, France24, 24 March 2020. Activists concerned about the use of facial recognition over privacy filed lawsuits against Moscow's Department of Technology which manages the capital's video surveillance program, seeking to ban the technology's use at mass events and protests. **Russian court says facial recognition tech does not violate privacy**, April 2020.

217 **Latvia and Sweden**, where the Public Health Agency uses mobile data to analyse how people move around the country. The authority accesses the information from the mobile operator Telia by collecting anonymised and aggregated data from its mobile phone customers. Researchers at Lund University created a smartphone app, to map the spread of covid-19 by following private persons reporting their symptoms on the app.

218 **Kyrgyzstan, Kazakhstan, Russian Federation and Turkey**.

TYPES OF SURVEILLANCE TECHNOLOGIES USED BY OSCE PARTICIPATING STATES



participating States used aerial drone surveillance to monitor movement and compliance with lock-down orders.²²⁷ One country was reported to use CCTV footage to monitor compliance with lock-down measures.²²⁸

The collection of data about individuals not only represents privacy risks, but such systems are also vulnerable to external third-party intrusion. ODIHR identified two states that publicly reported that their databases containing patients' information were subjected to cyberattacks. Personal data related to Covid-19 patients has been leaked from official sources in three participating States.²²⁹ Cyberattacks and data leaks not only represent a grave intrusion into individuals' privacy, in particular of Covid-19 patients, but also put them and their families at high risk. In some cases, even data

anonymization can be less effective if the categories of data to be released are not properly identified.²³⁰ Despite being anonymized, in the context of small villages and cities, such personal details as gender, age and the name of the street where the person lives can be enough for his/her identification. It is important that guarantees against data breaches are provided in the legislation governing the deployment of new surveillance technology measures and that such provisions are meticulously implemented.

Relevant legislation should always include clear specification of purpose and explicit limitations concerning the further use of personal data, as well as a clear identification of the oversight mechanism in place. If such safeguards are not properly reflected in the legislation, it may pose serious data protection concerns.²³¹ Measures introduced to curb the spread of the

²²⁷ For example, police in **Spain**, the Istanbul Police Department in **Turkey** and the office in Osijek of the Civil Protection Authorities in **Croatia**. For the latter, see **Croatian Police Use Drones to Catch Rule Breakers**, 2020

²²⁸ In **Greece**, the use of various video surveillance technologies, including aerial drone surveillance by law enforcement officials is not sufficiently legally regulated to prevent the infringement of the right to privacy.

²²⁹ In **Croatia**, unknown actors tried to misuse the emergency situation for the unlawful collection of personal data. Several citizens received messages, supposedly from government officials, through mobile applications requesting their personal data to create registries on citizens violating self-isolation measures. **COVID-19 pandemic adversely affects digital rights in the Balkans**, EDRI, 15 April 2020.

²³⁰ In **Slovakia**, information containing people's gender, age and street's name was published by the national health information centre. See, **Na webe boli ulice a presný vek pacientov s koronavírusom. tá chybu odmieta, alestiahol ich**, Zive.aktuality.sk (2020), 30 March 2020; **Matovič on the coronavirus map: the atmosphere does not favour more detailed data**, Slovak Spectator (2020), 6 April 2020.

²³¹ For example, in **Romania**, police officers resorted to the practice of taking pictures of citizens' IDs on their personal mobile devices while conducting random checks to enforce the social distancing measures. Despite the fact that eventually the police officers refrained from such practice

Covid-19 posed particularly heightened security and data privacy risks for persons in vulnerable situations or marginalized groups. Data privacy risks connected to revealing individuals' sexual orientation and gender identity were reported as one of the most prominent issues for the LGBTI community and people in prostitution.²³² Enhanced surveillance technologies, such as GPS tracking, can facilitate abuse when targeting particular individuals or groups, particularly refugees and migrants, as well as Roma and Sinti. To avoid rights violations, impact assessment should be conducted before resorting to various surveillance measures. Specific safeguards should be developed for tracing vulnerable groups to avoid infringement of their human rights.

Measures introduced to curb the spread of the Covid-19 posed particularly heightened security and data privacy risks for persons in vulnerable situations or marginalized groups.

Various obligatory response measures were reported to be used as a pretext to prosecute **human rights defenders, journalists, whistle-blowers and citizens who express critical views** towards authorities.²³³ In this regard, free, active and meaningful participation of relevant stakeholders, such as experts from the public health sector, civil society organizations and the most marginalized groups is crucial.

and eventually resorted to certified police equipment, such methods reflect the examples of serious data protection concerns. See **Poliția Română a ordonat polițiștilor să șteargă toate fotografiile declarațiilor pe proprie răspundere din telefoanele personale**, Mediafax (2020), 5 April 2020.

²³² **Statement on the International Day against Homophobia, Transphobia and Biphobia**, OHCHR 17 May 2020.

²³³ For example, in **Kazakhstan**, see **Rights Defenders Accuse Kazakh Authorities of Using Coronavirus Restrictions to Stifle Dissent**, RFERL, 20 April 2020. The **Azerbaijan** authorities reportedly used the restrictions imposed as part of measures to slow the spreading of Covid-19 (SMS registration system) to arrest opposition activists with a pretext of "disobeying the police" or "violating the quarantine regime" in order to silence government critics. See **Azerbaijan government arrests activists for breaking lockdown rules**, Privacy International, 16 April 2020.

GOOD PRACTICES

Both, open and transparent communication about electronic surveillance measures to the public, and a genuine and clear effort to ensure the protection of the right to privacy, ensure not only greater compliance but also encourage responsible behaviours. On 17 April 2020, the European Parliament adopted a resolution²³⁴ demanding full transparency from state authorities regarding the use of new technology to monitor the pandemic, so that people can verify the underlying protocol for security and privacy of chosen tools.

Data protection authorities play a key role in raising awareness and guiding respective governments towards less invasive techniques.²³⁵ New technology has also been widely used by different stakeholders during the crisis to inform and mobilise people. Citizen-led community responses played a critical role in helping to inform the public about the risks and needed steps.²³⁶ Of specific importance were also joint initiatives to inform people during the crisis through technology and innovative approaches.²³⁷

²³⁴ EU co-ordinated action to combat the COVID-19 pandemic and its consequences, European Parliament.

²³⁵ For example, **Lithuania's** State Data Protection Inspectorate advised that if only aggregate statistics are requested by a public health authority, data that identifies individual data subjects should not be provided. It also made a narrow distinction between the types of data that could be processed or not during the pandemic, emphasising the principle of data minimisation. See **Personal Data Protection and Coronavirus COVID-19**. Similarly, the Latvian data protection authorities provided support in the development of the "Apturi Covid app" ensuring that the data will be stored in the app for 14 days, then automatically deleted. See **Data custodians promise to make sure that Stop Covid respects your privacy rights**.

²³⁶ In **France**, two civil society organisations challenged the use of drones by the police with the aim to monitor compliance with lockdown measures. The Conseil d'état recently ruled that the operation of drones were unlawful because the data collected allowed them to identify the person. **Ordonnance N°s 440442, 440445 du 18 mai 2020**, Conseil d'Etat, France.

²³⁷ For example, a global virtual hackathon called "Hack Covid-19" was held in **Azerbaijan**, in co-operation with UNDP, to combine technological solutions to combat the coronavirus pandemic, as well as to support the "Stay at Home" motto. See **Hack Covid19**.

RECOMMENDATIONS

- Implement only those electronic surveillance measures that are provided for by law, are necessary, proportionate, non-discriminatory and time bound, combining the so called “smart” solutions with testing, in curtailing the spread of Covid-19.
- Review whether the protection of privacy is sufficiently guaranteed, and assess the risks connected to processing of the data, in particular administer data protection impact assessments before implementing any surveillance tools;
- Ensure that the collected data is erased immediately after the end of the outbreak, once such information is no longer immediately needed for the prevention of the spread of Covid-19 and guarantee that the data is not used for any other purposes.
- Plan to phase out emergency electronic surveillance once the current global health crisis is over. Refrain from misusing emergency powers and electronic surveillance against human rights defenders, whistle-blowers, journalists and front-line medical personnel who voice criticism about government action. Take additional measures to protect data that pertains to vulnerable groups. Protect personal data against leaks.
- Refrain from introducing compulsory applications, blanket data collection, citizen reporting applications and websites as they are prone to abuse.
- Ensure transparency on how collected data is being stored and shared with third parties.
- Adhere to transparency and accountability standards when introducing any surveillance measures, which must pursue a legitimate aim of protection of public health and must contain safeguards against human rights abuses.
- Promote inclusive approaches in addressing public the crisis in which civil society organizations, National Human Rights Institutions, data protection authorities, representatives of minorities are all represented.

PART II.

Impacts on Democratic Institutions and Human Rights

Both the pandemic itself and the state responses have had significant implications for the exercise and enjoyment of fundamental freedoms, human rights, and the functioning of democratic institutions and processes across the OSCE region. In the following sections, an overview is provided on how the pandemic has affected democratic institutions based on the rule of law and participation; specific human rights and civil society, and how equality and inclusiveness have been impacted. These three sections are aligned with ODIHR's strategic work and analyse the implications of emergency responses in the different fields of expertise of the Office.

This part is further divided in sections. The first addresses the functioning of parliaments, democratic law-making, justice institutions, elections and election observation, and National Human Rights Institutions (NHRIs) and human rights defenders. The second examines specific fundamental rights and freedoms that have been particularly affected by the emergency response, namely the freedom of movement, freedom from torture, ill-treatment and arbitrary detention, the freedoms of assembly and association, freedom of religion and belief, and the right to a fair trial. Third, it gives a deeper look at the human rights situation of all

those who have suffered from the negative (and often cumulative) consequences of inequality, which includes sections on hate crimes and discrimination, discrimination against women, gender inequality and domestic violence, Roma and Sinti, migrants, as well as victims and survivors of trafficking in human beings.

Examples from across the OSCE region are provided to illustrate the thematic trend analysis and highlight areas of concern as well as indicate what may be considered as good practices. All observations offered here are firmly rooted in OSCE commitments, as well as international human rights law and other relevant standards. The observations are also based on relevant good national practices, and on previous recommendations where applicable. In accordance with relevant OSCE commitments to mainstream a gender perspective into all policies, measures and activities, this report also takes into account the potentially different impact on women and men.

Finally, each section will conclude with a series of recommendations, to support participating States in their efforts to ensure they fulfil their commitments and respect human rights in their responses to the Covid-19 pandemic and other emergency situations.

II.1 DEMOCRATIC INSTITUTIONS AND PROCESSES

This section aims at identifying prominent trends and providing indications of areas of concern, as well as good practices, regarding the regular functioning of national parliaments, justice institutions, electoral processes and National Human Rights Institutions in the OSCE region. It is beyond the purview of this report to offer a detailed and comprehensive record of all the measures and processes adopted by participating States during the Covid-19 pandemic, also taking into account the diversity of parliamentary, judicial and electoral systems that exist across the OSCE region.

II.1.A FUNCTIONING OF PARLIAMENTS

The scope of this section is to offer an overview of the functioning of national legislatures across the OSCE region during the Covid-19 pandemic, providing an assessment of the potential limitations that the crisis has exerted on the normal exercise of legislative and parliamentary oversight powers in participating States. National parliaments need to play a crucial role in shaping democratic responses to this unprecedented crisis and in ensuring its ability to continue to make decisions, by guaranteeing the representation of all voices in society, an effective oversight of governments,²³⁸ and the inclusive and transparent adoption of legislative measures.²³⁹ To this end, participating States have committed in 1991 in Moscow “to ensure that the normal functioning of the legislative bodies will be guaranteed to the highest possible extent during a state of public emergency.”²⁴⁰

Rather than a thorough legal assessment of the national parliamentary procedures put in place by participating States in response to the Covid-19 pandemic, this section will review how states have successfully ensured the regular functioning of their legislatures, in accordance with principles of separation of powers and pluralistic democracy.²⁴¹

The 56 national parliaments of the OSCE participating States²⁴² have responded in considerably different ways to the challenges posed by the Covid-19 pandemic, adapting their functioning through specific measures and some unique solutions. Within such a diversity, three main observations are possible. First, the data collected by ODIHR illustrate national parliaments' general ambition across the OSCE region to continue their regular functioning to the extent possible, offering as a result a number of good practices and lessons which could inform counterparts in other countries and inspire inter-parliamentary co-operation. Secondly, however, limitations (in some cases rather severe) have impacted the functioning of many national parliaments, in regard to both procedural and logistical aspects, as well as to the substantial scope of their work, curtailing legislative functions and limiting oversight. Thirdly, in a limited number of participating States, national parliaments have been harshly impacted by the crisis, and have been unable, to a great extent, to ensure their normal functioning. In a few cases, it was up to the point of *de facto* abdicating legislative, representative or parliamentary oversight functions.

Within the diverse spectrum of measures taken by parliaments across the OSCE region to ensure they continue functioning properly, it is possible to identify five main trends that illustrate shared solutions adopted to address the challenges posed. While the ultimate results of these solutions vary, they point on the one hand to the reactivity of parliaments in dealing with the emergency situation, and on the other hand to the impact this had on their normal parliamentary work.

discussed in Part I. This section rather looks at how the pandemic and emergency measures affected parliaments in their normal functioning as democratic institutions.

242 The **Holy See** does not have a parliament due to the specificities of its statehood. The European Parliament, while being a full legislative body for 27 Member States, is not included here, as the European Union cannot be considered a participating State as such. It is recognized that the European Parliament was also majorly affected by the pandemic and that a series of adaptive measures were introduced to ensure its continued functioning.

238 See Copenhagen Document (1990) para. 5.2

239 See Copenhagen Document (1990) para 5.8

240 See Moscow Document (1991) para 28.5

241 See also the section on the role of parliaments specifically in adopting and controlling the introduction of emergency measures, including formal states of emergency, which is

The first trend highlights the decision of a number of national parliaments to amend their rules of procedures, allowing for certain alternative arrangements in their work to be introduced under the specific circumstances of the Covid-19 pandemic.²⁴³ Although procedural in nature, such a decision has been instrumental and necessary to alter the normal functioning of parliamentary work, enabling the introduction of some of the other measures that are reported further below. Such examples can represent, in their flexibility and responsiveness, a valuable practice for those national parliaments that have in their rules of procedure an obstacle to introduce necessary measures to continue working under emergency circumstances.

A second set of measures put in place by a number of legislatures has been to limit the number of plenary sessions and committee meetings, revising the calendar and streamlining the work of the parliament. This approach seems to be aimed, in most cases, at reducing the potential health risks of carrying out parliamentary work for those parliaments that require physical presence, usually complemented by additional measures for members of parliament and parliamentary staff involving social distancing and voting procedures. More than half of the national parliaments of participating States have reduced their work during the Covid-19 pandemic.²⁴⁴

Closely related to reduced calendars, several parliaments have also adopted measures to limit the thematic span of their work, deciding in most cases to limit their functioning in connection to work related to Covid-19 or similarly urgent cases. Different degrees of prioritization were noted across the OSCE region.²⁴⁵ As a result, the pandemic turned out to be a substantial challenge to representative democracy across the OSCE region, halting or weakening a considerable part of legislative processes, parliamentary oversight and scrutiny, as well as regular representation of citizens' concerns and interests beyond the immediate crisis-related needs.

A fourth set of measures adopted by a number of parliaments was to reduce the number of deputies having to physically attend plenary sessions and committee meetings, in some cases also lowering the quorum necessary for voting and passing legislation.²⁴⁶

However, the most widespread practice emerging during pandemic, and perhaps the one with the most lasting impact, has been the introduction by several parliaments of innovations and technological solutions allowing legislatures to operate remotely and virtually. Despite only a few legislatures being equipped prior to the current crisis to use communication technologies to conduct their functions remotely, and with many others having legal and constitutional barriers to prevent such practices, many parliaments of participating States have allowed for much of their work to be carried out online, through videoconferencing and other remote systems.²⁴⁷ Moreover, the innovative measures intro-

243 Among other, in the OSCE region, national parliaments in **Albania, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Germany, Lithuania and Poland** and **Russian Federation** have all decided to amend their rules in procedure. On 15 May, the House of Representatives of the United States Congress changed its rules to allow for proxy voting during plenary sessions and remote committee meetings.

244 This includes parliaments in **Austria, Czech Republic, Estonia, France, Greece, Iceland, and the Netherlands**. In **Latvia**, the parliament decided to limit the number of plenary sessions, barring deputies from working all together in the session hall and providing eight separate parliamentary premises equipped with conference equipment to ensure social distancing. In **Russian Federation**, the Duma also altered its working schedule until the end of August, as to limit the number of plenary sessions and mass gatherings. In **Slovenia**, the national assembly held extraordinary sessions, providing at least 1.5 meters of distance between the participants, while most committee meetings were postponed.

245 Parliaments in **Andorra, Bulgaria, Cyprus and France**, for instance, limited their work to crisis-related legislation. Other legislatures adopted a rather less restricting approach, such as in **Denmark, Germany, Iceland, Italy and Portugal**, allowing also for other essential and urgent legislative functions.

246 National parliaments in **Austria, Denmark and Finland** have all introduced provisions in this direction. In **Norway**, the parliament decided to reduce the number of deputies having to attend plenary sessions from 169 to 87 until the end of April. In **Portugal**, plenary sessions of the parliament changed their minimum attendance quorum to one fifth of the total number of members of parliament, reflecting the proportions of the parliamentary groups. Similarly, in **Sweden** party group leaders agreed that in March and April the number of deputies required to pass legislation would be 55 out of 349.

247 For example, in **Canada** the Standing Committee on Procedure and House Affairs has been tasked "to study ways in which members can fulfil their parliamentary duties

duced in this area by parliaments since March 2020 have been evolving rapidly. In the majority of cases, parliaments have favoured the work of committees to be allowed to take place remotely, possibly due to the stricter provisions regulating the work of plenary sittings in many legislatures.²⁴⁸ A number of parliaments have allowed for plenary work to be moved and take place remotely, through videoconferencing platforms or other innovative solutions.²⁴⁹ Additionally, remote voting during committee and plenary sittings was introduced in many participating States.²⁵⁰

while the House stands adjourned, including [...] technological solutions". Similar exploratory work has been carried out by parliaments in **Georgia** and **Mongolia**.

248 Among others, parliaments in **Croatia**, **Germany**, **Italy**, and **Luxembourg** have all adopted measures to allow committee meetings to take place remotely and using internet technology solutions. The parliament in **Albania** was one of the first to allow for committees to work remotely, through electronic means of communication. In **Norway**, the parliament suspended until 30 April the requirement for deputies to be physically present at committee meetings, allowing for remote teleworking. In **Ukraine**, parliamentary committees have been holding their meetings through videoconferencing, allowing also for remote voting by a show of hands or a verbal roll call voting. Committees are allowed to meet and vote remotely also in **Switzerland**, either through the polling function available in the platform or via nominal roll call.

249 For instance, parliaments in **Estonia**, **Finland**, **Lithuania**, **Monaco**, **Slovenia** and the **United Kingdom** have all endorsed a certain degree of remote participation for their deputies during plenary sittings. In March, for the first time the plenary sitting of the Senate in **Uzbekistan** was held in the form of videoconferencing.

250 In **Spain**, the parliament has interpreted the Covid-19 pandemic to be a special circumstance under its rules of procedure, initially introduced in 2012 to enable legislators who were sick or on maternity leave to participate in voting procedures, authorizing deputies to vote remotely during plenary sessions. In **Belgium**, the House of Representatives decided to consider deputies as present at committee meetings and plenary sittings even if not physically but only virtually present, and to vote remotely. All committee meetings were held using a videoconferencing platform with parallel interpretation in Dutch/French, allowing members to vote through the available function 'raise hands'. For plenary sittings, remote voting was made possible through a brand-new digital voting system developed by the parliament. The parliament of **Poland** has also introduced electronic means of communication to enable remote working of deputies during plenary sittings, committees and subcommittees. According to the new measures, each deputy received a tablet from the parliament, together with individual login credentials and password, allowing participation in parliamentary work and e-voting. In **Latvia** the parliament launched its full e-parliament platform in May, allowing for all parliamentary work to happen remotely.

The current crisis is playing the role of a catalyst towards innovative legislatures that increasingly embrace e-parliament features... but videoconferencing and remote debates still fall short of replacing in-person practices.

These examples are evidence that, in many states, the adoption of ICT solutions and innovative online platforms has ultimately facilitated the regular functioning of parliaments to continue to a certain extent during the pandemic. In several respects, this trend can be expected to continue in the future, with the current crisis playing the role of a catalyst towards the innovation of legislatures and their increasing embrace of e-parliament features. It is, however, important to mention the challenges that remain when introducing ICT solutions, such as the implications remote and online working platforms could have in terms of privacy of data, party patronage, proxy voting, and digital accessibility, among others. So far, videoconferencing and remote debates still fall short of replacing in-person practices, posing an important question about how virtual plenary sittings and committee meetings can ensure meaningful discussions, inclusive law-making, space for reaching political compromises, and most importantly safeguard the voice of the parliamentary oppositions, as cornerstones of representative democracies across the OSCE region. Further the use of ICT solutions has shown to have differing affects on the participation of men and women.²⁵¹

A limited number of parliaments have been severely impacted – directly or indirectly – by the pandemic, ultimately undermining their regular functioning, as required by commitments in the 1991 Moscow Document. Despite differences in context and measures being adopted, these cases have raised concerns regarding the rule of law and the balance of powers, depriving decision-making processes of parliamentary checks or oversight. In North Macedonia²⁵² and

251 See the House of Commons Library [report](#) from 26 May, 2020.

252 In **North Macedonia**, the parliament self-dissolved working on 16 February 2020, in advance of early parliamentary elections scheduled for 12 April. A technical "caretaker" government, including representatives of the ruling and opposition parties, had previously been established in January 2020 following the resignation of the prime

Serbia²⁵³ for example the parliaments were not functioning either because they had been dissolved or were not in a position to convene. As a result the declarations of a states of emergency and related measures adopted by the two governments went without parliamentary scrutiny for a significant period of time.

While these examples suffered in part from unfortunate coincidence in timing, it points to the possible need to reflect upon legal parameters for the dissolution and recomposing of parliaments in contexts of emergency. In order to ensure that at least some basic functions of parliamentary power are maintained, contingencies may need to be built into constitutional and legal frameworks to prevent the complete absence of a legislative branch of government in emergency periods.

minister in anticipation of the early elections. Following the introduction of a state of emergency on 18 March, the government issued a legally binding decree which suspended the electoral process until the termination of the state of emergency. There was no functioning parliament for the first several months of the pandemic, and the Constitution does not foresee parliamentary validation of legally binding government decisions during a state of emergency, though a high number of requests to review government decisions were submitted to the Constitutional Court. On 6 May, the Constitutional Court of North Macedonia unanimously ruled that the conditions for reconvening the parliament were absent, since following its dissolution on 16 February the mandate had been given back to the citizens. As a result, the parliament in North Macedonia was not functioning in this period; new elections were held on 15 July.

253 In **Serbia**, on 4 March 2020, the President called for new parliamentary elections initially set to take place on 26 April and later postponed. On 16 March, the President (together with the President of the Parliament and the Prime Minister) introduced a state of emergency in Serbia. This decision was not approved by the parliament, as it was considered unable to convene due to the government imposed COVID-19 or pandemic related restrictions on gathering exceeding 50 people. The parliament did not function for over 40 days. On 28 April, without clear justification for the suspension of its activities, the President of the Parliament convened the first plenary session since the introduction of the state of emergency. During the plenary the parliament approved the declaration of state of emergency from 15 March along with 44 decrees that were adopted by the Government during the state of emergency. On 6 May, the parliament again convened in a plenary session, and approved the decision to lift the state of emergency.

GOOD PRACTICES

Oversight functions conducted by national parliaments remain an essential requirement of parliamentary democracy, especially at times when states of emergency are introduced and the balance of power is tilted towards the executive. To minimise the risk for abuse of these increased powers, as well as to contribute to better decision-making, a number of parliaments in the OSCE region successfully continued to play their constitutional role of oversight, in some cases adopting dedicated oversight provisions. Some participating States' parliaments have created fact-finding missions or special committees to ensure close and timely monitoring of the handling of the crisis and its consequences.²⁵⁴ Other parliaments allowed for the submission of questions in digital form to ensure the continuation of this important oversight function²⁵⁵ or have initiated parliamentary inquiries.²⁵⁶ Some parliaments have set up commissions looking into the human rights implications of the government's overall response to the crisis.²⁵⁷ In regard to the transparency of parliamentary work, good practices in using the current crisis to raise access to information and open data have also been registered among a number of participating States.²⁵⁸

254 In **France**, for example, on 17 March, the parliament decided to create a fact-finding mission on the overall impact, management and consequences of the Covid-19 pandemic. This cross-party effort includes all political fractions and standing committees. The parliament of **Norway** has established a Covid-19 special committee, with the purpose of considering urgent matters relating to the crisis and the decisions taken by the government to address it.

255 In **Norway**, the parliament has ensured that the practice of deputies asking questions to representatives of the government can continue during the Covid-19 crisis, allowing questions and answers to be submitted digitally.

256 In the **United Kingdom**, on 30 March, the committee on women and equalities launched an **inquiry** on Covid-19 responses with regard to people with protected characteristics and has issued a call for evidence.

257 In the **United Kingdom**, a significant inquiry has been launched by the joint committee on human rights.

258 In **Albania**, for example, the decision to allow committee meetings to take place remotely using videoconferencing platforms has allowed for the side-effect of making the livestreaming of these meetings available to the wider public. In **Estonia**, the parliament decided to reinforce its level of transparency during the Covid-19 crisis and arranged to also livestream the parliamentary question-time on its Facebook page, with recordings of plenary sittings being available on the parliamentary YouTube channel.

RECOMMENDATIONS

- States should ensure the regular functioning of parliaments by providing for emergency situations in the rules of procedure, considering among other things physical arrangements, quorums, remote sessions, and the use of ICT solutions.
- As states come out of emergency situations, they should conduct an assessment of the application of ICT solutions to support the work of parliament in periods of emergency and beyond, evaluating the risks and benefits, impact on the participation of women and men and what needs to be introduced in the legal framework to facilitate the use of new technologies.
- Parliaments should ensure full transparency of their work and decisions regarding how they will function in emergency periods to offer clarity to citizens and may consider allowing citizens to submit on-line petitions to parliaments and their members addressing emergency related legislation/problems.
- Parliaments should conduct special hearings/debates on emergency related issues and states should ensure that parliaments are in the lead in designing policy responses in a transparent and accountable way (rather than allowing the executive to issue decrees without scrutiny).

II.1.B DEMOCRATIC LAW-MAKING

While parliaments, elected on the basis of genuine elections, exercise the legislative function in constitutional democracies, democratic law-making involves more than just the mechanical functioning of legislatures. The ICCPR (in Article 25), provides a legal foundation for the inclusive participation of every citizen in the conduct of public affairs. The UN HRC noted specifically in this respect that “citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves”.²⁵⁹ Furthermore, the UN General Assembly has recognized the right of individuals to participation in their government and in the conduct of public affairs, *inter alia*. This implies the right of petition, submitting proposals for improving the functioning of governmental institutions and drawing attention to any aspect of their work.²⁶⁰ On a regional level, the Council of Europe has advised that governments at all levels should ensure, without discrimination, the

effective participation of NGOs in dialogue and consultation on public policy objectives and decisions.²⁶¹

The ECtHR has held that the review of draft legislation that limits or restricts the exercise of fundamental rights, before being enacted by the legislature, and not only afterwards by the judiciary, makes such restrictions easier to justify and that the “quality of the parliamentary and judicial review of the necessity of the measure is of particular importance”.²⁶² The lack of substantive debate about issues by members of the legislature could result in a failure to meet the proportionality test applied by the Court.²⁶³ In addition, the ECtHR has also held that policy-making decisions “must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.”²⁶⁴ The principles are

²⁵⁹ UN Human Rights Committee, General Comment No. 25 (1996), Art. 25 (Participation in Public Affairs and the Right to Vote) – The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service.

²⁶⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Art. 8, UN General Assembly Resolution 53/144 of 9 December 1998.

²⁶¹ See Recommendation on the Legal Status of NGOs in Europe (Art. 76), Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies, CM/Rec (2007)14.

²⁶² ECtHR, *Animal Defenders International v. the United Kingdom*, 48876/08, 22 April 2013, para. 108.

²⁶³ ECtHR, *Hirst (No. 2) v. the United Kingdom*, 74025/01, 6 October 2005, para. 79. Where, when applying the proportionality test, the Court looked into the extent of parliamentary debate on the issue of prisoners’ right to vote and observed that “it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy”

²⁶⁴ ECtHR, *Hatton v. the United Kingdom*, 36022/97, 8 July 2003, para. 128; See also *Evans v. the United Kingdom*, 6339/05, 10 April 2007, para. 86. About the absence of real

applicable also to decisions that need to be taken as a matter of urgency, albeit with the need to find a good balance between expediency and participation.

Principles of democratic law-making are firmly rooted in OSCE commitments. The Copenhagen Document (1990) and the Moscow Document (1991) specify that legislation should be “adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability” and that “legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.²⁶⁵ OSCE participating States have also committed to ensure that the normal functioning of legislative bodies will be guaranteed to the highest possible extent during a state of public emergency.²⁶⁶ States have further committed to “secure environments and institutions for peaceful debate and expression of interests by all individuals and groups of society”,²⁶⁷ as well as to enable non-governmental organisations to contribute to matters of public debate and, in particular, to the development of the law and policy at all levels, whether local, national, regional or international.²⁶⁸

Legislative and policy decisions should also be informed by the recognition of the diversity inherent in societies, groups, gender and individual identities. The OSCE High Commissioner on National Minorities’ (HCNM) noted in this respect that “diversity is a feature of all contemporary societies and of the groups that comprise them” and recommended that “the legislative and policy framework should allow for the recognition

parliamentary debate since the adoption of a statute, which took place in 1870.

265 Among those elements of justice that are essential to the full expression of the inherent dignity and of the equal and inalienable rights of human beings are (...) legislation, adopted at the end of a public procedure, and regulations that will be published, that being the conditions of their applicability. Those texts will be accessible to everyone;” (Copenhagen Document (1990), para. 5.8) “Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document (1991), para. 18.1).

266 Moscow Document (1991), para. 28.5. For a detailed analysis of the role of parliaments, see the previous section.

267 Maastricht Ministerial Council (2003)

268 See Moscow Document (1991), para. 43

that individual identities may be multiple, multi-layered, contextual and dynamic.”²⁶⁹ The Council of Europe’s **Framework Convention for the Protection of National Minorities** also recognizes the obligation of signatory states to create the conditions necessary for the effective participation of persons belonging to national minorities in public affairs, in particular those affecting them.²⁷⁰

In general, the legislative process should adhere to the principles of democracy and the rule of law, core elements of which are legality, transparency, accountability and respect for human rights. Rule of law “promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.”²⁷¹ Further, a transparent and accountable law-making process supports anti-corruption efforts, reinforces good governance, and contributes to international development efforts, including in achieving the UN Sustainable Development Goals.²⁷²

AREAS OF CONCERN

In times of crisis, authorities are often inclined or compelled to shorten procedures, circumventing normal legislative processes, adopting laws and policy decisions in an expedited manner, avoiding meaningful discussions and public consultations. The pandemic prompted most participating States to resort to states of emergency or other extraordinary measures, which justified utilizing fast and simple legislative processes,

269 See OSCE High Commissioner on National Minorities (HCNM), Ljubljana Guidelines on Integration of Diverse Societies (2012), Principle 5, pages 14–15 and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999).

270 Art. 15 of the Framework Convention for the Protection of National Minorities, February 1995. Similar principles are expressed in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992.

271 Rule of Law Checklist, Venice Commission 106th Plenary Session (CDL-AD(2016)007-e, Venice, 11–12 March 2016.

272 **Goal 16** aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Target 16.7 is to ‘ensure responsive, inclusive, participatory and representative decision-making at all levels’.

swiftly adopting laws in order to provide a legal basis for urgent public health measures and to address the consequences of the pandemic across all sectors of society. At the same time, there have been instances when states applied accelerated procedures, fast-tracking legislation for purposes other than the emergency response. Furthermore, processes that lacked consultations, and sometimes a complete absence of meaningful parliamentary debate on proposed legislation, further distorted allocations of legislative power between the executive and legislature.

Most participating States have a regulatory framework in place that governs urgent or accelerated procedures (sometimes referred to as extraordinary or emergency procedures) through which legislation can be swiftly proposed and adopted in order to respond to imminent or pressing societal needs. It is without doubt that circumstances during the pandemic justify the use of expedited mechanisms, as has been the case in the vast majority of OSCE countries.²⁷³ While these procedures generally allow certain aspects of the regular legislative process to be passed over, the principles of transparency, inclusiveness and accountability should guide the overall process to ensure that laws are legitimate and accessible, as well as compliant with human rights and the rule of law.

Even in times of emergency, the principles of transparency, inclusiveness and accountability should guide legislative processes to ensure that laws are legitimate and accessible, as well as compliant with human rights and the rule of law.

In a few instances, where national legislation provides for safeguards or conditions for the use of an accelerated legislative process, states' emergency measures were adopted in contravention to these procedures.²⁷⁴

²⁷³ See Part I of this report for a detailed analysis of the relevant legal frameworks on states of emergency.

²⁷⁴ For example in **Poland**, an important, extensive **bill on regulating the conduct of the presidential elections** was passed through the lower house in a matter of days, notwithstanding parliamentary rules of procedure and international electoral standards.

Similarly, some participating States used such procedures for proposing contentious legislation, with only cursory reference to the emergency context, and/or to adopt legislative or other measures completely or partially unrelated to the emergency needs, for example on pensions, migration, and media freedom.²⁷⁵ ODIHR has noted that in some states, emergency legislation covered cross-sectional issues resulting in omnibus legislation (or legislative packages).²⁷⁶ While in emergency situations this law-making tool provides an opportunity to act rapidly and address several areas at once, it represents a risk with regard to the law's compliance with OSCE commitments, constitutional requirements and human rights principles. These issues have far-reaching consequences for societies and, in the absence of an objectively justifiable reason of urgency, should be subjected to a rigorous and participatory legislative process.

In a number of states, accelerated legislative processes have also been used to adopt legislative acts in order to retroactively provide a legal basis for government action already undertaken or being implemented. This was noted both for issues such as the imposition of fines, as well as the overall regulatory framework for the emergency response.²⁷⁷

²⁷⁵ For example, in **Estonia** where the coalition introduced in an emergency legislation package provisions on the change of the existing pension system and stricter controls on migration; in **Poland** the emergency legislative package included provisions amending the Penal Code and common court system; these amendments were considered by many to be unrelated to the Covid-19 pandemic response. See *Access to Information* section above for further examples related to media freedom.

²⁷⁶ In **Hungary**, a provision in an omnibus legislation passed on 18 May 2020, made it impossible for transgender persons to legally change their gender. The law will make it impossible for transgender and gender diverse persons to legally change their sex and/or gender marker since Art. 33 provides that all references to "sex" will now instead refer to "sex assigned at birth" in the national registry and on identity documents; in **Turkey** the omnibus legislation suspended collective bargaining processes for three months.

²⁷⁷ For instance, in **Belgium** (at some point, municipalities were fining people who did not respect lockdown measures without a legal basis, a measure authorized later on by the federal government); in **Croatia** (The Civil Protection Authority adopted quarantines measures and movement restrictions based on legislation that says such measures should be adopted by the Minister of Health. The situation was retroactively addressed by Parliament, potentially contravening the general prohibition of retroactive effect

In a few participating States, legislation was fast-tracked with little parliamentary scrutiny, resulting in measures that have disproportionate impact on fundamental freedoms and human rights. These measures ranged from hefty (and perhaps disproportionate) penalties for violations of lockdown measures, to widening of surveillance powers or other regulations infringing on the privacy of individuals that were subjected to only a few hours of parliamentary discussion. Furthermore, some far-reaching measures were imposed amidst serious doubts about the legal basis and questions on whether risks and necessity of such measures had been weighed properly.²⁷⁸

of legislation under Art. 90 of the Constitution ‘unless for exceptionally justified reasons’, which were not stated during in this law-making process); **Germany** (a ban on assemblies in public spaces and the prohibition of religious services in the presence of a congregation adopted by local authorities was not expressly provided by Art. 28 of the Federal Infection Protection Act, which was then later amended); **Lithuania** (the Government acted in a manner of urgency, adopting the quarantine measures that were not prescribed by the Law on Contagious Diseases and the *Seimas* (parliament) had to amend the Law retroactively giving legitimacy to the Quarantine Resolution adopted weeks earlier); **Portugal** (the most significant measures were introduced by Decree-Law 10-A/2020 enacted by the Government on 12 March although there was no prior delegation by the Parliament for a proper legal basis provided in law; the Decree-Law was ratified ex post facto even though the Art. 13(6) of the Constitution bans the retroactive restrictions of fundamental rights); in the **Russian Federation** (the Federal Law No. 68-FZ “On Protection of the Population and Territories against Emergency Situations of Natural and Technogenic Nature” dated 21 December 1994 did not explicitly allow Regions to order their residents to self-isolate at home; moreover, at the time of the enforcement of the Mandatory Lockdown Amendment, the definition of the emergency situation in the Federal Law, which was the legal basis for adopting such measures did not include the spread of dangerous diseases, which was only added later with the adoption of the Federal Law No. 98-FZ dated 1 April 2020). Similar examples can be found for example in **Italy**, where a decree was quickly converted into law by parliament resulting in legal uncertainty due to lack of understanding of the hierarchy between the announced measures, which was later corrected through amendments; in **Switzerland**, the government offices’ measures raised doubts regarding the legal basis; and in **Malta**, after a period of confusion as to the legal basis for the Superintendent to take certain measures, including on suspension and altering legal and judicial time limits, an Act was adopted to retroactively validate any subsidiary legislation made under the Public Health Act.

²⁷⁸ For example, **Armenia** passed amendments to “Legal Regime of the State of Emergency” and “Electronics Communication”, giving authorities broad surveillance powers, with only a few hours for consideration of

ODIHR noted instances where parliaments assumed a correcting role in the law-making process, for instance by taking up an effective oversight function in scrutinizing proposed legislation where governments would otherwise be granted far-reaching authority on matters that require parliament’s legitimization and adding safeguards to proposed legislation by ensuring the involvement of experts and necessary temporal and other limitations.²⁷⁹

Another area of concern relates to the accessibility and publication of adopted legislation and other regulations.²⁸⁰ In certain instances, the underlying legal texts or documentation on which decisions were based (scientific models, statistics, etc.) have not been published, which does not meet commitments that call for legislation to be published following a public procedure. Swift legislative responses and accelerated law-making procedures also result in omitting other aspects of a regular legislative process, such as public consultations and impact assessments.

A significant number of participating States do not appear to have included either experts, civil society

final draft on 31 March; in **Georgia** amendments to the Criminal Procedure Code introducing harsh penalties for the violation of quarantine rules were adopted through urgent procedure, with three readings in one day; in **Montenegro** the government body in charge of the response to health concerns related to the pandemic adopted a decision to publish personal data of individuals who have been required to self-isolate; in **Poland** a phone app was launched by the government that allows police to monitor individuals’ compliance with quarantine with the possibility to impose a fine; and in **Romania**, the government decree declaring the state of emergency, simply referred the human rights and fundamental freedoms it would restrict for a period of a month.

²⁷⁹ For example, in **Norway**, parliament managed to add safeguards to ensure that the Government would not be able to pass legislation without involvement of Parliament; in **Canada**, the opposition struck down provisions to include in a statute responding to the financial dimension of the crisis, including the power to spend, borrow and tax without Parliamentary approval until December of 2021; in the **Netherlands** the number of legislative proposals that were classified as ‘urgent’ during the pandemic was reduced.

²⁸⁰ Good practices can be drawn from the following examples: in **Ireland** the government has published an easy-to-understand overview of the next steps in the government’s plan and what citizens should or should not do and in **Iceland** the government provides timely, accessible and easy-to-understand information on what is not allowed in the current situation.

representatives or the general public in the legislative and decision-making process when adopting emergency legislation.²⁸¹ Other participating States even explicitly restricted public debates on non-emergency related issues they included in their emergency legislation.²⁸²

Both the coronavirus pandemic itself and the immediate consequences of the response, be it in the form of emergency measures or their socio-economic impact, have exacerbated inequalities and sharpened differences between groups in society.²⁸³ It would therefore be equally important to reflect the potential or intended impact of any newly adopted rules and regulations on different groups. ODIHR has found that states often either bypassed impact assessments or conducted these in a limited manner, which did not sufficiently consider the differentiated impact of emergency rules on different parts of society.²⁸⁴ Where the impact of

emergency legislative responses cannot, due to urgent public health requirements or other legitimate reasons, be analysed prior to their adoption, it is of importance to conduct an *ex post facto* evaluation of the impact on vulnerable groups. This should include a gender and diversity analysis to ensure that the rights of women and children, older people, persons with disabilities,²⁸⁵ migrants and Roma and Sinti, amongst others, are duly respected. Such analysis and refinement of the regulatory framework should be done in a participatory and inclusive manner and should be informed by independent and unbiased analysis of impacts on various groups.

In some countries, while the initial emergency legislation or measures may have been gender- and diversity-blind, later amendments or extensions have at times introduced more gender and diversity-sensitive measures.²⁸⁶ Evidence-based gender and diversity analysis is essential to increase the effectiveness of responses

281 For example, **Armenia, Azerbaijan, Denmark and Georgia.**

282 For example, in **Armenia** a bill giving authorities broad surveillance powers was passed without sufficient time for input by the public or civil society; in **Austria** where government actions were taken in stages, little room was left for public debate on the measures adopted in response to the pandemic; in **Denmark** amendments to the Epidemics Acts were rushed through parliament in 12 hours; in **Georgia**, immediately after state of emergency was lifted, the Parliament adopted amendments to the Law on Public Health granting the government broad powers to design and implement unspecified quarantine measures without parliamentary oversight; in **Norway**, the government prepared a draft emergency bill without the involvement of experts or holding a public discussion; in **Portugal**, the Emergency Decree suspended the right to participate in the drafting of new labour legislation (enshrined in the Constitution for trade unions and in the Labour Code for trade unions and employers associations) insofar as the exercise of such right may delay the entry into force of urgent legislative measures provided for in this Decree; in **Romania**, a new provision to the government emergency ordinance was added, providing that: "During the state of siege or the state of emergency, the legal norms regarding decisional transparency and social dialogue do not apply in the case of draft normative acts establishing measures applicable during the state of siege or state of emergency or which are a consequence of the establishment of these states."

283 This is discussed in detail in Part I, as well as subsequent sections of this Part, analysing the negative impacts of the crisis on the rights of marginalized or discriminated groups or parts of society.

284 For example, in **Finland**, decrees issued under the Emergency Powers Act lacked a proper assessment of the measures' compatibility with international human rights obligations. Similarly in Latvia, the Government decision on an emergency situation and subsequent related legislation

do not foresee an individual assessment of restrictions of human rights, such as the right to respect for private and family life, the freedom of assembly, the right to education and the freedom of movement.

285 For example, in terms of a good practice, **Canada** established the Covid-19 Disability Advisory Group (CDAG) to advise the government on the real-time lived experiences of persons with disabilities during the crisis, including disability-specific issues, challenges, systemic gaps and recommendations; The Covid-19 Law (enacted March 26, 2020) in the **United Kingdom** is an example of a law with serious implications for the rights of persons with disabilities. The law grants authorities emergency powers and needs to be renewed by parliament every 6 months. The law seems to lower the threshold for detention on mental health grounds by requiring only one doctor's recommendation instead of two under the Mental Health Act. The Covid-19 Law also makes it harder for adults with disabilities and their caregivers to have their needs met as a result of the effective suspension of the Care Act 2014. As the Bill is a temporary, emergency law, a formal impact assessment was not required; however, the government did carry out an equalities assessment though no mention of persons with disabilities is made in the assessment.

286 For example, the Law of 11 May 2020, extending the state of health emergency in **France**, introduced new provisions specifically regulating the situation of victims of domestic violence in the context of quarantine and confinement. Certain countries, such as **France, Greece, Ireland, Italy, Poland and Slovakia** have automatically extended the validity period of residence permits for foreigners. **Poland** has also provided that foreigners staying in Poland permanently, including refugees and beneficiaries of subsidiary protection, will be released from the obligation to apply for new residence cards until the relevant offices restore regular service.

to the pandemic, as well as inform preparedness and response plans in other contexts and future health emergencies. In that respect, experts and civil society

groups should be involved with relevant parliamentary committees in the overall decision-making process, and given a role in evaluating the legislative impact.

