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The impact of the Covid-19 pandemic on human rights and the rule of law

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Vladimir VARDANYAN, Armenia, Group of the European People's Party

Summary

The Covid-19 pandemic is an unprecedented challenge also for human rights and the rule of law, both of which remain applicable even in times of national emergency. Member States have taken a wide range of often broadly similar measures to limit the spread of Covid-19, restricting – often severely – the enjoyment of rights protected under the European Convention on Human Rights (the Convention). These measures have often been introduced under a state of emergency, sometimes accompanied by a derogation from the State's Convention obligations. Particular problems have arisen in the areas of privacy, in relation to contact tracing, judicial systems, the situation of detainees and corruption.

Whilst noting that European democracies have on the whole responded effectively without betraying their fundamental values, the Committee on Legal Affairs and Human Rights calls for full implementation of Council of Europe standards, in accordance with the expert guidance given by the Organisation's various relevant bodies, and for member States to conduct a prompt, thorough and independent review of the national response to Covid-19.

The committee also calls for the Secretary General of the Council of Europe to play a more proactive role in relation to derogations to the Convention, in order to encourage a more harmonised approach amongst member States. It calls on the Committee of Ministers to consider adopting a recommendation to member States on derogations, and to instruct appropriate inter-governmental bodies to review national experience of responding to Covid-19, in order to share experience and good practice.

1. Reference to committee: Bureau decision. Reference 4514 of 7 May 2020.

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A. Draft resolution[2]

1. Although primarily a public health crisis, the Covid-19 pandemic is also an unprecedented challenge for human rights and the rule of law – both of which remain applicable even in times of national emergency. The positive obligations under the European Convention on Human Rights (ETS No. 5, "the Convention") require States to take measures to protect the life and health of the population. This imperative does not, however, give States a free hand to trample on rights, suppress freedoms, dismantle democracy or violate the rule of law. Even during a state of emergency, the Convention continues to set limits, thereby ensuring respect for common European fundamental standards.

2. States have taken a wide range of often broadly similar measures to limit the spread of Covid-19. These generally include severe restrictions on freedom of movement and assembly and closures of educational establishments and premises used for commercial, recreational, sports, cultural and religious purposes. Such measures interfere with enjoyment of Convention rights, sometimes with serious personal consequences for the individuals concerned, but – despite their scope and impact – they do not necessarily violate those rights. Many Convention rights allow for limitations in order to accommodate the need to balance individual against public interests, including the protection of public health and safety. Interference with these rights is permissible under the Convention so long as it is lawful, necessary, proportionate to the public interest being pursued and non-discriminatory. The Parliamentary Assembly welcomes the timely and constructive interventions by the Commissioner for Human Rights of the Council of Europe on various situations relating to this issue.

3. Measures that restrict freedom of expression, access to information and media freedom are not readily justifiable. Information is essential for the public to understand the danger and adopt measures at a personal level to protect themselves. Restricting the public flow of information is detrimental to an effective public health response that attracts the informed and sustainable support of the public based on trust in public institutions. Journalists, whistleblowers and human rights defenders are key assets in preventing further damage by disclosing bad practices in good time for corrective measures to be taken. Only deliberate dissemination of misinformation that may cause significant public harm should be controlled, on the basis of laws that are clearly and narrowly defined and non-discriminatory.

4. Whilst states of emergency or similar exceptional regimes may allow for a more rapid, flexible and effective response, they limit the application of normal checks and balances. They are thus potentially hazardous from the perspective of human rights, democracy and the rule of law. The Assembly therefore fully endorses the principles applicable to states of emergency that have been elaborated by the European Commission for Democracy through Law (Venice Commission).

5. In this connection, the Assembly welcomes the fact that many member States have already brought their states of emergency to an end or have replaced them with less restrictive legal regimes and measures, once the public health situation allowed this. It also notes that several States have encountered difficulties in identifying a legal basis for the exceptional measures that they have had to introduce which meets the requirements of legality and constitutionality. There should and need not be any tension between effectiveness and legality. All member States would benefit from a thorough review of the measures taken in response to the pandemic, in order to ensure that a clear and sufficient legal framework exists for the future.

6. The Assembly notes that an unprecedented number of States have exercised their right to derogate from their obligations under the Convention with respect to measures they have taken in response to the pandemic. It recalls its Resolution 2209 (2018) and Recommendation 2125 (2018), entitled "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights", in which it recognised that protracted states of emergency and derogations have the effect of normalising lower standards and habituating populations to greater interference with their rights. The aim of the proposals made in these texts was to support national authorities in understanding the legal complexities in this area and to encourage a more harmonised approach in future. The Assembly considers that recent experience underlines the need for this.

