

# 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.<sup>7</sup> 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,<sup>8</sup> and even

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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.

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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.”<sup>9</sup> OSCE commitments envision derogations during a “state of public emergency” that is “justified only by the most exceptional and grave circumstances.”<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> In these cases, participating States specifically committed to “endeavour to refrain from making derogations” even where international conventions provide for derogation.<sup>13</sup>

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:<sup>14</sup>

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

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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)

## 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)

- 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).

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

- 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 instruments<sup>17</sup> (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,<sup>18</sup> the fundamental principles of a fair trial,<sup>19</sup> the fundamental guarantees against *arbitrary* detention<sup>20</sup> and the principle of *non-refoulement*, which is absolute and non-derogable.<sup>21</sup>

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.”<sup>22</sup> It should also be proclaimed “officially, publicly, and in accordance with provisions laid down by law.”<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> Finally, the Moscow Document explicitly states that a “*de facto* imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible.”<sup>26</sup>

Furthermore, even in times of emergency, overall respect for rule of law principles should be ensured.<sup>27</sup> 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”.<sup>28</sup> 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.”<sup>29</sup> 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.<sup>30</sup> Due democratic

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

19 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).

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.

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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 Alpay 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;<sup>31</sup> (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.<sup>32</sup> 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,<sup>33</sup> 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,<sup>34</sup> and the principle of *non-refoulement*.<sup>35</sup> 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.<sup>36</sup> Finally, international humanitarian law shall be respected in all circumstances.<sup>37</sup>

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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.

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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,<sup>38</sup> about the declaration of a state of emergency and of potential derogation to international human rights obligations.<sup>39</sup> 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 verbale* of 20 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.<sup>40</sup> 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,<sup>41</sup> or envisage them for specific types of emergencies not including epidemics or health emergencies.<sup>42</sup> 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.

### 1. 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.<sup>43</sup> 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, Lithuania, **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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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).<sup>47</sup>

## 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> Six

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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 **Iceland**.

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

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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).<sup>51</sup>

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.

### 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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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”.

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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.

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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”.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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

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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

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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”.<sup>58</sup> 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.<sup>59</sup> As mentioned above, the fundamental guarantees against arbitrary detention are considered to be non-derogable and absolute.<sup>60</sup> 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.<sup>61</sup> 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).<sup>62</sup>

**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.<sup>63</sup> 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.<sup>64</sup>

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58 See 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”.

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,<sup>65</sup> violations of ceasefires have been reported.<sup>66</sup> 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.<sup>67</sup> 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).<sup>68</sup>

### **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.

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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,<sup>69</sup> especially if the existing legal framework

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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.<sup>70</sup>

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.

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**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.

<sup>70</sup> 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.<sup>71</sup> 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.

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<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> On several occasions, additional confusion was brought by executives publicly

announcing additional rules or exceptions not necessarily reflected in legal texts.<sup>74</sup> Also, in certain instances, the underlying legal texts have not been published,<sup>75</sup> so they are not publicly accessible in contradiction with rule of law principles.<sup>76</sup> A number of countries used the public policy technique of ‘nudging’, urging 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.<sup>77</sup> 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.<sup>78</sup> As a result, at times far-reaching and potentially arbitrary powers

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72 For instance in, **Austria** (in the first weeks, the government introduced revisions of more than 50 statutory laws with no 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

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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.<sup>79</sup> Initial legal shortcomings have sometimes subsequently been rectified, for instance in Italy and Malta.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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).<sup>83</sup>

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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 constitutionality 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> This

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#### **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.<sup>88</sup> 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”.<sup>89</sup> 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.<sup>90</sup> When notifying of derogations, almost all participating States have provided for a specific

temporal limit either explicitly or in the attached legal texts.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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

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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.<sup>103</sup>

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.<sup>104</sup> Similarly, sanctions for

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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.<sup>105</sup> 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.<sup>106</sup> Similarly,

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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.<sup>107</sup>

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;<sup>108</sup> the procedure for all matters to have one judge hear cases rather than a panel;<sup>109</sup> the collection of data via coronavirus contact-tracing application;<sup>110</sup> the complete ban on traveling to the coast;<sup>111</sup> and a non-time-limited restriction on freedom of movement.<sup>112</sup>

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

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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 cancelation” and considered that it was not limited in temporality and therefore disproportionate.