RECOMMENDATIONS

- States should refrain from considering legislation that is not of urgent nature, while parliamentary functions are not fully operational and when certain civic and political rights are restricted, especially legislation that may impact fundamental freedoms and human rights.
- To the extent possible and using innovative approaches, states and parliaments should follow ordinary legislative processes, including public consultations (organised online if necessary) and review the impact on under-represented persons or groups of emergency and non-emergency legislation adopted in this period.
- Ensure inclusive public hearings and consultations to the extent possible, including through the use of online platforms.
- Ensure a parliamentary approval process for emergency response legislation and other regulatory actions.
- Ensure that safeguards are in place in relevant legislation on the functioning of democratic institutions.
- Conduct an evidence-based gender and diversity analysis of the measures adopted in response to the pandemic and review documentation of the gender- and diversity-specific human rights impacts of the emergency measures to inform preparedness and response plans for future emergencies.

II.1.C JUSTICE INSTITUTIONS

The observance of the rule of law “based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention” may never be more relevant than in times of crises and emergency.²⁸⁷

In order to ensure these goals, and access to justice more broadly, participating States have committed to pay due attention to the efficient administration of justice and proper management of the court system.²⁸⁸ Judicial independence has repeatedly been recognized by participating States as a prerequisite to the rule of law and as a fundamental guarantee of a fair trial.²⁸⁹

To this end, participating States have pledged to continue and enhance efforts to strengthen the rule of law

in a range of related areas, including the effective administration of justice, the right to a fair trial, access to court and the right to legal assistance.²⁹⁰ The specific role of constitutional courts as an instrument to ensure the principles of the rule of law, democracy and human rights has also been emphasized.²⁹¹

In the context of restrictions and derogations, participating States have committed to ensure that “legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency” and “to provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.”²⁹²

The pandemic posed particular challenges to upholding these commitments, not only because of the widespread and catastrophic implications for the general population, but also in order to ensure the safety and health of people serving in justice sector institutions

²⁸⁷ Decision No. 12/05 of the Ministerial Council on Upholding Human Rights and the Rule of Law in Criminal Justice Systems, Ljubljana, 6 December 2005.

²⁸⁸ Decision of the Ministerial Council No. 5/06 on Organized Crime, Brussels, 5 December 2006, para. 4.

²⁸⁹ Brussels Declaration on Criminal Justice Systems of the Ministerial Council, 5 December 2006.

²⁹⁰ Decision No. 7/08 of the Ministerial Council on Further Strengthening the Rule of Law in the OSCE Area, Helsinki, 5 December 2006, para 4.

²⁹¹ *Ibid.*

²⁹² Moscow Document (1991), para. 28.8.

themselves. Judges, lawyers, prosecutors and court staff, as all human beings, have the right to life and right to health, which requires states to set measures to ensure their protection.²⁹³ At the same time, judges and others working in the justice sector may justifiably be asked to accept a higher degree of risk than other individuals who do not hold public office, in a similar way as medical staff, police and fire-fighters.²⁹⁴

Key functions of courts reflected in international law relate to the right to a fair trial by an independent and impartial court (Art 14 ICCPR), the right to judicial control of deprivation of liberty (Art 9(3) and (4) ICCPR) and the right to an effective remedy (Art 2(3) ICCPR). These rights are mirrored in specific OSCE commitments and principles.²⁹⁵ All three functions are essential in times of emergency or crises. Courts deliver a particularly crucial role with regard to the protection of non-derogable rights and absolute rights.²⁹⁶

Even where courts remained open in principle, they worked with limited capacity and physical access to court buildings was restricted significantly in many places. As a consequence, individuals faced considerable challenges in access to justice in civil, criminal and administrative procedures.

The judiciary also plays a crucial role in keeping checks on the other state powers, in particular the executive, which tends to increase its power during states of emergency. As the UN Special Rapporteur on the

Independence of Judges and Lawyers has emphasized, national courts must remain competent and capable to evaluate and if necessary, nullify any unlawful imposition or unjustified extension of emergency measures.²⁹⁷

Courts have a vital function during and after the pandemic in providing an effective remedy against excessive or discriminatory emergency measures in individual cases. Uninterrupted access to courts is also required in other urgent legal matters, in particular for vulnerable people in cases of domestic violence, trafficking in human beings, detention and torture related situations.²⁹⁸ As violations of quarantine and lock down measures carry significant criminal penalties, including imprisonment, in a number of countries, access to courts is essential in these matters as well.

States of emergencies, curfews and lock-down measures during the pandemic have created considerable challenges for the functioning of courts and access to them. In most participating States, the pandemic has resulted in (partial) closures of courts and the suspension of procedures, except for urgent cases. Even where courts remained open in principle, they worked with limited capacity.²⁹⁹ Physical access to

²⁹³ It is worth noting that the mortality rate of the virus seems to increase with age, and that in many judiciaries a relatively high proportion of judges are older, compared to other professions.

²⁹⁴ Guidance Note of International Commission of Jurists (ICJ), **The Courts and COVID-19**, 6 April 2020

²⁹⁵ See, in particular, Moscow Document (1991) paras. 18 to 23.

²⁹⁶ In the ICCPR context, non-derogable rights include the prohibition of torture, prohibition of slavery, right to life, the presumption of innocence in criminal proceedings, the prohibition of retrospective criminal law and the availability of a remedy (Human Rights Committee, General Comment 29, para. 14). Also, guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.

²⁹⁷ UN Special Rapporteur on the Independence of Judges and Lawyers, *Report to the UN General Assembly*, 12 August 2008, UN-Doc. A/63/271, paras. 16–19, 66.

²⁹⁸ This is discussed in more detail in the respective sections of Part II below.

²⁹⁹ Examples of states in which court operations were limited to urgent cases during lock-down measures include **Azerbaijan, Canada, Denmark, Greece, Kyrgyzstan, Moldova, the Netherlands, Slovenia, Switzerland and Uzbekistan**. In **Ireland**, a range of courts (e.g. District Courts, Circuit Civil and Family Law Courts, High Court, Supreme Court, Court of Appeal) continued regular operations, however scaled back their work to urgent matters in response to Government directions to minimize social contact. In **Hungary**, an extraordinary judicial vacation was introduced from 15 to 30 March; however, court operations resumed on 31 March. Based on a Government decree (No 74/2020), proceedings continued, mainly by written procedure and remote hearings. In criminal cases with the requirement of personal presence, hearings were held with social distancing measures. In **Germany**, decisions to carry out court hearings remained within the judicial discretion of each judge. However, most courts (including the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court) decided to keep visitor traffic to a minimum. Whether or not court proceedings were to be postponed under these circumstances, however, was decided by the judges within their judicial discretion.

court buildings was restricted significantly in many countries.³⁰⁰

As a consequence, individuals faced considerable challenges in access to justice in civil, criminal and administrative procedures. Lawyers were largely unable to represent their clients effectively and faced obstacles in accessing clients in detention, women subject to domestic violence and persons with disabilities.³⁰¹ Unrepresented defendants and applicants struggled to navigate the changes in already complex legal proceedings as a result of emergency measures.³⁰² In response to these challenges, many participating States suspended, interrupted or expanded procedural deadlines

300 In **Austria**, for example, an ordinance of the Minister of Justice limited the movement of parties (“Parteienverkehr”) to the exercise of elementary procedural rights of parties. These included the inspection of files and the timely submission of applications and other submissions to the court. Courts tried to compensate by handling queries of parties by phone or email. Another example is **Bulgaria**, where the Supreme Judicial Council prohibited citizens, parties to cases, experts, translators, attorneys and all other persons from access to court buildings, except for those summoned in the context of explicitly listed types of cases.

301 In **Kazakhstan**, for example, civil society organisations consistently reported difficulties for lawyers to effectively defend their clients, including due to difficulties to submit procedural motions. As a result of the quarantine in the cities of Nur-Sultan and Almaty on 28 March 2020, visiting court buildings to participate in court sessions could be considered a violation of the quarantine.

302 **Albania**’s Normative Act, adopted on 25 March 2020, for example provided that deadlines for lawsuits and on any procedural action shall be suspended in administrative, civil and criminal cases; however, if the deadlines started during the suspension period, they were postponed “until the end of the epidemic”. The Normative Act went on to provide a list of cases in which the suspension of deadlines does not apply; for example, in administrative cases, the subject of which is the adjudication of measures on securing lawsuits in the event that the court deems that the examination after the deadline determined in the prior article of the law could cause serious and irreparable damages to parties. In **Romania**, most Courts have restricted their activities with the public, indicating that petitions should be submitted by regular post and email. However, it was reported that the servers and email addresses of the Courts quickly became unavailable, due to limited capacity. (Source: EU Fundamental Rights Agency, Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications: Romania, 23 March 2020)

and statutes of limitation.³⁰³ Jury trials have also been suspended.³⁰⁴

States have used a range of different sources of law in order to regulate these and other changes in the judicial system as a result of the pandemic, including laws, ordinances by ministries of justice and government decisions, as well as resolutions of judicial councils and instructions issued by court administrations. As a consequence, judges and court users often faced an abundance of instructions from a host of different sources, at times overlapping or even contradictory. Video conference hearings have been introduced or expanded, from some to all types of procedures (civil, criminal and administrative) in a large number of jurisdictions, although often without clear legal basis and/or without much preparation or guidance to judges and court users.

Courts faced new types of cases as a result of the pandemic and ensuing emergency legislation, in particular complaints and other remedies for individuals sanctioned for breach of quarantine rules. The definition of such offences, as well as the sanctions, often lacked clarity, contrary to the principle of legal certainty. Furthermore, quarantine measures resulted in increasing family disputes, in particular in terms of domestic violence but also with regard to other family-related conflicts. Labour disputes and insolvencies are also expected to increase considerably in the aftermath of the pandemic and will likely result in an additional caseload for already strained court personnel and infrastructure.

While state and court practices across the OSCE region differed, certain commonalities emerged with regard to cases and procedures considered urgent and hence to be continued despite the (partial) closure of courts. These typically included procedures related to persons deprived of their liberty and cases related to vulnerable individuals (children, women, older people and persons

303 Such measures were put in place in a large number of participating States, of which **Austria, Bosnia and Herzegovina** (Republika Srpska), **Bulgaria, Croatia, Czech Republic, France, Italy, Poland, Serbia, Spain** and **Ukraine** are illustrative. A smaller number of states did not suspend procedures, such as **Sweden**.

304 Examples of this practice include **Ireland, Kazakhstan, the United Kingdom** and the **United States**.

with disabilities), in particular in the context of their need of injunctive relief against violence.

In many participating States, cases of individuals in pre-trial detention or eligible for probation were reviewed with a view to their release from detention. This measure served as a means to protect these individuals from the risk of infection in closed quarters, as well as with a view to reducing the burden on the penitentiary and the judiciary systems during the pandemic.³⁰⁵

However, judicial systems were not always able, or even required, to adjudicate in a timely and effective manner on remedies against sanctions for breach of emergency measures, prompting concern especially in cases relating to non-derogable rights. Judicial self-governing bodies and general assemblies of courts also faced challenges in decision-making as a result of quarantines and social distancing requirements, including when seeking to determine emergency measures. In many jurisdictions, rules of procedure of such bodies do not envisage remote deliberation or decision-making. Following the peak of the pandemic, re-opening courts faced challenges in establishing protocols of social distancing, including arrangements relating to public attendance of hearings.

305 For example, in **France**, some 11,500 people who were within three months of completing their sentences or awaiting trial were released from prison to ease overcrowding and reduce the risk of infection with the SARS-CoV-2 virus. In **Norway**, 194 prisoners benefited from early release measures approved on 16 March. In **Germany**, its federal state of Hesse, 268 prisoners were released by 12 April 2020, and in more than 3,600 cases, the execution of prison sentences was postponed. In the **United Kingdom**, by contrast, by 27 April 2020, only 33 out of 4,000 prisoners in England and Wales eligible for early release had indeed been freed, and initial proposals for early release of offenders under certain conditions were eventually shelved by the government. For recommendations on reducing the number of detainees and release of vulnerable detainees and low-level offenders see for example the **statement** of UN High Commissioner for Human Rights, on 25 March 2020 and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), **Advice** of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic, 25 March 2020.

CONCERNS RELATING TO THE RULE OF LAW AND ACCESS TO JUSTICE

The pandemic demonstrated limitations in the ability of judges, court personnel, lawyers, judicial self-governing bodies and other justice stakeholders to work remotely using digital technology for communication, to file motions and conduct proceedings via videoconference,³⁰⁶ and with a view to decision-making in matters of judicial administration. Judicial systems in many participating States also lack provisions for judges to access files remotely while providing data security, and to authenticate themselves through electronic or digital signatures in order to validate decisions. Women justice stakeholders faced obstacles working from home while still bearing the main care-taking responsibilities for children and other family members.

The lack of clarity on the processing of pending cases and inconsistencies within jurisdictions, and even within courts, resulted in considerable legal uncertainty. Concerns arose in a number of states regarding the legality of the use of videoconference hearings due to lack of a (clear) legal basis, and regarding the use of videoconference hearings even where not all trial parties had adequate access to and familiarity with the respective technology. Other concerns related to data protection and privacy issues.

Various fair-trial related problems occurred in the context of videoconference hearings, including lack of meaningful participation during online hearings, shortcomings in terms of the ability of trial participants to observe non-verbal cues of individuals being summoned, problems with the examination of evidence, and lack of confidential client-lawyer communication during online hearings. Some judges or courts sought to compensate access of the public (partially) by broadcasting hearings, however, shortcomings remained, including access of trial monitors.³⁰⁷

306 See, e.g., European Union Agency for Fundamental Rights, **Coronavirus Pandemic in the EU – Fundamental Rights Implications**, Bulletin 1 (1 February – 20 March 2020)

307 For example, in **Georgia**, a civil society organization requested permission from the High Council of Justice to carry out remote monitoring of criminal proceedings, yet the request was rejected, on the basis of technical issues.

In some jurisdictions, concerns have been raised in the context of judicial administration during states of emergency, in particular the selection of judges or court chairpersons through procedures that were irregular and/or not transparent as a result of the pandemic.³⁰⁸ In

a number of participating States, judicial stakeholders have voiced concern regarding the ability of courts to deal with the backlog of cases following the pandemic and recommended to ensure that any prioritization in the adjudication of cases be fair, non-discriminatory and transparent.

Information about the court sessions was posted on the court website, except for sessions on 'First Appearance of the Accused'. However, only the defence and the prosecution could attend the hearing. Issues were eventually resolved with Tbilisi City Court on 4 May, but not at four other courts (Kutaisi, Batumi, Telavi, Rustavi) that also rejected monitoring by the civil society organization for technical reasons.

308 In **Ukraine**, civil society organizations reported that they were unable to monitor the work of the High Council of

Justice because it had closed its doors to the public and did not broadcast its sessions. Videoconference sessions of the Council were eventually conducted, however not in disciplinary cases. In **Georgia**, the new Chair of the Supreme Court was appointed during the state of emergency, a process criticized due to the use of an accelerated and non-transparent process, which did not allow for public discussion of the candidate (the candidate's identity was only disclosed at the voting stage).

RECOMMENDATIONS

- Courts need to remain functional to discharge key functions while preserving the right to life and health of judges and judicial staff, as well as for all users of court services. Key functions of courts include the review of legality of emergency measures, judicial review of emergency legislation with regard to constitutionality and compatibility with international law, and urgent legal matters where delay would cause irreparable harm.
- Emergency measures relating to courts and judicial procedures need to preserve judicial independence and should be consulted with judicial stakeholders, such as judges' associations, judicial self-governing bodies, lawyers, notaries and trade unions, where applicable.
- Standards of judicial independence need to be observed at all times, including adherence to national rules and international standards for the appointment, promotion and disciplinary procedures of judges.
- Avoid a 'hyper-production' of laws, decrees, regulations and instructions on emergency measures for the judiciary from different branches of power (legislative, executive, judicial), and make sure provisions are not contradictory, vague or incomplete.
- Clear criteria should be established, preferably in law, with a margin of appreciation for judges, for the determination of urgent cases, which should be continued even during lockdown measures. These include cases relating to individuals deprived of their liberty; individuals requiring immediate protection from (domestic) violence; urgent family disputes; complaints against sanctions for violation of emergency measures and other cases where effective remedies are required by international human rights law. The prioritisation of cases should ensure gender equality and protection of the most vulnerable.
- Online tools and technology should be used to deliver the key functions of courts, however weighing the interest in continuing the procedure despite shortcomings of videoconference hearings as compared to an actual trial hearing. ICT-solutions must never undermine the right to fair trial.
- Judicial self-governing bodies and judges' associations should engage in discussions on preparing for the restoration of court activities at the end of lock-down measures, including on ways in which to reduce the backlog of cases.
- Protocols should be discussed in a timely manner before the end of emergency measures to determine an organized and safe return to court for judges, parties, lawyers, witnesses, etc.
- A dialogue should be established and continued between different judicial stakeholders, in particular judges and lawyers, to discuss safety measures such as physical distancing protocols at court.

- Training for judges should be initiated to build the capacity of the judiciary relating to the new types of cases arising as a result of the pandemic, including international law and the requirements of necessity and proportionality of sanctions for breach of emergency measures.
- Provide the necessary resources for justice systems to deliver their functions during and in the aftermath of the pandemic, including adequate safety measures at courts and other justice sector infrastructure.
- Where judges are subject to periodic evaluation, such processes should take into account lower numbers of procedural conclusions as a result of the pandemic. Covid-19-related delays must never infringe the security of tenure of judges.
- Systematically collect and analyse information about court operations during and in the aftermath of the pandemic in order to capture lessons learned. This should include an assessment of the impact of emergency measures on their outcome, including remote hearings.

II.1.D ELECTIONS AND ELECTION OBSERVATION

In line with the ODIHR's specific election-related mandate, this section takes account of the emerging challenges to the OSCE commitments, takes stock of the already noticeable and prospective trends and approaches by participating States, and provides recommendations that could help states ensure their elections are in line with OSCE commitments, including if held during the pandemic, or similar circumstances in the future.

Greater attention is being paid to the constitutional and legal frameworks governing elections in crisis situations. There is also a heightened interest in alternative voting methods and an increase in understanding that the ability to effectively enjoy fundamental rights is key for genuine elections.

Elections are both a political and a technical exercise that involves a multitude of stakeholders and take place over a number of stages. Most elements of the electoral process come under pressure in the conditions of states of emergency or similar measures, and they have been significantly affected during the pandemic. This included, for instance, the predictability of election dates, fulfilling conditions for registering as candidates, full opportunities for political actors to campaign in a meaningful way and their ability to communicate with voters, the preparedness of election administrations to conduct necessary operations, and the provision of unimpeded access for voters. On the whole, the normal

conduct of elections in compliance with the OSCE's election-related commitments has been put at risk by the pandemic and in particular the measures taken in response. The impact of the pandemic on the elements mentioned above threatens to diminish the capacity for elections to serve as a mechanism to genuinely reflect the will of the people. Increased uncertainty, especially with election dates, may also pose questions to the legitimacy of the incumbents. The effects of the limitations imposed on the exercise of a number of fundamental rights that are key for elections reconfirmed that elections do not take place in the vacuum and freedoms of assembly, expression and movement are essential for genuine democratic elections.³⁰⁹

National authorities can and have tried to overcome some of the election-related challenges, but many will remain. While the validity of election-related commitments and other international obligations and standards is not in question, even in times of emergency, authorities of participating States have been forced to balance them with public health requirements, which sometimes override other considerations. Some steps have been taken to amend the rules for elections in an expedited manner, which has increased risks to the fulfilment of OSCE commitments. Politically disadvantaged groups, such as women, persons with disabilities and national minorities, may be disproportionately affected.³¹⁰ New trends that emerged in the public discussion across the OSCE region are greater attention to the constitutional

309 See also Council of Europe's Venice Commission **compilation** of opinions and reports on states of emergency.

310 See also International Foundation for Electoral Systems (IFES) paper on **Safeguarding Health and Elections**.

and legal frameworks governing the principle of periodic elections in crisis situations, a heightened interest in alternative voting methods, an increase in understanding that the ability to effectively enjoy fundamental rights is key for genuine elections, and the reaffirmation of the crucial role that election observers – citizen and international – play in the process. It is important for the OSCE participating States to ensure that measures to temporarily adjust to the imperatives of maintaining public health do not undermine adherence to existing commitments related to elections.

Apart from the postponement and suspension of elections in some participating States, the immediate effect of the pandemic on the respect of election-related commitments is difficult to assess at this stage. Planned and future ODIHR election-related activities will provide such assessments, focusing both on the electoral legislation and its implementation, including through practical arrangements considering public health requirements. Still, the challenges to the fulfilment of some commitments are already now perceptible as a result of the pandemic and conditions imposed to curb it.

As elections are a multi-faceted process, effects of Covid-19 on many aspects of civic and political participation are additionally covered in other parts of this report. Most importantly, genuine democratic elections are contingent on the respect of fundamental rights, such as the freedoms of assembly, expression or movement. Non-discrimination and the protection of vulnerable or marginalized groups are essential for the inclusiveness of democratic processes. Under the current conditions, citizens of the OSCE participating States may also face challenges with access to effective remedy, including when their electoral rights are violated. As the conduct of elections is guided by the relevant legal framework, attention should be given to the legislative powers and the law-making process and to the question whether the lawmakers take unnecessary or politically convenient shortcuts. ODIHR has underscored on multiple occasions that care should be taken to have rules governing the conduct of elections adopted and amended on the basis of a broadly inclusive, transparent and effective consultation and with due regard

to the principles of stability of electoral legislation.³¹¹ Below, specific consideration is given to how the pandemic affects adherence to particular election-related commitments in general, with specific references to countries to illustrate the matter. Thorough analysis of a particular state's compliance with OSCE's election related commitments will be provided in the course of regular ODIHR election-related activities including Election Observation Missions and Assessments.

OSCE participating States committed to “hold free elections at reasonable intervals, as established by law.”³¹² The concept of periodic elections emanates from the Universal Declaration of Human Rights and is reflected in other international standards and OSCE commitments. In the context of the pandemic, the principle of periodic elections had to be balanced against other obligations of states, particularly ensuring the right to life and the right to health and, thus, taking urgent measures to contain the pandemic. Postponement or suspension of elections under a state of emergency does not necessarily contravene human rights obligations of states, but highlights the importance of safeguards to prevent misuse.³¹³ Importantly, the “suspension of electoral rights is only permitted to the extent required by the situation and the suspension must therefore meet a proportionality test.”³¹⁴ The principle that reasonable intervals need to be established by law has been challenged as the legislation in a number of participating States did not provide for the postponement of scheduled elections in a state of emergency.³¹⁵ At times, when such provisions were in place, decisions were taken

311 See also ODIHR Opinions on **The Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020**, paragraphs 12 – 16, (April 27, 2020) and on **The Draft Act on special rules for the organisation of the general election of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting**, paragraph 10, (29 May 2020).

312 See Copenhagen Document (1990) para. 7.1.

313 See also IFES **paper** on “Legal Considerations When Delaying or Adapting Elections” and the Council of Europe’s **“Elections and COVID-19”**.

314 See para. 100 of the Council of Europe Venice Commission’s **report** “Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections.”

315 For example, postponement of local elections in England and Wales required adoption of a law by the Parliament.

not to declare the state of emergency,³¹⁶ which either made the postponement of elections a legal uncertainty or necessitated the creation of *ad hoc* context-specific solutions.³¹⁷ Some of the *ad hoc* decisions to either postpone the elections, suspend the conduct of an already ongoing process, or to hold elections in a challenging environment, raised questions as to whether a reasonable assessment was made vis-à-vis other state obligations, including safeguarding the right to health. Such decisions put an additional spotlight on the importance of genuine public debate and inclusive and transparent decision-making processes on matters of public concern.

Where elections were already taking place at the outset of the pandemic, participating States faced particular challenges with regard to their commitment to ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere.³¹⁸ It was particularly challenging to ensure that no “administrative action [...] bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them”.³¹⁹ Public gatherings, door-to-door visits and distributing campaign materials, all a traditional way for candidates to reach out to voters and for the voters to impart information or demonstrate their support, may be restricted due to public health considerations.³²⁰

Advantages of the incumbency and abuse of state resources, including through policies and initiatives related to the crisis and its socio-economic effects, might be especially pronounced when those in power have not only a duty to respond to the Covid-19 crisis but also a political role to play in the elections.

³¹⁶ See Part I for details.

³¹⁷ For example, **Poland** declared a “state of epidemic” and not one of the possible types of a “state of emergency” that would have precluded the holding of an election.

³¹⁸ See also the ODIHR statement from 7 April 2020 on the **importance of genuine campaign and public debate for democratic elections**.

³¹⁹ See Copenhagen Document (1990) para. 7.7

³²⁰ See Para. 103 of the Council of Europe Venice Commission’s **report** “Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections.”

Previous ODIHR election observation reports show that restrictions on the conduct of election campaigns may often be accompanied by discretionary enforcement by the authorities.³²¹ As the public health considerations may continue to dictate restrictions on campaign methods, this calls for a greater attention to whether and how participating States will “provide ... the necessary legal guarantees to enable [political parties and organizations] to compete with each other on a basis of equal treatment before the law and by the authorities.”³²² Advantages of the incumbency and abuse of state resources, including through policies and initiatives related to the crisis and its socio-economic effects, might be especially pronounced when those in power have not only a duty to respond to the Covid-19 crisis but also a political role to play in the elections.

In most participating States, media coverage was dominated by significant coverage of the developments around the pandemic and the responses of governments and the officials leading the crisis management. In the context of elections, this gives rise to some concerns regarding the commitment of participating States to provide conditions for “unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.”³²³ Whether the electoral contestants are able to use the media to convey their messages to the voters will certainly depend on how previously identified media-related shortcomings are rectified, on the impact of the economic downturn on the media landscape, but also on the willingness of those in power to not abuse their prominence in the context of the pandemic to gain an unfair advantage over political competitors. At the same time, they may be ‘punished’ by voters if they are seen as having failed to lead effectively during the crisis.

³²¹ See, for example, the ODIHR **Final Report** on 2018 Early Presidential and Parliamentary Elections in Turkey, the ODIHR **Final Report** of 2019 Early Parliamentary Elections in Belarus, the ODIHR **Final Report** on 2018 Presidential Election in the Russian Federation, the ODIHR **Final Report** on 2018 Early Presidential Election in Azerbaijan, the ODIHR **Final Report** on 2019 Early Presidential Election in Kazakhstan.

³²² See Copenhagen Document (1990) para. 7.6

³²³ See Copenhagen Document (1990) para. 7.8

The principles of universal and equal suffrage were also challenged regarding both the longer-term processes, such as voter and candidate registration, and the methods of voting. OSCE commitments to “guarantee universal and equal suffrage to adult citizens”³²⁴ may be challenged if voter registration or verification efforts are halted due to public health concerns. Movement of people caused by health concerns (such as when people choose to leave their place of residence to join their family) or economic effects of the pandemic (when people move because of losing a job) may necessitate the revision of voter lists.

While few countries allow for electronic submission of required documents, in a number of participating States the registration of electoral contestants is premised on an in-person collection, submission and verification of supporting signatures, which may be problematic in the conditions of social distancing or restrictions to assembly or movement. Substituting signature collection by alternative requirements for registration, such as monetary deposits, might disproportionately affect politically underrepresented groups, such as women or national minorities in certain countries, or pose additional financial burdens on those already hit by the economic downturn.

While traditional voting mechanisms may pose threats to public health, alternative solutions to voting in polling stations may, in turn, endanger the principle of universal and equal suffrage, as well as secrecy of the vote. A number of previous ODIHR election observation reports noted that homebound voting or casting ballots in such specially designated locations as prisons, hospitals or elderly homes raised concerns of undue influence on the voter.³²⁵ Facilitating voting by those subject to quarantine with the aim to uphold the principle of universality is a particular challenge in the current situation. Adherence to the commitments in such cases may be ensured by effective legal and practical safeguards against wrong-doing and the development of adequate

staff capacities and technical skills within election management bodies.

Some alternative voting methods may also pose a risk to the fulfilment of the commitment to “ensure that votes are cast by secret ballot or by equivalent free voting procedure.”³²⁶ Allowing or expanding proxy voting, which has been consistently identified by ODIHR as falling short of commitments to an equal and secret ballot, would not be a solution to address the prevailing health concerns. Women, older people and people with disabilities may be particularly vulnerable to undue coercion and their right to secrecy may be compromised if introduction of postal voting or other alternative voting methods is not accompanied by adequate safeguards.

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OSCE participating States have agreed that “the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place.”³²⁷ The deployment of observers, both citizen and international, has been challenging in the conditions imposed by the pandemic. While certain temporary adaptations of the ways for citizen and international observers to conduct their activities might be necessary, the principle of transparency that the observers serve to uphold might also be challenged. Limitations on access to the meetings of election management bodies may be remedied to a certain extent with proactive outreach, including by means of information and communication technologies, but effective observation of the procedural integrity of election day operations may nonetheless be difficult. This may particularly threaten the commitment to have votes “counted and reported honestly with the official results made public.”³²⁸

³²⁴ See Copenhagen Document (1990) para. 7.3

³²⁵ See, for example, ODIHR **Final Report** on 2013 Presidential Election in Montenegro, **Final Report** on 2013 Partial Repeat Parliamentary Elections in Ukraine, **Final Report** on 2019 Parliamentary Elections in Belarus.

³²⁶ Copenhagen Document (1990) para. 7.4

³²⁷ Copenhagen Document (1990) para. 8.

³²⁸ Copenhagen Document (1990) para. 7.4.

During the pandemic, a number of participating States postponed or suspended elections or revised specific elements in the timeline of electoral activities. In most of the countries where elections were planned to take place after the declaration of the global health emergency or a national state of emergency, decisions were taken to postpone or suspend them; a number of countries, however, kept the election day as initially planned.³²⁹ Although a decision to hold, postpone or cancel an election in times of a pandemic is a matter each participating State has to decide for itself and in full consideration of public health requirements, it should be taken in line with OSCE commitments and other international obligations and standards. In most cases, such a decision required modification of a country's legal and even constitutional framework.

In many participating States, a postponement of the election day was possible due to the declaration of a state of emergency (or equivalent measures) during which elections could not be conducted. In other cases, the existing legal apparatus and the types of declared states of emergency required the adoption of a special legal framework for the cancellation or postponement of elections and consequent extension of the mandate of institutions in place.³³⁰ In some participating States,

legislative processes and the adoption of laws were undertaken in a rushed manner, in the absence of a meaningful public and inclusive consultation among key electoral stakeholders, challenging the principles of legality and stability of election law.³³¹ While the Council of Europe's Venice Commission notes that "late amendments to the electoral legislation applicable only for concrete elections do not necessarily go against the European principles of electoral law,"³³² substantial amendments of the fundamental elements of the electoral law shortly before an election may influence the outcome of an election. It is equally important to uphold the principle of legality by adhering to a country's constitutional provisions when making any decision related to elections.

In some participating States, the likelihood of early elections increased as a result of the impacts of the pandemic and related measures on the economy and prevailing attitudes in the population. Both the opposition and the incumbents started focusing their political rhetoric on the effectiveness of combatting the pandemic and its social and economic effects. In some cases, the incumbents may be more willing to time the elections in accordance with their preferences.

Some participating States that decided to proceed with their planned elections introduced alternative voting methods with the stated aim to mitigate risks

329 Elections in the OSCE region were postponed as follows: local elections in **Kyrgyzstan** (originally scheduled for 12 April), second round of local elections in **France** (originally scheduled for 22 March, moved to 28 June), parliamentary elections in **North Macedonia** (originally scheduled for 12 April, moved to 15 July), parliamentary and local elections in **Serbia** (originally scheduled for 26 April, moved to 21 June), local elections in **Romania** (originally scheduled for June 2020), local elections in the **United Kingdom** (England and Wales, originally scheduled for 7 May 2020, moved to 6 May 2021), local elections scheduled for some federal states in **Austria** on 15 and 22 March have been cancelled. The first round of local elections in **France** took place on 15 March; **Germany's** state of Bavaria conducted first round of local elections on 16 March 2020 and second round on 29 March 2020. **Poland** decided to introduce "state of epidemic" instead of "natural disaster" or "state of emergency" that would allow for postponement of the presidential election which was to take place on 10 May 2020 but was eventually found to be not possible to occur. The presidential election was then held on 28 June and 12 July (second round). Other elections, such as presidential elections in **Belarus, Iceland** and the **United States**, parliamentary elections in **Mongolia** and local elections in **Bosnia and Herzegovina** are maintained on schedule.

330 For example, postponement of local elections in the **United Kingdom** (England and Wales) required the

adoption of a law by Parliament. In **France**, the Election Code provides that mayors are elected for six years and their renewal should take place in March at a date set by Ministerial Council decree at least three months in advance. The law does not have any provision to deal with an eventual postponement/cancelling of an election, not even under exceptional circumstances, related to the fact that the law does not provide for a competent authority entitled to take such decision. A special law postponing the second round by six months was adopted by the parliament, following broad consultations with health officials and an agreement between political forces. **Serbia** and **North Macedonia** introduced states of emergencies followed by government decrees suspending the organization of elections.

331 For example, on 6 April 2020, the lower chamber of the parliament of **Poland** adopted the "Draft Act on special rules for conducting the general election of the President of the Republic of Poland ordered in 2020". It was passed within one day and with a narrow majority.

332 See para. 115 of the Council of Europe Venice Commission's **report** "Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections."

of contagion posed by social contact.³³³ Decisions were taken either by extending already existing legal provisions or through developing additional ones. Preparations for an exclusive vote by mail would clearly be best applied in countries with a record of having conducted such processes for some categories of voters. This would, therefore, benefit from comprehensive analysis of different factors that may impact the likelihood of voters receiving ballots by mail and the possibility to return them in time. In principle, good practice suggests that alternative voting methods should be introduced gradually, well in advance of elections and based on appropriate testing and consultations with election stakeholders.

Women and other politically disadvantaged groups, such as people with disabilities, may be disproportionately affected by using alternative voting methods, such as postal voting. While such measures may increase the participation of women voters, the older people, voters with disabilities and those living in remote areas, the main challenge arising from postal voting is to maintain the secrecy and equality of the vote, since the voter receives a ballot that is to be marked in an uncontrolled environment outside of the polling station. In addition to this, reports of a worldwide increase in the number of domestic violence cases as a result of stay-at-home orders and confinement, pose a question about whether vulnerable persons could be subjected to undue influence when making their electoral choices.³³⁴ Considerations that provide real equal opportunities for all should therefore be taken into account when introducing new voting methods. Civil society organizations focused on the electoral rights of politically underrepresented groups should be involved in the introduction of new voting methods. Their expertise and lessons previously learned throughout the OSCE region with regard to protecting electoral rights of vulnerable groups might be valuable for all voters. The equality of opportunity to cast ballots with the use of alternative

methods might encounter specific challenges when voting is organized for those residing abroad when regulations of both the host country and the participating State organizing elections may apply.

At the initial stages of the pandemic, public opinion focused on the possibility of employing new technologies for casting and counting of ballots, such as Internet voting. It is, however, noteworthy that decision-makers in most participating States have not made any substantive moves toward such alternative solutions, in part due to the realization that introduction of new voting technologies requires substantial time and resources and, therefore, may not present the short-term solution for the challenges associated with the pandemic.

In many participating States, adjustments to election management were necessitated by safety considerations in light of threats posed by the pandemic. For instance, the recruitment and training of polling staff have proven to be more difficult. Additional safety measures, including provision and use of personal protective equipment, were introduced through legislation or sub-legal acts. Restrictions on gatherings have led to holding meetings of election management bodies behind closed doors, challenging transparency. Positively, some election commissions decided to stream their sessions online and increased the amount of information available on their websites.³³⁵ Some adaptations of election management placed additional responsibilities on the bodies outside of election administration, such as postal services or municipalities, at times without adjustment of the legal framework, allocation of appropriate resources or ensuring proper training. Specific attention should be paid to voter education and outreach by the election management bodies.³³⁶

In several cases when the participating States decided to proceed with planned elections either without

³³³ Germany's state of Bavaria conducted the second round of local elections using the postal vote for all. Shortly before the election, Poland's parliament adopted a law introducing the possibility of postal voting for all voters.

³³⁴ See also a [statement](#) by the Secretary-General of the United Nations António Guterres on Gender-Based Violence and Covid-19. More details on this aspect are discussed in the section on Gender Equality in Part II.

³³⁵ For example, the Republic Electoral Commission of **Serbia**, the Central Election Commission of **Moldova** and the Central Election Commission of **Belarus** decided to conduct all their sessions online while the Central Election Commission of **Russian Federation** continued the practice of streaming their session online.

³³⁶ See also International IDEA's "[Elections during COVID-19: Considerations on how to proceed with caution.](#)"

changing the date or re-starting the process, some elements of the electoral process were adapted and revised. Specific examples include revision of timelines pertaining to the collection of supporting signatures,³³⁷ voter registration updates, and the duration of the campaign period. Some procedural deadlines for the organization of voting and counting were altered due to the introduction of alternative voting methods. As with changes to the date of elections, such changes were in some cases made without consultation with or debate among electoral stakeholders.

During the pandemic, freedoms of movement and assembly have been restricted in many participating States.³³⁸ Public rallies, door-to-door canvassing, and in-person distribution of materials are all standard campaigning methods that had to be limited. A number of political actors shifted their activities to the media and online sphere. This further increased the role of social networks and heightened attention to the transparency of political finance and the ability of voters to form opinions independently and without manipulative interference.³³⁹ Some participating States faced the situation when legal provisions pertaining to campaigning or placing paid advertisement in online media or social networks were lacking.

337 **Poland** (2nd amendment), **Romania**, **Serbia**.

338 For a detailed overview, see the section on Freedom of Movement below.

339 Para. 19 of the **UNHRC 1996 General Comment No.25 to the ICCPR** states that “Persons entitled to vote must be free to vote ... without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector’s will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.”

Travel restrictions across the OSCE region, as well as the duty of care for observers by international organizations, have resulted in temporary suspension of ODIHR observation missions.³⁴⁰ The level of access to all aspects of the electoral process was also lowered. Citizen observers faced similar difficulties in their activities. While travel and health protocol restrictions across the OSCE region posed challenges to deployment of observation missions, ODIHR was able to deploy special election assessment missions and other election-related activities to a number of participating States holding elections, highlighting its ability to deliver on its mandate even in these extraordinary circumstances.

A number of participating States have engaged in follow-up activities, at times in order to strengthen their response to the challenges posed by the pandemic. At times, these responses were premised on addressing previous ODIHR recommendations. However, some states did not take into account previous ODIHR reports and recommendations and proposed legislative and practical measures that risk weakening their election processes. Based on requests from participating States, ODIHR strengthened its focus in this period on providing assistance to states in their efforts to follow-up on previous assessments and recommendations.³⁴¹

340 ODIHR has suspended the Election Observation Mission deployed for the 12 April early parliamentary elections in **North Macedonia** and cancelled the deployment of Election Observation Mission for the 26 April parliamentary elections in **Serbia** and the Limited Election Observation Mission for the 10 May presidential election in **Poland**.

341 The successful completion of electoral reform in **Albania** is an example for such fruitful co-operation.

RECOMMENDATIONS

- Refrain from fundamental changes to the electoral law shortly before an election in order to ensure stability of the law. The more fundamental the change, the more time before an election should be allowed.
- Should legal amendments or new legislation be introduced to regulate any elements of an electoral process during a pandemic or state of emergency, it is of utmost importance that electoral stakeholders, political forces, civil society, health authorities and other pertinent institutions are engaged in a consultative process and that laws are adopted at the end of a democratic debate.
- In participating States where there are no legal provisions for postponing or cancelling elections, consider amending the legal framework to allow such actions under exceptional circumstances, including

the competent authority entitled to take the decisions. Furthermore, states should consider introducing legal provisions that would guarantee continuity of the mandate of the institutions beyond the legal term, under exceptional circumstances for a reasonable period of time.

- Countries should use the opportunity to review their electoral legislation and assess the extent to which it covers situations like the pandemic just experienced, and to fill in the gaps in preparation of future similar emergency situations.
- If alternative voting methods are introduced, consideration should be given to adopting a gradual approach and piloting prior implementation of these methods nationwide, as well as providing comprehensive awareness raising, in particular to politically vulnerable groups (women, older people, persons with disabilities).
- With a view to ensure transparency and accountability, genuine consideration should be given to enabling citizen and international elections observation.
- States should develop and maintain contingency plans as an integral part of election management. Proper attention should be given to the preparedness of authorities other than election management bodies.
- If socio-economic recovery plans are developed, make sure the distribution of state aid does not create an impression of favouring incumbent political forces or vote buying by introducing clear, fair and objective criteria to identify those who are eligible for the aid, as well as making sure the timeline of the distribution of aid is not adjusted to the period of electoral campaigning.

II.1.E NHRIS AND HUMAN RIGHTS DEFENDERS

Independent, accountable and effective institutions and an active civil society, independent media and the ability of individual citizens to hold authorities to account are essential for democracy and democratic governance. National human rights institutions (NHRIs), as independent statutory bodies protecting and promoting human rights, as well as human rights defenders, whether they advocate for transparency, justice or the rights of marginalized or vulnerable groups, play a particularly important role in this regard.

In line with the UN Declaration on Human Rights Defenders, people who individually or in association with others act to promote and protect human rights and fundamental freedoms by peaceful means and without discrimination shall be considered 'human rights defenders'.³⁴² They are, therefore, first of all defined by their actions and can include associations,

institutions as well as individuals of any professional background, including journalists or medical personnel. ODIHR has observed that during the Covid-19 pandemic, numerous organizations and activists continued to actively promote human rights, raising critical issues of public interest. Furthermore, individuals of diverse professional backgrounds in a number of participating States stepped in to act as whistle-blowers to uncover information about human rights abuses, mismanagement of public resources or other acts of corruption in relation to governments' responses to the pandemic.

NHRIs are also considered human rights defenders and play a crucial role in advancing and protecting human rights.³⁴³ They can act as a bridge between civil society and the state, linking the responsibilities of states to the rights of citizens. The importance of NHRIs and their mandate to protect and promote human rights is recognized in OSCE commitments. In Copenhagen (1990), participating States pledged to "facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law." States are encouraged to strengthen the role of independent NHRIs and their mandate in accordance

³⁴² UN General Assembly Res. 53/144, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" (**Declaration on Human Rights Defenders**), UN Doc. A/RES/53/144 (9 December 1998). See also, The **ODIHR Guidelines on the Protection of Human Rights Defenders**.

³⁴³ For more about how NHRIs exercised their oversight function over emergency measures, see Part II.1.

with the Paris Principles.³⁴⁴ The General Observations to the Paris Principles refer to the state of emergency and emphasize that in the situation of a state of emergency, “it is expected that an NHRI will conduct itself with a heightened level of vigilance and independence, and in strict accordance with its mandate.”³⁴⁵

The role of civil society, as recognized in the OSCE commitments, remains key during times of crisis. During the pandemic, human rights defenders have raised public awareness about human rights issues, including pertaining to public health; have challenged reprisals and retaliation targeting activists and whistle-blowers; and have exposed gaps in states’ responses to the health emergency, thus contributing to accountability for violations and abuses. The UN Special Procedures have also reiterated the key role played by civil society organizations in responding to the crisis, including by providing support to vulnerable populations and promoting access to public health. They further highlighted that “no country or government can solve the crisis alone and thus “civil society organizations should be seen as strategic partners in the fight against the pandemic.”³⁴⁶

During the pandemic, human rights defenders have raised public awareness about human rights pertaining to public health; have challenged reprisals and retaliation targeting activists and whistle-blowers, and have exposed gaps in states’ responses to the health emergency.

NHRIs have been playing a similarly important role in responding to the extraordinary circumstances of the pandemic. They continued monitoring the implementation of human rights obligations and to hold

governments to account when violations occur. Many NHRIs published guides, notes or other documents to inform the public about their rights and governments’ restrictive measures.³⁴⁷ Several NHRIs established telephone hotlines to provide the public with information but also to file complaints.³⁴⁸ Many NHRIs also further issued recommendations and advice to their governments emphasizing the need to uphold human rights standards and protect vulnerable groups during the Covid-19 pandemic.³⁴⁹

On the basis of its monitoring of the situation of human rights defenders, including journalists, whistle-blowers and NHRIs, from March to May 2020, ODIHR has identified a number of challenges, as well as good practices, pertaining to the role played by human rights defenders and the need for their protection. ODIHR has also formulated recommendations to participating States to address identified gaps.