7. It is increasingly assumed that smartphone contact tracing applications will form part of many countries' responses to the pandemic. The Assembly notes that a lack of public trust in such apps due to privacy-related concerns, resulting in low levels of installation or use, would seriously undermine their effectiveness. The Assembly recalls the Council of Europe's Modernised Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (ETS No. 223, Convention 108+), whose standards member States should seek to respect when enacting the primary legislation necessary to introduce and regulate

2. Draft resolution adopted by the committee on 29 June 2020.

contact tracing apps. It fully endorses the advice given by the Chairperson of the Consultative Committee of Convention 108 and the Council of Europe Data Protection Commissioner on how these standards should be applied in the context of the Covid-19 pandemic. As regards applications of artificial intelligence systems to data processing in this context, it welcomes Committee of Ministers' Recommendation CM/Rec(2020)1 on the human rights impact of algorithmic systems.

8. The Assembly notes that the functioning of national judicial systems has also been severely disrupted by the pandemic. It recalls the rights to liberty and security, a fair trial and an effective remedy, as protected by the Convention, and the importance of ensuring respect for constitutional principles. It underlines the need to prioritise cases according to their urgency, general importance and impact on individual rights and vulnerable groups. It therefore fully endorses the "Declaration on Lessons Learnt and Challenges Faced by the Judiciary During and After the Covid-19 Pandemic" adopted by the European Commission for the Efficiency of Justice (CEPEJ).

9. The Assembly notes that the situation of persons deprived of their liberty makes them particularly vulnerable to infection and the negative consequences of prolonged physical isolation. It recalls the prohibition on inhuman or degrading treatment or punishment under the Convention, which obliges states to take action to protect the health and safety of persons deprived of their liberty. It therefore fully endorses the "Statement of Principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19)" adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

10. The Assembly notes that the massive increases in public expenditure on procurement of medical and other pandemic-related goods, and on economic support and stimulus measures, create a particular risk of corruption. It therefore fully endorses the guidance on "Corruption Risks and Useful Legal References in the Context of Covid-19", issued by the President of the Group of States against Corruption (GRECO).

11. All member States of the Council of Europe have been forced to take exceptional measures in response to the exceptional threat posed by the Covid-19 pandemic. On the whole, European democracies have proved themselves capable of effective response without betraying their fundamental values. Whether or not the measures taken have been successful from a public health perspective, they should be carefully monitored for compliance with Council of Europe standards and studied in order to learn lessons for the future. As an extreme stress-test, Covid-19 is an opportunity to reinforce national systems; so that if there is another pandemic, authorities can respond quickly and effectively, confident that they are respecting human rights and the rule of law.

12. The Assembly therefore calls upon member States of the Council of Europe to:

12.1. ensure that all measures restricting human rights that may be taken in response to a public health emergency are lawful, necessary, proportionate and non-discriminatory, and that they fully respect the principles applicable to states of emergency that have been elaborated by the Venice Commission;

12.2. keep all restrictive measures under review in light of the evolution of the pandemic, to ensure that only those restrictions that are still necessary and proportionate remain in force;

12.3. review the measures taken in response to the pandemic, in order to ensure that a clear and sufficient legal framework exists for the response to any future pandemic, and where necessary submit any proposed reforms to the Venice Commission for opinion;

12.4. take a cautious, progressive approach to emergency measures, adopting those that require derogation only as a last resort when strictly required because other, less restrictive options prove inadequate;

12.5. if a derogation is strictly required, ensure that the notification to the Secretary General includes full details of the declaration of the state of emergency, the derogating measures, the duration of the derogation (or its extension) and the Convention rights affected;

12.6. ensure that all measures involving automated processing of personal data, including contact-tracing smartphone applications, respect fully the standards of Convention 108 (and, where relevant, Convention 108+), along with Committee of Ministers Recommendation CM/Rec(2020)1 as regards applications of artificial intelligence systems, taking full account of expert guidance given by bodies such as the Consultative Committee of Convention 108;

12.7. where contact tracing may lead to compulsory self-confinement or quarantine, ensure that rapid infection testing is available to the people concerned so that those not infected may be released from such restrictions as soon as possible, in accordance with the principle of proportionality;

12.8. sign and ratify Convention 108+, where not already done;

12.9. ensure that any disruption to the judicial system does not lead to violations of the rights to liberty and security, a fair trial and an effective remedy or of constitutional principles, including by:

12.9.1. prioritising cases according to their urgency, general importance and impact on individual rights and vulnerable groups;

12.9.2. promoting the introduction of technological solutions such as online services, remote hearings and videoconferencing;

12.9.3. taking full account of the expert guidance given by bodies such as CEPEJ;

12.10. ensure that the health and safety of persons deprived of their liberty are protected and that they are not subjected to inhuman or degrading treatment or punishment, taking full account of the expert guidance given by bodies such as the CPT;

12.11. ensure that the massive increases in public expenditure related to the pandemic and its aftermath are not accompanied by an increase in corruption, by fully applying the standards of the Council of Europe Criminal and Civil Law Conventions on Corruption (ETS Nos 173 and 174) and taking full account of the expert guidance given by bodies such as GRECO;

12.12. conduct a prompt, thorough, independent review of the national response to the Covid-19 pandemic, including its effectiveness and respect for human rights and the rule of law, with a view to ensuring that if there is another pandemic, the authorities can respond quickly and effectively in accordance with Council of Europe standards.