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

#### 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.<sup>115</sup> 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”.<sup>116</sup> 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).<sup>117</sup> While age is not explicitly listed in the grounds for discrimination, a blanket ban for people over a certain age to exit their homes,<sup>118</sup> 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.<sup>119</sup> 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.

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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.

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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.<sup>120</sup> 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.<sup>121</sup>

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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 derogations, 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.<sup>122</sup> As such, failure to

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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.<sup>123</sup> In addition, domestic violence is internationally recognized as amounting to cruel, inhuman or degrading treatment and very often to physical or psychological torture.<sup>124</sup> It is documented that stay-at-home obligations and other measures restricting the movement of people have contributed to an increase in domestic violence.<sup>125</sup> 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.<sup>126</sup>

### 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., *Soering 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.<sup>127</sup> 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.<sup>128</sup> 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.”<sup>129</sup> 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.”<sup>130</sup>

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.<sup>131</sup> 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.<sup>132</sup> For example, the quarantine rules in Ireland and Canada and compulsory hospitalization in Poland,<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> (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.”<sup>136</sup> 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.<sup>137</sup> There should be parliamentary control and judicial review of the existence and duration of the emergency situation, and the scope of any derogation thereunder.<sup>138</sup> 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.”<sup>139</sup>

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

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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.<sup>140</sup> 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.”<sup>141</sup> 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.”<sup>142</sup>

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.<sup>143</sup> At times, there is also a mechanism to ensure that the parliament reviews or approves implementing measures adopted by the executive.<sup>144</sup> In a few countries, states of emergency or equivalent status have to be declared by the parliament itself,<sup>145</sup> which

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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.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> Modalities for continued work during the pandemic, for instance reduced hours of

parliamentary sitting have not always been conducive to effective oversight.<sup>149</sup>

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.<sup>150</sup> 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.<sup>151</sup> 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

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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).

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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.<sup>152</sup> 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.<sup>153</sup>

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.<sup>154</sup>

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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 of 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.”<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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

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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.<sup>158</sup> 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,<sup>159</sup> or due to other procedural reasons.<sup>160</sup> 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.<sup>161</sup>

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.<sup>162</sup> 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.<sup>163</sup> At

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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 regulations 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)**.

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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 data,<sup>164</sup> which raises additional concerns.

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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 of 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**).

164 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.<sup>165</sup> 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

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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.<sup>166</sup>

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.<sup>167</sup> 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.<sup>168</sup>

#### 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.”<sup>169</sup> 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.”<sup>170</sup>

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.<sup>171</sup> 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.<sup>172</sup> Also, as mentioned above, con-

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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).

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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 practice<sup>173</sup> (see

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

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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

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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.<sup>174</sup>

### **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.

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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.



## 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.<sup>175</sup> 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.”<sup>176</sup> 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.” 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.<sup>177</sup> 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. 34<sup>178</sup> 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.<sup>179</sup> 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.”<sup>180</sup> Several OSCE

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(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

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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.<sup>181</sup> 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."<sup>182</sup> 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."<sup>183</sup> The Istanbul Document (1999) reiterated the importance of the public's access to information.<sup>184</sup>

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.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup> 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

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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,

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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.<sup>188</sup> 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,<sup>189</sup> while others have specifically forbidden the media from publishing news on Covid-19 from sources other than those released officially by government.<sup>190</sup> 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.<sup>191</sup> (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.<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> Instead of

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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 stipulates 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).

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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.<sup>195</sup> 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).<sup>196</sup>

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.<sup>197</sup> 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.<sup>198</sup>

## 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 closures<sup>199</sup> 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.<sup>200</sup>

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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

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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.



## 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.<sup>201</sup>

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.”<sup>202</sup> 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.<sup>203</sup>

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.<sup>204</sup> 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

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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.*

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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.”<sup>205</sup> The right to privacy is also firmly enshrined in international human rights law.<sup>206</sup> In December 2013, the United Nations General Assembly adopted Resolution 68/167<sup>207</sup>, 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.<sup>208</sup> 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.<sup>209</sup>

ODIHR monitored and analysed types of electronic surveillance (e.g., mobile applications, geolocation tracking),<sup>210</sup> 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.<sup>211</sup> 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.

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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 A/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.