AREAS OF CONCERN

ODIHR has received a number of reports of threats and attacks targeting human rights defenders, reportedly connected to their human rights work during the pandemic. These included allegations of physical and verbal attacks, along with death threats, for reporting on the pandemic³⁵⁰ or for requesting information of

³⁴⁴ Principles relation to the Status of National Institutions (the **Paris Principles**), UN GA Resolution 48/134, 20 December 1993; and **ODIHR Guidelines on the Protection of Human Rights Defenders**, 2014.

³⁴⁵ **General Observations** is an interpretative tool of the Paris Principles, for application during the accreditation process, aiming to assist NHRIs in developing their own practices and procedures in compliance with the Paris Principles.

³⁴⁶ See, e.g., **States responses to Covid 19 threat should not halt freedoms of assembly and association**, OHCHR, 14 April 2020.

³⁴⁷ See, e.g., **Frequently Asked Questions about human rights standards during a pandemic** by the Public Defender in **Georgia**.

³⁴⁸ These include NHRIs from **Bulgaria, Cyprus, Czech Republic, Denmark, Greece, Lithuania, Portugal, Slovakia, Slovenia** and **Spain**. ENNHRI, **The rule of law in the European Union**, 11 May 2020, p. 27.

³⁴⁹ See, for example, **Bosnia and Herzegovina – Recommendations on the protection of human rights of vulnerable categories of citizens**, 31 March 2020, available; **Norway – Letter on the protection of human rights during the covid-19 pandemic to Ministry of Health, Directorate of Health, Norwegian Institute of Public Health**, 6 April 2020.

³⁵⁰ See, for example, **North Macedonia, AJM and SSNM: Acibadem Sistina’s reaction to IRL is a pressure on journalists and an attempt for censorship**, safe-journalists.net, 30 March 2020; **Russian Federation – Journalist at risk after receiving death threat: Elena Milashina**, Amnesty International, 17 April 2020; **Tajikistan – Attack on and threats against Avazmad Ghurbatov**, Frontline Defenders, 13 May 2020.

public interest related to the pandemic.³⁵¹ Threats and attacks targeting journalists, including gender-based insults directed at women defenders, allegedly came from both state and non-state actors, including on social networks, in the media or through anonymous phone calls.³⁵²

Furthermore, emergency measures adopted by participating States to combat Covid-19 have significantly impacted the ability of NHRIs to carry out their mandate and preserve their independence. These include freedom of movement restrictions, including restrictions on access to places of deprivation of liberty, limiting NHRIs' monitoring function; suspension of core public services; and risk of funding cuts.³⁵³

Emergency measures to combat Covid-19 have significantly impacted the ability of NHRIs to carry out their mandate and preserve their independence.

ODIHR further noted reports of judicial harassment and detention of human rights defenders, including journalists, in retaliation for expressing critical views or reporting on irregularities concerning governments' responses to the pandemic. For example, restrictions imposed to slow down the spread of the coronavirus, including limitations to freedom of movement imposed under a lockdown regime, were allegedly used to silence government critics and prosecute activists who denounced the poor conditions of state-run quarantine facilities or called for the provision of adequate social programs and financial compensation to people economically affected by the crisis.³⁵⁴ Several journalists faced criminal charges in retaliation for their coverage of

the pandemic, including on social media.³⁵⁵ Particularly worrisome were reports of journalists being targeted for pointing out shortcomings in the public health system, such as lacking protective gear or inadequate preparedness in medical institutions.³⁵⁶

Judicial harassment and detention of human rights defenders, including journalists, in retaliation for expressing critical views or reporting on irregularities in governments' responses to the pandemic has taken place.

There are numerous accounts of whistle-blowers and activists across the OSCE region facing criminal investigations or being detained as a result of undue application of newly adopted emergency laws, or existing legislation, criminalizing the dissemination of false information during a state of emergency. Under such laws, investigations were initiated against activists who reported (often on social media platforms) about public concerns relating to the 'inadequate' quarantine measures implemented in certain health facilities, or denounced on social media alleged cases of corruption and mismanagement of resources in the context of the pandemic response.³⁵⁷ In some participating States, individuals who raised doubts about the official statistics of Covid-19 related infections or deaths were arrested over allegations relating to the spread of 'fake news' about the pandemic.³⁵⁸

³⁵¹ [Seven organizations call on the Slovenian government to stop harassing an investigative journalist](#), Reporters Without Borders, 27 March 2020.

³⁵² *ibid.* See also, for example, a [social media post](#) by a Belgian/Romanian journalist writing about the rule of law in Hungary.

³⁵³ See, for example, [Affirming the work of NHRIs in times of crisis](#), Asia Pacific Forum of NHRIs, 24 April 2020.

³⁵⁴ See, for example, [Azerbaijan – Crackdown on Critics Amid Pandemic](#), Human Rights Watch, 16 April 2020.

³⁵⁵ See, for example, [Turkey – COVID-19 pandemic increases climate of fear for journalists](#), Amnesty International, 1 May 2020.

³⁵⁶ See, for example, [Serbia – Reporter's Arrest Over Pandemic Article Draws PM's Apology](#), Balkan Insight, 2 April 2020. In this case, a journalist was arrested (but released the following day) for reporting about the lack of adequate protective gear for medical personnel in health facilities. Allegedly, her apartment was searched and her private assets seized.

³⁵⁷ See, for example, [Russian Federation, Activist Says She's Hit By First Investigation Under 'Fake' Coronavirus News Law](#), Radio Free Europe Radio Liberty, 5 April 2020; [Kazakhstan detains government critic for 'spreading false information'](#), Reuters, 18 April 2020.

³⁵⁸ See, for example, [Montenegro, Police arrest man for spreading fake coronavirus news](#), mia.mk, 12 March 2020; [Turkey – detains more than 400 for Covid-19 social media posts](#), France24, 27 April 2020.

ODIHR also noted alarming reports of doctors or other medical staff being interrogated or intimidated after raising concerns on social media platforms about the situation in health facilities.³⁵⁹ Medical personnel have faced retaliation for informing the media about public health issues in the framework of the pandemic. In a number of cases, they have been prevented from speaking out, including by being threatened with disciplinary actions.³⁶⁰ There have been numerous reports of nurses or other staff in medical or nursing facilities exposing shortfalls in the availability of protective gear, inadequate procedures or missing equipment. Frequently, such criticism was reprimanded by the management of health institutions or even the authorities.³⁶¹

ODIHR has also been noted the acute vulnerability of those human rights defenders who remain in detention and other closed facilities. While some inmates have been released as a measure to cope with the spread of Covid-19 in prisons (for details, see the section on Detention below) a number of human rights defenders and political prisoners have remained in jail.³⁶² Civil society organizations and international organizations called for the release of activists from detention facilities, where their health is at serious risk due to their great exposure to infectious diseases, including Covid-19.³⁶³

In March and April, human rights defenders from a number of participating States were subject to online smear campaigns as a result of their pandemic-related journalistic activities.³⁶⁴ For example, several journalists and media outlets were the target of negative portrayals, including by state officials, and labelled as ‘traitors’ or ‘provocateurs’, ‘spreading lies’, ‘misleading the public’, ‘attempting to cause panic’ or ‘someone to be protected against’.³⁶⁵ In one instance, a defender and the members of his family faced online smear attacks and other forms of harassment as a result of the activist’s calls for the provision of social assistance to individuals affected by the pandemic.³⁶⁶

Undue application of or overly restrictive emergency legislation introduced by governments across the OSCE region during the pandemic is likely to have produced a chilling effect on freedom of expression and freedom of the media, potentially hindering access to information of public interest.³⁶⁷ For example, between March and May, ODIHR observed instances in which online media outlets were arbitrarily blocked after publishing Covid-19 related news, as a result of the application of regulations pertaining to the dissemination of false information.³⁶⁸ In other cases, investigative journalists’

359 See, for example, **Belarus, faces growing criticism for dismissive coronavirus response**, Financial Times, 7 April 2020.

360 See, for example, **United Kingdom, NHS staff forbidden from speaking out publicly about coronavirus**, The Guardian, 3 April 2020.

361 See, for example, **Poland, Dyrektor szpitala zwolnił położną, bo alarmowała na Facebooku, że brakuje maseczek i sprzętu** [Hospital director fires midwife because she raised alarm on Facebook that masks and equipment were missing], wyborcza.pl, 24 March 2020. A nurse was fired by the director of a hospital after denouncing on social media the lack of protective gear in hospitals and posting pictures of her homemade surgical mask on social media.

362 **Defending rights during an epidemic: The impact of Covid-19 on the safety and functioning of human rights defenders**, Frontline Defenders, 17 April 2020. See also **Turkey, Imprisoned journalists, human rights defenders and others, now at risk of Covid-19, must be urgently released**, Amnesty International, 30 March 2020.

363 See, e.g., **Kyrgyzstan, health of prisoner of conscience at risk: Azimjan Askarov**, Amnesty International, 22 April 2020. See also **Kyrgyzstan must uphold its human rights obligations and release human rights**

defender Azimjan Askarov, says UN expert, OHCHR, 8 May 2020.

364 **OSCE Media Freedom Representative urges public officials in Slovenia to refrain from pressure on independence of public broadcaster**, OSCE Representative on Freedom of the Media, 27 March 2020. See also **United States**.

365 See, e.g., **Repressive laws, prosecutions, attacks... Europe fails to shield its journalists against the abuse of the COVID-19 crisis**, Reporters Without Borders, 8 April 2020.

366 See, e.g., **Azerbaijan, Urgent action: harassment of activist and family must stop**, Amnesty International, 9 April 2020.

367 On occasion of World Press Freedom Day 2020, OSCE Media Freedom Representative calls on States to let journalists work freely without fear or favour, OSCE RFoM **statement**, 2 May 2020. See also, for example, **Kazakhstan, authorities threatened the media with criminal liability**, Analytical Center for Central Asia, 18 March 2020; **Hungary, Journalists fear coronavirus law may be used to jail them**, The Guardian, 3 April 2020; **Bosnia and Herzegovina, Bosnia Trying to Censor Information About Pandemic, Journalists Say**, Balkan Insight, 8 April 2020.

368 **Site-uri sancționate pentru știri false. Unul dintre ele, blocat pentru că „a publicat constant informații false, cu scopul de a dezinforma și a induce panica”**,

requests to access information were not granted but followed by threats and smear attacks against them.³⁶⁹

Several NHRIs reported that they were facing difficulties in carrying out their investigation and monitoring work due to the freedom of movement restrictions.³⁷⁰ Several NHRIs had to suspend their monitoring of places of deprivation of liberty, including the ones exercising their mandate as the National Preventive Mechanism (for more, see the section on Detention and Torture Prevention, below).³⁷¹ Furthermore, with the temporary closure of public services, NHRIs had reduced access to the individuals in need of their support, especially with regard to “walk-in” opportunities to file a complaint.³⁷²

ODIHR observed that in some participating States’ governments did not communicate with their NHRIs or follow their recommendations in the context of the

Covid-19 pandemic.³⁷³ Many NHRIs have submitted recommendations to their governments, raising specific concerns about, for example, the freedom of movement restrictions, intimidation of journalists, domestic violence or the treatment of people with disabilities, children, and people deprived of liberty.³⁷⁴

GOOD PRACTICES

ODIHR has observed a number of good practices pertaining to the protection and support for human rights defenders. For example, some participating States, including Romania and Slovakia, have collaborated with civil society to develop websites providing up-to-date information about Covid-19 and the measures taken by governments to respond to the spread of the disease.³⁷⁵ In Norway, the local authorities have supported a civil society initiative launched to assist people, through a hotline, in accessing information of public interest on Covid-19 in different languages.³⁷⁶

In April, a number of participating States that are part of the Group of Friends on Safety of Journalists within the OSCE co-signed a joint statement to highlight the need to ensure the safety of journalists and access to information during the pandemic. They called upon all states to protect media representatives and guarantee unhampered access to information, both online and offline.³⁷⁷

[Websites that have been penalised for fake news. One of them was blocked because ‘it constantly published false information with the purpose of spreading disinformation and creating panic’], [Paginademedia.ro](#), 26 March 2020; **OSCE Representative Désir concerned by several cases of restrictions on media publication linked to false information on COVID-19 in the Russia**, OSCE Representative on Freedom of the Media, 2 May 2020.

369 **Seven organisations call on the Slovenian government to stop harassing an investigative journalist**, Reporters Without Borders, 27 March 2020.

370 Especially NHRIs from **Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Luxembourg and the Netherlands** emphasized several challenges and barriers in relation to carrying out their investigation and monitoring function. ENNHRI, **The rule of law in the European Union**, 11 May 2020, p. 27.

371 *Ibid.*

372 In this context, some NHRIs reported an increase of complaints during the time of the Covid-19 pandemic, including, for example, **Armenia, Bulgarian, Estonia, Slovenia, Montenegro and Russia**. Other NHRIs have experienced a decrease, such as **the Netherlands and North Macedonia**. ENNHRI, **State of the rule of law in Europe**, 29 June 2020, p. 36.

373 See, e.g., **Slovakia, Ombudsmanka: Rozprava v parlamente vo mne vzbudila obavy o práva žien**, [Ombudsman: Parliament’s debate has raised concerns about women’s rights], [dennikn.sk](#), 22 May 2020.

374 **COVID-19 Guidance**, OHCHR. For more specific examples of the recommendations see **Bulgaria’s example of how NHRIs are responding**, ENNHRI

375 **Collecting Open Government Approaches to COVID-19**, Open Government Partnership.

376 *Ibid.*

377 **Joint statement on safety of journalists and access to information during the COVID-19 crisis**, 16 April 2020.

RECOMMENDATIONS

- Ensure that attacks and threats faced by human rights defenders, including journalists and whistle-blowers, are investigated and addressed in a prompt, thorough and efficient manner.

- Investigate promptly, independently, impartially and effectively any reported cases of administrative or judicial harassment of human rights defenders, including journalists and whistle-blowers. Ensure access of human rights defenders to effective remedies.
- Publicly condemn attacks and threats against human rights defenders, including journalists and whistle-blowers, and raise public awareness of the positive role played by civil society in the context of the pandemic. Acknowledge the key role of civil society in promoting awareness, accountability and the respect for human rights, fundamental freedoms, democracy and the rule of law, especially during times of crisis.
- Ensure that human rights defenders, including journalists and whistle-blowers are protected from retaliation and any form of administrative or judicial pressure, including through undue application of legislative and other measures adopted in response to the Covid-19 outbreak.
- Ensure that information of public interest, including related to Covid-19 and governments' response to the crisis, is made available online on a regular basis and is provided to civil society upon their request.
- Ensure adequate public funding for NGOs and access to financial and other resources for civil society organizations, in particular smaller ones working at the grassroots level, during the pandemic.
- Ensure meaningful participation of civil society and NHRIs in decision-making processes pertaining to governments' responses to Covid-19.
- Improve co-operation and communication with NHRIs when developing and implementing measures to combat Covid-19.
- Ensure effective implementation of NHRIs' recommendations, including those related to the public health response and emergency measures. Inform the public on a regular basis of the implementation progress.
- Ensure that NHRIs may exercise their monitoring functions, especially when freedom of movement restrictions are still in place.
- Refrain from cutting financial resources allocated to NHRIs and secure sufficient financial and other resources for NHRIs to ensure that they may exercise their mandates effectively and independently.

II.2 SPECIFIC HUMAN RIGHTS CHALLENGES

The interconnectedness and indivisibility of human rights implies that the impacts of something as massive as the present pandemic are complex and extend across the whole range of the human rights canon. However, a number of rights and freedoms were particularly affected by the emergency measures taken to contain the spread of the virus, mostly in states' efforts to stem the pandemic with the aim to protect the right to life and the right to health. The rights and freedoms analysed more in depth here are all gateway rights, in the sense that their exercise conditions the enjoyment of other rights. For instance, the freedom of movement is intrinsically connected with the right to work, the right to education, the right to health and other social, economic and cultural rights, as well as civil and political rights. The freedom from torture and arbitrary detention is closely connected with the right to health, and the freedoms of assembly and association are key for democratic participation and elections. The freedom of religion and belief, in particular regarding the manifestations of one's religion in community with others, was an early and obvious victim of various distancing rules and restrictions. The right to a fair trial is essential for the rule of law, not only with regard to the implementation of emergency measures but any other rights guaranteed by international law and commitments.

II.2.A FREEDOM OF MOVEMENT

The coronavirus was able to spread globally, easily traveling across borders and into remote areas, by taking advantage of unprecedented human interconnectivity and movement. Freedom of movement both within countries and across international borders was therefore an early victim of responses and emergency measures as states scrambled to slow transmission of the virus. Movement drastically slowed down in most countries, both as a result of enforced lockdowns and voluntary measures.³⁷⁸

As early as 1975, OSCE participating States committed to "facilitating freer movement and contacts...among persons institutions and organizations of participating States," and recognized this as an important element in the strengthening of friendly relations and trust among peoples.³⁷⁹ In Vienna (1989), participating States further committed to "fully respect the right of everyone to freedom of movement and residence within the borders of each State" and "the right to leave any country," which was reiterated in Copenhagen (1990).³⁸⁰ Freedom of movement is therefore a core commitment of the OSCE acquis and has become a reality taken for granted by hundreds of millions across the region. Freedom of movement is also firmly enshrined in international human rights law. Art. 12 of the ICCPR stipulates the right of persons to move freely within a state, the right to leave a country and the right to return to one's country. General Comment 34 underlines that all residents, including aliens, are protected by the Covenant. Freedom of movement standards can also be found under Art. 13 of the Universal Declaration of Human Rights and Art. 2, Protocol 4 of the ECHR. Freedom of movement is also a prerequisite for the enjoyment of a broad range of civil, political, economic, social and cultural rights, including non-derogable rights such as the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment.

When most states introduced drastic movement restrictions, including lockdowns and border closures, they justified these actions on the basis of the need to protect the population from harm, and to guarantee the right to life and the right to health. While certain restrictions on freedom of movement are permissible in times of emergency and under international law, including for reasons of security and public health, they, like other derogations or restrictions, must be strictly necessary for that purpose, proportionate to the interest to be protected and non-discriminatory. (See Part I for

³⁷⁸ For a detailed analysis of mobility data, see, for instance, **Google Mobility Trends: How has the pandemic changed the movement of people around the world?**, Hannah Ritchie, 2 June 2020

³⁷⁹ **Conference on Security and Co-operation in Europe, "Helsinki Final Act"**, Helsinki, 1 August 1975

³⁸⁰ Concluding Document of the Third Follow-up Meeting, Vienna 29 June 1990.

further information on derogations.) They also must be provided in law, must be the least intrusive instrument for the desired result, consistent with other rights and limited in time.

General Comment No. 27 of the ICCPR elaborates that restrictions to the right to freedom of movement (Art. 12) are permitted, but any restrictions must be provided for in law that specifies the conditions and duration under which the rights may be limited (the duration should in any case be 'expeditious') and the legal remedies that are available due to such restrictions. Any legislation or policies on freedom of movement of participating States should follow these legal tests if derogations or restrictions are invoked or applied. Finally, in situations of conflict, in addition to human rights standards, relevant provisions under the law of armed conflict, and soft law documents such as Guiding Principles on Internal Displacement³⁸¹ provide a framework for parties of any given conflict to follow in relation to freedom of movement.

Eight participating States formally derogated from Article 12 of the ICCPR,³⁸² while six have derogated from Article 2 Protocol 4 of the ECHR during the pandemic.³⁸³ Participating States have placed a number of restrictions on international freedom of movement (between states) and internal freedom of movement (within states) to curb the outbreak of the virus. Restrictions include the closing of land borders (both incoming and outgoing), airports and ports, restrictions of movement between cities and/or regions, the quarantining of cities or regions, the imposition of quarantines at borders or in one's home and/or curfews, and the permission of internal movement only for specific purposes including *inter alia* grocery shopping, medical visits, visits to pharmacy, and exercise. Moreover, there have been specific restrictions for certain categories of people, in particular people of advanced age.

381 The **Guiding Principles on Internal Displacement** (E/CN.4/1998/53/Add.2) restate and compile human rights and humanitarian law relevant to internally displaced persons.

382 **Albania, Armenia, Estonia, Georgia, Latvia, Moldova, Romania, and San Marino.**

383 **Albania, Estonia, Georgia, Latvia, Moldova and North Macedonia.**

Some participating States have restricted international movement through the suspension of flights from specific countries or regions, particularly high-risk areas, closing land border crossings with certain countries and allowing movement only within a specific region. Others have employed a stricter approach fully closing their land borders, ports and airports, allowing passage only to diplomats for humanitarian reasons or for repatriation. Some regional approaches have been taken in the OSCE area, such as the recommendations issued by the European Commission on 16 March 2020, to EU Member States to apply a 30-day restriction of non-essential travel from third countries into the EU.³⁸⁴ These recommendations were endorsed and applied by most EU Member States and non-EU Schengen countries³⁸⁵ and were renewed for another 30 days.³⁸⁶

Upon departure or arrival, some states required that passengers have their temperature measured. Some states provided for state quarantines at entry points or required self-isolation (usually 14-day) quarantines in order to permit entry, or only once persons who may possibly be infected were identified. Quarantines were often monitored by telecommunications systems (i.e., GPS, mobile applications or CCTV) or simply through frequent police visits.³⁸⁷ Several countries required negative tests for visitors before being allowed to enter.³⁸⁸

Starting at the end of April, a number of States decided to reopen their international borders, or developed

384 **“Communication from the Commission: Temporary Restriction on Non-Essential Travel to the EU”**. 16 March 2020.

385 Currently, the Schengen Area consists of 26 member countries. **Iceland, Norway, Switzerland and Liechtenstein** are associate members of the Schengen Area but are not members of the EU. **Monaco, San Marino**, and Vatican City/**Holy See** have opened their borders with, but are not members of the visa free zone.

386 **“Communication from the Commission to the European Parliament, The European Council and the Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU”**, 8 May 2020.

387 For example in **Poland**, see **“Poland: App helps police monitor home quarantine”**, Privacy International, 19 March 2020.

388 For example in **Austria, Cyprus, Czech Republic, Estonia, Greece, Iceland, Portugal, Slovakia, Slovenia**, and **Switzerland**.

regional approaches (“bubbles”) to ease travel.³⁸⁹ On 15 April, the European Commission called for a co-ordinated approach towards the lifting of restrictions prioritizing internal movement (restoration of the Schengen area) and easing restrictions with third countries as a second stage.³⁹⁰ However, many travel restrictions remain in place across the OSCE region at the time of reporting, likely to continue throughout the duration of the pandemic.

In addition to travel restrictions and conditions of entry, participating States have introduced internal freedom of movement restrictions in their efforts to curb the spread of the pandemic. Measures introduced have generally shifted depending on specific country developments and have varied in severity. They include

general curfews or curfews for specific parts of the population, physical distancing, self-isolation, self-induced quarantines, the quarantines of specific cities or establishments, the permission of movement only for specific purposes and/or during specific times and within specific geographic proximities. Public and private transport has also been affected to varying degrees. These measures have been monitored through various methods, including mobile phone applications, GPS signals, police checks on quarantines, drones, CCTV, location bracelets or police patrols. (A more detailed account and implications of such monitoring systems can be found in Part I.3) In some states in conflict situations (including post-conflict), additional measures and restrictions on internal movement including at crossing points were introduced by different parties.³⁹¹

³⁸⁹ Examples include border openings between the Baltic states and with neighbouring countries. For example, **Estonia's** government on 8 May decided that the restrictions for border crossings between Estonia and Finland would be eased as of Thursday, 14 May. **Austria** opened its borders with Czech Republic, Slovakia and Hungary (17 May), and travel restrictions were lifted between certain countries in the Western Balkans as of June 15.

³⁹⁰ **Joint European Roadmap towards lifting COVID-19**, 15 April 2020. The document prioritizes co-ordination on cross-border travel and seasonal workers but also working together to plan summer holiday travel. It prioritizes internal movement before restrictions at the external borders can be relaxed in a second stage.

³⁹¹ For example, in eastern **Ukraine**, a number of people were stuck at crossing points in mid-April unable to return to their homes after visiting family and exposed to active fire.

The variety of restrictions on internal movement introduced by participating States and enforcement mechanisms are schematically summarized in the table below:

CURFEWS	RESTRICTIONS ON INTERNAL MOVEMENT	QUARANTINES AFTER INTERNATIONAL TRAVEL, OR CONTACT WITH INFECTED PERSON	TRANSPORTATION
During specific times during the day/evening.	Social distancing guidelines – no to minimal enforcement.	14 days – Self-isolation – not monitored	No disruption, distancing and face covering required
Complete or for specific dates that are deemed risky (eg. Public holidays lasting the duration of, for example 48 hours or 60 hours). Monitored by law enforcement, lack of adherence may result in fines or imprisonment.	<p>Movement allowed but only for reasons allowed by government (usually for work, medical needs, groceries, exercise, assistance to vulnerable people, charity work, etc.). No permission or permission required (via applications, papers, etc.)</p> <p>Enforcement by police, penalties vary from fines to imprisonment.</p> <p>Number of times able to move from dwelling vary from once a day to indefinite times per day.</p>	<p>14 days self-isolation – monitored by the police or via online applications/web surveillance systems, CCTV.</p> <p>Non-compliance resulting in fines or imprisonment.</p>	<p>Some disruption or restrictions of number of people within train carriage, bus, tram.</p> <p>Fewer available routes.</p> <p>Restriction of use of bicycles.</p>
Complete curfews for certain parts of population, people aged above 65–70, people with underlying health conditions, pregnant women	Geographical limitations – movement for reasons specified, allowed only near place of residence (e.g., going for a walk within 2 km from one's house), within the same municipality.	14 days, organized by state at borders for new entrants from high-risk countries or other criteria.	No public transport.
	Residency limitations: People only allowed to move inside their place of residence. Enforced by police.	Quarantines of entire cities/ municipalities enforced by the state.	Use of private vehicle: Permission required through various means including obtaining a permit in the government transport offices or via applications. Enforced by police – failure to comply vary from fines, confiscation of driver's license for varied periods of time, and confiscation of license plates.
	Restrictions in crossing administrative boundary lines in contested territories.	Quarantine in migration centres or other settlements, enforcement by army/police	

AREAS OF CONCERN

During the early phases of the pandemic, the closures of borders and air-travel were imposed very quickly by most participating states (becoming effective within 24 to 48 hours), leaving people including migrants, tourists and other travellers stranded at airports and land borders, unable to leave and return to their place of residence, when they did not reach the borders or airports on time. Reports include cases of evictions at airports when travel was not made possible.³⁹² Some countries in the EU provided unclear guidelines on the right of third country (non-EU and EEA), residents to enter irrespective of holding a permanent residence permit, and required medical examinations and registry with the epidemiological authorities, a measure not necessary for permanent residents from the EU and EEA countries.³⁹³ Further, outside of the EU, some states introduced mandatory quarantines run by the state at facilities such as hotels.³⁹⁴

Any discriminatory practice conditioning return for certain groups due to Covid-19 is not in line with international standards and OSCE commitments. Other concerns include the well-being of persons with expiring documents (resident permits, visas, etc.), who could not leave in before their documents expired. While the aim of internal restrictions on movement was generally to protect persons from contamination, including those most vulnerable, excessive restrictions can lead to violations of other rights, which may not be proportional

392 ODIHR received reports of 300 migrants, including approximately 200 from **Tajikistan**, stuck for up to two weeks at an airport in the **Russia**. There were also reports of migrants stuck at the border between **Uzbekistan** and **Kazakhstan** at the end of March. Local residents and the local administration provided food and tents.

393 EU Fundamental Rights Agency, **Coronavirus Pandemic in the EU – Fundamental Rights Implications**, 1 February to March 2020, and **Hungary**, Consular Service (2020), Information on entry requirements due to COVID-19 situation, 25 March 2020

394 For example, **North Macedonia** and **Albania**, where permanent residents entering the country were required to undergo a 14-day quarantine. Some civil society reports have pointed to concerns of discriminatory practices in this requirement, namely applying to persons from the Roma community. See, for instance, a **report** on Roma being quarantined at the border to **North Macedonia**. See also the section on Roma and Sinti, below.

to the aim and may not be necessary, as other less intrusive measures can achieve the same result.

Complete curfews on certain groups could leave people completely reliant on state or volunteer services to obtain medicine, food and other essential items, or socially isolated, even when they are healthy and able.

For example, internal movement restrictions on care providers in at least one participating State reportedly led to the death of the elderly or the seriously ill, which could have been averted with clear instructions for care-workers.³⁹⁵ The decision to impose a complete curfew on certain groups such as the elderly, pregnant women or youth, which has been the practice in several participating States, could leave them completely reliant on state or volunteer services to obtain medicine, food and other essential items, or socially isolated, even when they are healthy and able. Single pregnant women could also be left particularly vulnerable. In addition, older people, may be in good health and/or may require exercise for their particular health condition. Complete bans on movement for these groups may be disproportional to the legitimate aim.

While the aim of internal restrictions on movement was to protect people's health, including those most vulnerable, excessive restrictions can lead to violations of other rights, which may not be proportional to the aim and may not be necessary, if other less intrusive measures can achieve the same result.

Most participating States introduced enforcement measures to discourage the breaking of curfews and/or quarantines. As indicated in the schematic overview above, some countries introduced imprisonment or monetary fines. Extreme punitive measures included imprisonment of up to five years or extremely high

395 EU FRA, **Coronavirus Pandemic in the EU – Fundamental Rights Implications**, 1 February to March 2020

finer.³⁹⁶ While these sanctions may serve as a disincentive, it is important that policies introduced are proportional and necessary. It is also important for states to note that as provided in the UN OHCHR Guidance on the use of force by law-enforcement personnel in times of emergency, “breaking a curfew, or any restriction on freedom of movement, cannot justify resorting to excessive use of force by the police; under no circumstances should it lead to the use of lethal force.”³⁹⁷

Other concerns related to the right to privacy and the publicly published data of infected persons, or cases where ‘warning labels’ were placed on the doors of residents to indicate infection.³⁹⁸ Most states used some form of surveillance, varying from mobile applications (voluntary or compulsory), GPS systems, CCTV, monitoring bracelets and drones, to monitor compliance with lockdowns or quarantines. EU Member States agreed on a protocol to ensure cross-border interoperability of voluntary contact tracing apps, so citizens can be warned of a potential infection when they travel within the EU.³⁹⁹ The long-term implications of these measures on privacy and other rights are still unknown, however, it is important that legislation provide safeguards and security measures to preclude leaks of personal data or third party access to such data, and limitations on the duration that data is stored. (See also section on surveillance in Part I).

In some participating States public transport restrictions impacted medical and other essential staff from reaching their work. Persons wishing to return home from state quarantines at land borders also struggled where no public transport was available. Some countries confiscated drivers’ licenses and vehicle license

plates for violating restrictions.⁴⁰⁰ While this can be seen as a means to discourage movement, the impact such a measure could have on the ability of people living in isolated areas to shop for food, reach medical services or to buy medicine, may be disproportional, if other less intrusive measures can be imposed to achieve the same result.

In some states, with active conflicts, some people were stuck at checkpoints that were closed, making them unable to return home and potentially exposing them to active fire.⁴⁰¹ This is of particular concern to their right to life, but also their right to leave and return. Furthermore, certain populations were prevented from accessing healthcare and medical facilities and some difficulties with the movement of medical personnel. In some post-conflict countries, populations including elderly returnees living in remote areas were not able to access healthcare, medicine or other provisions.⁴⁰²

GOOD PRACTICES

Many participating States organized repatriation charter flights for nationals or residents, in some cases subsidizing flights.⁴⁰³ ‘Emergency corridors’ were introduced across certain land borders and airports to allow persons transiting countries to pass through for specific periods of time.

In order to prevent hardships which could arise for migrants or travellers with expiring documents, such as residency permits or visas who could not return, many countries automatically extended all ID documents and residency permits for the duration of the Covid-19 crisis, or for specific periods (ranging from one to three months).⁴⁰⁴ Some countries introduced systems to regularize irregular migrants for the period (See also the

³⁹⁶ For example in **Albania** and **Bulgaria**. See also Chapter I for more information on sanctions for violating restrictive measures.

³⁹⁷ Office of United Nations High Commissioner for Human Rights, 17 April 2020, **COVID-19 security measures no excuse for excessive use of force, say UN Special Rapporteurs**.

³⁹⁸ EU Fundamental Rights Agency, Coronavirus Pandemic in the EU — Fundamental Rights Implications, 1 February to March 2020, Section 1.1.1 Enforcement and penalties

³⁹⁹ **Communication** From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tourism and transport in 2020 and beyond, 13 May 2020

⁴⁰⁰ For example, in **Greece** and **Albania**.

⁴⁰¹ See, for example, a report on eastern **Ukraine: Dozens Stranded in a War Zone – Authorities Close Crossing Points in Eastern Ukraine Due to COVID-19**.

⁴⁰² Examples have been reported from **Bosnia and Herzegovina**. Isolation from public services is a problem in many rural and remote areas but is exacerbated as a long-term effect of conflict.

⁴⁰³ For example, in the **United Kingdom** or **Sweden**.

⁴⁰⁴ Euronews, **Portugal grants temporary citizenship rights to migrants**, 29 March 2020.

section on migration, below). The EU issued a clarification on the obligation of its Member States to allow entry not only to all nationals, EU and EEA residents but also to third country nationals who are residents in the EU.⁴⁰⁵

Many participating States did not introduce curfews or restrictions for specific age groups or groups perceived vulnerable, but instead provided recommendations and guidelines while applying the same rules for everybody. Several States introduced schemes for vulnerable persons including developing volunteering networks to deliver food and supplies, hotlines for emergency services, online shopping platforms targeting only such groups, schemes that provide medical stock for a two-month period, or introduced shop opening times only allocated for elderly and vulnerable groups.

405 **Communication** From the Commission to the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU, 8 May 2020

Regarding data-protection and the use of tracking devices and other surveillance methods, the EU decided that any measures introduced that would affect the rights to private life and data protection should be grounded in law, necessary, proportionate, and should cease at the end of the pandemic. Data collected during the emergency should also be treated according to ordinary procedures.⁴⁰⁶

Co-operation among different sides of conflicts in some regions on the transportation of sick people across administrative boundary lines via liaison officers and the introduction of measures to allow quarantine-free passage of medical personnel living on either side of the relevant territories was also noted as a good practice.⁴⁰⁷

406 See European Parliament article on “**Covid-19 tracing apps: ensuring privacy and data protection**” from 15 May 2020.

407 Such examples have been reported from **Kosovo**. Please see OSCE disclaimer on page 26.

RECOMMENDATIONS

- Provide timely information about land and sea border openings and closings and on airport travel restrictions through official government and consular websites, radio and television communication. Continued arrangements should be made to repatriate persons who would otherwise be stranded via special flights, and subsidized, when possible, for people requiring this. Return for all legal residents should be facilitated without discrimination and communicated accordingly. Timely information should be provided to all returnees on the pandemic-related measure upon arrival, including quarantine and other requirements, contact details and hotlines in all relevant languages.
- When state quarantines are imposed, border guards and other relevant personnel should be trained to impose isolation measures in a non-discriminatory fashion. State-run quarantine premises should ensure that health standards are able to be maintained. Travel home from state-run quarantines should be facilitated through the continuation of public transport or other means, as long as appropriate safety measures are observed due to the elevated risks of infection in public transport.
- A thorough analysis of lessons learned from agreements reached and practices to facilitate the passage of persons through land borders designating corridors for return should be conducted. These lessons could help to develop rules that are practical and feasible for travellers and border authorities, and relevant authorities should be trained accordingly on providing necessary information to travellers at border points.
- Extend residency permits, work permits, IDs and other expiring documents to facilitate the legal stay in case return is not desired or possible. States should also explore possibilities to provide temporary residence for irregular migrants.
- Complete curfews or lockdowns for the elderly, pregnant women and or/youth should be avoided, instead governments should provide recommendations on risks associated to each group, while allowing at least minimum movement, determined by consultations with the target groups, or lessons learned. Services

should be arranged through hotlines, to provide support to people unable to care for themselves, including the acceptance of referrals to ensure that no-one is left without necessary supplies. All available measures should be widely advertised in languages that will reach the entire population. Comprehensive information on all services and the necessary contact information should be provided through a designated government website, and other tools to disseminate the information as widely as possible and in a format that is accessible.

- Guidelines for care providers should be drafted and communicated to ensure that vulnerable persons are not endangered due to freedom of movement restrictions.
- States should abstain from introducing disproportionate punitive measures, instead opting for proportionate fines as a penalty for violating internal movement restrictions or through encouraging voluntary compliance. States should also ensure that police or other state actors, including the army, do not use excessive force when enforcing measures. Training on this should be organized by the state, and complaint mechanisms should be widely advertised.
- In situations of conflict, people stuck at checkpoints, or who wish to return to their homes, should be allowed to cross and, if necessary, quarantined for the required period. Special arrangements for medical staff should be made. Crossings for medical purposes should still be facilitated, including through intermediaries, such as the Red Cross. Returnees living in remote areas, unable to move, should be assisted by state and non-state actors

II.2.B FREEDOM FROM TORTURE AND ILL-TREATMENT AND ARBITRARY DEPRIVATION OF LIBERTY

The freedom from torture and ill-treatment are fundamental rights enshrined in international human rights law⁴⁰⁸ and have since been further elaborated by a number of international human rights instruments at the international and the regional level, including OSCE commitments. The prohibition against torture is absolute and non-derogable.

The prohibition of torture means that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁰⁹ The prohibition against torture includes the obligation of states to actively prevent torture and other ill-treatment through different preventive

measures.⁴¹⁰ Factors that place detainees and prisoners in situations of vulnerability (and increase the risk of torture or other abuse) include: “a power imbalance between detainees and those in charge of them, an almost complete dependency upon the institution which has deprived them of their freedom or limits their movements, weakened social ties and stigmatization related to detention.”⁴¹¹ The prevention of torture, in particular in settings where people are deprived of their liberty, but also the investigation, prosecution and punishment of such acts have suffered a setback during the current pandemic.

The prevention of torture, in particular in settings where people are deprived of their liberty, but also the investigation, prosecution and punishment of such acts have suffered a setback during the current pandemic.

408 See, Art. 9 of the UDHR.

409 See, for instance, Copenhagen Document (1990), para.16.3; see also: UNCAT, Art. 2(2) and ICCPR, Art. 4 and 7; **Emergency Measures And Covid-19: OHCHR Guidance**; and **Statement of UN Special Rapporteurs, ‘COVID-19 security measures no excuse for excessive use of force, say UN Special Rapporteurs’**, 17 April 2020.

410 OSCE participating States have committed to “prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;” (Vienna 1989)

411 See ATP’s **page** on groups in situations of vulnerability.

The pandemic not only brought to light the pre-existing shortcomings in penitentiary systems or other places of deprivation of liberty, such as overcrowding, lack of or insufficient access to health care or unsanitary conditions of detention, which could amount to ill-treatment or even torture. It also posed additional challenges to the fight against torture. For instance, in addition to existing places of deprivation of liberty,⁴¹² new places of detention have emerged in the course of the current crisis, such as quarantine centres or places where people are not allowed to move freely. In fact, the measures taken in response to the pandemic have placed much of the population in participating States in some form of isolation, confinement or quarantine. In this extraordinary situation, deprivation of liberty has taken on new dimensions. In addition, one of the key safeguards against torture and other ill-treatment, the independent monitoring and oversight of places of detention, has been either suspended completely or has been only partially functional since the beginning of the pandemic in the majority of states.⁴¹³

Measures taken in response to the pandemic have placed much of the population in participating States in some form of isolation, confinement or quarantine. In this extraordinary situation, deprivation of liberty has taken on new dimensions.

Places of deprivation of liberty became further isolated from the outside world during the pandemic as a result of the preventive health measures leading to a situation where torture or ill-treatment may occur behind closed doors, out of sight of monitors, inspectors, civil society organizations, lawyers and the public.⁴¹⁴ Current limitations to the effective functioning of state institutions and the judiciary across the OSCE region may pose additional challenges to the investigation, prosecution and punishment of acts of torture or other ill-treatment, thereby decreasing accountability for such acts and fostering impunity.

This section cannot examine all ways in which the pandemic has complicated efforts to eradicate torture and ill-treatment in the OSCE region. It highlights some immediate concerns about a) conditions of detention and effects of restrictive measures in places of detention that could amount to ill-treatment or even torture and b) key challenges that inhibit the prevention of torture or its effective investigation.

States have a “heightened duty of care to protect the lives of individuals deprived of their liberty”⁴¹⁵ and they must provide medical treatment to protect and promote the physical and mental health and wellbeing of prisoners.⁴¹⁶ As stated by the Committee against Torture,

412 This includes prisons, pre-trial detention facilities, police custody, interrogation centres, military detention facilities, immigration detention centres, elderly homes and psychiatric institutions. According to Article 4 *Optional Protocol To The Convention Against Torture (OPCAT)*, places of detention means: “any place [...] where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). [...] deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”

413 With regard to National Preventive Mechanisms, decisions to undertake or suspend visits to places of deprivation of liberty fall within the prerogatives of NPMs themselves, and not of national, or subnational, authorities. Monitors are impacted by the restrictive measures for the general population (such as physical distancing and restrictions of movement, as well as the lockdown of places of deprivation of liberty). In the OSCE region, most NPMs (out of the 39) have decided to suspend in person visits from mid-March. Only in **Italy** have onsite visits continued without limitations. There are examples in *APT/ODIHR Guidance on Monitoring Places of Detention through the COVID-19 pandemic*, 3 June 2020.

414 *Ibid.*, See for example **blog on living-in prison officers in Georgia** (a practice also implemented in **Malta** and the **Russian Federation**); and the introduction of living-in prison officers in **Malta, the Russian Federation and in Georgia**.

415 UN Human rights committee, General Comment no. 36, para. 25. “The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriately regular monitoring of their health, [89] shielding them from inter-prisoner violence, [90] preventing suicides and providing reasonable accommodation for persons with disabilities. [91]”

416 ODIHR/PRI *Guidance Document on the Nelson Mandela Rules: Implementing the UN Revised Standard Minimum Rules for the Treatment of Prisoners* (2018), Chapter 6,

overcrowding, poor hygiene in prisons and the lack of appropriate medical treatment “aggravate the deprivation of liberty of prisoners (...) making of such deprivation cruel, inhuman and degrading punishment.”⁴¹⁷

In the OSCE region, overcrowding and poor hygiene in prisons endanger the health of prisoners and provide fertile ground for the spread of communicable diseases like Covid-19.⁴¹⁸ Persons deprived of their liberty are particularly vulnerable to infectious diseases because of their inability to protect themselves because of the often-limited access to healthcare and the lack of necessary hygiene, sanitation and medical equipment, as well as their underlying health conditions.⁴¹⁹ In closed facilities, people are under the care and control of authorities for most aspects of their daily lives. In such contexts, failing to protect persons deprived of liberty from a serious disease as a result of a lack of precaution or due diligence may amount to ill-treatment.⁴²⁰ Women prisoners face a specific and additional set of

challenges.⁴²¹ Another concern is that people from marginalised and impoverished backgrounds are over-represented in prison⁴²² and they may be even more vulnerable to such diseases for various reasons.⁴²³ Reports from across the OSCE region indicate that overcrowded prisons severely limit the possibility for prisoners to physically distance themselves from one another.⁴²⁴ A distinct lack of personal protective equipment for prisoners, as well as staff, but also access to testing, water and hand sanitiser has been noted in many states.⁴²⁵

Persons deprived of their liberty are particularly vulnerable to infectious diseases because of their inability to protect themselves because of the often-limited access to healthcare and the lack of necessary hygiene, sanitation and medical equipment, as well as their underlying health conditions.

Numerous legal challenges have already been started in the OSCE region that argue that states are failing to protect the health and safety of prisoners because of conditions of detention, coupled with the heightened risks that Covid-19 poses to (overcrowded) prison

para. 1; See also Nelson Mandela Rules 24, 25, 27 and 30: As part of their commitment to treating individuals in detention with humanity and respecting their inherent dignity, participating States have committed to observing the internationally recognized standards relating to the administration of justice and the human rights of detainees, including the Standard Minimum Rules (SMR) for the treatment of prisoners, nowadays called the Nelson Mandela Rules (Vienna 1989) (*Kudła v Poland* (no. 30210/96, ECHR 2000-XI).