13. The Assembly reiterates its invitation in Resolution 2209 (2018) to the Secretary General of the Council of Europe to consider how her office can play a more proactive role in relation to derogations, including by:

13.1. providing advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit its scope;

13.2. opening an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;

13.3. on the basis of information provided in response to such an inquiry, engaging in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the jurisdiction of the European Court of Human Rights.

B. Draft recommendation[3]

1. The Assembly refers to its Resolution … (2020) on "The impact of the Covid-19 pandemic on human rights and the rule of law". It refers further to its Resolution 2209 (2018) and Recommendation 2125 (2018), entitled "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights", and recalls the Committee of Ministers' reply to that recommendation.

2. The Assembly considers that derogations to the European Convention on Human Rights (ETS No. 5) may pose a risk to the maintenance of common minimum human rights standards across Europe. It recalls that the aim of its 2018 proposals was to assist national authorities in understanding the legal complexities in this area and to encourage a more harmonised approach in future.

3. The Assembly notes that an unprecedented number of 10 States derogated from the Convention in respect of measures taken in response to the Covid-19 pandemic, showing a notable lack of consistency in national practice in important areas. Whilst accepting that a perfectly uniform approach is neither necessary, feasible nor desirable, it considers that this situation underlines the need for guidance and harmonisation.

4. The Assembly therefore invites the Committee of Ministers to reconsider the recommendation that it examine State practice in relation to derogations from the Convention, in the light of the requirements of Article 15 and the case law of the European Court of Human Rights, the requirements of international law and the Assembly's findings and recommendations in Resolutions … (2020) and 2209 (2018), with a view to identifying legal standards and good practice and, on that basis, adopting a recommendation to member States on the matter.

5. The Assembly further invites the Committee of Ministers to give terms of reference to the appropriate inter-governmental committee or committees to review national experience of responding to the Covid-19 pandemic, with a view to pooling knowledge and experience and identifying good practice on how to ensure an effective response to public health emergencies that respects human rights and the rule of law. The results of this review could form the basis for future Committee of Ministers' recommendations or guidelines.

3. Draft recommendation unanimously adopted by the committee on 29 June 2020.

C. Explanatory memorandum by Mr Vardanyan, rapporteur

1. Introduction

1. Although primarily a public health crisis, the Covid-19 pandemic is also an unprecedented challenge for human rights and the rule of law – both of which remain applicable even in times of national emergency. The positive obligation to protect the right to life under Article 2 of the European Convention on Human Rights (ETS No. 5, "the Convention"), coupled with protections under Articles 3 and 8, require States to take measures to protect the life and health of the population. This imperative does not, however, give States a free hand to trample on rights, suppress freedoms, dismantle democracy and violate the rule of law. Even during a state of emergency, the Convention continues to set limits and ensure respect for Council of Europe standards.

2. This is why the Bureau of the Parliamentary Assembly, at its meeting on 7 May 2020, decided to seize the Committee on Legal Affairs and Human Rights for a report on the impact of the Covid-19 pandemic on human rights and the rule of law, and the Committee on Culture, Science, Education and Media for opinion, focussing mainly on journalists' protection and media freedom in times of restrictions to fundamental rights motivated by the pandemic.

3. The rapporteur has decided to concentrate on the following human rights and rule of law aspects: emergency measures; states of emergency; derogations from the Convention; privacy and data protection in the context of tracking of patients and tracing of their contacts; functioning of judicial systems; the situation of persons deprived of their liberty; and corruption connected with public procurement and measures to protect the economy.

4. The pandemic is already having an impact on human rights and the rule of law, on account of measures now in force. Most of these appear legitimate, given the threat to public health and safety. A few do not: they are disproportionate in scope or duration, or they involve attacks on fundamental democratic processes such as parliamentary scrutiny, judicial oversight, freedom of speech and media freedom. But there is also a risk that the Covid-19 will continue to have damaging consequences for human rights and the rule of law even after the pandemic is over – as was often the case following previous public crises, most recently those relating to terrorism. This risk must be anticipated and averted if our European standards and democratic way of life are to be preserved.