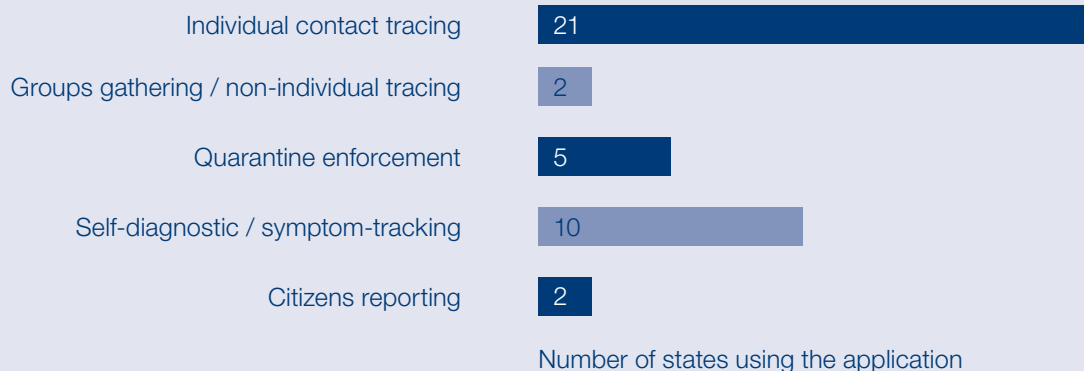
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209 **Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing, Interim Guidance**, WHO, 28 May 2020.

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 applications<sup>212</sup> have been increasingly adopted by authorities.<sup>213</sup> These applications rely on tracking systems, most often based on mobile devices proximity sensors, to determine contact between an infected person and another user.<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup>

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,<sup>217</sup> 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 countries<sup>218</sup> 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.<sup>219</sup> This measure was intended as a tracking tool for people diagnosed with Covid-19. Four States have already tested biometric bracelets<sup>220</sup> or rings as means to track individuals' compliance with isolation and quarantine orders.<sup>221</sup> Some states<sup>222</sup> conduct blanket data collection of all mobile activity including calls, messages, and related metadata (time, destination, etc.).<sup>223</sup>

Several countries employed CCTV cameras equipped with facial recognition<sup>224</sup> to enforce quarantine<sup>225</sup> or have significantly expanded their video surveillance capabilities.<sup>226</sup> 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

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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**.

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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**.

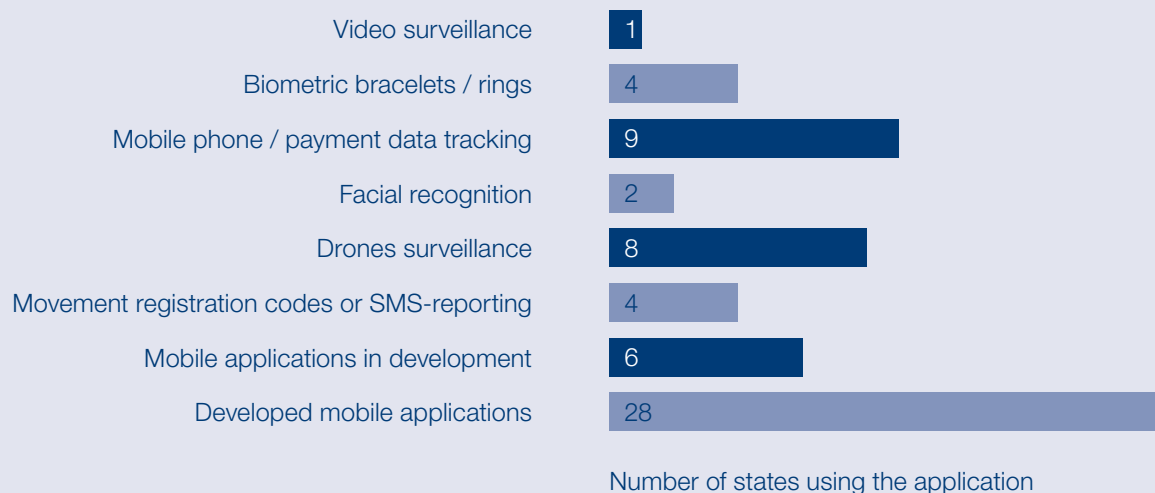
223 **Europe's Other Coronavirus Victim: Information and Data Rights**, BIRN, 24 March 2020.

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 Transdniestra: **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.

## TYPES OF SURVEILLANCE TECHNOLOGIES USED BY OSCE PARTICIPATING STATES



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

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.<sup>229</sup> Cyber-attacks 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.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup> 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.<sup>233</sup> 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 resolution<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> Of specific importance were also joint initiatives to inform people during the crisis through technology and innovative approaches.<sup>237</sup>

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.