417 **Statement** by the Committee against Torture, A/56/44. **Statement** by the Committee against Torture, A/56/44, Para. 95f; see also **ECtHR jurisprudence** on violations of Article 3 relating to prisoners' health-related rights; on the hygienic conditions of cells see: *Clasens v. Belgium* 28 May 2015 or *Petrescu v. Portugal* 3 December 2019; on personal space in multi-occupancy cell and prison overcrowding see: *Varga and Others v. Hungary* 10 March 2015 or *Ferreggiani and Others v. Italy*; on solitary confinement see: *Ocalan v. Turkey* (no. 2) 18 March 2014.

418 Infection rates for tuberculosis are between 10 and 100 times higher than in the community, as has been **documented** by a number of reports.

419 See for instance, “**Building our response on COVID-19 and Detention – OMCT guidance brief to the SOS-Torture Network and partner organisations**”; on the **right to health and hygiene** or on the special **focus on health in prisons**.

420 See **ECtHR jurisprudence** above. See also UN Special Rapporteur on torture and other cruel inhuman or degrading treatment, ‘Interim report’, **A/68/295**, 9 August 2013, para. 50; or **OHCHR COVID-19 Dispatch – Number 2**.

421 As **noted** by PRI, “women in prison have complex health needs with disproportionate rates of underlying health conditions compared to women in the community. This fact coupled with overcrowded and unhygienic prisons (...) puts women at great risk of contracting Covid-19. High numbers of women also enter prisons pregnant or having recently given birth, as drug users and/or with serious physical and mental effects of violence and related trauma.”

422 *Ibid.* and see the **report on global prison trends** by Penal Reform International (PRI), p. 7.

423 In the **United States**, for instance, minorities, including African-Americans, are disproportionately represented, both among the prison population and among those succumbing to Covid-19. On 29 May, **UN human rights experts urged** the United States to do more to prevent major outbreaks of Covid-19 in detention centres.

424 **Austria, Belgium, Czech Republic, Denmark, France, Greece, Hungary, Italy, Malta, Portugal, Romania, Russian Federation, Serbia, Slovenia, Turkey, United Kingdom** and **United States**. See also a **graph of prison overcrowding across Europe**.

425 For example: **Armenia, Belgium, France, Greece, Italy, United States** and **Turkey**. For the latter, see for instance, **Covid-19 Spreading Fast in Turkey’s Prisons, Rights Defenders Warn**.

populations, which could amount to inhuman or degrading treatment.⁴²⁶ While restrictive measures implemented by most states may be necessary and in the public interest, they need to be properly assessed in conjunction with the fundamental rights and freedoms that are curtailed in order to be proportionate and, therefore, in accordance with international human rights standards and OSCE commitments.

To limit the spread of Covid-19, many states have implemented restrictive measures in prisons, temporarily suspending physical visits from family, friends and sometimes even lawyers – despite the fact that the denial of family visits can be considered ill-treatment in itself.

Contact with the outside world is crucial to the material and psychological health and well-being of prisoners and other persons deprived of liberty and acts as a key safeguard against torture or other ill-treatment. It also provides opportunities for reporting human rights violations, including torture or other ill-treatment.⁴²⁷ To limit the spread of Covid-19, many participating States have implemented restrictive measures in prisons, temporarily suspending physical visits from family, friends and sometimes even lawyers – despite the fact that the denial of family visits can be considered ill-treatment in itself.⁴²⁸ As stated by the UN Subcommittee on the prevention of torture, in situations where visiting regimes

are restricted for health-related reasons, states must “provide sufficient compensatory alternative methods for detainees to maintain contact with families and the outside world, for example, by telephone, Internet/email, video communication and other appropriate electronic means. Such contacts should be both facilitated and encouraged, be frequent and free.”⁴²⁹ Although there are many positive examples of how OSCE participating States introduced innovative compensatory measures,⁴³⁰ there are also worrying reports that they are often not satisfactory. In some countries, there is a lack of telephones or videoconferencing equipment and calls are not offered for free or for an extended period of time.⁴³¹

The pandemic and resulting restrictive measures leading to heightened isolation have caused widespread fear and confusion among prison populations, for instance due to the lack of masks and poor communication about the nature and scope of preventive measures.⁴³² Across the region, there have been hunger strikes⁴³³ and prison protests or riots⁴³⁴ as an expression of anger against the suspension of visits (and conditions of detention). In some contexts, the suppression of riots has resulted in alleged excessive use of force by

426 For an example from the **United Kingdom**, see *Hafeez vs. UK; Manning, R. v (Rev 1)*, [2020] EWCA Crim 592 (30 April 2020), giving the lead judgment in the Court of Appeal, the Lord Chief Justice considered that the impact of a custodial sentence is likely to be heavier during the coronavirus pandemic than it would otherwise be, and that this was a factor that judges and magistrates can and should keep in mind when sentencing; Similarly, a **report** on a claim from **Canada**; an **example** about legal action in **France**; and an **account** about a law suit in the **United States**; which **claimed** inmates are unable to socially distance and have insufficient access to personal protective equipment and cleaning supplies, as well as inadequate medical treatment. Similar cases were also opened in **Spain**.

427 ODIHR/PRI, **Guidance Document on the Nelson Mandela Rules**, Chapter 5, para. 13–15.

428 UN Special Rapporteur on torture, Report to the Human Rights Council on observations on communications transmitted to Governments and replies received, 12 March 2013, A/HRC/22/53/Add.4, para. 20.

429 **Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic** (adopted on 25th March 2020).

430 See e.g., ODIHR/APT, *Monitoring Places of Detention Through the COVID-19 Pandemic* p. 23. **Italy**; other examples of extended phone times and videoconferencing include using Skype (**Albania**) or Zoom (**United States** – Pennsylvania), **United Kingdom secure video calls** at distribution of pre-paid phonecards (**Spain**) or tablets (**Norway**); more access to TV, radio and press (**Poland, Estonia**); **Prison service allows family members to pay money at post offices for the benefit of their relative in prison that can be used for phone calls (Ireland)**; or the distribution of one laptop computers for every 100 inmate aiming to give prisoners access to remote visits via video conferences (**Belgium**).

431 **Austria, Hungary and Italy**. There are also worrying **reports about monitoring prisoner phone calls** for mentions of Covid-19.

432 See APT/ODIHR *Guidance on Monitoring Places of Detention through the COVID-19 pandemic*

433 **Croatia, Luxembourg**, and a hunger strike in the **United States**.

434 **Belgium, France, Greece, Italy, Luxembourg, the Netherlands, Romania, Spain, Switzerland and United States**.

law enforcement officials, the use of solitary confinement as a punishment and accusations of torture or ill-treatment.⁴³⁵

Another measure that many participating States have resorted to is the preventive isolation or quarantine of prisoners suspected to be infected with Covid-19, as well as a 14-day quarantine for newly arrived prisoners. In order to ensure that this type of quarantine does not constitute *de facto* solitary confinement,⁴³⁶ “the person concerned should be provided with meaningful human contact every day.”⁴³⁷ In many states, whether prisoners are quarantined or not, access to out of cell time,⁴³⁸ outdoor and other educational or group activities has been further limited as a result of restrictive measures.⁴³⁹ The consequences of these limitations (leading to more isolation) on the physical and psychological health of persons deprived of liberty are not yet fully understood.⁴⁴⁰

435 **France, Russian Federation and Switzerland.**

436 “The predominant method of isolation and social exclusion is ‘solitary confinement’, which is defined as ‘the confinement of prisoners for 22 hours or more a day without meaningful human contact’. Under international human rights standards, solitary confinement can only be imposed in exceptional circumstances, and ‘prolonged’ solitary confinement, in excess of 15 consecutive days, is regarded as a form of torture or ill-treatment. The same applies to frequently renewed measures which, in conjunction, amount to prolonged solitary confinement. Even more extreme than solitary confinement is so-called ‘incommunicado detention’ which deprives the inmate of any contact with the outside world, particularly to medical doctors, lawyers and relatives, and has repeatedly been recognized as a form of torture.” A/HRC/43/49; Solitary confinement is prohibited for children, pregnant or breastfeeding women and people with mental disabilities (see e.g. Nelson Mandela Rules). 57.

437 **Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic**, Council of Europe

438 Examples can be found in a **report** from **Canada**; an **example** from the **United Kingdom**, or in **Portugal** due to staff shortages.

439 In **Austria**, the time outside in the open air was reduced from one hour to 15 minutes. Similar reports were received from **Croatia, Denmark, Italy, United Kingdom**, where a **report** on short scrutiny visits to young offender institutions holding children

by the Chief Inspector of Prisons recommended between 3 hours and 40 mins only outside of cells; as well as the **United States**.

440 See, for instance, a report from the **United Kingdom**, **Alarm over five suicides in six days at prisons in England and Wales**, The Guardian, 28 May 2020.

Outside of the criminal justice system, people held in other places of detention, such as immigration detention centres, psychiatric institutions and elderly homes, are similarly affected by the pandemic, and resulting restrictive measures, limiting contact with the outside world. Based on currently available information, certain people are considered more vulnerable to the Covid-19 virus, such as people over 60 years of age or who have health conditions like lung or heart disease, diabetes or conditions that affect their immune system, as well as pregnant or breastfeeding women.⁴⁴¹ The effect of increased isolation on persons in vulnerable situations is concerning.⁴⁴² The UN has recalled that “no-visitor policies in nursing homes and home care exacerbate the risk of violence, ill-treatment, abuse and neglect of older persons and others living in institutions.”⁴⁴³

In many countries across the OSCE area, migrants live in overcrowded camps, shelters or reception centres in unsanitary conditions, lacking minimal protection against infection. New restrictions on movement, as part of efforts to stem the spread of Covid-19, prevent migrants housed in temporary reception centres from maintaining the distance from others necessary to safeguard both their health and their dignity.⁴⁴⁴ In some cases, migrants were locked in their cells for up to 21 hours each day without activities provided for out-of-cell hours.⁴⁴⁵

441 The Working Group on arbitrary detention “is aware that COVID-19 mostly affects persons older than 60 years of age, pregnant women and women who are breastfeeding, persons with underlying health conditions, and persons with disabilities” and has therefore **recommended** “that States treat all such individuals as vulnerable” and “refrain from holding such individuals in places of deprivation of liberty where the risk to their physical and mental integrity and life is heightened.”; WHO has also issued specific **guidance** with regard to the situation of older people.

442 In **France**, according to a **study** on long-term care facilities, elderly people may have died of confinement disease (hypovolemic shock), not Covid-19 due to reduced numbers of caregivers and quality of care and isolation; In the **United Kingdom**, a **report** stated that deaths of detained mental health patients double due to covid-19.

443 **COVID-19 security measures no excuse for excessive use of force**, Statement by UN Special Rapporteurs.

444 **ODIHR statement**, 4 May 2020.

445 Examples have been **documented** by the Covid-19 Global Immigration Detention Platform of the Global Detention Project. For conditions in the **United States**, see also **As COVID-19 spreads in ICE detention, oversight is more critical than ever**, Brookings Institution, 14 May

New places where people are held in compulsory quarantine for reasons of public health protection are places of deprivation of liberty.

In response to the pandemic, many States have adopted restrictive measures such as enforced lockdowns or quarantine, often applicable to the entire population. According to the UN Subcommittee on the prevention of torture, these new places where people are held in compulsory quarantine for reasons of public health protection are places of deprivation of liberty⁴⁴⁶ and possible ill-treatment or even torture should be prevented and addressed. Research on the situation of compulsory quarantine facilities in the OSCE region is limited, as is information available on the situation of the general population who have been under mandatory quarantine in their own residences and are thus deprived of their liberty. Whereas there is consensus on the requirements for mandatory quarantine in order for it not to be arbitrary,⁴⁴⁷ the question whether compulsory quarantine and enforced lockdowns *per se* may constitute cruel, inhuman or degrading treatment is largely unexplored as of today. Reports of authorities welding

2020. (For more on immigration detention, including promising practices see the section on migration, below.)

446 “Any place where a person is held in quarantine and from which they are not free to leave is a place of deprivation of liberty for the purposes of the OPCAT and so falls within the visiting mandate of an NPM.” Subcommittee on Prevention of Torture (SPT), **Advice to the National Preventive Mechanism of the United Kingdom**, regarding compulsory quarantine (10–14 February 2020).

447 The UN Working Group on Arbitrary Detention has clarified that “mandatory quarantine in a given premise, including in a person’s own residence that the quarantined person may not leave for any reason, is a measure of de facto deprivation of liberty. When placing individuals under quarantine measures, States must ensure that such measures are not arbitrary. The time limit for placement in mandatory quarantine must be clearly specified in law and strictly adhered to in practice”. See also, **Enhorn v. Sweden**, para. 44: “The essential criteria when assessing the “lawfulness” of the detention of a person “for the prevention of the spreading of infectious diseases” are: whether the spreading of the infectious disease is dangerous to public health or safety; and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.”

doors of apartment buildings shut in order to quarantine the inhabitants are highly worrying.⁴⁴⁸ Similarly, the changes some participating States have made to legislation to punish violations of quarantine through incarceration are a matter of concern.⁴⁴⁹

The need to monitor the situation of torture or other ill-treatment also in this context is clear. Many NPMs are starting to monitor such places (sometimes private homes, hotels, ships or other facilities), taking into consideration quarantine conditions and the effect on more vulnerable groups.⁴⁵⁰ To prevent ill-treatment, all fundamental safeguards must be respected and individuals should not be treated as detainees, but free agents.⁴⁵¹

The independent monitoring of all places of detention, a key safeguard against torture and other ill-treatment, plays a vital role in the context of the pandemic and related emergency measures. The pandemic raises new challenges for independent monitors such as NPMs, ombuds institutions, NHRIs and civil society with respect to their monitoring functions, as access to detention facilities has been severely restricted in almost all participating States. Likewise, the risk of infection to the monitors themselves, as well as individuals deprived of their liberty and staff, has reached unprecedented levels.⁴⁵² The restriction of access for monitors has also reduced the access to an important complaint mechanism for victims of torture or ill-treatment as onsite visits play a crucial role in collecting complaints from inmates and submitting allegations of torture to the judiciary.

Any person has the right to judicial review of his or her deprivation of liberty under international law.⁴⁵³ Courts assume a particularly important role with regard to the protection of non-derogable rights, such as the

448 According to a report by Amnesty International, **Eastern Europe and Central Asia: Human rights must be protected during COVID-19 pandemic** of 29 April 2020, in **Kyrgyzstan** and **Kazakhstan**, authorities welded shut the doors of apartment blocks to enforce quarantines.

449 For example, **Albania, United Kingdom** and **Bulgaria**.

450 **Georgia, Italy**, and **Montenegro**.

451 See **SPT advice on “Measures to be taken by authorities in respect of those in official places of Quarantine”**, para. 10

452 Reference to **APT/ODIHR Guidance on Monitoring Places of Detention through the COVID-19 pandemic**.

453 Art. 9(3) and (4) ICCPR

absolute prohibition of torture. The pandemic has created considerable challenges for the functioning of courts, and lawyers have faced obstacles in accessing clients in detention and in representing clients effectively, in particular in cases where court hearings are held remotely.⁴⁵⁴ Those and additional issues pose a significant challenge to the fight against impunity and the prompt, independent and impartial investigation into allegations of torture or ill-treatment, including allegations made about conditions of detention that may amount to ill-treatment.⁴⁵⁵ (See also the section on access to justice and the functioning of courts, above.)

Cases of excessive use of force by law enforcement, such as beatings, the use of truncheons, threats of use of pepper spray and death threats, for violations such as not wearing face masks or not complying with restrictions of movement were reported in a number of participating States.⁴⁵⁶ Any unnecessary, excessive or otherwise arbitrary use of force by law enforcement

officials is incompatible with the absolute prohibition of cruel, inhuman or degrading treatment. Where such force intentionally and purposefully inflicts pain or suffering on powerless individuals who are unable to escape or resist, it is always conclusively unlawful and may amount to torture. In this context, developments regarding new legislation enacted in some participating States that could heighten the risk of ill-treatment or obstruct accountability for acts of ill-treatment were observed.⁴⁵⁷

GOOD PRACTICES

Promisingly, many states have taken action to reduce the number of prisoners during the Covid-19 crisis including the early release of certain categories of prisoners, increasing use of house arrest and delaying the start of prison sentences, leading to reduced prison populations by thousands.⁴⁵⁸

454 See Fair Trials Commentary: **Impact assessment of remote justice on fair trial rights**, see also **Coronavirus: Defendants more likely to be jailed in video hearings, research warns amid rise of remote justice**, The Independent, 5 May 2020 and an **evaluation of video enabled justice**.

455 For more information see also **Fair Trials, COVID-19 Justice Project**.

456 See, for instance, a **report** from **France**, an **account** from **Romania**; several **country examples** from Eastern Europe and Central Asia, an **example** from **Slovakia**, an

incident in the **United Kingdom**; and a **report** from the **United States**.

457 See, for instance, a **report on new police powers** in the **Russian Federation**

458 This includes practices regarding the early release of certain categories of prisoners in the **Netherlands**, **Ireland** and **France**; the increasing use of house arrest in **Spain** and **Italy**; and the delaying of the commencement of prison sentences in **Germany** and **Czech Republic**. Steps like these have contributed to reducing prison populations by thousands (e.g. **Italy** 7,000 and **France** 10,000). See e.g. **EU Observer**

RECOMMENDATIONS

- Reduce prison populations by considering alternatives to detention and by releasing prisoners and other persons deprived of liberty with no discrimination, taking into account the principle of do no harm, time already served, the vulnerability of certain groups of prisoners, including to a Covid-19 infection, and categories such as those convicted of non-violent acts.
- Release all people detained arbitrarily, without sufficient legal basis or for crimes that are incompatible with international law, as well as all those incarcerated for exercising their human rights, including expression of dissenting opinions. This covers, but is not limited to, human rights defenders, journalists, political prisoners and dissenting voices.
- Reduce the number of new arrests during the pandemic and consider the risk to prisoners' health during such an emergency in assessing appropriateness of detaining someone.
- Provide compensatory measures for the limited contact with the outside world for those in detention and thereby enhance preventive monitoring and access to complaint mechanisms for persons deprived of liberty during the pandemic.

- Enable the independent monitoring and oversight of places of detention. Where not possible through onsite visits, remote monitoring options for independent monitoring bodies, such as remote access to detention registers, files and data should be considered.
- Ensure that law enforcement agents are trained, equipped and instructed to avoid any unnecessary, excessive or otherwise arbitrary use of force, and to give priority to non-violent means of carrying out their duty in particular in the context of pandemic-related measures that they are supposed to implement, facing not only individuals in conflict with the law but entire populations affected by those measures.⁴⁵⁹
- Provide for a safe environment and inclusion of civil society organizations and human rights defenders working to fight torture, other ill-treatment and impunity.
- Ensure effective oversight and monitoring of all places of detention, including the first hours of police custody, through the development and strengthening of independent NPMs, as well as through ongoing dialogue and the implementation of NPM and other independent monitoring bodies' recommendations to address key issues in places of detention.
- Establish effective and independent mechanisms to ensure that all allegations of torture and other ill-treatment are promptly, thoroughly and impartially investigated and prosecuted.
- Ensure that the fight against torture and the zero-tolerance policy adopted by states remains high on the OSCE agenda also during emergency situations.
- Ensure that the zero-tolerance policy translates into a safe and conducive environment to report cases of torture and other ill-treatment for professionals within the security sector and the penitentiary system, victims, medical staff, lawyers, human rights defenders and other actors.
- Improve sanitary conditions and healthcare in prisons to prevent inhumane treatment and improve health and safety for all.
- Enhance capacity building for penitentiary staff and others working in places of detention on human rights standards and the humane treatment of prisoners such as the Nelson Mandela Rules and the Bangkok Rules.

II.2.C FREEDOM OF ASSEMBLY

The freedom of peaceful assembly is one of the foundations of a democratic society and should not be interpreted restrictively.⁴⁶⁰ This right is instrumental in enabling the full and effective exercise of other civil, political, economic, social and cultural rights. A robust body of international documents and regional standards governs the right to freedom of peaceful assembly, including of the UDHR,⁴⁶¹ the ICCPR,⁴⁶² the Convention on

the Rights of the Child (CRC)⁴⁶³ and the ECHR.⁴⁶⁴ OSCE Commitments to respect the right to freedom of assembly are stated *inter alia* in the Copenhagen Document,⁴⁶⁵ the Charter of Paris for a New Europe (1990)⁴⁶⁶ and the Helsinki Ministerial Council (2008).⁴⁶⁷ On the basis of these standards and commitments, ODIHR, jointly with the Venice Commission of the Council of Europe, has also developed the *Guidelines on the Freedom of Peaceful Assembly*.⁴⁶⁸

⁴⁵⁹ For more information see e.g. [report of the UN Special Rapporteur on torture](#) (July 2017)

⁴⁶⁰ See, for example, European Court of Human Rights (ECtHR) *Ludrevičius and Others v. Lithuania* [GC], Application no.37553/05, 15 October 2015, par 91, *Nemtsov v Russia*, Application no. 1774/11, 15 December 2014, par 72, ;see also UN Human Rights Committee: *Belgium CCPR/C/79/Add.99*, 19 November 1998, par 23.

⁴⁶¹ Art. 20 (1), Universal Declaration on Human Rights (**General Assembly resolution 217 A**)

⁴⁶² Art. 19 and Art. 21, International Covenant on Civil and Political Rights (ICCPR)

⁴⁶³ Art. 15 para. 1 of the Convention on the Rights of the Child (CRC)

⁴⁶⁴ Art.10 and 11, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

⁴⁶⁵ Copenhagen Document (1990) para. 9.2.

⁴⁶⁶ Charter of Paris (1990), preamble.

⁴⁶⁷ Statement adopted by the 16th Ministerial Meeting in Helsinki on 4 and 5 December 2008 (p. 5).

⁴⁶⁸ ODIHR/Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2nd edition (2010) and a forthcoming 3rd edition (2020).

The right to freedom of assembly covers a wide range of different public gatherings, including planned and organized assemblies, unplanned and spontaneous assemblies, static assemblies (such as public meetings, “flash mobs”, sit-ins and pickets) and moving assemblies (including parades, processions and convoys).⁴⁶⁹ There should be a presumption in favour of (peaceful) assemblies, without regulation to the extent possible. States have a positive duty to facilitate and protect the exercise of the right to peaceful assembly, which should be reflected in the legislative framework and relevant law enforcement regulations and practices.⁴⁷⁰ Pursuant to Art. 21 (2) of the ICCPR, this right may only be restricted in conformity with the law, and only if necessary in a democratic society, in the interests of national security, public safety, public order, the protection of health or morals or the protection of rights and freedoms of others. This means that the legal provisions covering the freedom of assembly must be sufficiently clear and that imposed restrictions should be the least intrusive means of achieving a legitimate aim.⁴⁷¹ In order to be warranted, such limitations must neither be more restrictive nor last longer than needed.⁴⁷²

In times of public emergency, states can take measures derogating from obligations as prescribed by Articles 19 and 21 the ICCPR and Articles 10 and 11 of the ECHR. However, such measures must be of an exceptional and temporary nature.⁴⁷³ In case of the right to peaceful assembly, restrictions of the right in certain situations might be justifiable and sufficient, not requiring the declaration of the overall state of emergency⁴⁷⁴ (for a detailed discussion on the state of emergency and related restrictions, see Part I.1).

The pandemic poses particular challenges to states in this regard, as large gatherings and crowds had been identified by the WHO as particularly prone to facilitating Covid-19 transmission. This overview is not to judge

whether particular restrictions were in fact legitimate or proportionate, as that has to be determined within each specific context. In most cases, it appears that restrictions on public gatherings have been lawful and necessary, but it would require a far deeper analysis to assess whether and to what extent they were proportionate. In many cases, public assemblies were treated in the same way as other forms of social gatherings and public events, such as concerts or sport matches, school attendance, religious and private gatherings. The question whether restrictions experienced across the region were justifiable due to health concerns and whether they were within the limits of proportionality and legality needs to be determined case by case and with specific considerations of the local context in light of international standards. In April, UN Special Rapporteur on the rights to freedoms of peaceful assembly and of association outlined the main principles that states should consider when designing their response to Covid-19 threats, while respecting the right to freedom of assembly.⁴⁷⁵

According to information collected by ODIHR, in the period between March and May, the freedom of peaceful assembly was restricted in most participating States due to the pandemic. In some states, all public assemblies were banned. In others, assemblies were restricted to a certain number of participants,⁴⁷⁶ or by an obligation for participants to adhere to epidemiological measures, such as maintaining physical distance from others, or wearing personal protective equipment or facemasks. Some participating States that introduced a state of emergency or equivalent regime, transferred powers from the legislative to the executive branch, which then restricted the right to the freedom of assembly through governmental decisions.⁴⁷⁷ Other countries

469 *Ibid.*

470 *Ibid.* paras 31 and 33.

471 *Ibid.* paras 35 and 39.

472 See, for example, **UN Human Rights Office of the High Commissioner paper on Emergency measures and Covid 10: Guidance**

473 CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, para 1.

474 *Ibid.*, para 5.

475 See UN Special Rapporteur on the rights to freedoms of peaceful assembly and of association, **Guidelines on Freedom of Peaceful Assembly and COVID-19 restrictions**

476 During the pandemic some countries banned all public assemblies (**Mongolia**), and some even in private gatherings (**Azerbaijan**). Others banned those of more than a very few people, two (**Montenegro**) or three (**Georgia**). Most countries introduced bans on assemblies, especially larger events (**Switzerland** and the **United Kingdom**).

477 Examples include **Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Georgia, Hungary, Kazakhstan, and Serbia**.

introduced restrictions on assemblies through temporary legislation and/or legislation linked to health and natural disaster emergencies, for instance disease prevention acts.⁴⁷⁸ The degree of parliamentary oversight of the transfer of powers and the possibility to challenge regulations on the freedom of assembly in court varied from strong to complete suspension.⁴⁷⁹ The duration of the restrictions also varied from indefinite to clearly limited in time. During the course of the pandemic, several countries gradually lifted restrictions.

Early in the pandemic across the OSCE region, organizers cancelled or postponed many planned public assemblies, even before restrictions or bans had been introduced. According to information received by ODIHR, in the first half of April, despite the bans and in the face of restrictions, public assemblies re-emerged, and by May around 80 per cent of the participating States were seeing some form of public assembly during the pandemic, most of them multiple times.

Some of the assemblies typical to the context of the pandemic included assemblies held in protest against the introduction, expansion or extension of restrictive measures adopted by authorities. Assemblies over perceived abuse of power by state and non-state actors seeking to pass controversial legislation or lacking of transparency in the development of plans amid the crisis were also seen. Other assemblies were organized to call for improved access to personal protective equipment and to protest increased economic challenges for citizens.

Before and during the pandemic numerous examples of assemblies, such as meetings or protests, took place online, including climate strikes, petitions and webinars. Online assemblies are still an emerging subject⁴⁸⁰ and a clear definition of such assemblies does not yet exist. It is crucial that “new or alternative” ways to gather are respected both during times of crisis and other times to allow for (political) debate and joint expression of opinions. Keeping the Internet accessible is essential,

and Internet shutdowns or restrictions must not take place to avoid debate and criticism.⁴⁸¹ Online forms of mobilization and protest can, however, not be considered a full substitute to the freedom of assembly as it is guaranteed by human rights norms and standards.

The monitoring of the right to freedom of assembly has a crucial role in ensuring stronger respect for this fundamental right. Independent assembly monitoring activities are mostly exercised by civil society, NHRIs and international human rights bodies, missions or institutions, including ODIHR. Across the region, all major actors in this regard have faced difficulties and limitations to their monitoring activities during the Covid-19 crisis, except for assemblies that were happening online. At the same time, civil society organizations, NHRIs and international bodies, such as ODIHR, have remained active in monitoring developments in the region related to the freedom of assembly and raised some of the concerns and issues with respective governments.

AREAS OF CONCERN

Restrictions on the freedom of movement indirectly affected public assemblies, such as excluding by law and regulations certain groups (for example, older people or pregnant women) from participating in protests, preventing people from traveling to demonstrations outside of their usual place of residence, or by limiting the time of day when public assemblies may take place. Persons with disabilities faced particular challenges due to imposed physical distancing rules and a lack of flexible mechanisms allowing them to safely leave their homes during mandatory quarantine; unavailability of accessible information; limited access health care services; and disruption of services and support.⁴⁸² These challenges contributed to the limited participation of persons with disabilities in many public gatherings or assemblies.

478 Examples include **France** (“health emergency”) and **Norway** (Temporary legislation and the Disease prevention act”).

479 Examples include **Serbia** (suspension) and **Bulgaria** (oversight).

480 *Guidelines on Freedom of Peaceful Assembly*, para. 45.

481 Internet shutdowns or restrictions have been reported in some countries, both prior and during the pandemic. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 26 May 2011, para. 30.

482 European Disability Forum, **Open letter to leaders at the EU and in EU countries: COVID-19, disability inclusive response**.

The right to effective remedy to challenge bans or restrictions on assemblies, and especially blanket bans, is an important safeguard against unjustified restrictions. This right should be in place even in times of public health emergencies when the judiciary may itself operate in a reduced mode for the same reasons. On several occasions, courts in effect upheld the right to peaceful assembly, striking down emergency regulations or individual orders, reinforcing the approach of a case-by-case assessment of public assemblies.⁴⁸³

Despite the pandemic, the basic principles for the use of force of the law enforcement remain unchanged: all representatives of law enforcement agencies must adhere to principles of legality, necessity and proportionality in the use of force, and officers who employ force contrary to these principles must be held accountable.

In some cases, law enforcement authorities used force to disperse assemblies that were not held in compliance with regulations, approaching participants with physical force and batons, or deploying pepper spray, tear gas and other special means. ODIHR has noted instances of unnecessary or excessive use of force in several participating States during the pandemic. Despite the pandemic, the basic principles for the use

of force of the law enforcement remain unchanged; all representatives of law enforcement agencies must adhere to principles of legality, necessity and proportionality in use of force, and officers who employ force contrary to these principles must be held accountable.

While authorities did not always attempt to end an assembly that was organized without respecting the health crisis regulations, in numerous instances participants were identified, fined, charged with infractions and felonies linked to their participation in assemblies, including non-compliance with lockdown rules and/or breach of curfew.⁴⁸⁴ ODIHR has received information about countries adopting legislation and development plans that require extensive public consultation or are known to have triggered public protests and demonstrations in the past.⁴⁸⁵ Some participating States already had strict legislation on the freedom of peaceful assembly in place prior to the pandemic, which have been further exacerbated during the crisis. It is important to emphasize that times of crisis should not be used as an opportunity to introduce restrictive legislation on the freedom of assembly.⁴⁸⁶

GOOD PRACTICES

State responses to public assemblies that did not follow the laws and regulations during the pandemic varied, but, in many states, authorities allowed the assemblies to continue for at least a certain period of time. In some cases, authorities urged participants to maintain

483 The Federal Constitutional Court in **Germany** decided on freedom of assembly related issues on several occasions during the pandemic when organizers sought preliminary injunctions. In the case of a prohibition of assemblies planned in the city of Gießen, state of Hesse, the Court found that local authorities violated the petitioner's right to freedom of peaceful assembly by failing to recognize that there was no general prohibition on public assemblies of more than two people who do not belong to the same household in Hesse, and that the city had discretion to decide in this particular case. BVerfG, **Order** of the 1st Chamber of the First Senate of 15 April 2020 – 1 BvR 826/20-, paras. (1–19). In the instance of another planned assembly, in Stuttgart, Baden Württemberg, the Court ruled that authorities failed to take the freedom of peaceful assembly into account as an exception to the general rules on protection measures, and that they did not decide based on specificities of the organizer's case and possibilities to minimize infection risks. BVerfG, **Order** of the 1st Chamber of the First Senate of 17 April 2020 – 1 BvR 37/20-, paras. (1–29).

484 Peaceful activists in **Poland** were administratively fined 10,000 Polish Zloty (approx. 2,205 EUR) each for violating physical distancing rules at a small protest, **10 tysięcy złotych za list artystów do Sejmu. „Karę doręczył mi do rąk własnych zamaskowany oddział policji”** [10,000 zloty for the artists' letter to the Sejm. 'Masked police unit gave me the fine'], TOK FM, 19 May 2020; Other examples of harsh penal reactions include: In **Greece**, the penalty for violating physical distancing rules was 1,000 Euro, while in **Georgia** the violation of state of emergency rules could amount to a fine up to 5,000 Euro and imprisonment of up to 3 years for repeated violations.

485 For instance, ongoing legislative processes to pass stricter legislation on abortion in **Poland**, where similar proposals had previously caused large-scale protests.

486 This has been the case in **Kazakhstan**, although there have also been some improvements in the newly adopted law.

physical distance from each other.⁴⁸⁷ In some cases, police engaged with protesters and followed flexible, ‘do-no-harm’ approaches, thus avoiding greater health risks and provocations.⁴⁸⁸ During assembly, police often enforced social distancing rules and issued fines to those who were not complying with the required

measures. Law enforcement services in various states also allowed people to hold assemblies for some time before urging them to disperse. Anti-conflict and similar units of law enforcement specifically deployed to communicate with organizers and participants were present and active at several assemblies during the pandemic.

487 In **Romania**, General Directorate of the Gendarmerie in Bucharest urged people not to participate in a planned assembly and cautioned them that organizing and conducting an assembly was prohibited, but in the same message published an infographic with instructions how to behave during an assembly. See: **“A doua zi de protest al celor care neagă existența coronavirusului în Piața Victoriei din București”** [The second day of coronavirus deniers protest at Victory Square in Bucharest], Radio Europa Liberă România, 16 May 2020

488 The State Police of **Latvia** engaged with the organizers/ participants and the civil society organizations and tried to dissuade them from publicly commemorating 9 May at the Riga monument. The police subsequently decided not to block the access to the monument to ensure the shortest possible stay of people who eventually came to the monument **“Piespriež pirmos sodus par pārkāpumiem 9.maijā; policija noliedz labvēlību pret pārkāpjiem”** [First penalties imposed for 9 May violations; police deny favouring offenders], TVNet.lv, 13 May 2020

ODIHR observed that some assemblies were organized in motor vehicles or on bicycles, as a largely safe (and physical distancing compliant) manner of publicly expressing views during a health emergency. ODIHR noted that in most cases these assemblies were not viewed by the authorities as problematic from a public health perspective.⁴⁸⁹

489 However, the Constitutional Court of **Spain decided** against holding one such assembly, with a single participant planned per vehicle, ruling that without safety guarantees in the situation of the highest risk of infection, the right to life outweighs the right to freedom of assembly.

490 Guidance can be found in ODIHR/Venice Commission, Guidelines on Freedom of Peaceful Assembly; 2nd edition and 3rd edition

RECOMMENDATIONS

- Ensure, also in times of emergency, that restrictions on the freedom of peaceful assembly are clearly prescribed and easily accessible to the public, and that they are based on law, proportionate, time-bound and non-discriminatory.⁴⁹⁰
- Avoid introducing blanket bans on holding assemblies and facilitate the freedom of assembly through regulations proportionate to the existing public health threat; authorities should engage in dialogue with organizers and/or participants on ways to decrease the risk of infections or on alternative ways to gather, and not impose unnecessary bans.
- Ensure, to the extent possible, meaningful public consultations when designing and implementing any public emergency related restrictions, reviewing restrictive temporary special measures from a gender perspective, evaluating impact on persons with disabilities, minorities, etc.
- Consider delaying legislation and development plans while restrictions on the freedom of assembly, freedom of expression and other rights remain in place; restrictions on the freedom of assembly that are inhibiting public debate is not an opportunity to pass controversial legislation or development plans.
- Ensure respect for freedom of expression, including through unhindered access to Internet and online space.
- Ensure consistent and non-discriminatory enforcement of the freedom of assembly-related restrictions. Clear instructions should be issued to law enforcement authorities, who should practice consistent and easily understandable communication with the public and apply a “no-surprise approach” to policing any public gatherings.

- Ensure that despite the health crisis, any instances of use of force by law enforcement must be in line with basic principles on the use of force.
- Ensure that fines and penalties for violating restrictions and non-compliance with epidemiological rules are applied in a proportionate way and are not excessively harsh; ensure that penalties that are equally applicable to participants in different public assemblies are applied in a non-discriminatory manner and not based on the assembly's message.
- Support and encourage civil society organizations and NHRIs' in monitoring the freedom of assembly, to the extent possible during public health crises, recognizing the positive contribution it brings to strengthening the respect for this fundamental right.

II.2.D FREEDOM OF ASSOCIATION

OSCE commitments and international human rights standards recognize that restrictions of the right to freedom of association are only permissible in strictly limited circumstances, including in the interests of public safety⁴⁹¹ or to protect public health.⁴⁹² Any such restriction shall be prescribed by law in a precise, certain and foreseeable manner, must be necessary in a democratic society and, thus, proportional to their legitimate aim. A restriction shall always be narrowly construed and applied, the least intrusive option chosen, and shall never completely extinguish the right nor encroach on its essence.⁴⁹³ In that respect, the ten key principles developed by the UN Special Rapporteur on the right to peaceful assembly and association in the context of the current health emergency is useful guidance to ensure respect for the right to freedom of association.⁴⁹⁴

Through a number of documents, most significantly the Copenhagen Document (1990), participating States have reiterated that all forms of associations, interest groups, trade unions and political parties are crucial to a vibrant democracy.⁴⁹⁵

It is crucial to see restrictions on freedom of association in the context of the shrinking space for civil society in a number of countries of the OSCE region, which has been observed in recent years.⁴⁹⁶ Prior to the start of the current crisis, existing constraints included legal and administrative barriers that hindered certain types of NGOs to receive funds, both domestic and foreign, blanket restrictions on foreign funding or the introduction of new stringent reporting and disclosure obligations. Further, in some countries, negative stigmatization and discrediting of civil society groups and organizations may have hampered their operational capacity and the physical safety of their representatives. Already before the pandemic, a growing number of

491 Public safety is a broad notion involving the protection of the population at large from varied kinds of significant damage, harm, or danger, including emergencies, see ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015), p. 121.

492 Art. 22 of the ICCPR and Article 11 of the ECHR. For a more detailed discussion, see PART I.

493 ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015), Principles 9 and 10.

494 The UN Special Rapporteur's **statement** of 14 April 2020; see further ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015); ODIHR-Venice Commission **Guidelines on Political Party Regulation** (2010); ODHR **Guidelines on the Protection of Human Rights Defenders** (2014); Council of Europe, **Legal Status of Non-Governmental Organisations**, Recommendation CM/Rec(2007)14 and explanatory memorandum; further the jurisprudence of the ECtHR which on numerous occasions affirmed the direct relationship between democracy, pluralism and freedom of association;

e.g., ECtHR *Gorzelik and Others v. Poland* [GC], para. 88; *Sidiropoulos and Others v. Greece* para. 40.

495 Copenhagen Document (1990), para. 26.

496 See e.g., UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, **Thematic Report on Civil Society Space, Poverty and National Policy** (11 September 2019), especially paras 21–27; and **Report on Trends in relation to the Exercise of the Rights to Freedom of Peaceful Assembly and of Association** (26 July 2018), Section III; UN High Commissioner for Human Rights, **Report on Practical Recommendations for the Creation and Maintenance of a Safe and Enabling Environment for Civil Society** (2016), paras. 4 and 9; **2019 Report** of the Secretary General of the Council of Europe, pages 17–19; EU Fundamental Rights Agency, **Report on Challenges Facing Civil Society Organisations Working on Human Rights in the EU** (2018); European Parliament Policy Department's **Study on Shrinking Space for Civil Society: the EU response** (2017), pp. 9–12.

human rights defenders have been subjected to intimidation and harassment (for the impacts of the crisis on the activities of human rights defenders, see the specific section above).⁴⁹⁷

This challenging environment for NGOs to operate in some participating States has been aggravated by the emergency measures introduced as a response to the Covid-19 pandemic. For example, restrictions on the freedom of expression and access to information imposed by number of States undermine the watchdog function of civil society, sideline critical voices and limit their capacity to reach the decision-making level and have some impact on policies and legislation.

In this context, there is a danger that more constraints may be imposed impeding the operation of some types of associations under the pretext of responding to the pandemic. There is a serious risk that some governments will use emergency measures in order to justify the imposition of further restrictions on civic space. This might entail consequences in the long-term perspective that may unduly and disproportionately restrict rights to freedom of expression and association.

Associations, and civil society more broadly, should be regarded as essential partners for governments when addressing the Covid-19 pandemic, especially when developing emergency policy and legislative responses, disseminating information accessible to all, and providing support and services to marginalized communities. Associations providing support or services to marginalized communities are traditionally considered particularly vulnerable and, hence, in need of enhanced protection. A state of emergency should not be used “as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health nor should

it be used to silence the work of human rights defenders.”⁴⁹⁸ (see also the sections on NHRIs and human rights defenders).

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AREAS OF CONCERN

Overall, many measures adopted in the context of the pandemic do not sufficiently reflect the crucial role of the freedom of association for the functioning of democracy, and the fact that it constitutes an essential prerequisite to the exercise of other fundamental freedoms.⁴⁹⁹ The restrictions on civil society during the pandemic have been significant across the OSCE region, especially the impact on their regular activities, participation in public decision-making processes, the ability to register and manage them, and their access to resources.

Restrictive laws providing for lockdown measures and containment have generally prevented associations from continuing regular operations, because in many countries their activities were generally not covered by exceptions concerning businesses and/or organizations carrying out “essential services”. Many associations have had to put planned activities on hold and tried to shift some of their work online. Associations that generally provide support to vulnerable communities have been especially limited when their activities involved physical proximity or contact, whereas civil society has a key role to play for providing support and services to the most vulnerable and marginalized people, such as

⁴⁹⁷ ODIHR, **2019 HDIM Report from Working Session 6 on Freedom of Peaceful Assembly and Association**. See further, ODIHR, **Report on “The Responsibility of States”: Protection of Human Rights Defenders in the OSCE Region** (2014–2016), 14 September 2017; UN Special Rapporteur on the Situation of Human Rights Defenders, **World Report on the Situation of Human Rights Defenders** (December 2018); Council of Europe Commissioner for Human Rights, **Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions** (December 2018).

⁴⁹⁸ See UN OHCHR **COVID-19: States should not abuse emergency measures to suppress human rights – UN experts**.

⁴⁹⁹ ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015), para. 8.

homeless people, people in poverty, victims of domestic violence, victims of hate crimes, victims of trafficking, refugees or migrants.

At least two participating States specifically derogated from Article 22 of the ICCPR on the right to freedom of association, including San Marino that explicitly informed ODIHR of such derogation.⁵⁰⁰ Some states have also considered tightening legislation regulating associations in the midst of the Covid-19 pandemic.⁵⁰¹ In others, Covid-19 pandemic related restrictions further exacerbated already stringent legislation and practices pertinent to the work of associations.⁵⁰²

While the participation of associations in policy and law-making is a key principle of democratic law-making,⁵⁰³ associations and civil society have generally not

been involved nor consulted in the process of developing, implementing or reviewing emergency measures (see the section on democratic law-making above). At times, certain emergency decrees or laws expressly excluded the participation of associations in, or social dialogue during, the law-making process.⁵⁰⁴

This is especially worrisome since associations are often at the forefront of representing the interests of marginalized communities and under-represented groups in public decision-making processes. The right to public participation should be ensured in times of emergency as well, especially as this allows the specific needs and expectations of under-represented persons or groups to be taken into account, thus enhancing the effectiveness of the response to the pandemic. Some countries have also introduced provisions allegedly linked to the pandemic, which impact the independence and autonomy of associations or render the participation of associations in public decision-making even more cumbersome.⁵⁰⁵

500 For example, see the **notification** by **Estonia** and the **notification** by **San Marino**.

501 On 4 March, in **Kyrgyzstan**, deputies of the Jogorku Kenesh approved the draft amendments to the law on associations in the first reading. The draft obliges NGOs to additionally report on sources of funding, as well as provide more information about their official activities. **Belarus** has prepared further legislation on volunteering and foreign grants for associations.

502 For example, in 2018, two **Joint Opinions** of ODIHR and the Venice Commission criticized the so-called “Stop Soros” Legislative Package targeting NGOs working in the field of migration; in 2017, legislation in **Hungary** enhancing reporting and disclosure obligations for non-governmental organizations receiving foreign funding were also criticised by the **Venice Commission**; in 2018, Ukraine introduced new disclosure and reporting obligations for NGOs, which was criticized in a ODIHR and Venice Commission **Joint Opinion**; also in 2018, **Romania** introduced new regulatory requirements for NGOs which was criticized in a ODIHR and Venice Commission **Joint Opinion**; the Law on Amendments to Legislative Acts of the **Russian Federation** regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent of 2012, which requires civil society organizations receiving funding from abroad to register as “foreign agents” has been criticized by the **Venice Commission** and the OSCE Parliamentary Assembly; Article 193-1 of the Criminal Code of **Belarus** on the right of non-registered associations has been assessed by the **Venice Commission** in 2011.