5. The present report takes account of the webinars organised by the Chairperson of the Committee and the Chairperson of the Sub-committee on human rights (prior to his appointment as rapporteur) on 27 April 2020 with Mr Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, Mr Nicos Alivizatos, rapporteur of the European Commission for Democracy through Law (Venice Commission) on states of emergency, Mr Mykola Gnatovskyy, President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Ms Alessandra Pierucci, Chairperson of the Committee of Convention 108 (the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108) and Mr Georg Stawa, member and former President of the European Commission for the Efficiency of Justice (CEPEJ). It also takes account of the exchange of views between the Committee and Mr Christos Giakoumopoulos, Director General for Human Rights and the Rule of Law, on 5 June 2020, during which Mr Giakoumopoulos presented the Secretary General's "Toolkit for member States on respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis".[4]

2. Areas in which the Covid-19 pandemic has had an impact on human rights and the rule of law

2.1. Emergency measures

6. States have taken a wide range of often broadly similar measures to limit the spread of Covid-19, almost always including severe restrictions on freedom of movement and assembly. Most European countries have introduced enhanced border controls, or even closures; many have restricted internal movement and/ or imposed rules on individual behaviour in public spaces ('social distancing'); and a large number have ordered home confinement of everyone other than essential workers, with minimal exceptions only for basic needs. Covid-19 patients are often quarantined, to the extent that children have been prohibited from visiting their dying parents and grandparents in hospital. Such measures have an obvious impact on the enjoyment of

4. SG/Inf(2020)11, 7 April 2020.

protected rights. People are prevented from meeting friends and family, assembling for social, cultural, political or religious purposes, and moving freely even within their own neighbourhoods. Other measures also have a clear human rights impact, such as appropriation of private property for public health-related use, closure of private premises used for religious, cultural, sporting, recreational or commercial purposes, school closures, and postponement of elections and referenda. These measures are often of exceptional scope, being applied not just to specific groups, in certain places, for short periods, but to entire populations for weeks or months on end.[5]

7. Such measures interfere with enjoyment of Convention rights but – despite their scope and impact – they do not necessarily violate them. Many Convention rights allow for limitations in order to accommodate the need to balance individual against public interests, including the protection of public health and safety. They include notably the right to private and family life (article 8), freedom of religion (article 9), freedom of expression, which includes the right to receive and impart information (article 10), freedom of assembly and association (article 11) and freedom of movement, which includes the right to leave any country including one's own (article 2 of Protocol No. 4 to the Convention), as well as the protection of property (article 1 of Protocol No. 1 to the Convention), the right to education (article 2 of Protocol No. 1), and the right to free and fair elections (article 3 of Protocol No. 1). Interference with any of these rights is permissible under the Convention so long as it is lawful, necessary and proportionate to the public interest being pursued, and non-discriminatory. Deprivation of liberty for the purpose of preventing the spread of infectious disease, including compulsory quarantine or self-confinement and their enforcement, is permitted under article 5.1.e (and enforcement under article 5.1.b) – again, so long as it is lawful and proportionate, and the special guarantees of articles 5.2 to 5.5 are respected. Anyone who is subjected to compulsory quarantine or self-confinement should be tested for infection at the earliest possibility, so that the restriction can be brought to an end as soon as possible. The Convention also requires that States provide an effective remedy to ensure that measures do not go beyond lawful, proportionate interference and thereby become violations (article 13).

8. Whilst even very extensive measures that restrict the right to private and family life and freedom of assembly and movement, for example, may be readily justifiable in response to the pandemic, those that restrict freedom of expression, access to information and media freedom will be far less so. As Commissioner for Human Rights Dunja Mijatović has stated, "journalism serves a crucial function during a public health emergency … information is essential for the public to understand the danger and adopt measures at a personal level to protect themselves".[6] The Commissioner expressed concerns in particular about new legal restrictions on freedom of expression in Hungary, the Russian Federation, Azerbaijan, Romania, Bosnia and Herzegovina, and Armenia;[7] about the arrest of journalists in Turkey; and about interference with the work of journalists in the Czech Republic, Serbia, Slovenia and Italy. The Commissioner has separately expressed concerns about the arrest and detention of journalists in Russia[8] and the Azerbaijani authorities' use of the health crisis as an excuse to "clamp down on freedom of expression".[9]

9. Freedom of expression is also relevant to the situation of whistle-blowers. One need only recall the case of Dr Li Wenliang, the Chinese doctor who was punished by the police for having alerted colleagues to a new respiratory disease in Wuhan. As a result, no action was taken to suppress the outbreak of Covid-19 until its spread had become almost irreversible. Two months later, Dr Li died of Covid-19 contracted whilst treating patients. Had his whistleblowing been heeded rather than silenced, tens of thousands of lives might have been saved and world history may have taken a very different course.

10. More widely, the activities of human rights defenders in general are hard hit by restrictions on the freedoms of expression and assembly, despite the fact that their work is particularly important to ensure that the effect of restrictive measures does not lead to human rights violations. The public management of the Covid-19 pandemic (health, public procurement and subsidy, global supply chains, restrictive measures, digital tracking tools and privacy issues, with decisions taken following emergency procedures and often with reduced parliamentary and judicial oversight) may well result in wrongdoings, maladministration and human rights violations. In this context, journalists, whistleblowers and human rights defenders are key assets in preventing further damage by disclosing bad practices in good time for corrective measures to be taken.[10]

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5. For further details of measures taken in individual States, see the EU Fundamental Rights Agency's Bulletins on the Coronavirus Pandemic in the European Union.
6. "Press freedom must not be undermined by measures to counter disinformation about COVID-19", 3 April 2020.
7. Following the expressions of concern by the Commissioner, the OSCE Representative on Freedom of the Media and others, Armenia withdrew the restrictions on media activities. Romania's restrictions ceased when the state of emergency came to an end on 15 May 2020.
8. https://twitter.com/CommissionerHR/status/1266029459473403905
9. "Dunya Mijatović: Azeri government is using pandemia for violation of human rights", *Turan*, 12 June 2020.

11. Some restrictions on the freedom of expression and information under article 11 may nevertheless be necessary (for example, combating disinformation that may cause panic or social unrest). Recognising this problem, the Venice Commission suggests that "offences which might apply in ordinary times … can be used in such circumstances, e.g. deliberately inducing panic in the public" and further suggests that "existing powers to require internet service providers to remove 'offensive' content might also be employed to restrict access to grossly misleading information. Obviously, such powers and offences have a great potential for abuse by authoritarian governments." Some of the laws that have been introduced during the present crisis, however, have a questionable legal basis, and are vaguely worded and potentially disproportionate; they appear to be deliberately aimed at suppressing public criticism of the authorities' response to the pandemic and even at weakening scrutiny by independent media and civil society in general. These have included the introduction of vaguely-worded criminal offences purportedly covering dissemination of false information on the pandemic; restrictions on access to the internet and social media; and restrictions on public debate. Such unjustifiable and disproportionate interference is not only a violation of human rights, it is an attack on the foundations of democracy. In relation to the Covid-19 pandemic, it is also detrimental to ensuring an effective public health response that attracts the informed and sustainable support of the public based on trust in public institutions.

12. Particular sensitivities may arise in relation to freedom of religion. The right to manifest one's religion or belief, "either alone or in community with others and in public or private", is closely connected to the freedoms of expression and assembly. The closure of religious premises and restrictions on assembly for religious ceremonies may thus interfere with all three rights. Limitations on leave from work for the personnel of essential services may interfere with religious freedoms if people are prevented from observing religious holidays. The above concerns are particularly significant for Christian, Jewish and Muslim believers as Easter, Passover and Ramadan all fell during April-May. The compulsory wearing of protective masks may interfere with the right to manifest one's religion through observance of religiously prescribed dress codes. Appropriation of religious premises by public authorities for use as medical or other facilities would interfere with both the right to manifest one's religion, as well as the protection of property. Authorities should take these considerations into account, carefully balancing public interests and individual rights.

2.2. States of emergency

13. Most Council of Europe member States have introduced restrictive measures following the declaration of a formal state of emergency (or similar). A state of emergency creates an exceptional legal regime under which the executive has exceptional authority to exercise exceptional powers in response to an exceptional threat, with exceptional limitations on the roles of the legislative and judicial branches under that regime. Whilst such regimes may allow for a more rapid, flexible and effective response to an acute threat, they limit the application of normal checks and balances and are thus potentially hazardous from the perspective of human rights, democracy and the rule of law. The Venice Commission has identified a list of "principles governing the state of emergency" that should be applied in order to ensure compliance with Council of Europe standards:

– *Overarching principle of the Rule of Law.* Under the 'rule of law approach', a state of emergency is a "legal institution, which is subject to legal regulation, though the rules applicable to it may be somewhat different from those applicable in times of normalcy … Even in a state of public emergency the fundamental principle of the rule of law must prevail."

– *Necessity.* "Only measures which are necessary to help the State overcome the exceptional situation may be justified. The general purpose of emergency measures is overcoming the emergency and returning to 'normalcy'."

– *Proportionality.* "States may not resort to measures that would be obviously disproportionate to the legitimate aim (in terms of their severity or the geographical area covered …). If they have a choice between several measures, they should choose the ones which are less radical."

– "The principles of *necessity* and *proportionality* … should be respected in three contexts: first, in declaring, prolonging and terminating the state of emergency; secondly, in activating particular emergency powers; and thirdly, in applying these powers."

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10. See statement by Sylvain Waserman of 8 April 2020 (https://pace.coe.int/en/news/7847/covid-19-it-is-vital-we-improve-the-protection-of-whistle-blowers-both-during-and-after-the-coronavirus-crisis-says-pace-rapporteur); also Assembly Resolution 2300 (2019) "Improving the protection of whistle-blowers all over Europe" and Committee of Ministers' Recommendation CM/Rec(2014)7 on the protection of whistleblowers.

– *Temporariness.* “Emergency measures may only be in place for the time the State experiences the exceptional situation. They must be terminated once the exceptional situation is over. They should therefore not have permanent effects.” “The declaration of the state of emergency should be always issued for a specific period of time, which moreover should not be excessively long, and should be terminated before the expiry of the period of the emergency has been overcome and exceptional measures are no longer necessary. Declarations with no time limit … should not be considered as lawful. At the same time, it is possible to prolong the situation for so long as it is necessary.” That said, “the longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools.” “There should be an obligation to terminate the state of emergency immediately upon overcoming the emergency … as soon as the emergency can be addressed by the ordinary legal mechanisms”.