503 See Moscow Document (1991), para. 18.1 according to which participating States committed to have legislation adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives”; see also Copenhagen Document (1990), para. 5.8; see also ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015) paras. 186, 207.

504 In **Portugal**, the Emergency Decree of 3 April explicitly suspended the right to participate in the drafting of new labour legislation, which is enshrined in the Constitution for trade unions and in the Labour Code for trade unions and employers associations, insofar as the exercise of such right may delay the entry into force of urgent legislative measures for the purposes provided for in the Decree. In **Romania**, Article 33(1) of the Emergency Ordinance no. 34 of March 26, 2020 amending and completing of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency, provides that: “During the state of siege or the state of emergency, the legal norms regarding decisional transparency and social dialogue do not apply in the case of draft normative acts establishing measures applicable during the state of siege or state of emergency or which are a consequence of the establishment of these states”.

505 In **Poland**, the new legislation on combating Covid-19, which entered into force on 31 March 2020, contains a provision authorizing the Prime Minister during the period of the state of epidemiological emergency to dismiss members of the Social Dialogue Council, which is a statutory forum for dialogue between employers, employees and the government, whose members are designated by trade unions and employers organizations. In **Slovenia**, Art. 42 of the Anti-Corona Act introduces new stringent conditions for public interest NGOs in the field of environmental protection to participate in procedures for obtaining a building permit, which was supposed to allow public scrutiny of the legality and environmental adequacy of the projects.

Limitations to freedom of peaceful assembly, access to information and freedom of expression have especially impacted associations.

The limitations to freedom of peaceful assembly, access to information and freedom of expression have especially impacted associations. Several participating States have adopted or amended legal provisions, or used existing ones, to criminalize the dissemination of “false information” about the pandemic.⁵⁰⁶ As mentioned above, although there may well be a legitimate concern about the deliberate and malicious spread of disinformation, such criminal provisions are unlikely to comply with the principle of specificity of criminal law enshrined in Article 15 of the ICCPR and Article 7 of the ECHR due to the inherent vagueness and ambiguity of the term “false information”. Moreover, the very existence of such provisions has a chilling effect on associations and civil society in general, especially in contexts where state authorities are prone to abuse such powers to curb criticism or limit the freedom of expression (see also sections on access to information and human rights defenders above). Further, such prohibitions of “false information” are incompatible with normally applicable international standards for restrictions on freedom of expression and may unreasonably restrict the ability of civil society to monitor, analyse and report on issues of public importance.⁵⁰⁷

506 For instance, the **Azerbaijan, Hungary, Kazakhstan, Kyrgyzstan, Romania, Russian Federation, Spain, Turkey, Uzbekistan**. In **Bulgaria**, the President partially vetoed a controversial law on emergency measures that would have introduced prison sentences for spreading false information about infectious diseases. In **Bosnia and Herzegovina**, the government of the Republika Srpska had issued a decree on 18 March that prohibited causing “panic and disorder” by publishing or transmitting false news during a state of emergency, which has been withdrawn since then; see also **Press Releases** by the OSCE Representative on Freedom of the Media on several legislative initiatives trying to stem the dissemination of “false information”.

507 See para. 2 (a) of the Joint declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (3 March 2017) by the OSCE Representative on Freedom of the Media, UN Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States’ Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of

While public authorities need to combat information that may contribute to damaging public health during a health emergency, such a goal is best achieved by ensuring access to independent and pluralistic sources of information, the disclosure of detailed data and statistics that form the basis of government decision-making and a pro-active and transparent information policy by the authorities.⁵⁰⁸ Despite the importance of civil society actors, including associations, journalists and human rights defenders, freely exercising their right to seek, receive and impart ideas and information, whether concerning the crisis and its management or other subjects, several states have also limited in law or in practice the rules regulating access to public information (see access to information section in Part I).⁵⁰⁹

In many countries, the registration of associations is not possible online, and the lockdown and closure of public offices have impeded the establishment of new associations. Regulations should remain flexible so that any registration or reporting requirements can be conducted online and public administration should have in place the necessary infrastructure to facilitate this, thus simplifying the establishment and conduct of business and operations of associations.⁵¹⁰ The legislation of some States also requires that associations hold their annual general or other meetings in person.

Expression and Access to Information, that calls for the abolishment of such provisions.

508 See also the **Press Release of the OSCE Representative on Freedom of the Media on Occasion of World Press Day 2020**.

509 For instance, the government in the Netherlands announced at the end of April that dealing with requests under access to information legislation about Covid-19-related policies would be put on hold until at least 1 June. In **Slovenia**, the government passed a law suspending most deadlines in administrative proceedings, including those under the Public Information Access Act, thus *de facto* suspending all freedom of information requests. In the United States of America, the Federal Bureau of Investigation (FBI) announced in March that they would only accept freedom of information requests sent by mail not through its online portal, though this has changed since then. Other countries such as **Moldova, Poland, Serbia** and the **United Kingdom** have adopted measures or have made announcements concerning the extension of the times that public officials have to respond to freedom of information requests or may in practice delay the obtention of public information.

510 ODIHR-Venice Commission **Guidelines on Freedom of Association** (2015), para. 262.

In addition to existing legislation in some participating States already unduly limiting access to international funding and resources, the pandemic may pose additional challenges for associations to access financial and other resources. This is of particular concern with declines in donations and potential additional costs associated with the crisis, including costs associated with equipping staff to work remotely and/or to be provided with necessary personal protective equipment. Also, the rules imposed by their donors may not allow enough flexibility to re-allocate funds to address new priorities or extend deadlines for expenditures until after lockdown measures have been eased. This affects the ability of associations to provide support and services, especially to the most marginalized persons or communities.

Political parties are a specific form of associations. Pursuant to the Copenhagen Document (1990), participating States “recognize the importance of pluralism with regard to political organizations.”⁵¹¹ While in many countries, political parties are regulated by separate legislation that supplements the regulations applicable to all associations, groups of individuals choosing to associate themselves as political parties, as well as political parties themselves, have the full protection of freedom of association and the interconnected rights of freedom of peaceful assembly and freedom of expression. Thus, many of the limitations outlined above are applicable to political parties during an emergency situation. Additionally, when election campaigns have continued during the pandemic, due to generalized, strict limitations on public gatherings and assemblies, political parties have not been able to organize public

511 Copenhagen Document (1990) para 3.

rallies and campaigning in traditional forms.⁵¹² (see the section above on elections).

GOOD PRACTICES

Positive trends have been observed in a number of participating States where charitable and social organizations were specifically considered to constitute “essential services” and were authorized to continue operating during the crisis.⁵¹³ Some states also provided for specific exceptions from restrictions or bans on movement or travel when providing support to vulnerable or marginalized people. In certain countries, measures for mitigating the impact of the pandemic on businesses are also made applicable to associations.⁵¹⁴ Rules have been adopted to facilitate the management of associations online and to extend the time-limits for the completion of reporting requirements and other administrative formalities.⁵¹⁵

512 See ODIHR Director’s **statement** of 7 April 2020 on genuine campaigning and public debate during the pandemic.

513 For instance, several states in the **United States** have specifically exempted organizations carrying charitable and social services from the order to stay home and prohibition to travel. **Spain** and **Portugal** listed the provision of protection and assistance services to victims of gender-based violence as an essential activity to remain operational during the lockdown.

514 In **Slovenia**, the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy, also regulates the possibility of state reimbursement of wage compensation to employees of NGOs. In **France**, the support measures for businesses are also applicable to associations. In **Latvia**, crisis-affected employers and crisis-affected taxpayers, including those working in the NGO sector, are eligible to apply for a downtime allowance.

Georgia currently is considering draft legislation that would waive income tax for certain groups of employees, specifically including the NGO sector.

515 For instance, this has been the case in **France**.

RECOMMENDATIONS

- States should ensure that the ability of associations to operate during a public health emergency is not unduly limited and may consider providing specific exceptions to allow them to continue operating and ensure access to the communities they serve.
- States should refrain from introducing blanket bans preventing associations from monitoring the police, prisons, migrant detention centres or accessing these facilities for that purpose.

- Consideration should be given to providing opportunities for associations, especially women's groups and organizations representing the interests of under-represented persons or groups to participate in the proposal, design, approval, implementation, monitoring and evaluation of responses to public health emergencies, including policy- and law-making.
- States should refrain from introducing and should repeal any criminal offenses pertaining to the dissemination of "false information" or other similar provisions and instead ensure access to independent and pluralistic sources of high-quality information.
- Authorities should provide clear, accurate, timely and accessible information to associations, civil society and the public about public health issues, extraordinary measures adopted and the management of the public health emergency.
- Seek to introduce regulations on association that are flexible so that any registration, reporting or other accounting and administrative requirements can be conducted online, including annual general meetings, while putting in place the necessary infrastructure to facilitate this, thus simplifying the establishment and conduct of business and operations of associations.
- To ensure the continued functioning of key civil society, states should extend the time-limits for the completion of reporting requirements and other administrative formalities.
- Recognize the key role many associations play in responding to a health emergency by allowing NGOs to access funds designed for legal persons to mitigate the impact of the pandemic and provide both financial and other forms of support to associations, together with the support and incentives offered to commercial entities.
- Where election campaigns continue during through the pandemic, ensure that restrictions do not have a discriminatory effect on certain political parties or candidates or contravene the principle of equal treatment.

II.2.E FREEDOM OF RELIGION OR BELIEF

Since religious activities typically involve the gathering of larger groups of people, and since public gatherings of any type are particularly prone to spread the viral infection, the imposition of preventive measures related to Covid-19 has had a profound impact on the ability of individuals and communities to manifest their religion or belief across the OSCE region.

The freedom of religion or belief is a multi-faceted human right, embracing individual, collective, institutional, educative and communicative dimensions, and is expressly recognized in OSCE commitments⁵¹⁶ and international and regional standards. The right to the freedom of thought, conscience and religion is

⁵¹⁶ For OSCE commitments and international standards see *ODIHR Freedom of Religion or Belief and Security Policy Guidance*, p. 12

non-derogable – according to Art. 4(2) of the ICCPR. States cannot derogate from their obligations under Art. 18(2) of ICCPR even in a state of emergency, declared as a result of a threat to the life of the nation.

Moreover, the inner dimension of the right to freedom of religion or belief (*forum internum*) – to have or adopt a religion or belief of one's choice and to change one's religion or belief – is afforded absolute protection. This dimension cannot be subject to the limitation clauses enshrined in Article 18 of the ICCPR and Article 9 of the ECHR. The external component of freedom to manifest a religion or belief (*forum externum*) – as elaborated in detail in the OSCE's Vienna Document (1989) – protects a wide range of acts such as the freedom to worship, teach, practice and observe one's religion or belief.⁵¹⁷

This external dimension can be limited, but only if the limitation is prescribed by law; pursues the purpose of protecting public safety, public order, public health or

⁵¹⁷ Vienna Document (1989) para. 16.

morals, or the fundamental rights and freedom of others; is necessary for the achievement of one of these purposes and proportionate to the intended aim; and is not imposed for discriminatory purposes or applied in a discriminatory manner.

Because religious activities typically involve the gathering of larger groups of people who do not share a household, and public gatherings of any type have been identified as particularly likely to spread the viral infection, the imposition of preventive measures related to Covid-19 has had a profound impact on the ability of individuals and communities to manifest their religion or belief across the OSCE region. The pandemic has also put the interrelationship between the right to freedom of religion or belief and the right to health, specifically in the public health context, into sharp focus.

The health crisis has posed a challenge for individuals and communities to manifest their religion or belief and has greatly affected their ability to access places of worship, observe religious holidays and participate in rituals associated with certain stages of life, such as religious funeral services. It has also impacted the ability of people to gather in homes for worship, to conduct community activities and religious processions and to teach religion or belief. Moreover, physical distancing has hampered the efforts of religious or belief communities to undertake charitable and humanitarian work and to reach out to and assist the most vulnerable people.

In response to the virus, depending on the spread of Covid-19 in different national or local contexts, certain states⁵¹⁸ chose to impose very high-level restrictions, effectively banning private prayers in public places of worship, as well as public religious gatherings. Others⁵¹⁹ imposed highly restrictive measures by banning public gatherings but allowing for private prayer to be accommodated in public places of worship. Yet others⁵²⁰ adopted a moderate approach, allowing public

gatherings to take place, so long as they did not exceed a maximum number of participants (ranging from five to 50 participants). Certain states⁵²¹ opted for lower-level restrictions, allowing public religious celebrations subject to physical distancing or without any limitations. In this category, some religious or belief communities elected to impose stricter restrictions than those minimally required by law.⁵²²

AREAS OF CONCERN

Most religious or belief communities have complied with the public health directives from their governments or have adopted voluntary restrictions on their activities following public health recommendations. However, some have refused, challenging the existing guidelines on social distancing or insisting that religious services and activities continue in person. Some of these incidents have been met with wide publicity.⁵²³ In a few cases, religious leaders have been arrested and detained by the authorities, following their defiance of national and regional orders. Such arrests have resulted in social tensions and unrest.

Toxic narratives espoused by state and non-state actors in certain participating States have emerged, blaming Jews and Muslims,⁵²⁴ in particular, for the spread of the virus. The pandemic has also exacerbated existing discrimination and intolerance on grounds of religion or belief, fuelling an upsurge in incitement to hostility or violence, conspiracy theories and scapegoating. Such negative stereotyping, stigmatization, discrimination and incitement to violence and violence based on religion or belief has particularly affected the ability of individuals and communities to manifest their freedom of religion or belief (e.g., wearing distinctive religious

521 For example, **Bulgaria, Hungary, Spain** and **Turkmenistan**.

522 For a good overview, see, for example, Alexis Artaud de La Ferrière, **Coronavirus: how new restrictions on religious liberty vary across Europe**, The Conversation.

523 See, for instance, **Kyiv Pechersk Lavra Closes for Quarantine: Over 90 Coronavirus Cases Found**, hromadske.ua, 13 April 2020. The Lavra's clergy had previously called on believers to ignore state-imposed quarantine restrictions.

524 For example, **shaming Muslims for allegedly failing to adhere to lockdown measures** and a **report about global conspiracy theories about Jews**.

518 For example, **Cyprus, Denmark, Germany, Romania, Tajikistan, Turkey** and the **United Kingdom**.

519 For example, **Croatia, Estonia, Finland, France, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania** and **Uzbekistan**.

520 For example, **Czech Republic, the Netherlands, Poland** and **Sweden**.

clothing or symbols).⁵²⁵ (See also the section on Hate Crimes and Discrimination, below.)

As a result of the pandemic, many individuals and communities have moved their activities online. In light of this, there is a growing concern that state authorities might utilize this trend for surveillance, monitoring and the collection of digital footprints for profiling purposes. In some cases, the availability of online religious services has made it possible for women and girls to participate in collective religious practice for the first time, if they were previously not allowed to leave the house to go to places of worship by their male relatives or spouses. However, engaging in private worship or online religious activities may be very difficult or impossible for those living in oppressive households; women and girls belonging to religions or beliefs different from the male members are particularly at risk in this regard.

Religious leaders have shared and reinforced the advice of credible health authorities and helped to counteract misinformation about the pandemic. Religious or belief communities responded to needs by supporting health services and reaching out to and assisting the most vulnerable members of societies.

The widespread use of online religious services has also enabled “converts” to participate in collective religious practice, as previously they were fearful of their public participation in such activities. However, there are also cases where converts were reluctant to participate in online activities for fear of being identified.⁵²⁶

During the lockdown in a few participating States, there were incidents of law enforcement raiding the homes of individuals belonging to non-registered religious or belief communities. These raids were considered by

⁵²⁵ See, for instance, a [report](#) on how a religious community in **France** was scapegoated by politicians and media.

⁵²⁶ OHCHR received information that despite the lockdown, law enforcement officials in certain participating States have continued to harass and raid the homes of individuals belonging to non-registered religious or belief communities in disregard of the existing health and safety measures to combat the virus.

some as rising to the level of harassment.⁵²⁷ Concerns were also raised about the health and safety conditions of those currently in detention.⁵²⁸

GOOD PRACTICES

As the pandemic has progressed, a number of good practices, such as careful legal assessment of initial bans on public worship and increased co-operation between state authorities and religious or belief communities could be observed. Blanket bans on meetings in places of worship were considered excessive as they did not allow for exceptions⁵²⁹ or as disproportionate to the objective of preserving public health.⁵³⁰

Religious or belief communities, organizations, leaders and actors have played a key role in responding to the pandemic across the OSCE region, often working in collaboration with public authorities and civil society organizations to make a direct and important contribution to societal resilience, cohesion and security. In many instances, religious leaders have shared and reinforced the advice of credible health authorities and helped to counteract misinformation about the virus. Religious or belief communities respond to need by supporting health services and reaching out to and assisting the

⁵²⁷ See for example, in Kazakhstan “[Warned for violating coronavirus regulations, but fined for leading worship,](#)”

in Uzbekistan “[Despite coronavirus lockdown officials continue literature raids,](#)” and in Russia “[Mass raids, new arrests on “extremism” charges.](#)”

⁵²⁸ For example see [statement](#) from Forum 18 from 18 May, 2020.

⁵²⁹ For example, following the initial imposition of blanket bans on meetings in places of worship, the highest courts in **France** and **Germany** ruled to lift such bans. The German Federal Constitutional Court [argued](#) that “the prohibition of meetings in churches, mosques and synagogues as well as prohibition of meetings of other religious communities for the common practice of religion” has to be “provisionally suspended, as it is then impossible to allow exceptions to the ban on request in individual cases”. The Court also stated that “the competent authority – if necessary in coordination with the responsible health authority – has to deal with individual cases after a corresponding application to check whether church services can exceptionally take place with appropriate conditions and restrictions, provided that a relevant increase in the risk of infection can be reliably denied.”

⁵³⁰ The French Council of State [found](#) that the blanket ban was “disproportionate to the objective of preserving public health.”

most vulnerable members of societies. Many leaders also promote a much-needed sense of solidarity and hope, especially against the backdrop of great stress and anxiety, as well as rising nationalist tendencies, xenophobia and division.

In some states, governments have engaged in constructive dialogue and collaboration with religious leaders and actors to ensure an evidence- and

science-based and gender-sensitive policy response to the pandemic.⁵³¹

531 As a recent **example** of effective co-operation between authorities and civil society related to the easing of lockdown restrictions, religious leaders and the **United Kingdom** government have established a taskforce to develop a plan to enable the phased, safe and evidence-based reopening of places of worship.

RECOMMENDATIONS

- Ensure that any limitations imposed on the right to manifest freedom of religion or belief are prescribed by law, necessary for the achievement of the legitimate aim of protecting public health, are proportionate and non-discriminatory and framed in a gender-sensitive manner.
- Ensure that such limitations are accompanied by guidance for the authorities responsible for implementing them and those affected, in order to minimize the potential misuse or lack of implementation of such measures.
- Ensure that individuals and communities have effective recourse to appeal or review measures in question and/or decisions taken regarding their implementation.
- Make sure that in the process of imposing limitations newly established religious or belief communities and those more recently established or numerically smaller religious or belief communities are afforded equal protection.
- In consultation with all religious or belief communities and taking gender considerations into account, periodically review the restrictions imposed, monitor their impact and adjust the level of restrictions in accordance with the evolving health and risk considerations.
- In cases when religious or belief communities resist implementing measures, avoid sensationalizing or misrepresenting such developments. They should not attribute blame to the community as a whole and should sanction only the individuals concerned, as appropriate.
- Ensure that the competent authorities that monitor places of worship for compliance with preventive measures are trained in both religious literacy and in freedom of religion or belief, deal with those attending places of worship with due sensitivity and are aware of and trained to deal with potential issues specific to men and women, including the different ways in which they might exercise their freedom of religion or belief in those spaces.
- Take steps to understand how the right to freedom of religion or belief of women and girls and young people is affected in oppressive homes and develop appropriate responses to address these concerns.
- Government leaders should speak out strongly and quickly against any forms of incitement to discrimination, hostility or violence on grounds of religion or belief; they should also proactively promote a counter-narrative of solidarity, hope and inclusion.
- Ensure that privacy and personal data are adequately protected in light of increased use of online media and technology by religious or belief communities.
- Establish permanent channels of communication and/or focal points at national, regional and local levels to build trust with representatives of different religious or belief communities.
- Proactively and systematically engage with all religious or belief communities within their jurisdiction to enable the phased, safe and evidence-based reopening of places of worship.

- Hold regular meetings with the focal points from religious or belief communities at national, regional and local levels. Such meetings should be used to set up crisis management systems to ensure the best possible joint planning and response to emergency situations.

II.2.F THE RIGHT TO A FAIR TRIAL AND MONITORING OF TRIALS

All participating States have made significant commitments to respecting and protecting the right to a fair trial.⁵³² This includes commitments to elements of such as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,⁵³³ and the right to a hearing within a reasonable time.⁵³⁴ These commitments are reiterated in several international human rights conventions.⁵³⁵

Specifically in criminal cases, states are obligated to respect the right to be presumed innocent until proven guilty,⁵³⁶ the right to defend oneself in person, and the right to legal assistance.⁵³⁷ These rights are applicable regardless of whether an action is classified as criminal offence or an administrative offence or other offence under domestic law.⁵³⁸ It is rather the nature of the offence and the severity of the penalty applied that are decisive.⁵³⁹

532 For instance, the Copenhagen Document (1990) and Moscow Document (1991).

533 Copenhagen Document (1990) para. 5.7b.

534 Vienna Document (1989) para. 13.9.

535 For instance, ECHR, Art. 6 and the ICCPR, Art. 14. In these conventions, several features of the right to a fair trial are established, such as 1) a fair and public hearing by a competent, independent and impartial tribunal established by law, 2) to be presumed innocent until proved guilty, 3) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge or accusation, 4) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, 5) to have adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing, 6) to not be compelled to testify against oneself, 7) to have one's conviction and sentence reviewed by a higher tribunal.

536 Copenhagen Document (1990) para. 5.19.

537 Copenhagen Document (1990) para. 5.17.

538 See for instance *Deweert v Belgium*, no. 6903/75, ECtHR 1980.

539 See for instance *Engel and Others v the Netherlands*, no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECHR 1976.

While the fundamental principles of fair trial, including the presumption of innocence shall not be deviated from, states can limit certain aspects of the right to a fair trial.⁵⁴⁰ For example, courts may restrict public access to the entirety or parts of a trial to protect the privacy of the parties or other participants in the process. Such limitations must be provided for by law and be necessary and proportionate. Limitations must not be applied in such a way or to such an extent that the very essence of the right to a fair trial is impaired.⁵⁴¹

Under no circumstances can states invoke Article 4 of the ICCPR as justification for acting in violation of peremptory norms of international law by deviating from fundamental principles of fair trial,⁵⁴² and states always have an obligation to ensure that the legal guarantees necessary to uphold the rule of law remain in force.⁵⁴³ States are not allowed to derogate from certain fair trial related rights, such as the prohibition of retroactive criminalization,⁵⁴⁴ the right of detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention,⁵⁴⁵ the presumption of innocence and

540 CCPR, General Comment no. 29, para. 11.

541 See for instance **Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights**, (1985) (Siracusa Principles), Art. I. Limitation Clauses.

542 CCPR, General Comment no. 29, para. 16; and General Comment no. 32 (2007), para. 6. These would include the right to be tried by an independent and impartial tribunal (CCPR General Comment no. 32 (2007), para. 19); the presumption of innocence (CCPR General Comment no. 32 (2007), para. 6); the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to habeas corpus (CCPR, General Comment no. 29, para. 16; and **General Comment no. 35, Art. 9 (Liberty and security of person)**, para. 67).

543 Moscow Document (1990) para. 28(2).

544 ICCPR, Art. 4(2) and 15(1).

545 CCPR, General Comment no. 29, para. 16; and **General Comment no. 35, Art. 9 (Liberty and security of person)**, para. 67.

the independence of the judiciary.⁵⁴⁶ ODIHR noted that even in countries that formally derogated from human rights instruments, their notifications lacked details on concrete limitations of fair trial rights.⁵⁴⁷

Prior to the pandemic, multiple issues regarding participating States respecting the right to a fair trial were reported, including persecution of defence attorneys in sensitive cases.⁵⁴⁸ Further, ODIHR's previous work showed that fair trial rights were often negatively impacted when participating States declared states of public emergency to combat security threats.⁵⁴⁹

AREAS OF CONCERN

In response to the pandemic, most participating States (partially) closed their courts and examined only urgent matters (for more on prioritization of cases see Section on the functioning of courts, above). In many of these cases, courts limited the physical access of the public and media to court hearings and held hearings remotely by using information and communication technologies (ICT). The increased use of ICT by courts raised serious challenges to respect the right to a fair trial and access of the public to hearings, in particular, in criminal cases.⁵⁵⁰ Further, the use of remote hearings was not

sufficiently regulated and therefore questioned by some judges.⁵⁵¹

Existing and emergency legislation generally lacked sufficient guidance for court officials to ensure the observance of the right to a fair trial during the pandemic. In some cases, judicial self-governing bodies and courts issued guidance and advice,⁵⁵² however, such recommendations or instructions does not substitute a firm legal basis for conducting trials in such circumstances.

An important feature of the right to a fair trial is that trials should be public.⁵⁵³ It builds trust in the judiciary and allows the public, including media, to attend all stages of trials and understand their nature. Publicity discourages possible abuses, such as false charges or excessive judicial sanctions and contributes to the overall fairness of trials.⁵⁵⁴ It further contributes to the perception of impartiality of those adjudicating.⁵⁵⁵ For

546 See for instance Human Rights Committee, General Comment 29, para. 16. Guarantees of fair trial, including judicial independence may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights such as the prohibition of torture, prohibition of slavery, right to life, the presumption of innocence in criminal proceedings, the prohibition of retrospective criminal law and the availability of a remedy. See also ODIHR expert meeting report **Fair trial rights during state of conflict and emergency**, October 2016.

547 Participating States that made formal derogations from human rights treaties, often made no mention of any intention to limit the right to a fair trial. See for instance the notifications to the Council of Europe by **Albania, Armenia, Georgia and Romania**.

548 See, for example, an **NGO report** to the OSCE Human Dimension Implementation Meeting 2018 on **Azerbaijan, Kazakhstan, Tajikistan and Ukraine**.

549 **Fair Trial Rights during States of Conflict and Emergency: OSCE/ODIHR Expert Meeting Report** (2016).

550 In **Sweden**, the use of video conference in court increased by 101 per cent in May 2020 compared to the previous year, according to a **report**. See also **statistics** from the **United Kingdom**. In many jurisdictions, the use of ICT was approved in a haphazard manner, sometimes without proper consideration of safeguards, such as consent of the

accused. MEDEL Institute E-Book, Justice and Challenges in Times of Pandemic in Europe, 1 June 2020.

For instance, in **Serbia**. See **Commentary: Preserving procedural safeguards during the COVID-19 crisis – a Serbian perspective** Vladimir Hrle, Fair Trials, 29 April 2020.

551 In some countries, the criminal procedure code and other legislation only foresee trials where the accused is physically present. In such jurisdictions, it is questionable to hold a trial where the accused is present only via video link or other remote technology. A court or tribunal is not considered established by law if it does not have authority to try a case established in domestic law, see for instance *Richert v. Poland*, no. 54809/07, ECtHR 2011.

552 In the **United Kingdom**, judicial self-governing bodies and the Lord Chief Justice issued guidance continuously throughout the pandemic. See for instance **Practice Direction 51y – Video or Audio Hearings During Coronavirus Pandemic**. In **Romania**, the Superior Council of Magistrates issued instruction on which cases to prioritize. In **Ukraine**, the High Council of Justice introduced **recommendations for courts on ensuring stable operation under quarantine conditions**. In **Georgia**, the High Council of Justice adopted **Recommendations to prevent the transmission of Coronavirus**.

553 See UDHR Art. 10 and 11(1); ICCPR Art. 14(1); ECHR Art. 6(1) and the Copenhagen Document (1990).

554 See Chapter IV of the **OSCE/ODIHR Legal Digest of International fair Trial Rights (2012)**.

555 The essence of the right to a fair trial is to have an independent and impartial tribunal established by law. It is not enough that judges and courts are free from political interference, they should also be perceived as such, see for instance *Ergin v. Turkey*, no. 47533/99 ECHR or *Bochan*

these reasons, states should take all possible measures to ensure that the trial is held in public.⁵⁵⁶ Judges can restrict the publicity of trials only in very limited cases,⁵⁵⁷ and should provide a reasoned court decision in such case.⁵⁵⁸

The pandemic has led to substantial limitations on the right to a public hearing, impacting transparency and the ability of trial monitors and the media to observe the process.

One valuable tool to reinforce publicity of trials is trial monitoring. Specialized trial monitors can attend hearings and assess the performance of professional trial participants, such as judges, prosecutors and attorneys, and the observance of the right to a fair trial.⁵⁵⁹ Reports that elaborate on the findings from trial monitoring activities may result in judicial reforms, which consequently may lead to a more fair and transparent justice system. Monitoring trials is particularly important in situations where the judiciary is under pressure for various reasons, including during a public health

v. Ukraine, no.7577/02 ECHR (2007), para. 65 and 66. See more about this in the Section of the report on functioning of courts.

556 States have a positive obligation to ensure publicity through targeted actions. Such measures may include providing adequate venue for the court, which is accessible to the public, having a court room which can accommodate some persons in addition to parties.

557 Art.6 (1) of ECHR envisages that: “[...] the press and public may be excluded from all or part of the trial in the interests of morality, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice [...]”.

558 Although states can restrict the publicity of trials as an exception, see ICCPR, Art. 14(1) and ECHR Art. 6(1), the issue of public health is not expressly mentioned under such exceptions. Some interlocutors suggested that during the pandemic states should formally derogate from fair trial obligations under national and international law before effectively limiting publicity of trials, at least in the absence of a substitute such as video broadcasting of proceedings, see **Guidance Note of International Commission of Jurists (ICJ), The Courts and COVID-19**, 6 April 2020.

559 In Copenhagen Document (1990), para. 12, participating States committed to allow observation of hearings as a measure to build public trust in the judiciary.

emergency. ODIHR (and OSCE field operations) have conducted trial monitoring on many occasions,⁵⁶⁰ and developed important tools to enable monitors from civil society to effectively observe the respect of fair trial rights in courts.⁵⁶¹

During the height of the pandemic, ODIHR received reports about substantial limitations of the right to a public hearing, impacting transparency and the ability of trial monitors and the media to observe the process. Although some courts held in-person hearings with the physical participation of parties, trial monitors and the public were often not allowed to attend.⁵⁶² Other courts used ICT to hold remote hearings, but they failed to provide effective access to the public and trial monitors to such hearings. Further, the transparency of the process was limited by the lack of schedules for remote hearings or information on how to connect to ICT platform, Internet connectivity issues and incidents of trial participants being disconnected were reported.⁵⁶³ Some courts sought to compensate in part for the lack of public access by broadcasting hearings, however, shortcomings remained. Further, as violations of quarantine and lockdown measures began being prosecuted there was public interest in transparent court processes for these cases.⁵⁶⁴

560 Information about OSCE/ODIHR's previous trial monitoring projects can be found in the following country specific trial monitoring reports: **Georgia** in 2014, **Belarus** in 2011 and **Armenia** in 2010.

561 See **OSCE/ODIHR's Reference Manual on Trial Monitoring for Practitioners** and **OSCE/ODIHR Legal Digest of International fair Trial Rights (2012)**.

562 For example, in **Georgia**, trial monitors initially faced difficulties accessing remote hearings but this was later resolved with some courts facilitating access. Further, during the **Annual Trial Monitoring Meeting of May 2020**, ODIHR was informed by a civil society organization that in **Armenia** the public was not being granted access to remote court hearings and trial monitoring activities had to be temporarily suspended.

563 For example, it was reported that during a remote hearing in **Kazakhstan**, the court secretary disconnected one of the defence lawyers from the hearing for a short period based on instructions from the judge. This reportedly happened after the lawyer had made allegations about the judge being biased.

564 In **Serbia**, a person was sentenced to three years imprisonment for violating the obligatory quarantine after returning from abroad. The trial was conducted remotely via Skype. Detailed information about the situation in Serbia can be found in the report **“Human Rights and Covid-19 – Analysis of the changes in legal framework during**

OSCE participating States have referred to the right to a fair hearing as being part of those elements of justice that are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings.⁵⁶⁵ Further, the principle of equality of arms means that the procedural conditions at trial and sentencing must be the same for all parties. It calls for a “fair balance” between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.⁵⁶⁶

Among the minimum guarantees for a fair trial are:

- The right to be informed of the charges promptly, in detail and in a language understood by the defendant;
- The right to have adequate time and facilities to prepare the defence, including the right to communication confidentially with legal counsel;
- The right to a lawyer of one’s choice, with free legal assistance if the defendant does not have the means to pay for it;
- The right to be present at the trial; and
- The right to obtain the attendance and examination of defence witnesses.⁵⁶⁷

Remote hearings may seriously limit the ability of states to ensure these minimum guarantees and therefore, in many participating States, procedural legislation allows the use of ICT rather as an exception in certain situations when trial participants cannot attend some hearings or for reasons of protecting certain trial participants.⁵⁶⁸ Still, the use of remote hearings during the

pandemic should not automatically amount to a fair trial violation if the courts took all possible efforts to prevent it, i.e., the restrictions should be proportionate and necessary.⁵⁶⁹

The rights to adequate time and facilities to prepare a defence and to confidential communication with legal counsel was particularly difficult for states to ensure when strict quarantining and lockdown measures were in place. In some participating States, defence lawyers could not obtain special permissions to travel to or to enter detention facilities and communicate with their clients.⁵⁷⁰ Further, when communication between defendant and counsel is confined to video communication, this must remain private.⁵⁷¹ Privacy is difficult to ensure through ICT communication particularly when the defendant is in a place of detention.

all trials are held with the physical participation of participants in front of judges. Nevertheless, some parts of the proceedings can be held remotely as an exception. For example, art.110 stipulates that some in cases when there are serious reasons to believe that the life and physical integrity of witnesses or of their relatives is endangered; courts may allow remote interrogation of such witnesses with the use of ICT. The legislation establishes a list of guarantees against possible abuses. In particular, judges need to issue a formal decision in this sense and to provide reasoning on the need to undertake remote interrogation of witnesses. Moreover, judges should ensure that defendants and their lawyers have all possibilities to address questions. Although the witnesses interrogated through such remote procedure may be physically outside the court building, they should provide the statements only in the presence of an instruction judge. The **statements** of such witnesses should be considered by the court as evidence only to the extent their validity is confirmed by other evidence.

569 See International Commission of Jurists **paper**, *op.cit.*, page 5, “[...] If they (the use of ICT) are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the present outbreak, and do not for instance prevent confidential communication of a person with their lawyer, in principle such adaptations of modalities can be a proportionate response, at least in civil matters and criminal appeals...].”

570 For example, in **Kyrgyzstan** and **Uzbekistan**, special travel permits had to be issued by the authorities in order to move around during the lockdown; however, such permits were not issued to private advocates and defense lawyers. For that reason, some lawyers’ ability to operate during the state of emergency was significantly hampered and this also affected the defendants’ right to effectively select a lawyer of his/her own choice.

571 See for instance *Gorbunov and Gorbachev v. Russia*, no 43183/06 and 27412/07, ECtHR 2016.

a state of emergency and impact on enjoying human rights” published on 7 May 2020 by the Serbian NGO Lawyers’ Committee for Human Rights (YUCOM).

565 Copenhagen Document (1990) para. 5.

566 Article 14 of the ICCPR states that “All persons shall be equal before the courts and tribunals... In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:”. See also **ODIHR Legal Digest of International Fair Trial Standards**, citing *Werner v Austria* [1997] ECHR 92, para 63; *Coëme and Others v Belgium* [2000] ECHR 250, para 102; *G. B. v France* [2001] ECHR 564, para 58.

567 See for instance Copenhagen Document (1990), para. 5.12. and 5.17, ECHR, Art. 6(3c) and ICCPR, Art. 14(3d).

568 For instance, Criminal Procedure Code of the Republic of **Moldova**, Law No.122 from 12 June 2003, envisages that

Recognizing this, some courts consulted the lawyers on whether hearings could take place or need to be postponed. Still courts need to balance the need to hold a hearing with the necessity to guarantee defendant's rights, including the right to examine witnesses and evidence, which some judges argue is not possible in all cases through the use of ICT.⁵⁷² Further, while the increased use of ICT for transferring electronic files and correspondence may increase the efficiency of trials, it also raises concerns in respect of the privacy of such communication.

The impact of other fair trial rights must also be balanced with the right to trial without undue delay.⁵⁷³ States faced challenges not only in ensuring that everyone deprived of his or her liberty had the possibility to bring proceedings before a court to challenge the legality of the detention,⁵⁷⁴ but also in ensure the right to be tried without undue delay.⁵⁷⁵ In a number of states, courts had to postpone hearings as the presence of the necessary trial participants could not be facilitated.⁵⁷⁶

572 During ODIHR Webinar on Functioning of Courts during Covid-19 Pandemic, 4 June 2020, some judges participating stressed that cases where the main facts are disputed and where live evidence has to be examined are unsuitable for remote adjudication.

573 Anyone involved in court proceedings has a legitimate interest in having the trial take place within a *reasonable time*. Excessively lengthy investigations and proceedings may violate the right to a fair trial, see for instance *Dobbertin v. France*, no. 10039/87, ECHR 1993. However, such a right cannot be observed at the detriment of the right to effective defence.

574 See Working Group on Arbitrary Detention, **Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies** (8 May 2020), para. 5; **Report of the Working Group on Arbitrary Detention to the UN Human Rights Council**, A/HRC/22/44, 24 December 2012, paras. 42–51; **General Comment no. 35** on Art. 9 of the ICCPR (Liberty and security of person), para. 67.

575 Article 14(c) of the ICCPR.

576 For instance in the **European Union**, there was difficulties executing the surrender of persons under the auspices of European Arrest Warrant, **EJJUST Report the impact of COVID-19 on judicial cooperation in criminal matters**, p3. In the **Netherlands**, due to the lack of video technology in detention facilities the time each suspect could only use the connection was restricted to 45–60 minutes per hearing, <https://www.fairtrials.org/news/short-update-challenges-right-fair-trial-netherlands>.

Where remote hearings were held, participants were dependent on their ability to use ICT, the quality of communication platforms and quality of the Internet connection. Not all trial participants have the necessary knowledge, skills and material possibilities to access hearings through ICT and therefore, remote hearings may restrict their rights to effectively participate in hearings and to defend their legitimate interests. Further, consideration must be given for the specific needs of persons with disabilities to have equal access to participate fully in hearings.

GOOD PRACTICE

As a good practice, some states introduced regulations or recommendations to provide a clear framework for the increased use of remote hearings and ICT equipment by the courts in times of emergency,⁵⁷⁷ and clarity on judicial discretion on holding remote hearings or not.⁵⁷⁸ Some individual courts facilitated the participation of trial monitors through connection to online hearings.⁵⁷⁹ As a good practice, some courts made preparations well in advance which allowed online hearings to be held as smoothly as possible from a technical point of view,⁵⁸⁰ and for some courts a certain level of formality was maintained despite the hearing being

577 For example in **France**, Ordinance n°2020-303 adapts the rules applicable to courts' ruling on criminal matters and makes it possible for Judges to use IT technologies (electronic or audio), even without the consent of the accused, see MEDEL Institute E-Book, Justice and Challenges in Times of Pandemic in Europe, 1 June 2020, page 18.

578 For example in **Croatia** and **Georgia**, general recommendations and guidelines were provided, but in the end it is up to the individual judge to decide if a case is considered as urgent and suitable for online hearing, as discussed in the ODIHR webinar on the Functioning of Courts in the aftermath of COVID-19 pandemic, 9 June 2020.

579 For example in **Georgia**; while general access to trial monitors to observe criminal court proceedings was not granted by the High Council of Justice due to technical difficulties, trial monitors from civil society were still permitted by Tbilisi City Court to connect to some hearings.

580 For example, in **North Macedonia**, the court had prepared and shared in advanced a set of detailed instructions on how to connect to a video hearings and how to behave during the hearing (e.g., that trial monitors were encouraged to keep their microphone muted and connect well in advance). A technician was present throughout the hearing and was ready to assist in case of any technical difficulties.

held online.⁵⁸¹ Although there was no unified practice on what platform to use for online hearings and much effort is still needed to ensure confidential communication between lawyer and client, most platforms did provide for some level of private communication between clients and lawyers either in via the chat function

or in separate breakout rooms.⁵⁸² Finally, some courts broadcasted hearings live to ensure transparency.⁵⁸³

581 For example, in **North Macedonia** the judges wore their robes and the attendees stood up when the verdict was delivered.

582 Online hearings in **North Macedonia** were conducted via Microsoft Teams, while the Zoom platform was used in **Kazakhstan**. Although the platforms provided an option for communication, there were concerns raised on whether communication could happen in a secure manner.

583 For instance, in the **United States**, the **Supreme Court allowed live broadcasting of hearings**. Also the Supreme Courts in **Bulgaria** and in the **United Kingdom** livestreamed court sessions via YouTube during the pandemic.

RECOMMENDATIONS

- Develop in co-operation and consultation with civil society and legal professionals a solid legal framework for the conduct of remote proceedings and use of ICT during a state of emergency. Such legislation should be fully compliant with fair trial standards and provide the relevant fair-trial guarantees.
- Ensure that all hearings are held in person where fair-trial rights cannot otherwise be guaranteed and that the physical presence of parties in court hearings remains the rule and the recourse to remote proceedings should be made only as an exception.
- Develop standards or protocols to be used by courts for the conduct of remote proceedings with concern for privacy and data protection, which should cover the following issues: how to identify the parties, how the parties should certify their statements, what ICT should be used, what personnel should be in charge of ICT, what should be their professional qualification, etc.
- Provide the necessary financial resources to courts to conduct remote proceedings that should cover: the necessary technical equipment, connection to the Internet, training for the staff in charge with the use of this equipment, etc.
- Develop the legal basis and allocate sufficient financial resources to guarantee the access of vulnerable defendants, injured parties, and witnesses to remote hearings through the use of ICT. Such resources could cover the necessary ICT equipment, access to the Internet, training on the use of ICT, etc. Adequate solutions should be provided for the access to remote hearing of vulnerable trial participants, including persons with disabilities.
- Judges should respect the right to publicity of trials and the right to a fair hearing of defendants during the pandemic. Any restrictions should be necessary, proportionate and based on law.
- Judges should issue reasoned decisions on the conduct of remote hearings which should be available to trial participants and the public. Such decisions should clarify what fair trial restrictions will be imposed due to state of emergency/health reasons and what possible compensatory actions will be undertaken by courts to balance such restrictions.
- Judges should take steps to compensate and balance possible fair-trial restrictions triggered by the conduct of a remote hearing.
- With a view to guaranteeing the right to a fair trial in the future, judges in co-operation with governments, civil society and professional trial participants assess recent practices, existing procedures, guidelines and legislation for the managing of cases in emergency situations to identify gaps in legislation and build on emerging good practices.

II.3. INEQUALITY, DISCRIMINATION AND MARGINALIZATION

Whereas the rights described above in general are enjoyed by all individuals in a given jurisdiction equally, it is important to emphasize that the pandemic and the resulting emergency measures have affected groups and individuals differently, depending on their gender, status, age, or belonging to a particular community. Although all humans are more or less equally susceptible to getting infected, the likelihood of falling ill or dying from Covid-19 starkly differ between certain segments of society. Moreover, access to health care and quality of healthcare is uneven. Emergency restrictions such as lockdowns or stay-at-home orders affect different people differently, and the impact on the socio-economic dimension further exacerbates inequalities.

The pandemic has aggravated societal problems such as hate crime, domestic violence and discriminatory measures against certain communities. People already in difficult situations, such as Roma in informal settlements, migrants and victims of trafficking, found themselves in particularly dire circumstances as a result of the pandemic. Often, states failed to live up to their legal and political obligations concerning non-discrimination and in doing so often exacerbated existing inequalities.

While the following analysis is not exhaustive, it aims at highlighting the particular impact the pandemic has had on vulnerable groups and those otherwise marginalized and references are made to particular participating States to illustrate this. They are only meant to serve as examples, and should not be read as indicating that similar incidents have not occurred in other states. Further, the mere fact that a country has multiple mentions is not necessarily indicative of a problem but may be a consequence of more and better reporting, access to independent media, stronger civil society, and/or the presence of OSCE field operations.