– *Effective (parliamentary and judicial) scrutiny* – over “both the declaration and possible prolongation of the state of emergency, on the one hand, and the activation and application of emergency powers on the other hand.”[11]

  - Where the state of emergency is declared by the executive, “it should be subject to immediate parliamentary approval” and “not enter into force before approval by parliament”. Where immediate entry into force is necessary without parliamentary approval, “the declaration should be immediately submitted to parliament which can repeal it.” “Parliaments should have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the *post hoc* general accountability powers of Parliament ... to conduct inquiries and investigations ... are extremely important for assessing government behaviour.”

  - “Judicial control of the declaration of the state of emergency may be limited to the procedural aspects … If, however, emergency measures involve derogations from human rights, the substantive grounds for the state of emergency shall be subject to judicial review as well … Judicial review over the … application of emergency powers … should always be possible. The judicial system must provide individuals with effective recourse in the event that government officials violate their human rights. Courts should exercise control so that the derogatory measures do not – either in general or in specific cases – exceed the boundaries of legality and the limits of what is strictly required … and do not infringe non-derogable rights”.

– *Predictability of emergency legislation*. “The emergency regime should preferably be laid down in the Constitution, and in more detail in a separate law, preferably an organic or constitutional law [where such things exist]. The latter should be adopted by parliament in advance, during normal times, in the ordinary procedure.”

– *Loyal co-operation among State institutions* – important “for the crisis management to be effective and coordinated and for the sake of equality and fairness of treatment of all citizens”, especially since “a state of emergency involves derogations from the ordinary rules of distribution of powers”.

14. Concerning necessity, proportionality and temporariness, the need for regular review and adjustment of emergency measures and the recourse to ordinary law measures as soon as practicable, several states have indeed varied their approach as the situation has evolved, including the following:

– In Bosnia and Herzegovina, the state of emergency ended at federal level on 31 May (and in the Republika Srpska on 21 May).

– In Bulgaria, the state of emergency ended on 13 May, to be replaced by a “state of epidemic alert” until 14 June.

– In Cyprus, the state of emergency ended on 30 April.

– In the Czech Republic, the state of emergency ended on 17 May, although some restrictions were maintained until the end of 2020 under the Law on Public Health.

– In Estonia, the emergency situation was ended on 18 May (and the derogation to the Convention withdrawn with effect on the same day).

– In Latvia, as restrictions were gradually lifted, the scope of the derogation was first reduced and then withdrawn.

11. On the role of parliaments, see further the report of the Committee on Political Affairs and Democracy on “Democracies facing the pandemic”, rapporteur: Mr Ian Liddell-Grainger (United Kingdom, EC/DA).

– In Georgia, the state of emergency ended on 22 May and was replaced by special emergency legislation (but the derogation to the Convention remained in effect).

– In the Republic of Moldova, the state of emergency ended on 16 May (and the derogation to the Convention was withdrawn on 19 May).

– In Portugal, the state of emergency was replaced on 2 May by a "state of calamity" until 15 June.

– In Romania, the state of emergency ended on 15 May and was replaced by a "state of alert", adopted by parliament for 30 days.

– In Serbia, the state of emergency ended on 7 May.

– In Slovenia, the government declared an end to the local epidemic, although some restrictive measures remained in place.

– In Spain, the government declared a "state of alarm", the lowest of three possible degrees of state of emergency.

– In Switzerland, the state of emergency ended on 19 June, to be replaced by a "state of particular situation".

15. Whilst it is beyond the scope of the present report to address the proportionality of measures taken in particular States, the question of legality – whether or not the measures have a sufficient legal basis – can more readily be examined. A series of scholars writing on the *Verfassungsblog* have noted issues concerning the legality and constitutionality of measures taken in a number of Council of Europe member States.[12] Their observations are indicative of the problems that States have faced:

– In Albania, article 17 of the Constitution stipulates that limitations on constitutionally guaranteed rights may only be imposed "by law", but Covid-19 limitations were initially imposed by orders of the Minister of Health and Social Protection and decisions of the Council of Ministers.

– In Bulgaria, parliament had to retroactively legalise measures taken by the executive following parliament's earlier declaration of a state of emergency.

– In Croatia, a novel legal arrangement to give decision-making powers to an administrative body required retroactive legislative amendments to resolve problems this arrangement had created, despite a general constitutional prohibition on retroactive legislation.

– In the Czech Republic, in the space of two months, the government adopted 65 resolutions all bearing the same title, plus resolutions to annul some of those resolutions; the health ministry adopted additional measures. Some government resolutions were annulled, only for the same measures to be applied by the health ministry.

– France initially responded to the pandemic using ordinary law but then introduced a new "state of health emergency" law, despite the fact that emergency powers regimes already existed (including a 1955 law that was applied during the 2015-2017 state of emergency).

– In Georgia, parliament approved a Presidential Decree that authorised the government to restrict rights in some areas without always specifying the nature or scope of those restrictions.