II.3.A HATE CRIMES AND DISCRIMINATION

Addressing all forms of discrimination and intolerance, including hate crime, is an integral aspect of the

OSCE's concept of comprehensive security, and is central to its human dimension. OSCE participating States have committed to strongly condemn racial and ethnic hatred, xenophobia, discrimination, anti-Semitism and intolerance against Muslims, Christians and other religions and have committed to address these phenomena in all their forms.⁵⁸⁴ States have also committed to the equality of all before the law and to prohibiting discrimination as essential elements of justice.⁵⁸⁵

Numerous Ministerial Council declarations and commitments acknowledge the need to address manifestations of intolerance, including hate crime, especially as they may give rise to conflict and violence on a wider scale.⁵⁸⁶ This includes a comprehensive set of commitments to prevent and counter hate crimes, by strengthening legislation, collecting reliable data, building the capacity of actors in criminal justice systems, and considering drawing on resources developed by ODIHR in relevant areas.⁵⁸⁷ In addition to participating States, civil society also has an indispensable role in the process of addressing intolerance and discrimination.⁵⁸⁸

584 Copenhagen Document (1990).

585 Copenhagen Document (1990).

586 Since 2003, participating States have established a normative framework of Ministerial Council decisions to reflect their commitments to address these phenomena: MC Decision 4/03, further reinforced with subsequent MC Decisions 12/04, 10/05, 13/06, 10/07 and 9/09.

587 MC Decision No. 9/09.

588 In numerous Ministerial Council Decisions, participating States have committed to establishing and intensifying co-operation with civil society to promote tolerance and non-discrimination, including at Maastricht (2003); Ljubljana (2005); Brussels (2006); and Athens (2009). At the 2006 Brussels Ministerial Council, States identified the need for "effective partnerships and strengthened dialogue and co-operation between civil society and State authorities in the sphere of promoting mutual respect and understanding, equal opportunities and inclusion of all within society and combating intolerance." Furthermore, civil society organizations have the potential to play an essential role in combating intolerance and discrimination and promoting mutual respect and understanding, including through hate crime data collection and the provision of victim support (Brussels 13/06; Maastricht 4/03).

Finally, a number of OSCE human dimension commitments recognize the vital importance of participating States' realization of their binding human rights obligations under international treaties,⁵⁸⁹ in order to ensure lasting peace and security in the OSCE region.⁵⁹⁰ In the context of public emergencies, the ICCPR specifies that emergency measures taken by states, *inter alia*, cannot involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁵⁹¹ Additionally, states must guarantee non-discrimination in the exercise of economic, social and cultural rights guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁹²

Across the OSCE area, the pandemic has added new layers of complexity to an already difficult task of addressing discrimination and hate crime, exacerbating it by intolerant discourse and racist scapegoating of minorities. In general, victims of hate crime often belong to groups facing discrimination and marginalization on a daily basis. In times of crisis, such as the current pandemic, the threat posed by hate crimes only intensifies, heightening the sense of fear and uncertainty. Reports have proliferated of hate-motivated attacks across the OSCE region, especially against people perceived to be of Asian backgrounds, as well as other minority communities. The pandemic and its physical distancing restrictions also fuelled the proliferation of various forms of online intolerance and discrimination, which can lead to acts of violence and hate crimes.⁵⁹³ Jewish, Muslim and minority Christian communities were also

targeted in incidents. Refugees and migrants have also found themselves singled out for abuse and hatred. Meanwhile, discrimination and hate crimes affect men and women in different ways in the context of the pandemic. While some political leaders condemned hate crime during the pandemic, others fuelled intolerance with their statements.

The pandemic has deepened existing inequalities and exposed vulnerabilities in all spheres of society, which as a result amplified the impact of the pandemic on women simply by virtue of their sex.⁵⁹⁴ This is especially concerning in the case of migrant and minority women, who are affected by multiple forms of discrimination and incidents of hate, including discrimination based on intersectionality of gender with race/ethnicity and religion.⁵⁹⁵

In the light of related OSCE commitments, at the start of the pandemic, the OSCE leadership called on participating States to ensure that "national minorities and vulnerable groups are adequately protected, and that it is made clear that discrimination and hatred will not be tolerated."⁵⁹⁶ ODIHR sent out a reminder that in the current situation, intolerance and discrimination are particularly damaging,⁵⁹⁷ and publicly condemned racist slogans and attacks.⁵⁹⁸ A number of other intergovernmental organizations and their experts, including the UN and Council of Europe, condemned various aspects of intolerance and discrimination in the course of the pandemic. With regards to human rights during the

589 By the means of ratifying international human rights treaties, states commit to render their policies and legislation in line with their treaty obligations and duties. In this manner, human rights guaranteed under international law are protected under domestic legal systems.

590 Budapest Summit Declaration (1994), para. 14; Madrid Document (1983).

591 ICCPR, Art. 4(1).

592 CESCR, **General Comment No. 20 on Non-Discrimination in economic, social and cultural rights**, article 2(2), 2009; General Comment No. 16.

593 Participating States have long recognized the inherent challenges and dangers connected to hate speech that manifests itself as hate on the internet – "Cyberhate." (MC Decision 9/09). At the same time, States need to both ensure the freedom of expression and fulfil their obligation to renounce hate speech by public officials and ensure robust interventions whenever comments expressed on the Internet pose a threat to targeted individuals and communities.

594 See for example, Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey, Michèle Tertilt, **"The impact of COVID-19 on gender equality,"** 19 April 2020.

595 For example, in the **United States**, Asian-American women reported incidents of harassment 2.4 times more than men while in **Canada**, a number of verbal attacks and physical assaults against women of Asian descent were reported in Toronto and Vancouver. In **Germany**, reports showed physical attacks on women of Asian descent. In **Greece**, a **cartoon** published in a daily newspaper showed Muslim women as virus carriers.

596 See, **A message to the OSCE Community: We need solidarity and co-operation, OSCE core values, to work together to stop the pandemic**, OSCE Chairmanship, OSCE HCNM, OSCE ODIHR, OSCE RFoM, OSCE Secretariat, 26 March 2020.

597 See, **Societies that stand together are more resilient in times of crisis**, ODIHR, 20 March 2020.

598 See, **Inclusion and not hatred needed to overcome the common crisis we face**, ODIHR, 17 April 2020.

pandemic, UN human rights experts emphasized the importance of non-discrimination in all pandemic-related policies.⁵⁹⁹ They also called on states to provide support to special groups, including (but not limited to) minorities, migrants and women.

AREAS OF CONCERN

While people around the world are affected by the pandemic, it is important to note that some groups were already in a position of vulnerability before the pandemic started. Evidence gathered during the compilation of ODIHR's annual hate crime data indicates that violent acts against particular groups and communities continue to be a concern across the OSCE region.⁶⁰⁰ Already existing types of racism, xenophobia and other types of intolerance now also emerge as acts of intolerance and discrimination related to the pandemic. Some minority communities were negatively portrayed by the general public, ranging from ordinary citizens to high-level politicians and policymakers and in the media. Numerous virus-related hate incidents have been reported since the beginning of the pandemic in many participating States.⁶⁰¹

599 **No exceptions with COVID-19: "Everyone has the right to life-saving interventions" – UN experts say**, OHCHR, 2020.

600 Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people. To be considered a hate crime, the offence must meet two criteria. The first is that the act constitutes an offence under criminal law. Secondly, the act must have been motivated by bias. ODIHR maintains a [website](#) that presents information from participating States, civil society and inter-governmental organizations about hate crime. Information is categorized by the bias motivations ODIHR has been mandated to report on by participating States.

601 Such cases were reported from **Austria, Belgium, Canada, Croatia, France, Germany, Italy, the Netherlands, Russian Federation, Spain, Sweden, the United Kingdom** and the **United States**. With regards to all references to particular participating States in this chapter, it is important to emphasize that they are presented to illustrate the manifestations of the phenomena described, and that these lists are by no means to be considered exhaustive. They are only meant to serve as examples, and not definite conclusions on where certain phenomena manifested themselves. In a similar vein, more information available publicly about a State may also be a consequence of more and better reporting, stronger civil society, and/or the presence of OSCE field operations. This entails the possibility that some of the described phenomena could also apply to other countries, which

As the coronavirus is widely considered to have spread from China to other countries, intolerance and discrimination was significantly directed towards people perceived to be of Asian descent in the early phase of the pandemic.⁶⁰² Individuals perceived to be of Asian descent also appear to have been particularly and highly disproportionately targeted in hate incidents.⁶⁰³ The scale of the reported incidents of this type was considerably wider in several States, compared to others.⁶⁰⁴ This may be a reflection of the numerical presence of the particular community in a country, their representation

are not mentioned here. ODIHR's capacities and ensuing methodology in collecting information on hate crime and discrimination in the light of the Covid-19 pandemic did not allow for a comprehensive and uniform data collection across participating States.

602 For example, in **Austria, Canada, Croatia, Czech Republic, Denmark, France, Estonia, Finland, Germany, Ireland, Italy, Latvia, the Netherlands, Poland, the Russian Federation, Serbia** and the **United States**.

603 Incidents have been reported in **Austria, Belgium, Canada, Croatia, France, Germany, Italy, the Netherlands, Poland, Russian Federation, Spain, Sweden, the United Kingdom** and the **United States**. In terms of types of incidents, hate incidents targeting people included threats (**Austria, Canada, Sweden, Kyrgyzstan**) and physical assault (**Belgium, Canada, Italy, Poland, Spain, Sweden**), including cases of serious bodily harm. Attacks against property consisted of arson (**Italy** and **United Kingdom**) and vandalism (**France, the Netherlands, United Kingdom** and **United States**) or racist graffiti (**Canada**). In **Canada** and the **United States**, various types of property connected to or associated with East Asia were attacked, targeting cultural institutions, businesses and restaurants. Through association, members of Japanese, Korean, Singaporean and Vietnamese communities were also physically assaulted, and their businesses and property vandalised (**Canada, France, United Kingdom, United States**). In some cases, members of the Hindu community were victims of anti-East Asian hate crime, due to their facial features (**United Kingdom**). Nationals of Central Asian States living abroad were also sometime treated in a discriminatory anti-East Asian manner. In the **Russian Federation**, there were reports of its own citizens from the far east of the country, who have East Asian facial features, were mistaken for Chinese and harassed.

604 In particular, **Canada, the United Kingdom** and the **United States** stand out, most likely in relation to the availability of data and the considerable size of Asian communities in these countries. More serious attacks against Asians also happened in **Belgium, Croatia, Denmark, France, Germany, Italy, Poland, Spain** and **Sweden**. Activists also emphasized that racism directed at Chinese people is not a new phenomenon, yet the pandemic caused it to come to the surface and propagate.

and social position, the states' policy and practice on recording hate crime, as well as the level of reporting by media and civil society.⁶⁰⁵ It was also reported that the usage of face masks by persons of East Asian appearance was sometimes interpreted as a sign of danger and provoked hate incidents.⁶⁰⁶

Organized hate groups whose activities consistently display hostility towards protected groups, in particular, appeared to exploit the public emergency by spreading intolerant discourse and conspiracy theories, assigning blame to different minority communities, often at the same time.⁶⁰⁷ For instance, Jewish communities were targeted by anti-Semitic conspiracy theories, scapegoating related to Covid-19, and various other expressions of anti-Semitism, including hate crime.⁶⁰⁸ In a similar vein, predominantly Muslim minority communities, such as ethnic Turkish minorities in Western Europe, as well as Muslim migrants and foreign Muslim students, were blamed for the spread of the virus in some participating States with majority non-Muslim populations.⁶⁰⁹ At

the same time, the spread of hate online affects communities across state borders. In some states where tensions between Christian Orthodox denominations exist simultaneously on religious and ethnic grounds, the minority communities in questions reported concerns about more intensive surveillance regarding the respect for regulations limiting religious services during the pandemic, including arrests of clergy for lockdown violations.⁶¹⁰ Sikh communities reported difficulties of living in mainly multigenerational households under lockdown, while trying to keep older members safe. At the same time, the closure of gurdwaras which provide meals for the needy left vulnerable community members without access to food.⁶¹¹ Roma communities were also frequently accused of violating public order and pandemic-related measures, as well as spreading Covid-19.⁶¹² (See also the section on Roma and Sinti below.) Refugees and migrants were also blamed for the spread of Covid-19 in many participating States.⁶¹³ Inflammatory rhetoric by local political figures was also reported, and it may have provided legitimacy and

605 In addition to widely spread intolerant and discriminatory discourse, sometimes by politicians and mainstream media (**Italy, United States, Russian Federation**), examples include discrimination of persons of East Asian descent in access to shops, restaurants, hotels and public transportation, or obstacles in access to healthcare, education and housing (**Estonia, Germany, Poland, Romania, Russian Federation and Sweden**).

606 Such incidents have been reported from, for instance, **Poland** and the **United States**. Virus-related anti-Asian conspiracy theories further negatively contributed to the intolerant atmosphere, as well as numerous smaller acts contributing to a hostile atmosphere (**Canada, Poland, United States**).

607 This has been the case in, for example, **Austria, Canada**, the **Netherlands**, the **Russian Federation** and the **United Kingdom**.

608 Such reports have been received from **Austria, Canada, France, Poland**, the **Russian Federation** and the **United States**, where politicians singled out Jewish communities as alleged violators of physical distancing restrictions. In **Canada**, as Jewish communities turned to online Holocaust memorial commemorations, online religious services when synagogues closed down, or online classes and other events, these were aggressively disrupted in various ways, including through displays of Nazi symbolism and anti-Semitic slurs. "Zoom bombing" emerged as a new phenomenon of deliberate intrusions characterized by the use of hateful and pornographic messages and images, and originated and flourished during the first months of the pandemic.

609 This has been reported from **Austria, Belgium, Georgia, Greece, Hungary, Poland**, the **United Kingdom** and

the **United States**. In **Serbia** and the **United Kingdom**, untruthful claims and old video clips were circulated claiming that Muslim communities violated physical distancing measures to attend prayer and communally break the fast during the holy month of Ramadan.

610 **Montenegro**.

611 **United Kingdom**.

612 Incidents have been reported from numerous states, including **Bulgaria, North Macedonia, Romania, Slovakia** and **Spain**.

613 For example, in **Austria, Croatia, Denmark, France, Germany, Ireland, Malta, Portugal, Serbia** and **Slovenia**. In **Poland**, this belief built on already existing prejudice against migrants as "spreading disease." In **Bosnia and Herzegovina**, the local population opposed the construction of makeshift camps intended to accommodate transiting migrants (because of the applicable restrictions of movement for all, as well as to stop the spread of the pandemic) and a high-level political representative demonized migrants in the context of the pandemic and threatened them with deportation. **Hungary** expelled a group of foreign university students for alleged violations of hospital quarantine, severely affecting their personal and professional lives. In **Poland**, activists expressed concern about the lack of local information about the pandemic in the languages asylum seekers speak. In **Ireland**, concerns were expressed that asylum seekers have to share bedrooms and attend joint canteens in state-supported centres, which placed them at higher risk of contracting the virus than the majority population.

encouraged hate crimes and discriminatory acts.⁶¹⁴ (See also the section on migrants and refugees, below.)

Old age represented grounds for marginalization and discrimination in the pandemic, particularly among women and under-represented groups. One such example was the consideration of age as the criterion in making decisions on the allocation of medical treatment for Covid-19, without differentiating between various health conditions of older people. Older citizens also faced restrictions on freedom of movement, as some participating States requested older people not to leave their homes, for days or even weeks, including those living alone and without assistance.⁶¹⁵ Ageist discourse also appeared, which referred to older people as less deserving of societal solidarity and state protection.⁶¹⁶

Women were also victims of pandemic-related gender-based hate crimes, with single and multiple bias motivations in which gender intersects with race/ethnicity and religion; women are also affected by hate crime in different ways than men.⁶¹⁷ Members of some minority groups, such as LGBTI, were in a particular situation of vulnerability in the context of the pandemic.⁶¹⁸

614 For instance, in **Bosnia and Herzegovina**, a high-level political representative demonized migrants in the context of the pandemic and threatened them with **deportation**. In **Sweden**, a high-level public health official **blamed nursing-home staff** of mainly migrant background for the high number of COVID-19 cases in their country's nursing homes. The staff allegedly did not adequately apply instructions due to lack of skills in the country's language.

615 **Bosnia and Herzegovina, Serbia.**

616 In **Ukraine**, a minister of health referred to the people over 65 years of age as "corpses" who should not be in the focus of Covid-19 efforts; in the **United States**, a high-level official suggested that older people should sacrifice themselves for the sake of the economy of the country.

617 For instance, in the **United States**, women of East Asian descent were physically assaulted and insulted with racist and sexist slurs. Moreover, in **Canada** and the **United States**, a notable majority of hate incidents targeting persons of East Asian descent targeted women. According to UN Women, female health workers were also frequently targeted in hate incidents. With regards to women from Muslim communities, in **Austria, France** and **Canada**, that ban the face coverings typically used by Muslim women, the mandatory use of face masks created a paradoxical situation where the type of behaviour that was banned for them now became obligatory for all.

618 See Victor Madrigal-Borloz, UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, webinar "**COVID-19**

For example, self-isolation and quarantine can render them vulnerable from discrimination and hate crime at the hands of their own family members. In some participating States, the state of emergency was seen as an opportunity to amend legislation that adversely impacted the LGBTI community in those states.⁶¹⁹

The pandemic had a disproportionate impact on persons with disabilities, who in addition to concerns about contracting the virus also may have had concerns about how they would be treated if they get ill. Some disabilities make individuals more susceptible to falling seriously ill from the disease and can therefore be considered particularly vulnerable. Persons with disabilities have faced a long history of discrimination in accessing healthcare and have often been excluded, largely because of out-dated attitudes about the value

and the Human Rights of LGBTI People" organized by Columbia Law School, 19 May 2020. For example, in **Bosnia and Herzegovina** and **Hungary**, LGBTI community members reported that self-isolation and quarantine rendered them vulnerable to discrimination and hate crime at the hands of their own family members (Emina Bošnjak, Executive Director, Sarajevo Open Centre, webinar "**Digital Presentation of LGBTI Human Rights: Pink Report 2020**" organized by Sarajevo Open Centre, 18 May 2020. Tamás Dombos, Board Member, Háttér Society, webinar "**Minorities and Disadvantaged Groups during the Pandemic**" organized by Hungarian Helsinki Committee, 12 June 2020). In several participating States, such as **Bosnia and Herzegovina** and **Germany**, there were reports of LGBTI migrants quarantined in collective centres suffering abuse from other migrants and they could not access either safe shelter or legal aid (Amnesty International, "**Refugees and Migrants Forgotten in Covid-19 Crisis Response**," 12 May 2020; Darko Pandurević, Programme Co-ordinator, Sarajevo Open Centre, webinar "**Digital presentation of LGBTI Human Rights: Pink Report 2020**" organized by Sarajevo Open Centre, 18 May 2020; Mengia Tschalaer and Nina Held, "**Coronavirus exacerbates LGBTIQI refugees' isolation and trauma**," Al Jazeera, 22 April 2020). In , Kosovo see, Dafina Halili, "**LGBTQ Life Under Quarantine**," *Kosovo 2.0*, 12 May 2020. Please see OSCE disclaimer on page 26..

619 For example, in North Macedonia anti-discrimination legislation was repealed leaving particularly vulnerable and marginalized communities of society unprotected against any form of discrimination; and in **Hungary**, a provision in an omnibus legislation passed on 18 May 2020, made it impossible for transgender persons to legally change their gender. The law will make it impossible for transgender and gender diverse persons to legally change their sex and/or gender marker since Art. 33 provides that all references to "sex" will now instead refer to "sex assigned at birth" in the national registry and on identity documents.

and quality of their lives that are present in many participating States. As life-saving health care resources were stretched to capacity in some countries, persons with disabilities were concerned whether they would be discriminated against or their needs brushed aside. Additionally, persons with disabilities who require assistance from others have been particularly affected by the restrictions in freedom of movement.⁶²⁰ Persons with disabilities were also targeted by pandemic-related hate crime in some participating States.⁶²¹

The process of “othering” in order to condemn extended to national and even regional identity. Individuals assumed to be nationals of states with a high number of Covid-19 cases at the time faced discrimination.⁶²² In some places, this was also the case with the countries’ own citizens returning from abroad during the pandemic.⁶²³ Medical status, as well as profession, also became grounds for intolerance and discrimination. People infected or suspected to be infected with the virus, in general, were targeted by intolerance and discrimination in some participating States and threatened and/or physically assaulted. This included social workers and medical professionals, due to their presumed contact with infected people.⁶²⁴ In some participating

States, minorities and persons of migrant background are overrepresented among essential workers, many of them women.⁶²⁵ Especially in the health care sector, concerns were expressed about their public invisibility, and dangerously inadequate personal protective equipment that appeared to be designed for the size of an average white man.⁶²⁶ Furthermore, discrimination, often structural in nature in economic and social rights can create poor public health conditions in affected minority communities, which places them at special risk of contracting the virus and falling sick.

In some minority communities, such as Roma, people of African descent and/or of migrant background, discrimination in access to adequate housing, characterized by high density of housing units or entire neighbourhoods and settlements sometimes without access to clean water, exposed them to the virus and made them more likely to fall seriously ill.⁶²⁷ Access to clean water has also been reported as an issue for indigenous communities living on reservations.⁶²⁸ Discrimination in access to adequate health, especially if in combination

620 See, **Protect Rights of People with Disabilities During COVID-19**, Human Rights Watch, 26 March 2020.

621 For instance, in the **United Kingdom**. In **Finland**, intolerant discourse targeting persons with disabilities blamed them for allegedly using healthcare resources that could alternatively be used to fight Covid-19. Mandatory face covering also created communication difficulties both for persons who rely on lip reading, as well as medical staff working with them, as reported for instance from the **United States**.

622 For instance, in **Bulgaria**. In **Austria** and **France**, Italian nationals were exposed to intolerance and discrimination, in the light of the early expansion of the Covid-19 in Italy. Similarly, some French individuals were treated in a discriminatory manner in neighbouring countries’ areas bordering France. Anti-German pandemic-related conspiracy theories spread in some neighbouring countries. In **Portugal**, people coming from particular areas of the same country, including capital cities, known for a high number of Covid-19 infections, also faced discrimination and intolerance outside of their region.

623 For example, in **Bosnia and Herzegovina, Montenegro, Romania** and **Ukraine**.

624 Such incidents were reported in **Bosnia and Herzegovina, Montenegro, Russian Federation, Ukraine** and the **United Kingdom**. This was particularly an issue for medical professionals from minority communities: in the **United Kingdom**, a survey among minority

health care workers in state medical institutions showed that one in five of them experienced discriminatory behaviour. In **Poland** and **Spain**, medical staff received messages of hate because of their assumed exposure to infection. In **Canada** and the **United Kingdom**, for example, individuals and minority communities were threatened with being intentionally infected with the virus, including Jewish communities, people of East Asian descent and indigenous peoples.

625 For example, in the **United Kingdom**, **statistics** show that BAME (Black, Asian and Minority Ethnic) professionals make up about 20 per cent of the National Health Service (NHS); in the **United States**, Black and Latino people are overrepresented among essential workers, according to JoAnn Yoo of the Asian American Federation (Reimagining Racial Justice webinar, 9 June 2020). In **Canada**, many migrant workers and other non-permanent residents have been working on the front lines of the COVID-19 pandemic.

626 For example, **reports** show in the **United Kingdom**, of the 53 NHS staff known to have died in the pandemic thus far 68 per cent were BAME. In **Canada**, many female Filipino nurses working in the health sector without personal protective equipment due to the lack of work safety, were blamed for allegedly carrying the Covid-19 virus (Jeffrey Andrión, PhD, University of Toronto (Resisting Anti-Asian Racism in Canada webinar, 27 May 2020). Already in 2017, a **report** established that “most PPE is based on the sizes and characteristics of male populations from certain countries in Europe and the United States”.

627 For example, in **Bulgaria** and **Sweden**.

628 See, the **United States, Covid-19 Disparities Reflect Structural Racism, Abuses**, Human Rights Watch

with undocumented status and limited health insurance, put many migrant workers at risk. Many were forced to leave their jobs and return to their home countries, out of concern that they may not receive equal treatment in healthcare institutions. In some states, migrant workers were also made vulnerable through their high representation in specific high-risk workplaces, such as the meat industry.⁶²⁹

Furthermore, against the backdrop of the pandemic, the killings of African Americans in the United States⁶³⁰ sparked massive anti-racist protests inspired by the Black Lives Matter movement in the United States as well as a number of other participating States. A number of hate crimes targeting people of African descent, or those supporting the anti-racist movement, were recorded in some participating States since the beginning of protests and directly relating to the protests, without explicit connection to the pandemic.⁶³¹ At the same time, in some States concerns were expressed about the possibility of virus propagation during public protests.⁶³²

Furthermore, the emergency measures introduced by authorities across the OSCE region to contain the spread of the pandemic appeared to frequently affect minority communities in a disproportionate manner. In terms of monitoring and ensuring the application of measures, media and civil society made allegations of disproportionate securitization of minority communities.

Testimony to US House of Representatives Ways and Means Committee.

629 For example, the **United States**; and in **Germany** a significant number of clusters of Covid-19 infections have been linked to meat processing plants employing predominantly Eastern European workers.

630 Including Breonna Taylor and George Floyd, both killed at the hands of police, as well as the racist murder of Ahmaud Arbery.

631 These included physical assaults, threats, vehicle rammed into them, activists' signs and vehicles damaged, and churches vandalized (**United States**).

632 For example, **Belgium, Denmark** and the **United States**. Fears over the spread of the virus during the protests arose, with some participating States (e.g., **Norway**) discouraging their citizens from the participation in protests. In some states (e.g., **Germany**), the protesters made efforts to respect physical distancing recommendations as much as possible. Some scientists also suggested that use of tear gas by the police against the protesters (**United States**) may contribute to propagation of the disease.

This reportedly included minority groups, including predominantly migrant or Roma communities, being threatened with, or actually selectively placed under enforced lockdown, monitored by police, without a medical or other legitimate justification or in a discriminatory or disproportionate manner.⁶³³ According to some reports, only a small number of states provided pandemic-related information in minority languages.⁶³⁴

There is a general continued trend of gaps in reported official data, indicating that under-reporting and under-recording of hate crimes is prevalent throughout the OSCE region.⁶³⁵ The state of public health emergency, including the involvement of police and military in enforcing related measures, as well as the closure of many judicial institutions, can only be assumed to have further hindered access of victims of hate crimes to justice and/or deterred them from reporting hate crimes to state authorities. Lack of appropriate support to victims of hate crime, characteristic for many states before the pandemic, may likely deteriorate due to a potential shift of resources, or adoption of austerity measures, including cuts in funding of civil society organizations.⁶³⁶ Civil society organizations often bear the brunt of supporting the victims of hate crime and have, therefore, often

633 For example, in **Azerbaijan, Bulgaria, Georgia, the Russian Federation, Slovakia** and **Spain**. In **Belgium, France, the Russian Federation** and **Slovakia**, heavy-handed law enforcement raids, meant to monitor the implementation of restrictive pandemic-related policies, disproportionately affected minority communities, including instances of police violence. In **Romania, Slovakia, Spain, Greece, France** and **Turkey**, this was particularly the case with Roma communities, persons of African descent or those of migrant background. In **Canada**, "random checks" and profiling that police conducted in the streets, in the context of ensuring lockdown, sometimes appeared to disproportionately affect racialized minority groups. In the **United States**, an overrepresentation of people of African or Latin American descent were fined for apparent violations of physical distancing restrictions, indicating the possibility that these groups may have been disproportionately profiled and fined. In **Canada**, concerns were raised around "carding", racial and social profiling in the context of police checks on potential violations of lockdown regulations, leading to mass collection of data about marginalized people.

634 See also statements and reports by the HCNM.

635 For details, see ODIHR's annual **Hate Crime Reporting**.

636 In **Poland**, for instance, the funding of development civil society organizations was abruptly cancelled because of the pandemic.

developed expertise, good practice and standards in dealing with these victims.

The work of civil society organizations addressing hate crime and discrimination has been further hampered by physical distancing and other state-imposed restrictions due to the pandemic. Concerns were expressed that hate crimes not related to the pandemic continue to take place, for example against Roma or African-Americans,⁶³⁷ yet civil society's limited resources do not allow for adequate research and advocacy work. Unveiling phenomena such as intolerance and discrimination in a developing crisis situation is heavily reliant on the strength and capacity of civil society and on how much media focuses on and reports such issues, which also underlines the need for heightened state attention on these issues during times of crisis. Provided that they had such capacity in terms of human and technical resources, some organizations moved their related advocacy work online. Yet, virtual space can also be unsafe for human rights defenders.⁶³⁸

GOOD PRACTICES

Despite the enormous challenges with regard to confronting discriminatory practices, attitudes and structural obstacles, and facing an upsurge in expressions of intolerance and even hate crimes, many participating States, civil society actors and international organizations acted with determination to halt and reverse these trends. The long-term effects on social cohesion across the OSCE region are yet to be assessed, but some of the positive examples observed in many states may help to inspire others to follow suit.

Several participating States addressed hate crime in different forms and applied various approaches.⁶³⁹

⁶³⁷ This was reported from **Ukraine** and the **United States**.

⁶³⁸ Online events focusing on addressing intolerance and discrimination were frequently interrupted by "Zoom bombing." At the same time, an intensified online presence may also make civil society organizations vulnerable to state surveillance. In addition, their work cannot reach those who cannot afford adequate technical equipment and access to the Internet.

⁶³⁹ For example, with regards to addressing hate crime, police services including the Vancouver police in **Canada** or other public authorities in the **United Kingdom** and the **United States** publicized data on recorded pandemic-related hate

These actions not only raised public awareness of hate crime, and emphasized the dangers of hate crime for the security of entire societies, but also sent a strong message that hate crimes are recorded and adequately dealt with. High-ranking, regional and local politicians of several participating States, including presidents and prime ministers, condemned hate crime against their nationals of Asian descent.⁶⁴⁰

In the area of addressing intolerance and discrimination in the context of the pandemic, some participating States recognized the need for special support to minority communities, by announcing new health-care support for, *inter alia*, indigenous communities amid the pandemic⁶⁴¹ or carried out other symbolically important acts to signal inclusiveness and tolerance.⁶⁴² Special commissions were created to monitor the impact of the pandemic on vulnerable groups.⁶⁴³ Some States provided information on Covid-19 in the languages of national minorities, and/or languages of the main migrant groups in their countries.⁶⁴⁴ Information on Covid-19 specifically for persons with disabilities was also provided in some participating States.⁶⁴⁵

crime and highlighted a sharp increase compared to 2019. Special task forces on hate crime were created, as well as special funds allocated to address them. In **Canada** and the **United Kingdom**, police services also created Sign Language videos on hate crime, representing a positive example of reaching out to persons with disabilities.

⁶⁴⁰ For example, in **Canada**, the **United States** and the **European Union**.

⁶⁴¹ For example, in **Canada**.

⁶⁴² For instance, national or local authorities in **Canada**, **France**, **Germany**, the **Netherlands** and the **United States** temporarily allowed public playing on loudspeakers of the Muslim call for prayer from local mosques or prayer facilities as a sign of support for Muslim communities during the pandemic.

⁶⁴³ For example, in **Belgium** and in **Canada**. In terms of addressing the disproportionate impact of the pandemic on minority communities, some participating States provided a good practice of publishing detailed reports, including the Centres for Disease Control and Prevention, **COVID-19 in Racial and Ethnic Minority Groups** in the **United States**, where a number of lawmakers **declared racism a public health emergency**, and the governor of a state provided its population of African descent with free medical insurance.

⁶⁴⁴ For example, in **Sweden**, **Austria**, **Czech Republic** and **Georgia**.

⁶⁴⁵ For example in **France**, where a dedicated and Universal Design-compatible **website on Covid-19** was created for people with disabilities. Similar examples were reported in **Czech Republic** and **Finland**.

The engagement of national human rights institutions also brought some inspiring examples calling on national governments and local authorities to safeguard the rights of minorities and marginalized groups or intervened in the interest of particularly vulnerable communities.⁶⁴⁶

There have been numerous examples of civil society organizations quickly adapting to changed circumstances, and providing material or psychological assistance, whether online or in a manner adapted to local circumstances, and filling gaps left by government bodies.⁶⁴⁷ This assistance was sometimes provided by minority organizations to marginalized communities, however in practice the assistance was frequently provided to any individual in need, regardless of their background. In this manner, civil society compensated for overburdened state services in a number of participating States.⁶⁴⁸ In some cases, such work on behalf of marginalized communities, otherwise frequently vilified

in public discourse, also served to counter negative prejudice and stereotypes.⁶⁴⁹

In a number of participating States, civil society organizations engaged in monitoring how the pandemic directly and indirectly affected minority communities.⁶⁵⁰ They also invested considerable effort into raising public awareness of instances of intolerance and discrimination, as well as hate crime, through webinars, reports, campaigns and public statements.⁶⁵¹ All this advocacy work is extremely important in the current crisis situation, with the state authorities mainly focusing their efforts on public health aspects of the pandemic. Civil society organizations, including faith-based ones, also created a virtual bridge-building and dialogue between communities, countering the flourishing of prejudice, stereotypes, assigning blame and conspiracy theories.⁶⁵²

646 For example, in **Ireland**, the NHRI called political parties involved in government formation to safeguard human rights and equality measures amid the emergency responses to the pandemic. In **Serbia**, the NHRI called the authorities to provide particular support to Roma communities, including access to clean water.

647 For example, in **Romania**, the **United Kingdom** and **Poland**.

648 See, for instance **Inclusion Europe Coronavirus (COVID-19) pandemic**, which provided easy-to-read information on COVID-19 in four major European languages, for persons with intellectual disabilities. In some participating States, Roma civil society organizations mobilized networks of volunteers who shared information and distributed face masks and humanitarian assistance in Roma settlements. Migrant associations organized hostel accommodation for stranded migrant workers in the **Russian Federation**.

649 For example, in **Poland**, Chechen women refugees were sewing face masks, and in the **United States**, Chinese-American and Vietnamese-American communities purchased personal protective equipment.

650 For example, in **Canada**, the **United States**, the **United Kingdom**, **Germany**, **Ireland**, and through the European Network Against Racism (ENAR), a network of member organizations across Europe.

651 Some minority organizations, such as ENAR in Europe, as well as examples in the **United States**, the **United Kingdom**, **Canada** and **Spain**, actively debunked dangerous narratives presenting their communities as not respecting pandemic-related regulations. In **Hungary**, they also provided legal defence to individuals affected by discriminatory state policies in the light of the pandemic.

652 For instance, some organized webinars where representatives of different communities spoke of the rise of discrimination and hate crime during the pandemic and about the importance of inclusion and working together to address these negative phenomena. See, for instance in the **United Kingdom Dialogue & Debate: Faith Responses to COVID-19**, Cumberland Lodge webinar.

RECOMMENDATIONS

- States should uphold existing commitments and international obligations on tolerance and non-discrimination.
- Condemn any form of discrimination and hate crime and abstain from any statement or action that exacerbates vulnerabilities.
- Respond swiftly to hate crimes, including those motivated by gender or sex, to record and investigate them so that the perpetrators can be brought to justice and adequate penalties imposed. Support victims

as they report their experiences, and ensure the availability of all necessary psychological, social and legal support for victims, including through close co-operation with civil society. Relevant authorities should also publicly condemn any such acts and ensure that perpetrators are brought to justice.

- Consider, where states have not done so, providing the possibility to report hate crimes online and allowing third-party reporting to police by civil society groups and equality bodies.
- Ensure that any measures and restrictions imposed due to the emergency situation are created and applied in a non-discriminatory manner, as prescribed by relevant international standards. Working together with civil society organizations and minority communities in this process is crucial.
- Ensure meaningful public participation of minority communities' representatives, in both the assessment of the situation as well as in designing and implementing the adequate remedial policies and actions, while taking into account the different needs of women and men. In the process, women and men should be equally included.
- Promote policies focusing on equality of opportunity by making the collection of equality data in the context of the pandemic a norm across the public sectors in participating states, assess how health and emergency measures have disproportionately affected minority and/or marginalized communities, adopt mitigating measures, as well as ensuring that further disadvantages are not created. Participating States should support and co-operate with civil society in the collection and analysis of equality data.
- Make sure adequate guidance is widely provided on measures taken by the state in the languages of minority communities and distributed in a manner socially and culturally appropriate for these groups.
- Stop and further prevent discrimination through disproportionate securitization and profiling of minority communities and their members in the context of the pandemic.
- Base criteria for prioritization in providing medical assistance in the context of Covid-19 on clinical appropriateness and proportionality of the treatments, and not on criteria related to protected characteristics, such as age or disability.
- States should implement the WHO guidelines for persons with disabilities.⁶⁵³
- Assess and improve relevant mechanisms for hate crime recording and data collection, including gender disaggregated data and assess the existing current victim support systems.
- Ensure that the consequences of the current pandemic, including the economic crisis, do not affect states' capacities to provide support to victims of hate including through appropriate funding to non-state actors and civil society organizations.
- Build law enforcement and justice sector capacities to recognize and effectively investigate hate crimes and to ensure that specialized training, focused on hate crime victims and their needs, is provided for officials and civil society organizations within the victim support structures. Enact policies, through inter-agency co-operation, to address hate crimes in a comprehensive manner.
- Prevent new outbursts of hate crime against racialized minorities by undertaking pre-emptive and proactive steps when easing physical distancing restrictions.
- For countries banning face covering typically used by Muslim women, banning or restricting the Muslim call to prayer, or requiring mandatory handshakes in some formal contexts, to consider repealing such policies and legislation, in the light of the changes brought about by the pandemic that proved these bans and obligations unfounded.

These include: "Captioning and, where possible, sign language for all live and recorded events and communications. This includes national addresses, press briefings, and live social media; Convert public materials into 'Easy Read' format so that they are accessible for people with intellectual disability or cognitive impairment; Develop accessible written information products by using appropriate document formats, (such as "Word"), with structured headings, large print, braille versions and formats for people who are deafblind; Include captions for images used within documents or on social media. Use images that are inclusive and do not stigmatise disability; Work with disability organizations, including advocacy bodies and disability service providers to disseminate public health information." **World Health Organization "Disability considerations during the COVID-19 outbreak".**

- Promote policies focusing on equality of opportunity by making equality data collection and disaggregated statistics a norm across the public sector and co-operating with civil society in the collection and analysis of equality data.
- Design and implement recovery assistance in a non-discriminatory manner, with the participation of underrepresented groups affected by discrimination.
- Celebrate and harness the strength of diversity within participating States, as a means of overcoming current and forthcoming social and economic challenges of the pandemic.

II.3.B GENDER INEQUALITY AND DOMESTIC VIOLENCE

There is an extensive acquis of OSCE commitments covering gender equality and domestic violence. Participating States have called for more equal participation of women and women's organizations in legislative, programmatic and policy development, and enhanced measures to address violence against women, including through effective investigation, prosecution and service provision.⁶⁵⁴ The importance of these commitments as essential elements of comprehensive security and the human dimension has been underlined on numerous occasions. In the Moscow Document (1991), participating States recognized gender equality as a cornerstone of security and democracy in the OSCE region. In 2003, states committed to *pay special attention to the health of women and girls, inter alia, by: Improving access to gynaecological health care,*

654 2009 MC Decision 7/09 on Women's Participation in Political and Public Life; and the 2005, 2014 and 2018 MC Decisions on Violence Against Women (15/05; 7/14 and 4/18). Reaffirming the earlier two Ministerial Council Decisions (15/05 and 7/14) on Preventing and Combatting Violence Against Women, Decision 4/18 called on participating States to "ensure access to justice, effective investigation, prosecution of perpetrators, as well as provide, while respecting their rights and privacy, adequate protection, rehabilitation and reintegration support for victims of all forms of violence against women and girls" (Cf. OSCE MC, DEC/4/18 para 1); The earlier MC Decision 7/14 called also on States to "Give consideration to the signature and ratification of relevant regional and international instruments, such as the Council of Europe Convention on preventing and combating violence against women and domestic violence, where applicable". OSCE pS have also committed to "adhere to and fully implement the international standards and commitments they have undertaken concerning equality, non-discrimination and women's and girls' rights", in particular the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). (MC, DEC/14/04 - 2004 OSCE Action Plan for the Promotion of Gender Equality)

including prenatal, delivery and postnatal health care services".⁶⁵⁵ The Covid-19 pandemic and related emergency measures have presented an unprecedented challenge to live up to these standards and ensure these commitments are reality across the OSCE region.

The public health emergency responses to the pandemic have had a significantly negative impact on women's human rights, exacerbating existing gender inequalities and discrimination, and raising concerns regarding the implementation of gender equality commitments across the OSCE region. The economic impact on women is likely to be greater, as they face a higher risk than men of losing their job in the private sector. At the same time, they make up the majority of staff in the medical or care services, as well as caring for children, older people and the sick at home.⁶⁵⁶ However, ODIHR monitoring has revealed low numbers of women in Covid-19 decision-making bodies such as commissions or taskforces in most participating States; limited gender analysis within crisis response and recovery planning; and an inability of many states to tackle the increased levels of economic vulnerabilities and employment discrimination against women. Quarantines, curfews, and closures of schools and other public services have intensified women's time constraints as their unpaid care work has increased. Confined living conditions due to lockdowns and self-isolation regimes, coupled with increased financial stress, unemployment and strained community resources, have compounded existing forms of gender-based discrimination. This includes violence against women, as their exposure to abuse at the hands of an intimate partner or family member has

655 MC, DEC/3/03 - OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area

656 **OECD Policy Responses to Coronavirus (COVID-19): Women at the core of the fight against COVID-19 crisis**

increased, while opportunities to seek and receive vital support have diminished.⁶⁵⁷

Public services normally available to women victims of violence, including gynaecological health services, police interventions, judicial remedies and sheltering services have all been disrupted, while the risk of violence has increased. In some cases, pressure on referral mechanisms available to victims of violence, in addition to restrictions of movement, has been lethal for women, with a documented rise in femicides.⁶⁵⁸

Diversity in public and political life, policy making, advisory and decision-making bodies, as well as a gender-sensitive legislative process, translate into more representative and effective laws and policies, which benefits everyone.⁶⁵⁹ An analysis of the composition of Covid-19 taskforces reveals significant gaps in terms of gender balance in many participating States. While women's representation is higher in public health councils and vaccination advisory groups, it has been low in roles with stronger links to political decision-making.⁶⁶⁰ The limited integration of gender perspectives into pandemic-related crisis planning and response is likely to exacerbate existing gender inequalities. In this context, it is of concern that few participating States

are reported to be conducting gender impact assessments to guide more gender-sensitive Covid-19 recovery policies.⁶⁶¹

Although gender statistics such as sex- and age-disaggregated data on the socio-economic impact of Covid-19 are not systematically collected across the OSCE region, such data is important to address the differential impact that emergency responses and measures have had on women and men, including those in different situations of vulnerability and risk, such as older women, adolescent girls, migrant and refugee women, women with disabilities, women deprived of liberty, and women from minority backgrounds, including Roma and Sinti, as well as indigenous women.⁶⁶²

The impact of the pandemic response measures on women's economic rights has been significant. Women are globally over-represented in less protected and low-paid jobs and in most hard-hit sectors, such as tourism, retail and manufacturing, and are therefore at a disadvantage as the economic situation deteriorates.⁶⁶³ In many participating States women, particularly those who are pregnant, have been disproportionately affected by pandemic-related lay-offs.⁶⁶⁴

657 **Covid-19 and Ending Violence Against Women and Girls, UN Women**

658 **Statement by the UN Working Group on discrimination against women and girls - Responses to the COVID-19 pandemic must not discount women and girls.** The UN called domestic violence "the shadow pandemic" alarming over its spread and extent. Many international and national governmental and non-governmental organizations have joined their voices to calls for action. Joint calls on participating States to step up measures to protect women and children were made by heads of **OSCE Executive Structures, ODIHR and the Parliamentary Assembly** as well as by **forty-three OSCE participating States**. WHO warned of a surge of domestic violence as COVID-19 cases decrease in Europe, **UN Regional Information Centre for Western Europe, COVID-19 Pandemic: Tackling the Dramatic Increase in Cases of Violence Against Women, Council of Europe**

659 ODIHR, **Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation**, Warsaw, 2017.

660 **For instance, the Covid-19 taskforce of the United States and Italy did not initially include any women. Hungary's taskforce included one woman out of 15 task force members.** For an overview of different countries' task forces see [here](#).

661 Based on the information published by the **Council of Europe** only **Serbia** and **Sweden** initially reported to be conducting gender impact assessments.