– In Lithuania, the government adopted and subsequently amended a "quarantine resolution" to introduce measures that were not envisaged by the relevant law. Parliament was then obliged to amend the law retroactively in order to legitimise these measures.

– In Malta, criticism of an order by the Superintendent of Public Health to close the courts led the parliament to adopt a law to legitimise this and other measures retroactively.

– In Poland, the constitution requires limitations on rights to be introduced by statute and be proportionate to their goal, yet the government introduced severe restrictions on rights on the basis of new statutory provisions that are worded in vague and very general terms, and which the restrictions are said to exceed.

12. See further at https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/.

– The Portuguese Parliament retroactively ratified the government's decree-law that introduced the most significant measures, despite a constitutional prohibition on retroactive restrictions of fundamental rights. In addition, the "chaotic body of law and administrative orders raises issues of legal security and certainty, as doubts on the interpretation of poorly drafted provisions and successive amendments grow".[13]

– In Russia, where primary responsibility was conferred on the regions, regional authorities imposed restrictive measures ('self-isolation') with no basis in federal law.

– In Serbia, "rules on the days and hours of confinement changed weekly, contributing to the confusion, insecurity and sense of helplessness".[14]

– In Spain, the government relied on a legal provision allowing limitations on freedom of movement to impose an almost total ban on public presence, despite there being an alternative framework that would have more clearly permitted a total ban.

– In Switzerland, the Federal Council has used emergency powers to amend federal law and in ways that may contradict the constitution.

– In Turkey, the government has chosen not to declare a state of emergency (as was done for several years following the 2016 failed coup d'état) but has instead introduced measures through a combination of presidential or ministerial circulars, which are amongst the lowest categories of legal norms and cannot contradict laws or regulations. The constitution permits restrictions on rights and freedom only by law. Only one of the numerous presidential or ministerial circulars on which Covid-19-related measures are based was published in the Official Gazette.

– In Ukraine, the constitution permits restrictions on rights and freedoms only on the basis of legislative acts, whereas subsidiary legislation was used to introduce Covid-19-related measures.

16. The problems encountered seem to fall into four main categories:

– Restricting rights through measures of a type that is not foreseen for that purpose;

– Restricting rights through measures based on laws that are insufficiently clear in defining the scope of permissible restrictions, or through measures that exceed the scope of restrictions permitted by law;

– Use of retroactive legislation to legitimise measures taken without sufficient legal basis, in some cases despite retroactive legislation being forbidden;

– Lack of legal certainty, meaning instability and lack of clarity and accessibility of the restrictive emergency measures, taken individually and as a whole.

17. There should and need not be any tension between effectiveness and legality. The Venice Commission has noted that "many states have felt the need and chosen to legislate especially for the situation caused by the Corona-virus epidemic, including several states which provide, either in their constitution or in ordinary legislation, for wide-ranging emergency measures. This seems to indicate that few, if any states, have felt that their existing emergency laws are adequate for the present emergency". This would explain the difficulty that so many States appear to have encountered with the legal basis for emergency measures. It is clear that many States would benefit from a thorough review of the measures taken in response to the pandemic, in order to ensure that a clear and sufficient legal framework exists for the future: as the Venice Commission noted, the legal framework shoud be "adopted by parliament in advance, during normal times, in the ordinary procedure". This is a lesson for the future, given that many countries, when already confronted by the pandemic, found that their existing emergency legal frameworks were unsuited to it and were therefore obliged to adopt new laws whilst the crisis was occurring.

18. On one particular aspect, one country has taken an approach that is fundamentally different from that of any other member State. Hungary introduced a new form of state of emergency which was not time-limited. This unique peculiarity was widely criticised, including by the President of the Parliamentary Assembly,[15] the Secretary General of the Council of Europe,[16] and the Council of Europe Commissioner for Human Rights.[17] On 16 June, the Hungarian Parliament adopted two laws, LVII and LVIII of 2020. The first called for an end to

13. See https://verfassungsblog.de/coping-with-covid-19-in-portugal-from-constitutional-normality-to-the-state-of-emergency/.
14. See https://verfassungsblog.de/fight-against-covid-19-in-serbia-saving-the-nation-or-securing-the-re-election/.
15. "COVID-19: 'Let's not normalise the abnormal'", 23 April 2020.
16. "Secretary General writes to Viktor Orbán regarding COVID-19 state of emergency in Hungary", 24 March 2020.
17. See https://twitter.com/CommissionerHR/status/1242036471508414464

the state of emergency. The second, amongst other things, created the legal framework for a new 'state of medical emergency', with no constitutional basis, which is declared and can be repeatedly extended by government decree, without parliamentary endorsement.[18] The state of medical emergency is administered by an "operative staff", bypassing cabinet government and parliamentary scrutiny.[19] The state of medical emergency allows the government to suspend the activity of any body (not excluding parliament or the courts) and increases the role and powers of the police and army.[20] Normal public procurement rules may be suspended and the prime minister may award contracts directly.[21] On 17 June, Prime Minister Orban issued two decrees, one ending the state of emergency and the other declaring an immediate state of medical emergency.[22] The new state of medical emergency also raises serious concerns from the perspective of fundamental Council of Europe values of democracy and the rule of law.