662 See also: MC.DEC/04/13, para. 2.12 on Enhancing OSCE Efforts to Implement the Action Plan On Improving The Situation Of Roma And Sinti Within the OSCE Area, With A Particular Focus On Roma And Sinti Women, Youth And Children. For the intersecting forms of discrimination and impact of pandemic-related responses and measures with relation to access to rights, see the Section on Roma and Sinti Issues. Disaggregating data on a variety of characteristics, including disability, migrant and refugee status is recommended to facilitate more inclusive decision making.

663 The economic and labour crisis created by the pandemic could increase global unemployment by almost 25 million, according to a new **assessment** by the International Labour Organization (ILO).

664 For example, an **analysis** by the state bodies in **Finland** has revealed that while the proportion of those laid off has increased overall, this has disproportionately impacted women, particularly in the age cohort of 35–45 years. In the **United States**, 60 percent of those who lost jobs during the first two months of the epidemic were women, according to some **reports**. The **United Kingdom's** Equality and Human Rights Commission has **noted** increased employment discrimination against pregnant women. According to a **study** by the Institute for women's policy research, women lost more jobs than men in almost

Throughout the health crisis, women appeared slightly more likely than men to be diagnosed with Covid-19, possibly partly due to the fact that women account for the majority of healthcare workers. Globally, women constitute a majority of employees in healthcare and frontline services sectors⁶⁶⁵, which makes them more susceptible to infection.⁶⁶⁶ A large majority of healthcare workers infected with Covid-19 have been women.⁶⁶⁷

Available evidence has shown that across the OSCE region, states experienced a dramatic surge of domestic violence cases reported to national helplines and support services,⁶⁶⁸ with women and girls forming the overwhelming majority of victims in search of emergency shelter. According to women's rights experts and media sources, different forms of online violence have also been on the rise including stalking, bullying, sexual harassment, and sex trolling during the pandemic, in particular during strict lockdown periods.⁶⁶⁹

The sudden introduction of lockdown measures in many countries and the lack of or inadequate level of preparedness by national governments and local authorities for this extraordinary situation has affected protection

and response measures to tackle the increase in domestic violence. In some cases, first responders from the police and judicial and health services have found themselves overwhelmed, in other cases, resources have been diverted away from the criminal justice system towards more immediate public health measures to deal with the pandemic. This has resulted in the scaling back of helplines, crisis centres, legal aid and social services in some states, in particular in the initial phase of the crisis.⁶⁷⁰ Examples of gaps in protection also included the replacement of walk-in free legal aid services with remote counselling because of social distancing requirements, which *de facto* often hindered access to justice for victims of domestic violence as they were unable to speak in the presence of their abuser.⁶⁷¹ The crisis has also disrupted the work of courts in many states,⁶⁷² leading to delays in issuing injunctions for protection or restraining orders as well as in adjudicating divorce and child custody proceedings. In many cases, the severity of quarantine regimes and the enactment of curfews have affected the opportunity of women to escape from the household, fearing fines, reprisals by their abuser and a lack of protection by the state.⁶⁷³

In shelters, lengthy admittance procedures linked to virus-testing or confirmation of medical certification have often exposed victims to further harm in the home.⁶⁷⁴ In some countries, equitable access to sexual and reproductive health care has been severely reduced, with relevant health services classified as non-essential during the course of the pandemic.⁶⁷⁵

all sectors of the economy. Amnesty International has **noted** increased discrimination and job insecurity in Hungary, particularly impacting pregnant women.

665 For example, in **Czech Republic** and **Ukraine**, the proportion of women in health services is 78 percent and 82 percent, respectively, which is higher than the global average of 70 percent, according to a Council of Europe **study**.

666 Furthermore, according to media **reports**, the standard-sized personal protective equipment is often designed for male bodies and facial features, which exposes women in frontline health care work to further evitable and unnecessary risks, which indicates gender bias in the decision-making process and insufficient consideration of the needs of women.

667 Early figures from Spain, **Italy** and the **United States** indicated that 75.5 percent, 69 percent and 73 percent respectively of the total health-care workers infected with Covid-19 were women, which is significantly higher than the percentage of women infected amongst the general population. Source: UN Women **calculations**

668 For instance, in the **United Kingdom**, this was reported to range from 15 percent to 120 percent, **UK domestic abuse helplines report surge in calls during lockdown**, The Guardian

669 Examples include unsolicited pornographic videos appearing in virtual chat rooms. See, for instance, **Risk of online sex trolling rises as coronavirus prompts home working**. Reuters

670 **Justice for Women Amidst COVID-19**, UN Women, IDLO, UNDP, UNODC, World Bank and The Pathfinders.

671 **Eastern Europe and Central Asia Confronted with COVID-19: Responses and Responsibilities**, Amnesty International

672 See the section on the judiciary and access to justice above for more detail.

673 **COVID-19 and Domestic Abuse: When Home is not the Safest Place**, Balkan Insight

674 **Eastern Europe and Central Asia Confronted with COVID-19: Responses and Responsibilities**, Amnesty International

675 Reports include examples from **Poland**, the **Russian Federation** or in some states in the **United States**. See **Abortion Access Worsens Amid Pandemic**, Foreign Policy, **How COVID-19 affects Women's Sexual and Reproductive Health**, Medical News Today; **Denying Women Abortion Access in Moscow**, Human Rights Watch.

Emergency measures have had extremely negative consequences on women with less access to security, justice and health services such as women with disabilities, women from ethnic and other minority or indigenous backgrounds, and women from at-risk groups such as migrants, asylum seekers or refugee women in camps, all of whom have found themselves in situations of increased vulnerability to violence.⁶⁷⁶ During lockdowns, these groups of women have had to cope with numerous accumulated challenges. For example, women with disabilities have also faced poor access to health and social services.⁶⁷⁷ Women from minority, marginalized or migrant backgrounds have faced a lack of access to life-saving information through a lack of internet access or due to the unavailability of information in minority languages or in remote or rural areas.⁶⁷⁸

Alongside increased reports of domestic violence, risks for women also increased in institutional settings. Disruption to the work of many external oversight bodies and mechanisms has meant that women detained in criminal justice facilities, or in need of mental and other healthcare services including in nursing homes and other institutions, may have been exposed to heightened risk of violence.⁶⁷⁹

GOOD PRACTICES

This brief overview of the negative impact of pandemic and related emergency measures on women and how they have exacerbated gender inequalities can only be considered as indicative. A thorough analysis is still needed at all levels and in all sectors, based on disaggregated data and gender-sensitive research. As the pandemic continues and some emergency measures are still in place, and as in particular the social and economic consequences will be felt for years to come,

it is too early to present a comprehensive analysis at this point. It has, however, already become clear that a number of states have acknowledged the importance of the gender dimension of the pandemic and response measures, and some positive examples of policy adjustments, dedicated services and communication initiatives have emerged. Several such examples are presented below, with the aim of feeding into recommendations to participating States and encouraging a positive learning exchange between countries.

Some participating States have made concerted efforts to integrate gender considerations into their Covid-19 policy responses⁶⁸⁰, or have established mechanisms to capture and analyse the available documentation and provide lessons learned.⁶⁸¹ Some countries have developed targeted guidance on maternal health.⁶⁸² Emergency sexual and reproductive health services and treatment have remained available in many states.⁶⁸³ The rise in domestic violence has prompted some participating States to make emergency support programmes part of their emergency response.⁶⁸⁴

680 For example, in **Belgium**, the Institute for the Equality of Women and Men is represented in the taskforce conducting analysis, monitoring and proposing policy measures. In **Serbia**, the co-ordination body for gender equality is conducting a gender analysis of the situation to set measures to remedy the adverse effects of Covid-19 on women and men, and on gender equality in the country. In **Sweden**, a government decision has made gender impact assessments mandatory regarding all policies related to Covid-19. Similar mechanisms and practices are in place in **Ireland** and **Bosnia and Herzegovina**. Promoting and protecting women's rights at national level, **Council of Europe. Belgium, Serbia, Sweden, Ireland, Bosnia and Herzegovina**

681 In **Finland**, the National Institute of Health and Welfare has created an online repository of resources that capture the effects of coronavirus and its impact on men and women as well as on gender equality in Finland.

682 For instance, **Spain, Slovenia** and the **United States (New York State)**. In **Ireland**, the Department of Justice and Equality produced a videoclip on "Pregnancy and COVID-19" targeting travellers and Roma and Sinti. See **Promoting and protecting women's rights at national level, Council of Europe. Spain, Slovenia, Ireland.**

683 Including in **Slovenia** and **Finland**, as well as in **Belgium** where access to regular and emergency contraception has been facilitated via e-prescription. **Promoting and protecting women's rights at national level, Council of Europe. Slovenia, Finland, Belgium**

684 In **Spain**, the Ministry of Equality has promoted a contingency plan against gender-based violence during the Covid-19 crisis, which includes declaring as essential all

676 Covid-19 and violence against women and girls: Addressing the shadow pandemic. UN Women, <https://www.unwomen.org/en/digital-library/publications/2020/06/policy-brief-covid-19-and-violence-against-women-and-girls-addressing-the-shadow-pandemic>

677 **Rapid gender assessment of the situation and needs of women in the context of COVID-19 in Ukraine**, Reliefweb.

678 **COVID-19 compounds isolation of rural women facing violence**, Canada's National Observer

679 **Justice for Women Amidst COVID-19**, UN Women, IDLO, UNDP, UNODC, World Bank and The Pathfinders.

Some states have set up detection and protection measures focused on expanding access to counselling and sheltering services to victims of domestic violence through early warning mechanisms, including through the use of radio and TV, social media, mobile applications, dedicated 24-hour helplines and web-pages⁶⁸⁵ or established email-based services⁶⁸⁶ for domestic violence cases. Some states have introduced new helplines to provide free legal and psychological advice in collaboration with international organizations and civil society.⁶⁸⁷ To tackle the digital divide, efforts have also been made to expand internet access⁶⁸⁸ or make mobile services affordable or free.⁶⁸⁹ Some participating States have enabled pharmacies to initiate referral pathways through code words.⁶⁹⁰ Others have trained personnel from postal services to identify and

respond to cases of domestic and gender-based violence.⁶⁹¹ Additional sheltering accommodation has been put in place in some states, including the use of hotels or holiday apartments as shelters for victims of domestic violence.⁶⁹² Special crisis teams have been created on the basis of law-enforcement and civil society co-operation.⁶⁹³

In some states, national human rights bodies and institutions have taken a leading role in developing appropriate responses in this area.⁶⁹⁴ Several countries have begun prioritizing court cases for violence hearings.⁶⁹⁵ Additional funding sources have been allocated to deal with the increased needs in several participating States.⁶⁹⁶

comprehensive assistance services for victims of such violence. **Promoting and protecting women's rights at national level, Council of Europe. Spain**

685 In **Italy**, police have expanded the usage of an app called "YouPol", originally designed to report bullying and drug dealing, to give victims of violence an opportunity to alert the police without the partner's knowledge. **European Countries Develop New Ways to Tackle Domestic Violence During Coronavirus Lockdowns, NBC News.**

686 In **Portugal**, the Commission for Citizenship and Gender Equality has activated an email service to request support in domestic violence cases.

687 The Gender Equality Commission of the Republic of **Uzbekistan**, with the support of the UNFPA and Civic Initiative Support Centres, launched a helpline for the prevention of domestic violence during the quarantine. Senate of the Oliy Majlis of the Republic of Uzbekistan: **"Establishment of telephone helpline of the Gender Commission"**.

688 Modems have been delivered to families without internet in **Malta**. **Promoting and protecting women's rights at national level, Council of Europe. Malta**

689 The government of **Belarus** has partnered with a mobile operator to make the national help-line toll free to subscribers. **Eastern Europe and Central Asia Region. COVID-19 Situation Report. UNFPA.**

690 This innovative practice has been reported from **Belgium, Uzbekistan, Spain, the United Kingdom and France.**

691 For example **Czech Republic.**

692 Examples include **Belgium, Germany, Italy, Bosnia and Herzegovina and France, Charities look for creative ways to protect women trapped in their homes with violent partners during COVID-19 shutdown, Thomson Reuters Foundation News**

693 For instance, in **Bulgaria** and in **Kyrgyzstan.**

694 In **Armenia**, the Human Rights Defender's Office has established a working group on domestic violence prevention during the pandemic. In the **Russian Federation**, the Human Rights Commissioner has called on the authorities to allow domestic violence victims to leave their homes without obtaining special digital permits that several cities have introduced to monitor the lockdown measures, while members of the parliament have asked the government to exempt victims from punishments for violating quarantine rules. **Domestic Abuse in Russia Doubles Amid Virus Lockdown: Official.** The Moscow Times

695 E.g. in **Malta** and in the **Netherlands. Promoting and protecting women's rights at national level, Council of Europe**

696 In **Canada**, for instance, the federal government has earmarked funding for the immediate needs of shelters and sexual assault centres including an existing network of emergency shelters to support Indigenous women and children fleeing violence. **Violence Against Indigenous Women During COVID-19 Sparks Calls for MMIWG plan,** CTV News

RECOMMENDATIONS

- Involve state bodies responsible for gender equality, as well as women's civil society, in emergency response and post-emergency planning and explicitly incorporate gender considerations into any recovery strategies and plans;

- Take into account the gendered impact of the crisis in state budgeting to ensure adequate resource allocation for social protection and safety nets for those who have been laid off due to the emergency and to ensure sectors with so-called essential workers are adequately resourced and individuals in these sectors are adequately compensated;
- Prioritize proceedings to investigate and prosecute cases of domestic violence and other forms of gender-based violence and provide judicial remedies in all cases;
- Pay particular attention to ensure information dissemination campaigns reach marginalized women, women from minority backgrounds and women with disabilities to step up the accessibility of violence reporting mechanisms and ensure alternative accommodation for victims, even after quarantine measures are lifted;
- Classify shelters and crisis centres as essential during all stages of emergencies and increase support to civil society organizations assisting victims of domestic violence;
- Ensure the delivery and accessibility of health services of immediate need, including health services covering gynaecological health, making these available to all women experiencing violence by an intimate partner, and consider targeted delivery of health services to women subject to intersecting forms of discrimination, such as Roma and Sinti women and women with disabilities;
- Collect sex-disaggregated data to understand the social, economic and legal impacts of the public health crisis on women and girls, and the implications of restrictions to fundamental freedoms brought about by government responses;
- Integrate gender considerations into laws, policies, budgets and other measures related to emergency planning, preparedness and response, so they efficiently address inequalities and deliver adequate services, protection and equitable recovery to all, women and men, in all their diversity;
- Ensure greater representation of women in any future emergency taskforces, efficiently address women's needs, and reflect a diversity of women's perspectives in decision-making;
- Promote inclusive approaches to addressing public crises, with the participation of civil society organizations catering to different population segments, including the most marginalized;
- Increase women's participation in the delivery of security and justice services and continue enabling special crisis teams to function beyond the termination of quarantine measures;
- Set up effective legal protection and guarantees to prevent and combat domestic violence and other forms of gender-based violence through national legislation; and thoroughly revise enforcement mechanisms where gaps have been reported during the pandemic.

II.3.C ROMA AND SINTI

As early as 1990, participating States recognized the specific human-dimension challenges faced by Roma and Sinti communities throughout the region.⁶⁹⁷ Since then, Roma and Sinti issues have continued to figure prominently on the OSCE agenda, exemplified by the establishment of the Contact Point for Roma and Sinti Issues (CPRSI) within ODIHR in 1994 by the Budapest Summit, which tasked ODIHR, among other things, to act as a clearing house for the exchange of information on Roma and Sinti issues, including information on the

implementation of commitments pertaining to Roma and Sinti.⁶⁹⁸

Recognizing the particular difficulties faced by Roma and Sinti people and the need to undertake effective measures in order to eradicate racism and discrimination against them, in 2003 in Maastricht participating States adopted the Action Plan on Improving the

⁶⁹⁷ Copenhagen Document (1990) para. 40

⁶⁹⁸ The Roma are Europe's largest ethnic minority. Out of an estimated 10–12 million in total in Europe, some 6 million live in the EU, and most of them hold the citizenship of an EU country. The term Roma encompasses diverse groups, including Roma, Gypsies, Travellers, Manouches, Ashkali, Sinti and Boyash. See, **Roma and the EU**, European Commission

Situation of Roma and Sinti within the OSCE area.⁶⁹⁹ Subsequently, three more Roma-focused Ministerial Council Decisions⁷⁰⁰ were adopted, expanding the OSCE commitments on Roma while placing further emphasis on aspects such as access to early education, addressing the rise of violent manifestations of intolerance against Roma and Sinti, and challenges faced by Roma women, youth and children.

Since the outbreak of the pandemic, the CPRSI has engaged with civil society organizations from which it has received reports of a number of measures adopted by States that can be considered as targeting Roma communities in a discriminatory manner.

Due to the nature of the pandemic, the poorer and more vulnerable groups and categories of populations are hit harder than the rest of the population. Against a backdrop of widespread fear caused by the health crisis, there has been a surge in manifestations of prejudice and racism coupled with some (local) authorities undertaking hasty and biased measures against such groups, including Roma and Sinti. At times, they were abusively labelled as ‘a hazard to public safety’, ‘undisciplined’ and ‘spreading the virus’.⁷⁰¹ At the same time the authorities often failed to raise awareness among these communities of the emergency measures and their necessity, and to help them understand how to prevent contamination and its spreading.

Many Roma live in informal settlements, in overcrowded and substandard conditions, lacking proper infrastructure for running water, sanitation and sewage. Widespread poverty and linguistic challenges make this population ‘hard-to-reach’ in public health terms. As a consequence, such areas and their inhabitants are more prone to the risks of contamination. The pandemic poses particular challenges to the Roma population as it is compounded by a long history of neglect and marginalization of these communities, with many

people already suffering from poor health.⁷⁰² Due to these hardships, as documented through various analyses in the past decade, the life expectancy of Roma people from such communities is 10–15 years below that of the majority population. Any health crisis therefore has the potential to deepen an already adverse situation.

Due to the differences in the health status of the Roma communities compared to the majority population, states need to pay more careful attention to the former, in line with the principle of leaving no one behind.⁷⁰³ Therefore, states have an obligation to assess the specifics of the situation of Roma communities to ensure that the standard measures taken to contain the epidemic consider all the risk factors. This will ensure that interventions are tailored to address those specific challenges and at the same time avoid infringing on people’s rights and their further stigmatization and marginalization. It is in the best interest of states to be mindful of the principle of the weakest link in the chain, and therefore act proactively to ensure that Roma communities have adequate access to health services and care and can fully enjoy their social and economic rights.

A number of restrictive and quarantine measures were imposed in the absence of solid evidence that those communities had been affected by the pandemic, while full lockdowns were enforced in large communities where only a handful of individuals were infected. Arguing concern for public safety, some authorities undertook strict measures that amounted to limiting the

699 Maastricht Ministerial Council 2003 (MC.DEC/3/03) - OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area

700 Helsinki Ministerial Council, 6/2008, Athens Ministerial Council 8/2009, and Kyiv Ministerial Council 4/2013

701 The CPRSI has collected reports of such incidents and documented abusive statements by officials and political leaders.

702 Also, indicators such as child mortality, malnutrition and mental health are generally worse among Roma communities in poverty and living in informal settlements.

703 Numerous OSCE commitments refer to equal access to human rights and social justice for all. In 2015, UN Member States resolved, in the UN summit outcome document ‘Transforming our world: the 2030 Agenda for Sustainable Development’, “between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources.” Recognizing “that the dignity of the human person is fundamental” and wishing to see the Sustainable Development Goals and targets “met for all nations and peoples and for all segments of society”, they also “pledged that no one will be left behind” and endeavoured “to reach the furthest behind first.”

movement of people, restricting access to and outside of their communities, curfew, checkpoints with barriers manned by police and the military, and full lockdowns of communities. Such measures were clearly discriminatory in nature as they were only imposed on the Roma, while other districts and areas inhabited by non-Roma were not targeted in the same way. These discriminatory lockdown measures have had a severely negative impact on the economic opportunities of Roma, which often depended on informal and temporary work, pushing many further into poverty.

Unfortunately, some of these early patterns of negative attitudes and biased measures targeting Roma that occurred soon after the outbreak have intensified and been replicated in numerous places. Only a few authorities have introduced positive measures to try and identify ways to help vulnerable communities, for example small-scale campaigns to provide them with social and humanitarian support, or raising awareness about the prevention of contamination. The overall situation of Roma communities across the OSCE region remains critical.

AREAS OF CONCERN

OSCE participating States have placed combating racism and discrimination against Roma and Sinti at the core of efforts to improve their situation.⁷⁰⁴ Nevertheless, racism and discrimination against Roma and Sinti continue to manifest themselves across the OSCE area.

Adding to already existent social and economic vulnerability, manifestations of racism and discrimination, often violent, have been reported in a number of participating States since the outbreak of the pandemic. Many such incidents stemmed from restriction measures imposed by the authorities, as well as by increased anti-Roma rhetoric in the public arena, including online, and not infrequently by public officials, media and opinion leaders.⁷⁰⁵ Some measures to subject Roma communities to quarantine or other limitations and restrictions are

thought to be connected to allegations made against Roma and spread through the mass media.⁷⁰⁶

There have been reports of Roma communities subjected to Covid-19 testing by the authorities that was administered with the involvement of the military.⁷⁰⁷ While testing is in principle a necessary and welcome public health measure, civil society groups expressed concern over such practices without the provision of necessary protection and support, thus contributing to further stigmatization of the communities concerned.⁷⁰⁸ The anti-Roma rhetoric in the public arena further contributed to fuelling hate and intolerance. Unabated hate speech⁷⁰⁹ inciting people against Roma have the potential to lead to hate crime and racially motivated violence.⁷¹⁰ There have been cases of harassment,⁷¹¹ damage to property,⁷¹² physical assault⁷¹³ and violent

706 See, for instance, Amnesty International, **Stigmatizing quarantines of Roma settlements in Slovakia and Bulgaria**

707 Cases have been reported in **Bulgaria, Slovakia** (see previous footnote), **Romania** (Deutsche Welle, **Coronavirus: Europe's forgotten Roma at risk**), **North Macedonia** (European Roma Rights Centre (ERRC), **Roma quarantined at the border to North Macedonia**), or **Spain** (El Diario, **Coronavirus: el racismo que la pandemia deja al descubierto**)

708 Amnesty International, **Roma must not be further stigmatized during COVID-19**

709 See, **National Equality Bodies report Impacts on Equality of Coronavirus Pandemic**.

710 This can be illustrated by reports from **Bulgaria** (ERRC, **Anti-Roma hate speech by MEP Angel Dzhabazki**), **Romania** (Ziare.com, **The National Agency for Roma asks Prime Minister Orban to take measures after the statement of the prefect of Timis county**, Liliana Onet; Libertatea.ro, Traian Basescu, Racist statements against the Roma: **"Gypsy groups must understand that they cannot be tolerated with their way of life"**), **Ukraine** (NGO "Human Rights Roma Center" **alleged** that the head of the Odesa regional health department, used "hate speech" against Roma in describing the epidemiological situation in the region; ERGO Network **statement** on the eviction of Roma by the mayor of Ivano-Frankivsk), **Slovakia** (EU Observer **reported** on a racist statement of the mayor of Kosice on social media), or **Spain** (El Diario **reporting** on a widespread message spreading false and racist accusation against Roma.

711 **Young Roma Student harassed and discriminated in a bus** in **North Macedonia**, 24vakti portal

712 **Demolished office and stolen inventory of Roma CSO** in **North Macedonia**, Setaliste news portal

713 **Driver runs into Romani boy in crosswalk, shouts racist abuse at him and drives off**, in **Czech Republic**, Romea news portal

704 See, for instance Copenhagen Document (1990) para. 40

705 See also the section on Hate Crimes and Discrimination, above.

attacks⁷¹⁴ against Roma that were reported and documented by media or civil society.⁷¹⁵

Amidst restrictions to movement, quarantines and lockdowns imposed by the authorities as part of their declared status of emergency, there have been a number of cases of police or law enforcement intervention in relation to Roma communities, involving the unjustified and disproportionate use or abuse of force.⁷¹⁶ In a number of participating States, police and security forces, while carrying out checks on the compliance by Roma with quarantine or other safety measures, have displayed conduct that is disproportionate and unjustified, including hitting children with truncheons, extensive hitting of handcuffed Roma lying face down on the ground, the use of tear gas, including against women and children, and entering private houses and physically abusing Roma residents.⁷¹⁷ Such interventions have been posted and praised on the Facebook page of a police union with thousands of subscribers, and accompanied by openly racist remarks by their administrators, demonstrating a widespread⁷¹⁸ racial bias behind police action in some places.⁷¹⁹

Long before the outbreak of the pandemic, Roma and Sinti pupils and students already suffered from inequality in education, including through their routine

placement in segregated schools and “special schools” designated for children with intellectual disabilities and learning difficulties, meaning they are educated according to a substandard school curriculum by poorly qualified teachers. Throughout their quest to access education, they have been often subjected to a hostile school environment, discrimination and bullying both from teachers as well as from their peers, leading to high dropout rates and poor learning outcomes. Segregation deprive Roma and Sinti students of a quality education and opportunities to obtain the qualifications necessary to secure jobs in the future.⁷²⁰

Due to the pandemic and emergency school closures to be found in most participating States at some point during the outbreak, education moved online, with students expected to study and participate in classes from home. While pupils and students quickly adapted to this home-learning environment in many countries, these measures excluded tens of thousands of Roma students from educational processes as they generally lack the minimum requirements (e.g. quiet rooms, computer access, or internet connections) for such learning.

Furthermore, the crisis and movement restriction measures have exerted a higher toll on such poor communities as their capacity to secure their daily subsistence has diminished drastically. The lack of proper equipment to attend online classes is therefore compounded by the burden of poverty, including a lack of regular and decent nutrition. Extended school closures, which are expected to persist in several states, and potentially new waves of the pandemic, is likely to widen and deepen the educational gap for Roma students, resulting in even higher dropout rates and loss in employment opportunities over the long term.

The outbreak of the pandemic was accompanied by a surge in inflammatory articles in the European media that portrayed Roma in a biased and negative manner.⁷²¹

714 **Roma camp attacked and tents burned down by unknown assailants in Ukraine**, ERFAC

715 See additional information in the preceding section on Hate crime and Discrimination.

716 **Bulgaria military allowed to use force amid coronavirus curbs**.

717 Such cases were reported in **Germany** (Central Council of German Sinti and Roma, Central Council of German Sinti and Roma **demands** complete clarification of police violence against a Roma family in Freiburg); **Slovakia** (Romea news portal, Slovak police officer **said** to have beaten five Romani children in a campsite settlement and threatened to shoot them); **Romania** (Center for Legal Resources, **Roma minority – scapegoated during the pandemic**, Letter to the President, Prime-Minister and other relevant institutions)

718 In the past month in Romania alone, **The European Roma Rights Center** recorded at least eight incidents where police officers used disproportionate force against the Roma.

Amnesty International’s **Evidence Lab** verified 34 videos from across Europe showing police used force unlawfully, and in many instances when it was not required at all.

719 Facebook **page** of **Romanian** police union “Sindicatul Europol.”

720 See **Education: the situation of Roma in 11 EU Member States**, EU FRA, 30 October 2014, p 43.

721 News outlets in 9 countries: **Spain**: Diari16, **Coronavirus and gypsies**, 19 March; **Slovakia-Czech Republic**: Novinky, **Headlines “It exploded in Roma settlements, the prime minister said. Coronavirus is spreading uncontrollably”**, 16 April; **Romania**: MEDIAFAX, **Traian Basescu was also reported to CNCD for his**

In these, Roma are often scapegoated and blamed for the spread of the disease, for irresponsible and negligent behaviour, and for disregarding social distancing measures. Even though non-compliance with the imposed measures was common and widespread, the cases of Roma were highly publicised and presented as a risk to the majority population.

A number of media outlets resorted to the use of anti-Roma and Sinti discourse. Racist and discriminatory articles and TV broadcasts⁷²² were prominent and amplified further through their extensive dissemination on social media platforms. Civil society organizations and human rights defenders in a number of countries have sent open letters to governments with a request for such incidents and crimes to be promptly and properly investigated.⁷²³

Throughout the OSCE region, many Roma and Sinti communities live in poverty, characterized by informal settlements and improvised housing, often without access to running water and sanitation infrastructure.⁷²⁴ During the pandemic, these communities have faced increased risks and further exclusion, affecting their ability to follow basic hygiene measures such as hand washing that were recommended to stem the spread of Covid-19.⁷²⁵ Along with the higher exposure to potential

contamination, Roma and Sinti faced significant barriers in accessing healthcare services.⁷²⁶ Taken together, all these circumstances have placed Roma and Sinti communities in a very vulnerable situation, which, if not addressed properly, will leave these communities unable to keep the pandemic at bay.⁷²⁷

As the economic situation has declined in many countries, many Roma and Sinti have lost their sole sources of daily income due to the movement restrictions and lockdown measures.⁷²⁸ People living from collecting scrap metal and recyclable materials, as well as those who are self-employed, or work in markets or as daily labourers without a contract, were unable to benefit from the unemployment measures provided during the pandemic, and were thus left alone to survive as best they could.⁷²⁹ In some instances, due to pre-existing barriers such as a lack of personal documentation or statelessness, Roma were unable to benefit from measures designed to help the population during the pandemic.⁷³⁰ Without an economic safety net to compensate for their loss of daily income, the socio-economic situation of Roma and Sinti may become significantly worse than before the pandemic, making it still more difficult to escape from the cycle of poverty.⁷³¹

declarations. Was it incitement to hatred? What the former president said about ethnic Roma, 3 May; **Hungary**: HirKliikk, **The coronavirus can be devastating among Roma**, 9 April; **United Kingdom**: Glasgow Times, **Claims 50% of Roma group have fled Govanhill after false Covid-19 rumour**, 11 April; **North Macedonia**: KANALSITY, **The number of infected is growing and in Topansko a wedding was held today despite the ban**, 22 March; **Bulgaria**: Your News, **Bulgaria's Roma say some coronavirus measures are discriminatory**, 24 March; **Greece**: Keep talking Greece, **Tsiodras visits Roma settlement in quarantine, gives anti-racism lesson**, 10 April; **Ukraine**: Zaxid net, **The mayor of Ivano-Frankivsk apologized to the Roma for the discrimination**, 23 April.

⁷²² In **Bulgaria**, see: **Btnovinite, Residents of Sliven's Nachezha in an attempt to fight with a BTV team**, 25 April.

⁷²³ See Centre for Legal Resources (Bucharest), **Roma minority: scapegoat during the pandemic**, 12 May 2020.

⁷²⁴ European Roma Rights Centre, **Thirsting for Justice: A Report** by the European Roma Rights Centre, March 2017.

⁷²⁵ Council of Europe, **Governments must ensure equal protection and care for Roma and Travellers**, 7 April 2020.

⁷²⁶ In **France, No money, no water, no food: Covid-19 lockdown in a Paris Roma slum**, France 24, 16 April 2020.

⁷²⁷ With a focus on the situation of **Ireland's Roma A Marginalized People Facing A New Crisis With Coronavirus Pandemic**, International Business Times, 27 April 2020; EU Observer, **Inequality, anti-Roma racism, and the coronavirus**, 21 May 2020

⁷²⁸ EurActive, **The Roma are among most threatened by coronavirus in Europe**, 8 April 2020

⁷²⁹ Exit News, **Roma Community Suffering Due to Coronavirus Crackdown**, reporting on the situation in **Albania**, 20 March 2020; Reporting Democracy, **Roma: Europe's Neglected Coronavirus Victims**, 1 April 2020; Reuters, reporting a story on **Hungary's Roma facing economic disaster as COVID restrictions lifted**, 4 May 2020

⁷³⁰ The Institute for Research and Policy Analysis (Romalitto) documented this situation in **North Macedonia in People without Personal Documents in Macedonia are Still Invisible for the Institutions**, 14 May 2020.

⁷³¹ Open Society Foundations, **Roma in the COVID-19 Crisis: An Early Warning** from Six EU Member States (**Spain, Italy, Slovakia, Hungary, Romania and Bulgaria**).

GOOD PRACTICES

In the course of the pandemic, a few notable initiatives have been implemented by some participating States to support Roma communities. In Greece, the Ministry of Interior announced allocations of 2.25 million EUR to help Roma during the pandemic.⁷³² At the same time, 34 municipalities from seven participating States have co-operated with the Council of Europe to mobilize small-scale funding and human resources in order to respond to the pandemic and help Roma communities.⁷³³

732 This example from **Greece** is reported in RomeaCZ, **Greece approves crisis fund for Romani settlements**, 21 April 2020

733 Council of Europe, **ROMACTED Contribution to COVID-19 Action**, 30 April 2020

However, the majority of good practices related to the Roma have come from civil society organizations, primarily through the provision of humanitarian aid in the form of food packages, disinfectants and masks.⁷³⁴ Self-mobilization by Roma and Sinti communities has also been important throughout the pandemic.

734 Activists, civil society organizations, and Roma from **Albania, Czech Republic, Montenegro, North Macedonia, Romania, Serbia, Ukraine** and other participating States have mobilized through various causes to help alleviate the pandemic effects for the most marginalized Roma and Sinti. See for example: **Roma Women Rights Center - Albania**, 5 May 2020; Agentia "Impreuna" **video report**, 15 April 2020; or Blog Hate Free, **A pair of Roma Women from Tanvald Sewed over 1,000 Veils for Seniors and People in Financial Distress per week**. Also see **Kosovo**, Please see OSCE disclaimer on page 20.

RECOMMENDATIONS

- Utilize existing national social and poverty maps and databases from social protection services to identify people in need, on the threshold of poverty or below, who need to be supported through the establishment of food banks and delivery of food support based on assessment of their basic needs per month;
- Ensure that Roma and Sinti communities have equal access to basic medical services, such as doctors or pharmacies during lockdown; ensure that healthcare is guaranteed for everyone, including for those without health insurance or personal documents;
- Guarantee access to clean drinking water for Roma and Sinti communities living in marginalized settlements that are lacking water infrastructure and basic sanitation;
- Together with local authorities, bridge the digital divide affecting Roma settlements by providing them with internet hotspots free of charge, as these are essential for accessing public information as well as online education and learning;
- Assist Roma and Sinti children in accessing remote learning and materials, by providing the necessary electronic equipment and support by social and education workers;
- Ensure that the upcoming recovery plans being developed for the post-pandemic period are inclusive and take the challenges and vulnerabilities of Roma and Sinti communities and their needs fully into account; ensure the full participation of Roma in the consultations, design and development of such recovery plans and strategies;
- Strongly and unequivocally condemn racial and ethnic hatred, anti-Roma sentiment, xenophobia and discrimination against Roma and Sinti, and ensure that violations of human rights do not enjoy impunity;
- Share information and experience about the provision of large-scale humanitarian aid and emergency support, and match efforts with state funding to establish and implement such plans, ensuring that Roma and Sinti communities are among the prioritized and targeted beneficiaries;
- Develop measures to promote and protect human rights while actively countering racism and discrimination against Roma and Sinti.

II.3.D MIGRATION

Since the Helsinki Final Act, OSCE participating States have expressed concern for the protection of the rights of migrant workers and refugee populations. Subsequently, in Madrid in 1983, they reiterated the application of existing human rights standards in the field of civil and political rights, as well as the economic, social and cultural rights to migrants and refugees. Participating States have made specific commitments related to migration, such as border security and management,⁷³⁵ as well as detention and other situations of deprivation of liberty.⁷³⁶

Although the legal framework and practical needs of a specific category of migrant may differ and require specific analysis, for the purposes of this overview, all people affected by migration share similar vulnerabilities and it is in this context that the human rights impact on this population are described here. The focus is therefore on the common effect that the pandemic and related emergency measures have had on migrants overall, such as border restrictions, detention practices or difficulties in accessing legal procedures.

ODIHR's mandate on the protection of the human rights of migrants stems from the commitments made by participating States as long ago as 1990 in the Copenhagen Document and at the Helsinki Summit (1992). Later, these commitments were further developed to incorporate concerns such as enabling migrants to participate in public life,⁷³⁷ creating the conditions that foster harmonious relations between migrants and the rest of the society,⁷³⁸ combatting discrimination and violence,⁷³⁹ and developing or reinforcing national plans for migrant integration.⁷⁴⁰

⁷³⁵ Ljubljana Ministerial Council (2005).

⁷³⁶ Copenhagen Document (1990).

⁷³⁷ Moscow Document (1991), Maastricht Ministerial Council (2003).

⁷³⁸ Ljubljana Ministerial Council (2005), Athens Ministerial Council (2009), Hamburg Ministerial Council (2016).

⁷³⁹ Maastricht Ministerial Council (2003).

⁷⁴⁰ Helsinki Summit (1992), Budapest Summit (1994), Maastricht Ministerial Council (2003), Ljubljana Ministerial Council (2005), Athens Ministerial Council (2009), Hamburg Ministerial Council (2016). The rights of migrants and refugees are enshrined in international law, in particular in UN conventions such as the **1951 Refugee Convention**,

AREAS OF CONCERN

The **closure of international borders** was one of the first measures taken by participating States at the onset of the crisis. In many countries of the Schengen area, which comprises 26 OSCE participating States that have agreed to freedom of movement, internal border controls were reinstated.⁷⁴¹ Border restrictions brought international travel to a standstill, by suspending international air and rail links, closing airports, imposing strict conditions on who could cross borders and in exceptional cases, even limiting the ability of nationals to leave their own country.⁷⁴²

Across the OSCE region, border restrictions impacted international mobility and, as such, migrants' ability to return home or to take up employment, including of a recurrent seasonal nature. As a result, many migrants were left stranded and availed of repatriation efforts put in place by their countries of origins.⁷⁴³ Uncertainty regarding international travel and reopening of borders poses great threats for migrants whose physical safety and economic well-being may be dependent on crossing borders.⁷⁴⁴

the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**, adopted by General Assembly resolution 45/158 of 18 December 1990, as well as within the framework of the Council of Europe or through consensus-led processes such as the **Global Compact on Migration** or the **Global Compact on Refugees**. In adopting the **New York Declaration for Refugees and Migrants**, the 193 UN Member States recognized the need for a comprehensive approach to human mobility and enhanced co-operation at the global level.

741 The Schengen Borders Code provides Member States with the capability of temporarily reintroducing border control at the internal borders in the event that a serious threat to public policy or internal security has been established. See, European Commission, **Temporary Reintroduction of Border Control**.

742 This has been reported from **Czech Republic, Belgium and Ukraine**, among others. See, for instance, **Only Czechs and Belgians Banned From Travel Abroad in Europe Over Coronavirus**, by Prague Morning, 22 April 2020

743 See, for example, **Coronavirus Exposes Central Asian Migrants' Vulnerability**, The Diplomat, 10 April 2020.

744 See, **The coronavirus pandemic could be devastating for the world's migrants**, World Economic Forum, 6 April.

Border crossing points are already risk areas for migrants in normal times but emerged as particularly vulnerable flashpoints for many migrants during the pandemic. Despite pandemic-related restrictions increasing the obstacles to carrying out border monitoring work,⁷⁴⁵ several incidents at international borders were reported by civil society. For instance, reports from civil society working at the external borders of the European Union highlighted the continued use of illegal pushbacks, incidents of violence and health risks posed by border officials continuing to carry-out controls despite testing positive for Covid-19.⁷⁴⁶ Pushbacks, or arbitrary and collective expulsions, are illegal under international law. These principles are applicable to all migrants and not just refugees. Refugee law emphasizes the principle of *non-refoulement*, which cannot be guaranteed when undergoing a collective expulsion as no individual assessment can be carried out.

Following the onset of the pandemic and the ensuing border closures, access to the asylum procedures was *de-facto* or *de-jure* impacted in many countries across the OSCE region. Some States were able to maintain the pre-registration or registration of asylum-seekers.⁷⁴⁷ However, in many other countries, restrictions on access to the territory were applied to those seeking asylum and in others due to the physical closure of asylum

offices, new asylum claims could not be filed, and existing claims could not be further processed.⁷⁴⁸

The pandemic has brought to light the challenges in terms of physical distancing and hygienic measures present at collective centres, such as reception centres and transit centres, which are often subject to overcrowding. Not only is this an issue of concern for migrants living in such centres, but it also impacts authorities' efforts to protect the wider population from transmission. Unfortunately, in a few countries, entire reception centres were locked down and the movement of residents curtailed, without any evidence of cases being diagnosed.⁷⁴⁹ In some cases, the lockdowns were enforced by armed forces and violent incidents were reported.⁷⁵⁰ These indiscriminate lockdowns may have contributed to an increased perception of migrants as vectors of disease, resulting in reported incidents of vigilantism and anti-migrant sentiment.⁷⁵¹

Expert guidance emphasized that people in immigration detention are at particular risk of contracting coronavirus.⁷⁵² Detention facilities are not walled off from society and even with increased restrictions and screening, there is a constant flow of people. Thus, not only is it very difficult to preclude the virus from entering a detention facility and spreading rapidly, its spread may pose risks of amplifying and spreading the virus to communities in its vicinity and at large. Due to travel and health restrictions in response to the pandemic, the implementation of many return orders has been suspended; as it becomes impossible to determine the duration of pre-return detention, such detention is rendered arbitrary and thus, unlawful. There is a general growing consensus on the importance of increasing the use of alternative means to custodial detention for

745 Border monitoring is a common activity carried out by CSOs but also national institutions such as NHRIs. Border monitoring, including the role of CSOs and human rights defenders in border monitoring, are enshrined in the **OHCHR Recommended Principles and Guidelines on Human Rights at International Borders**.

746 Before the start of the pandemic in Europe, an increase in the number of migrants trying to enter the EU through Turkey was reported (see media **report** from 1 March) which contributed to pressures at the border before and during the pandemic (see media **report** from 2 May). In late March, Turkey reportedly relocated some 6,000 migrants from the border (see media **report** from 30 March). During the pandemic, the illegal use of pushbacks was reported in **Croatia, Bosnia and Herzegovina, and Greece**. See the **report** of the Border Violence Monitoring Network of 5 May 2020. See the **report** by the same group on incidents of violence along the "Balkan Route" in **Slovenia, Croatia, Serbia and Greece**.

747 This included **Austria, Georgia, Germany, Iceland, Ireland, Italy, Liechtenstein, Moldova, Slovakia, Slovenia and Switzerland**.

748 See, for instance, **statement from UNHCR, 19 March 2020**.

749 This included **Bosnia and Herzegovina, Cyprus and Serbia**.

750 See, for example a **report** of the situation in **Serbia and Bosnia and Herzegovina**.

751 See, for example, a report from **Bosnia and Herzegovina, Bosnian minister proposes deportation and incarceration of migrants** by Sertan Sanderson, 24 April 2020.

752 **Guidance** provided by the WHO, the International Committee of the Red Cross (ICRC), the Council of Europe and the Inter-Agency Standing Committee (IASC).

the purposes of immigration,⁷⁵³ to ensure that detention remains legal, not arbitrary and that human rights violations can be prevented. Similarly, the issues of alternative and child detention are interconnected. For states to be able to eliminate the practice of child and family detention, non-custodial alternatives must be in place (both for families and unaccompanied children). (For more on issues related to the deprivation of liberty and detention in the context of the pandemic in general, see the previous section.)

In the first months of this year, the number of people reaching Europe from North Africa and Asia was expected to be slightly higher than in the previous year, but following the escalating Covid-19 crisis, departures of boats carrying asylum seekers were reduced drastically.⁷⁵⁴ However, this pause was only temporary. As weather conditions improved in April, departures began again but only one search and rescue vessel continued to operate in the Mediterranean Sea.⁷⁵⁵ In an unprecedented move, several states declared their ports unsafe for asylum seekers and closed them,⁷⁵⁶ citing sanitary safety as the reason.⁷⁵⁷

The UN High Commissioner for Human Rights has expressed concern over reports of failure to assist,

753 Administrative detention (such as immigration detention) needs to be distinguished from criminal detention (imprisonment) and preventive detention (e.g., health-related). The framework for immigration detention is substantially different from other forms of detention (irregular stay/entry is not generally a criminal offence but rather administrative in nature) and the purpose of immigration detention also varies from that of criminal detention (rather than a punishment, it is there for the purpose of ensuring return to country of origin). As such, detention is considered a pre-return tool. These elements are specific to migration frameworks and policies. In this regard, ODIHR focuses on the promotion of alternatives to detention and the end of the practice of child and family detention.

754 See, UNHCR's [Sea Arrivals Dashboard for Italy](#).

755 The *Alan Kurdi*, operated by the German NGO Sea Eye.

756 For example, see a [report](#) on Italy's port closures, or a similar [report](#) from Malta. In the past rescue ships had been refused docking on multiple grounds, including security-related issues, while in this case states decided to close the ports, as they were deemed 'unsafe' because of risk of SARS-CoV-2 transmission.

757 Unable to disembark in Malta, several boats carrying migrants in distress were left adrift for long periods of time while awaiting disembarkation. Up to 85 migrants were feared dead as a result. See [85 migrants feared dead in Mediterranean](#), InfoMigrants, 13 April 2020.

co-ordinated pushbacks of migrant boats in the central Mediterranean, and potential violations of the principle of *non-refoulement*.⁷⁵⁸ These reports included allegations of requests from authorities for commercial ships to push back boats carrying migrants back into the sea, and to escort boats back to Libyan territorial waters a violation of the principle of *non-refoulement*.⁷⁵⁹

GOOD PRACTICES

It is important to emphasize that following an initial period of suspension and halting of asylum procedures, many countries found ways to resume them despite existing restrictions. These include states that introduced innovative approaches,⁷⁶⁰ including the use of online procedures to continue processing some or all asylum cases.⁷⁶¹

On May 14, the Court of Justice of the European Union declared that Hungary's use of transit zones along the Hungarian-Serbian border amounts to unlawful detention. Following the judgment, Hungarian authorities released approximately 280 people who had been detained on average for eight months.⁷⁶²

Health concerns helped advance existing plans for relocation of asylum seekers. In early May, Greece made a commendable effort to move almost 400 asylum seekers from the island of Lesbos to mainland Greece

758 See [UN rights office concerned over migrant boat pushbacks in the Mediterranean, 8 May 2020](#).

759 See, for instance, [12 die as Malta uses private ships to push migrants back to Libya](#), The Guardian, 12 May 2020.

760 For example, in **Malta**, registration of new asylum applications was done by phone and/or email and all follow-up communications were carried out by phone and/or email; and in **Germany**, the Federal Government updated its procedures to allow for asylum applications in writing, written follow-ups are also permissible.

761 See [Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic](#), UNHCR.

762 See for instance, [Hungary: Abolishment of Transit Zone Following CJEU Ruling](#), ECRE, 22 May 2020. Since then, however, new problematic restrictions have been introduced and the European Commission is likely to launch an infringement action over this non-compliance with the Court's judgement. UNHCR has [found](#) these measures to be against international law.

in order to address overcrowding in the hotspots.⁷⁶³ The first relocations of unaccompanied children from Greece to Luxembourg took place in mid-April. This is a part of a commitment by ten EU member states to relocate 1,600 children.⁷⁶⁴

Many countries issued guidance and put in place measures to address the risk of transmission in collective centre settings, such as reception centres and transit centres.⁷⁶⁵ Such measures included reducing the occupancy of centres to allow for physical distancing, introducing shifts and additional hygiene procedures in refectories, bathrooms and common areas, allocating designated areas for those self-isolating and transferring vulnerable residents to more appropriate accommodation settings. In order to prevent further spread of the virus and maintain the legality of immigration detention, many countries opted for the release of detainees.⁷⁶⁶

The pandemic has shed light on the contribution that migrants provide to essential sectors of the economy, and the key role they play in society.⁷⁶⁷ This has become evident in the role that migrants played in the

provision of care in medical facilities and nursing homes. Their work in agriculture and meat processing has also been essential to society during the lockdown. While this period has highlighted the contribution of migrants, it has also exposed the poor conditions under which many of them are employed.

Several countries automatically extended the residence permits of migrants in their territory for the duration of the health emergency.⁷⁶⁸ This included regularisation for migrants working in the agriculture and domestic work sectors,⁷⁶⁹ or relaxations of employment restrictions in the health care sector.⁷⁷⁰ Some states also changed labour laws for some categories of workers.⁷⁷¹ Several countries put in place measures to ensure access to healthcare, accommodation and other services for migrants.⁷⁷² Some of the most successful and progressive practices during the pandemic relate to extending access to rights, services and care for all or some

763 The definition of hotspots as per the European Border and Coast Guard regulation is “an area in which the host Member State, the Commission, relevant union agencies and participating Member State cooperate with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external border”. See also, **Almost 400 migrants moved from Lesbos to Greek mainland**, Emma Wallis, 1 May 2020.

764 Relocations to **Finland** and **Germany** followed in the month of April, to be followed by **Belgium, Bulgaria, Croatia, France, Ireland, Lithuania** and **Portugal**.

765 This included **Austria, Belgium, Croatia, Denmark, Germany, Greece, Ireland, Italy, Latvia, Serbia, Spain, Sweden** and **Turkey**.

766 **Spain** halted all immigration detention and released all detainees during the pandemic. In **Slovenia**, those in immigration detention were released and granted temporary permission to stay. Other countries which have released at least some immigration detainees include **Belgium, the Netherlands, Norway, Romania**, and the **United Kingdom**. In order to facilitate the release of detainees, authorities have teamed up with civil society organizations and municipalities to ensure safe accommodation for those who cannot reside in the community or with family members.

767 See, for example, a note from the European Commission **Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response**, 24 April 2020

768 Including **Ireland, Italy, Portugal, Poland**, the **Russian Federation** and **Uzbekistan**. In **Portugal**, all pending immigration-related applications, including those of irregular migrants, were approved for the duration of the emergency to ensure equal access to services as Portuguese citizens.

769 In May, the government of **Italy** approved a targeted regularisation for migrant workers. The regularisation concerns migrants working in the agriculture and domestic work sectors and offers six-month renewable residence permits to those meeting a certain criterion. See, **Italian government adopts targeted regularisation for migrant workers**, European Commission, 18 May 2020.

770 Calls for regularisation have also been made in **Ireland**, and the measure has been included in the Programme for Government of the newly-formed coalition. A number of migrants and asylum seekers benefited from some relaxation of employment restrictions in the health care sector as an exceptional measure.

771 **Germany** changed some of its labour laws to allow for the employment of certain categories of migrants, including asylum seekers and some irregular migrants in the agriculture sector until October.

772 This includes the **example of Portugal** as previously mentioned, where migrants were granted equal access to services as Portuguese citizens until July, and also **Ireland** where all migrants who lost their employment as a result of the pandemic, irrespective of their legal status, can access the newly introduced Covid-19 Pandemic Unemployment Payment. The Irish government also **announced** that no data will be shared with immigration authorities regarding an applicant's status and that accessing this payment will not have an implication on future residence or citizenship applications.

migrants to ensure equal access to services irrespective of legal status.⁷⁷³

In some countries specific measures were put in place to address homelessness among migrants in order to avoid the spread of infections⁷⁷⁴ or set up special programmes to assist migrants.⁷⁷⁵ Many countries⁷⁷⁶ made exceptions to allow seasonal workers to travel despite restrictions raising questions regarding the prioritisation of economic activity over the health and safety of workers in sectors such as agriculture.⁷⁷⁷ Inadequate

employment and accommodation conditions for these essential workers was part of the rationale to implement the regularisation of workers.⁷⁷⁸ The inability to keep social distancing in workplaces, for example in meat processing plants, resulted in infectious outbreaks and led to a broad realization of inadequate working conditions in such facilities.⁷⁷⁹

773 For example, the decision of **Ireland** to extend welfare payments to all migrants, or the decision by **Portugal** to extend residence rights to all migrants with pending applications, or the **United Kingdom** decision to extend healthcare rights to all migrants irrespective of status.

774 For example, in **Belgium, Bulgaria** and **Italy**.

775 In the **United States**, California set up a \$75 million Disaster Relief Fund that will support undocumented Californians impacted by the pandemic who are ineligible for unemployment insurance benefits and disaster relief due to their migration status. In Chicago, the mayor signed an executive order to ensure that refugee and migrant communities have equal access to benefits and services provided by the city, including the pandemic disaster relief.

776 This includes **Germany, Ireland** and the **United Kingdom**.

777 Agricultural and farm workers have been included in the list of essential workers of most countries that applied such exceptions. A number of reports and studies have shown the essential nature of this work in order to ensure a continued supply of food during lockdown. One example is **Italy**,

where virtually all food and vegetable harvesting is carried out by migrants. The proportion of migrants in health care or other service sectors is also significant.

778 This was the case, for example, in **Italy**, as described above.

779 The large majority of workers in meat processing plants across Western Europe are migrant workers. Furthermore, due to lockdown measures, the essential contribution of workers in both meat processing and agriculture became apparent and the requirement of migrant labour was further exacerbated. See, for instance, **reports** from such outbreaks in **Germany** and **Ireland**.

780 Firewalls are designed to ensure, in particular, that immigration enforcement authorities are not able to access information concerning the immigration status of individuals who seek assistance or services at, for example, medical facilities, schools, and other social service institutions. Relatedly, firewalls ensure that such institutions do not have an obligation to inquire or share information about their clients' immigration status. Access to service and care are part of guaranteed rights and state obligations as per a number of international conventions (e.g., access to healthcare for children, access to maternity care, access to minimum standards of social protection that ensure the right to life).

RECOMMENDATIONS

- States should consider introducing explicit exemptions to guarantee access to the territory for asylum-seekers when imposing border restrictions, as well as simplifying the registration process at borders. States may also consider allowing, where possible, the submission and continuation of asylum procedures via written or electronic means. States should also introduce automatic extensions of residence permissions of all those present in the state for the duration of exceptional measures.
- In an emergency situation such as the Covid-19 pandemic, states should consider the regularisation of pending applicants, both in the asylum and migration frameworks to ensure equal access to services and care.
- Introduce 'firewalls'⁷⁸⁰ between immigration control and access to services and care in order to reach the broadest number of migrants at risk of Covid-19 or similar diseases.
- Whenever possible, shift reception facilities to independent, individual accommodations or smaller collective centres, particularly for older people and those deemed vulnerable. Implement decongestion measures in communal areas to lower the risk of transmission.

- Implement systematic health checks for new arrivals and isolation rooms for suspected or confirmed cases of Covid-19.
- Address the specific vulnerabilities of migrant homeless groups, including through the provision of temporary housing.
- Implement a moratorium on the use of immigration detention and consider the release of detainees into alternative community-based facilities.
- Reinstate search and rescue operations⁷⁸¹ and ensure they are maintained during emergency situations based on principles of solidarity and responsibility-sharing.
- Ensure that human rights defenders can continue to safely carry out border monitoring activities.
- Address legislation and other regulations that may prevent the population from assisting migrants in need.
- Consider facilitating the employment of temporary migrants and asylum seekers in sectors deemed essential during the crisis.
- Ensure appropriate health measures are implemented in vulnerable sectors of employment with high concentrations of migrant workers.

II.3.E VICTIMS AND SURVIVORS OF TRAFFICKING IN HUMAN BEINGS

OSCE commitments call on participating States to implement anti-trafficking measures in the areas of prevention, prosecution and protection, including the development of National Referral Mechanisms (NRM), National Anti-Trafficking Plans of Action, legislative and other measures aimed at effective prevention and combating trafficking in human beings and protection of victims of trafficking.⁷⁸² In addition, participating States have recognized the importance of international instruments, in particular the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) (2000), which includes the first internationally agreed definition of the crime of trafficking in persons and provides a framework to effectively prevent and combat trafficking in human

beings. Other international and regional instruments⁷⁸³ have inspired and impacted work in this area in many participating States. Furthermore, with regard to emergency situations, the UN General Assembly called upon Governments and the international community "...to address the heightened vulnerability of women and girls to trafficking and exploitation, and associated gender-based violence."⁷⁸⁴

The outbreak of the pandemic across the OSCE region increased the vulnerability of at-risk groups to trafficking in human beings⁷⁸⁵ and impacted the ability of states to

781 The obligation of states to implement search and rescue operations derives from obligations to protect the right to life. Additionally, the Ljubljana Ministerial Council (2005) goes into more detail in relation to border management, including the respect for migrants' human rights, including the right to life.

782 OSCE participating States have made a series of commitments in various areas of combating trafficking in human beings. See, in particular, the OSCE Action Plan on Combating Trafficking in Human Beings, adopted at the Maastricht Ministerial Council (2003) as well as Ministerial Council Decisions and Declarations in Vienna (2000), Porto (2002), Sofia (2004), Ljubljana (2005), Brussels (2006); Madrid (2007); Helsinki (2008); Vilnius (2011); Kyiv (2013); Vienna (2017) and Milan (2018).

783 The Council of Europe Convention on Action against Trafficking in Human Beings (2005), the UN Convention on the Rights of the Child (1989) and its optional protocols, the Worst Forms of Child Labour Convention No. 182 (1999), the Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (2011), the Global Compact for Safe, Orderly and Regular Migration (2018), and the CEDAW Draft General Recommendation on Trafficking of Women and Girls in the Context of Global Migration (2020). See also the Agenda 2030 for Sustainable Development in particular the Sustainable Development Goals 5, 8 and 16.

784 UN General Assembly Resolution, **Trafficking in women and girls**, 30 January 2009, A/RES/63/156, paragraph 4.

785 The UN Special Rapporteur on Trafficking in Persons, emphasized that while the full impact of the pandemic on trafficking in human beings is not yet fully possible to assess, "it is sure that its socio-economic consequences are already making precarious and marginalized people more vulnerable to trafficking and exploitation." See OHCHR (2020) **COVID-19 Position paper: The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons.**

address the crime of trafficking in human beings. The pandemic poses significant concerns for the effective response to trafficking, including the identification of victims, their access to services, protection, redress, and prevention. Although many governments have prioritized resources for pandemic-related measures, it is essential that NRMs and equivalent systems continue to function effectively based on a human-rights, victim-centred, trauma-informed and gender-sensitive approach.

In order to assess the impact of pandemic-related measures on victims and survivors of trafficking and on combating trafficking in human beings and develop appropriate responses, ODIHR and UN Women conducted a survey [hereinafter survey] of non-governmental anti-trafficking stakeholders and survivors of trafficking.⁷⁸⁶ The survey results have informed the findings and conclusions below.

AREAS OF CONCERN

The outbreak of the pandemic has exacerbated vulnerabilities to trafficking in human beings.⁷⁸⁷ According to the World Bank, the pandemic will push approximately 40 to 60 million people into extreme poverty. People working in the informal economy are even more at risk of falling victim to different forms of exploitation.⁷⁸⁸ The pandemic has decreased the transfer of remittances by at least 20 percent, further increasing the vulnerability of at-risk groups dependent on these funds for survival.⁷⁸⁹ Moreover, it has had a detrimental impact on the access to employment or rights of migrant workers,

especially young women.⁷⁹⁰ As many countries partially or fully closed their borders for a lengthy period, these travel restrictions led many migrants or asylum-seekers to look for alternative, more dangerous migration routes, exposing them to trafficking in both transit and destination countries.⁷⁹¹

Prior to the pandemic, women and girls already made up the majority of detected victims of trafficking in human beings and it is likely that they will also be the most affected during and in the aftermath of the pandemic,⁷⁹² especially those from marginalized communities. Emerging trends are affected by pre-existing gender inequality, as the surge of domestic violence during the pandemic is a well-documented push factor for trafficking in human beings.⁷⁹³ The pandemic has also increased the vulnerability of children to trafficking,⁷⁹⁴ especially online. Law enforcement agencies in the OSCE region have reported increased grooming and exploitation of children through the internet, as well as an exponential growth of child sexual exploitation material shared online.⁷⁹⁵ Concerns have also been raised about convicted traffickers who use the pandemic to claim that they are no longer generating income and therefore cannot afford to pay the court-ordered compensation.

786 Responses of non-governmental anti-trafficking stakeholders were collected from over 100 countries (45 countries from the OSCE region) and of survivors of trafficking from over 40 countries (13 countries from the OSCE region). Selected quotes from key respondents are included in the box below.

787 **COVID-19 Position paper: The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons**, OHCHR (2020)

788 World Bank, **"The impact of COVID-19 (Coronavirus) on global poverty: Why Sub-Saharan Africa might be the region hardest hit"**, 20 April 2020

789 See **Coronavirus a challenge, and opportunity, to fix remittances system than funnels billions home from abroad**, UN News, 2 June 2020

790 Fraser, E. (2020) Impact of COVID-19 Pandemic on Violence against Women and Girls, VAWG Helpdesk Research Report No. 284. London, UK: VAWG Helpdesk.

791 **COVID-19 Position paper: The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons**, OHCHR (2020)

792 **Aggravating circumstances: How coronavirus impacts human trafficking**, Wagner L., Hoang T. (2020)

793 **The Intersections of Domestic Violence and Human Trafficking**, NNEDV (2017)

794 **Policy Brief: The Impact of COVID-19 on children**, United Nations (2020)

795 See **Exploiting Isolation: Offenders and victims of online child sexual abuse during the COVID-19 pandemic**, EUROPOL, 19 June 2020.

ODIHR/UN Women Survey of Victims and Survivors of Trafficking in Human Beings (2020)

“Survivors are suffering – mental health is suffering – we are having flashbacks of being trapped, of nearly dying, suffocating, of not having food, etc. We need to know that we won’t lose our homes, will have food and will not have to choose between life and income. Do I really have to die? Do I have to feel like I’m being suffocated every time I go out or have to stay in a tiny apartment. No one speaks to me...”

Woman survivor from the United States

“[Victims are] being forced to interact with others who may be infected, as traffickers find new ways to exploit victims.”

Woman survivor from the United Kingdom

“Better knowledge of escape plans for women, they feel they have nowhere to go, shelters are full of Covid-19. Apartments won’t rent, girls can’t access social workers or social services to escape.”

Woman survivor from Canada

“[Provide] financial support from the state to cope with the difficulties even after the Covid-19 pandemic.”

Woman survivor from Albania

“Yes, frontline services should get in touch with those affected and make exit offers. Hotels affected by the closure due to Corona could be rented cheaply by responsible authorities in the cities and made available to victims of human trafficking during the Corona pandemic.”

Women survivor from Germany

The emergency measures during the pandemic have led to a number of increased risks for victims of trafficking, including intensification of control, violence and isolation at the hands of exploiters and reduced access to assistance. There are concerns that victims of trafficking will not seek medical assistance for Covid-19 due to fears of administrative detention because of their irregular migration status. Victims of trafficking in immigration detention or other detention settings may not be identified due to lack of access for NGOs conducting monitoring. Other identified victims of trafficking were sometimes left in limbo and unable to return to their countries of origin due to border closures, lack of documentation and resources for return or absence of coordination between countries’ authorities. Some survivors of trafficking reported an increase in domestic violence, economic insecurity, and a fear of traffickers released from prison during the pandemic.⁷⁹⁶ Furthermore, there

are indicators that victims of trafficking who have debts to repay to traffickers may be forced to engage in high risk activities, such as informal labour, prostitution or the production of pornography online⁷⁹⁷.

According to the survey results, the pandemic has impacted the effective functioning of NRMs and national child protection systems, and particularly access to identification procedures, sheltered accommodation, and social services. Other obstacles included accessing referral to NRMs or equivalent mechanisms, regularization of migration status, non-sheltered accommodation, psychological, medical, interpretation and legal services. In addition, civil society frontline responders indicated a lack of funding to continue addressing the needs resulting from the pandemic.

⁷⁹⁶ See **Safety Planning During COVID-19: Tips From Survivors For Survivors**, Sanctuary for Families, 17 March 2020.

⁷⁹⁷ See OHCHR (2020), COVID-19 Position paper: The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons. <https://www.ohchr.org/Documents/Issues/Trafficking/COVID-19-Impact-trafficking.pdf>

Due to the impact of the pandemic on law enforcement operations and capacity, detecting trafficking cases has become more challenging. Victims in the process of receiving the statutory 'victim of trafficking' status have experienced delays, resulting in a lack of access to services and thus a greater vulnerability to further exploitation. Victims have also experienced difficulties in accessing sheltered accommodation and other assistance, as many shelters and service providers were only partially functional, closed or did not accept new clients. For child victims of trafficking, significant changes in procedure, delays and postponements in the appointment of legal guardians have had a negative impact on access to appropriate protection and legal procedures⁷⁹⁸.

Besides limited access to accommodation, victims and survivors of trafficking had difficulty in accessing health-care, including access to primary doctors, psychological services, hospitals, pharmacies, Covid-19 testing, and personal protective equipment (PPE). Particularly significant is the increase of PTSD symptoms and other psychological issues among victims and survivors of trafficking.

There have been changes in procedure, delays and postponements in administrative, criminal and civil cases due to the implementation of emergency measures, which negatively impacts victims' and survivors' access to protection, justice and redress. Administrative procedures are central to the processing of asylum applications, temporary and permanent residence permits, work permits and the regularization of residence during the pandemic.⁷⁹⁹

The pandemic has led to a loss of employment, resulting in a lack of financial means to cover basic necessities, such as food, housing and childcare. In this context, effective remedial action in the form of financial assistance has been identified by survivors as one of the most urgent needs, as it is necessary for their reintegration and social inclusion and for reducing

vulnerability to exploitation and re-trafficking during and post-pandemic⁸⁰⁰. In some states, survivors still living in sheltered accommodation have been prevented from moving out as emergency measures make it difficult to visit housing and sign rental contracts. Furthermore, victims of trafficking are often unable to return to their country of origin or experience delays due to closed borders, interrupted long-distance transport and unavailability of assistance from governmental agencies and service providers in the country of return⁸⁰¹.

Since the pandemic began, the dynamics of trafficking for sexual exploitation, particularly of women and children, are currently shifting from the more traditional formats of exploitation to **various** forms of trafficking online. Some evidence of production and proliferation of pornography of victims of trafficking, especially child pornography, has been reported in the media.⁸⁰² For instance, the largest pornography website in the world, which is under investigation for hosting videos of victims of trafficking, children and rape,⁸⁰³ has been providing free access to all its content during the Covid-19 outbreak worldwide, which is expected to generate further demand for trafficking in women and children for the purpose of pornography production and other forms of trafficking for sexual exploitation online. Although the evidence is anecdotal, webcam sex trafficking also appears to be increasing.⁸⁰⁴ Additionally, remote working amid the pandemic gives abusers new ways to target people online, both to generate demand and to groom vulnerable women and children for trafficking for sexual exploitation.⁸⁰⁵

800 OSCE/ODIHR (2020), Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic: Survey of Survivors of Trafficking. Summary Report.

801 Ibid.

802 See **How traffickers exploit the covid-19 pandemic**, Siddharth Kara

803 **Pornhub Under Fire After Videos of Rapes, Sex Trafficking Victims Posted to Site**, The Dailywire, 12 February 2020.

804 **'Traffickers Are Not Shut Down': Congressman Warns of Risk to Children & Other Victims**, CBN NEWS, 28 April 2020.

805 **Risk of online sex trolling rises as coronavirus prompts home working**, Thomson Reuters Foundation, 18 March 2020.

798 OSCE/ODIHR and UN Women (2020), Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic: Survey of Non-Governmental Frontline Service Providers. Summary Report

799 Ibid.

School closures, increase in domestic violence and economic insecurity, as well as increased time spent online are all exacerbating the potential vulnerabilities of children to trafficking in human beings. Children who are victims of abuse, homeless, stateless, internally displaced or undocumented or unaccompanied are particularly exposed to trafficking. Isolation with potential perpetrators can lead to additional risk factors for children to become victims of trafficking, especially for the purpose of sexual exploitation. During the period of emergency measures, there has been an increased number of reports of child abuse, including new ways to sexually exploit and abuse children, such as live-streaming child sexual abuse or the establishment of “delivery” or “drive-thru services”.⁸⁰⁶

Moreover, there are reports of increased grooming and exploitation of children online through gaming sites and social media platforms by sexual predators during the emergency measures, as children have to stay at home and are spending more time online, and at the same time the demand for pornography has risen.⁸⁰⁷ International and national law enforcement agencies, including EUROPOL and the FBI, are warning about the increasing risk of sexual exploitation on the internet and signs of child abuse or child trafficking.⁸⁰⁸ Available information indicates a growth of demand for child sexual abuse materials and growth of such materials and online exploitation, especially through the use of live-streams during the pandemic.⁸⁰⁹ Distributors of child sexual abuse materials are constantly developing sophisticated, cross-platform strategies to evade detection by the technology companies’ automated tools to detect child abuse.⁸¹⁰

806 UN News, **COVID-19 crisis putting human trafficking victims at risk of further exploitation, experts warn**, 6 May 2020.

807 See, **Video Games and Online Chats Are ‘Hunting Grounds for Sexual Predators**, New York Times, 7 December 2019.

808 See **Exploiting Isolation: Offenders and victims of online child sexual abuse during the COVID-19 pandemic**, EUROPOL, 19 June 2020, and **Pandemic Profiteering: How Criminals Exploit the COVID-19 Crisis**, EUROPOL, 27 March 2020; See also **School Closings Due to COVID-19 Present Potential for Increased Risk of Child Exploitation**, FBI, 23 March 2020

809 Ibid.

810 See, for instance, **Child sexual abuse images and online exploitation surge during pandemic**, NBC NEWS, 23 April 2020.

GOOD PRACTICES

Many states recognize the emerging trends and dynamics in trafficking in human beings. In some countries, measures to ease the situation of migrants has been positive for victims and survivors of trafficking. However, very few states have taken dedicated action focused on trafficking in human beings specifically, such as developing special protocols to ensure that NRMs can continue to function.⁸¹¹ Granting temporary residence and access to services has reduced vulnerability to trafficking in some countries.⁸¹² Others have extended the ‘move on’ policy,⁸¹³ which is granted to individuals not recognized as victims of trafficking or who do not require accommodation. Some states have also begun to look into ways to address the growing exploitation online.⁸¹⁴

811 **Kyrgyzstan** is in the process of developing a State of Emergency Protocol on Combating trafficking in human beings to ensure the functionality of NRMs in any state of emergency.

812 In March 2020, the government of **Portugal** announced that migrants and asylum seekers with pending residence permit applications would be granted permission for temporary residence, reducing their vulnerability to trafficking, as this at-risk group then has access to the same rights as citizens. See **Portuguese government gives temporary residence to immigrants with pending applications**, European Commission, 28 March 2020.

813 The **United Kingdom** extended it for three months, see Modern Slavery Act 2015: statutory guidance for England and Wales.

814 The Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 in the **United States** proposes revising the framework governing the prevention of online sexual exploitation of children. See **EARN IT Act of 2020**

RECOMMENDATIONS

- Ensure that participating States are better equipped to create, strengthen and implement effective anti-trafficking legislation, National Referral Mechanisms (NRMs), National Action Plans (NAP) and Standard Operating Procedures by developing a protocol for combating trafficking in human beings for emergency situations;
- Strengthen existing NRMs to ensure effective implementation after the pandemic. Develop NRMs in states that are currently lacking them. Ensure that specific emergency-related vulnerabilities and needs of women and girls are addressed in NRMs and NAPs;
- Provide funding for frontline responders to ensure availability of all necessary services to victims and survivors of trafficking during and after the pandemic. Alert and provide protection for victims and survivors at risk from the early release of convicted traffickers from prison;
- Ensure availability of exit services from the sex industry to increase identification of victims of trafficking and reduce vulnerability to trafficking in human beings for sexual exploitation during and after the pandemic;
- Introduce identification protocols in healthcare institutions, as healthcare workers may be the only people in contact with victims of trafficking during states of emergency;
- Develop, strengthen and implement policy on supply chain management practices as businesses resume operations to ensure that trafficking in human beings or forced labour do not take place. This should include campaigns to promote ethical recruitment practices in the private sector and raise awareness among at-risk groups of the dangers of trafficking in human beings during and post-pandemic;
- Commit to developing and implementing public procurement regulations that ensure public funds are not used for labour exploitation of trafficking victims;
- Work with internet service providers, credit-card companies, banks, etc. to prevent the use of the internet for sexual exploitation of children and to disrupt traditional payment methods to reduce profitability.⁸¹⁵

815 Pursuant to OSCE MC.DEC 7.17.

CONCLUDING OBSERVATIONS AND ODIHR'S OFFER OF ASSISTANCE

At the time of writing, the Covid-19 pandemic may have receded in a number of participating States, allowing some to relax stringent emergency measures, but with others still struggling to contain the spread of infection. Most are only beginning to come to terms with the socio-economic consequences of the disruption and this unprecedented challenges will remain for years to come. At the same time, the UN is warning that the pandemic may only be in the early phases in many countries around the globe, and in an interconnected world, we know that while the coronavirus persists, it may affect the security and safety of societies everywhere.

Covid-19 has been a test to our democracies. Nationally, health systems and social services, local governments and security agencies have been stretched, some to their limits. Many have innovated and often improvised to protect their societies. The infringements on fundamental rights and freedoms have been unprecedented both in extent and scale. In some states, governments met this challenge well, while others used the pandemic and ensuing states of emergency, unjustifiably, as a pretext to roll back democratic standards, erode fundamental freedoms and curtail the rule of law. Internationally, the pandemic has shown the fragility of organizations and multilateral co-operation in times of crisis, demonstrating that no country can face this challenge alone, and that only by living up to commitments of joint responsibility and collective security will this global enemy be defeated. The crisis has also reconfirmed the centrality of responsible and engaged citizenship and empowered communities to cope with such an enormous destabilizer, and it has made us realize how important trust and communication are for effective governance and crisis management.

In the OSCE context, participating States have agreed on the centrality of the human dimension for co-operative security and the lasting stability of our societies. The respect for human rights and fundamental freedoms, democracy and the rule of law remain at the core of the OSCE's comprehensive concept of security,

especially in times of crisis. States are accountable to their citizens and responsible to each other for their implementation of the OSCE commitments.⁸¹⁶ States have also agreed that all OSCE commitments, without exception, apply equally to each participating State, and that they cannot use emergencies to dismantle them. Their implementation, in good faith, is essential for relations between states, between governments and their citizens, as well as for the continued effectiveness of the organizations of which they are members.⁸¹⁷

When the coronavirus first spread in the OSCE region, many states were caught off guard and societies were unprepared. Now, many lessons have been learned, about how to contain the spread of the disease effectively – essentially by testing, identifying, tracing, and isolating infected individuals, and maintaining a high degree of hygienic discipline. But equally important is the lesson only to use lockdowns and other more drastic measures only when the necessity arises, not infringing upon the basic norms and principles democratic societies are built upon – democratic accountability, the rule of law and access to justice for all and the full enjoyment of universal human rights. This report contains many such lessons and offers good practice in the hope that states will be inspired and learn from each other.

Among the major lessons from the Covid-19 pandemic, so far, are the reinforced need for international collaboration and collective responses to a collective health and human security crisis. It has underscored the need for a transparent and informed partnership between responsible citizens and accountable state institutions and political leaders. Likewise, it has highlighted the importance of social justice and inclusion as cornerstones of the human dimension – to ensure that no one is left behind. Inclusion and equality are not only basic values emanating from the ideas of fundamental and

816 Istanbul, 1999

817 *Ibid.*

universal human rights, they are also essential for the social cohesion of our societies. This report has provided details about how various groups and segments of society have fared differently during the pandemic, and the unjust accumulation of negative consequences faced by some. Discrimination has exacerbated the impacts of both the virus and the adverse implications of emergency measures.

States could have foreseen that vulnerable groups and communities would suffer multi-layered consequences. Many human rights groups and international organizations warned of such adverse effects. A number of states have avoided some of these consequences and offered targeted help promptly. Others struggled or failed to do so, which further worsened the situation of certain communities, some even suffering scapegoating and stigmatization.

These important lessons must be studied implemented and built upon. Measures should be put in place to ensure that states are prepared to adequately handle future crises, while respecting human rights and making sure that the principle of 'leaving no one behind' is reality. Unfortunately, all predictions are that similar crises, including pandemics and the increasing threat of the consequences of climate change, will put our established institutions, structures and systems to the test.

The principle of 'do no harm' must be at the forefront when ordering emergency measures. Authorities can learn lessons from short-sighted, drastic emergency lockdowns, especially those that isolated entire communities without support, including access to means for basic hygiene or subsistence. At the same time, lessons must be learned from public health measures that inadequately reflected the equal value of human life and the inviolability of the dignity of every human.

ODIHR has made every effort to serve participating States from the beginning of the pandemic by offering advice and recommendations on integrating human rights into their public health and emergency responses. The Office has worked in the rapidly changing environment to document and collect information to be able to provide concrete support to states. Operating under unprecedented restrictions and reduced mobility of its own staff, ODIHR has exercised its mandate to

collect and share information on states of emergencies and related derogations limiting human rights, and has maintained close contact with all those who can provide information on how human dimension commitments are implemented in practice and how vulnerable people have been affected. Due to travel restrictions, ODIHR was forced to postpone a number of training events and monitoring activities, but in many cases innovative solutions have been found, albeit without fully substituting the ability to be present in person. In the coming months, together with other OSCE structures and institutions, ODIHR stands ready to help to collect more lessons learned, to assist states in the restoration and protection of all fundamental rights and freedoms as soon as the situation allows; to provide assistance to those who have been hit the hardest; to design and implement recovery measures in an inclusive manner; and to prepare for future emergencies. ODIHR's experts look forward to further discussions and exchanges with participating States in this regard.

ODIHR therefore invites participating States to make use of its numerous applicable tools and resources. ODIHR will work with states to help parliaments and judicial institutions to begin fully functioning again and, as states consider the legislative changes needed to be better prepared for future emergency situations, ODIHR offers its **legislative assistance** in reviewing draft or existing legislation and advising on the development of legislation impacting the state's human dimension commitments. ODIHR looks forward to co-operating with states to protect human rights defenders, based on the **Guidelines on the Protection of Human Rights Defenders**. The Office is prepared to offer capacity building training to state actors and NHRIs, as well as legislative support or other types of expert advice. States should consider inviting ODIHR to monitor assemblies once health concerns subside and they can be held, and draw on the work of the Office in the area of the freedom of peaceful assembly.⁸¹⁸ ODIHR also wishes to refer to all other available tools and past recommendations, such as the recent **ODIHR Guidance: Monitoring Places of Detention through the COVID-19 Pandemic**.

⁸¹⁸ Including ODIHR **Guidelines on Freedom of Peaceful Assembly**, and ODIHR **Human Rights Handbook on Policing Assemblies**

ODIHR has been working for many years to address discrimination and hate crime to build more tolerant societies and remains at the disposal of participating States to support them in implementing their commitments in the area of tolerance and non-discrimination, including building related capacity of law enforcement.⁸¹⁹ ODIHR's work collecting data to address hate crime, as well as intolerance and discrimination in general, has been slowed by the Covid-19 pandemic, but remains a core priority of the Office.⁸²⁰

819 See, the **resources and tools on tolerance and non-discrimination**.

820 For instance, ODIHR's annual 2019 Hate Crime Reporting process, which coincided with lockdowns across the OSCE region in early 2020, has been affected, as civil society organizations faced an unexpected change and were forced by circumstance to modify their priorities.

Finally, it is expected that all participating States will fully account for how they have responded to the Covid-19 crisis while living up to their human dimension commitments in the course of the regular human dimension mechanisms designed for mutual accountability within the OSCE. It is also anticipated that they will duly report on how human rights and fundamental freedoms were upheld in the various treaty-based frameworks and mechanisms, such as within the Council of Europe and the United Nations. For instance, states should include an analysis of the impact of pandemic response into state reports to ICCPR, IESCR, CEDAW, the CRC and others of which participating States may be signatories, and they should consult with relevant civil society and affected groups and communities in preparation of these reports. ODIHR remains at the disposal of participating States to assist them in this endeavour.

STRIPOESULT

ANNEXES

1. ADDITIONAL INFORMATION ON STATES OF EMERGENCY OR EQUIVALENT STATUS WITHOUT SEEKING DEROGATIONS*

PARTICIPATING STATE	DESCRIPTION	DURATION
Bulgaria	State of Emergency declared by the National Assembly as per Art. 84(12) of the Constitution on 13 March until 13 May, and a one-month “nationwide epidemic situation” started on 14 May, which was extended.	2 months
Czech Republic	State of Emergency declared by resolution of the Czech Government, based on Art. 5 of the Constitution and the Crisis Act No. 140/2000 Coll. and Constitutional Act No. 110/1998 Coll. on the Security of Czech Republic, starting on 13 March for an initial period of 30 days, and ended on 17 May.	Slightly more than 2 months
Finland	State of Emergency declared on 16 March by the government in co-operation with the President as per the Emergency Powers Act and in accordance with Section 23 of the Constitution, initially until 15 April, then extended until 13 May and was lifted on 16 June.	3 months
Hungary	“State of Danger” declared by decree on 11 March for 15 days, on the basis of Art. 53 of the Fundamental Law of Hungary, with extension possible only upon authorization by the Parliament, which was provided with the adoption of the Act on the Protection Against the Coronavirus on 30 March, for as long as the “state of danger” persists, which is to be determined by the government. A Bill to end the “state of danger” was adopted on 16 June and the “state of danger” ended on 18 June, when Hungary transitioned to an open-ended state of healthcare emergency .	3 months and one week
Italy	State of Emergency declared by government on 31 January for a period of six months in accordance with Law 225 of 24 February 1992 on the Italian Civic Protection.	Planned 6 months
Kazakhstan	State of Emergency declared by presidential decree, based on Art. 44 (1) (16) of the Constitution, from 16 March to 15 April initially, and then extended twice until 11 May.	Nearly 2 months
Luxembourg	“State of Crisis” declared on 18 March by regulation of the Grand-Duc pursuant to Art. 82 (4) of the Constitution, for a duration of 3 months until 24 June, and confirmed unanimously by the Parliament.	3 months
Portugal	15-day State of Emergency declared on 18 March by Presidential Decree after mandatory consultation of the Council of State and government and the authorization of the Parliament, as per Art.s 134 and 138 of the Constitution, and renewed twice until 2 May after hearing the government and authorization of the Parliament, as per the Constitution. On 4 May, Portugal transitioned to a “state of calamity”.	1.5 months
Slovakia	“Emergency Situation” declared as of 16 March by the government, on the basis of Art. 5 of the Constitutional and Law No. 227/2002 on the State Security in Times of War and State of Emergency, which is distinct from a “state of emergency” provided in Art. 4 of the same Law, for a maximum of 90 days, and was lifted on 13 June.	90 days
Spain	15-day “State of Alarm” – lowest level of state of emergency – declared by governmental decree, from 14 March to 29 March, in accordance with Art. 116.2 of the Constitution, and extended six times following authorization by the Congress of Deputies, until 21 June when it ended.	90 days

*This overview does not include the subnational level in federal states.

2. ADDITIONAL INFORMATION ON STATES OF EMERGENCY OR EQUIVALENT STATUS, WITH DEROGATIONS NOTIFIED TO THE UNITED NATIONS OR/AND THE COUNCIL OF EUROPE

PARTICIPATING STATE	DESCRIPTION	DURATION
Albania	State of Natural Disaster, different from a “state of emergency”, declared by the Council of Minister on 24 March, later extended upon the consent of the Assembly of the Republic of Albania, as per Art.s 170-175 of the Constitution, and ended on 23 June.	3 months
Armenia	30-day State of Emergency declared by decision of the government on 16 March, on the basis of Art. 120 of the Constitution, and extended three times by governmental decrees until 13 July, and expected to be further extended.	TBC
Estonia	“Emergency Situation” declared on 12 March, on the basis of Art. 87 of the Constitution and the 2017 Emergency Act, and terminated as of 18 May.	Slightly more than 2 months
Georgia	30-day State of Emergency declared by the President on 21 March, further approved by the Resolution N5864 of the Parliament of Georgia on the same day, in accordance with Art. 71 par 2 of the Constitution and Art. 2 par 1 of the Law of Georgia on State of Emergency, later extended twice and ended on 22 May. On 22 May, the Parliament of Georgia adopted and the President promulgated special emergency legislation amending the “Law on Public Health” and the Criminal Procedure Code of Georgia, which introduced special restrictive measures until 15 July, and Georgia notified the Council of Europe about the extension of derogations until that date.	2 months
Kyrgyzstan	“Emergency Situation” declared on 22 March on the whole territory, for one month, which has been renewed, while a State of Emergency was declared on 25 March, based on Art. 64 (9) (2) of the Constitution, in certain specific cities and districts, as approved by the Jogorku Kenesh, and later extended to 10 May for certain of these cities and districts, while a nationwide “emergency situation” remains).	1.5 months
Latvia	“Emergency Situation” declared by the government, as per Art. 10 of the Law on Emergency Situation and State of Exception, from 13 March, as approved by the Parliament on 13 March, initially until 14 April and extended twice until 9 June when it ended, with a partial lifting of derogations in the meantime.	Nearly 3 months
Moldova	State of Emergency declared by Parliament’s Decision no. 55 on 17 March for a period of 60 days, on the basis of Art. 66 sub-para. (m) of the Constitution of the Republic of Moldova, and terminated on 15 May.	60 days
North Macedonia	30-day State of Emergency established by President’s Decision on 18 March on the basis of Art.s 125-126 of the Constitution, further extended four times until 22 June, when it ended.	3 months
Romania	30-day State of Emergency decreed by the President on 16 March and endorsed by the Parliament of Romania, in accordance with Art. 93 of the Constitution, extended for 30 days according to the same procedure and ended on 14 May.	60 days
San Marino	Since the Constitution has no provisions on “state of emergency”, urgent measures were adopted by the government through a series of decree-laws i.e., regulatory instruments adopted in case of necessity and urgency by the government and which, within 3 months and under penalty of forfeiture, have to be submitted to the Parliament for ratification as per Art. 3 of the Law no. 59 of 8 July 1974 on Declaration of Citizens’ Rights and of the Fundamental Principles of the San Marinese Legal Order, initially extended until 31 May but new Decree Law no. 96 of 31 May provides restrictive measures that will last “until the end of the health emergency”.	Undetermined
Serbia	State of Emergency declared on 15 March by the President of the Republic together with the President of the National Assembly and the Prime Minister, pursuant to Art. 200 of the Constitution, and lifted on 6 May 2020 by the National Assembly.	7 weeks

3. STATES OF EMERGENCY AND OTHER EMERGENCY MEASURES IN FEDERAL STATES

PARTICIPATING STATE	DESCRIPTION
Austria	Several Federal Acts on Covid-19 were adopted, authorizing federal ministers to adopt regulations to deal with the pandemic, with most of the measures being based on the 1950 Federal Epidemics Act.
Belgium	A federal phase of crisis management was declared on 13 March by the Federal Minister of Interior, to allow for greater co-ordination between the federal state and federated entities. The legal basis for the special powers at the federal level was promulgated by two laws that entered into force on 30 March, with a retroactive effect from 1 March, and conferred special powers on the King until 30 June. In parallel, several legislators from the Regions, Communities and Community Commissions also granted special powers to respond to the Covid-19 pandemic to the governments of colleges of the entities concerned.
Bosnia and Herzegovina	The Republika Srpska declared a state of emergency on the basis of Art. 70 of the Constitution as of 3 April, which ended on 21 May, while the Federation of Bosnia and Herzegovina declared a state of natural or other disaster on 17 March, on the basis of the <i>Framework Law on Protection and Rescue of People and Material Property from Natural and Other Disasters in BiH</i> , which ended on 31 May.
Canada	All Canada's provinces and territories have declared, in one form or another, states of emergency (eight) or other public health emergency status (five).
Germany	Several Laender declared a state of emergency, while the German Bundestag has determined "an epidemic situation of national importance" in the country in accordance with the 2001 Protection against Infectious Diseases Act, which was amended in March 2020 to confer additional competencies to the Federal Ministry of Health.
Russian Federation	Restrictive measures were imposed by regional and local decrees on high alert regimes based on the Federal Law No. 68-FZ "On Protection of the Population and Territories against Emergency Situations of Natural and Technogenic Nature"; by 19 March, all the federated entities had announced high alert regimes; the Federal law No. 98-FZ dated 1 April 2020 "On amendments to certain legislative acts of the Russian Federation for the prevention and elimination of emergency situations" introduced amendments to several federal laws to clarify the powers of the Regions when dealing with natural disasters, introduce tightened penalties for breaking quarantine or self-isolation requirements and toughened liability for spreading fake news about the Covid-19 outbreak.
Switzerland	In cases of "extraordinary situations" as per Art. 7 of the Law on Epidemics, the Cantons must abide by the Confederation's legal prescriptions, meaning that the Cantons' ability to act is limited to those areas falling within their jurisdiction and not covered by the Federal Order.
United States of America	A "National Emergency" was declared by the President on 13 March on the basis of the Constitution and national legislation of the United States of America, including the National Emergencies Act and the Social Security Act. In parallel, about two-thirds of the states declared a state of emergency, while less than a third declared a public health, disaster or other emergency status and only a few states adopted other restrictive measures without declaring such special legal regime.