2.3. Derogations from the European Convention on Human Rights

19. Many States have activated national emergency laws in order to allow the introduction of exceptional measures. Some States have gone on to derogate from their obligations under the Convention. There is an important distinction to be drawn between emergency measures and derogations. From a human rights perspective, a state of emergency merely establishes a legal basis for taking exceptional measures that may restrict fundamental rights. Such restrictions may nevertheless be compatible with Convention requirements on the basis that they are lawful, necessary and proportionate responses to an acute threat to public health and safety. A derogation, on the other hand, implies that the State assumes that the restrictions go beyond what might be permitted under the normal limitations clauses and are not compatible with Convention requirements. Article 15 of the Convention then allows the State to "take measures derogating from its obligations … to the extent strictly required by the exigencies of the situation". In fact, a State does not have to declare a state of emergency (which is often the precondition for invoking exceptional provisions of domestic law) in order to derogate from the Convention, although this has been the case for at least nine of the Covid-19-related derogations (the information provided by San Marino is unclear on this point).

20. The Convention does not allow for derogation from the rights under articles 2 (right to life), 3 (prohibition on torture), 4.1 (prohibition on slavery and servitude – excluding forced or compulsory labour, prohibited under article 4.2, from which derogation is permitted) and 7 (no punishment without law). This means that States can derogate from all of the rights that allow for proportionate interference (see above). It is, however, not immediately obvious what advantage could be gained by derogating from these rights. First, because permitted grounds for proportionate interference include public health and safety; and second, because derogation is permitted only "to the extent strictly required by the exigencies of the situation" – which is itself a test of proportionality. Six of the ten states that have so far derogated from the Convention for Covid-19-related measures have specified the rights that may be affected by these measures: four of these six refer only to rights that may in any case be limited in pursuit of public health and safety goals, whilst the other two refer also to articles 5 (right to liberty and security) and/ or 6 (right to a fair trial).

21. Even derogations to articles 5 and 6 are heavily circumscribed. Article 15 states that derogating measures must not be "inconsistent with [the State's] other obligations under international law". This includes peremptory norms such as the prohibitions on collective punishment and arbitrary deprivation of liberty, and fundamental fair trial principles such as the presumption of innocence. It also includes procedural guarantees necessary to the protection of non-derogable rights in the context of deprivation of liberty, including the right to life and the prohibition on torture. Furthermore, as noted above, articles 5 and 6 themselves contain provisions allowing for flexible application in exceptional circumstances.

22. Derogation does not exclude supervision by the European Court of Human Rights (the Court) of the measures concerned, although it does change the nature of the Court's control. The Court applies a very wide margin of appreciation to the national authorities' perception of a state of emergency, and has only once disagreed. It is less deferential on the question of necessity, recalling that "States do not enjoy unlimited power in this respect. The Court … is empowered to rule on whether the State has gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision." Again, this does not seem to imply a qualitatively different approach to cases depending on whether or not a state has derogated: the Court also allows a "margin of appreciation" to States when determining whether an interference with a protected right was proportionate or not.

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18. See sections 315-319 of Law LVIII of 2020 and amended Article 228 of the 1997 Health Act.
19. Law LVIII of 2020, section 317.
20. Op. cit., section 318.
21. Op. Cit., section 319.
22. Nos. 282/2020 and 283/2020 respectively.

23. The Assembly has in the past called for a progressive approach to emergency measures and derogations, recommending that States (i) exhaust the possibilities offered by ordinary law, (ii) before having recourse to emergency measures that are nevertheless still compatible with Convention requirements, and (iii) only as a last resort introducing particularly restrictive measures that require derogation from the Convention. Each successive step involves acceptance of progressively greater interference with protected rights and, in the case of a derogation, acceptance of standards that fall below the generally recognised European minimum level. Protracted states of emergency and derogations have the effect of normalising lowered standards and habituating populations to greater interference with their rights. Experience has also shown that governments have a tendency to retain measures introduced during a state of emergency even after the emergency itself has ended. Sometimes this is done by making changes to the ordinary law (and even the constitution) through emergency procedures lacking democratic safeguards; sometimes by transposing emergency measures into the ordinary law when the state of emergency is lifted. On the other hand, a properly designed state of emergency regime, limited in scope and time and with effective judicial and parliamentary oversight, should ensure that emergency measures are brought to an end when the emergency ends.

24. The Venice Commission has also recognised this quandary. "Derogation is not always necessary … The ECHR provides for the possibility to restrict several rights on account of protection of health … Other rights contain more general grounds for restriction, and the European Court of Human Rights takes account of the context when interpreting the extent of rights. Refraining from making a derogation may convey the message that a crisis may be handled without resorting to exceptional powers: on the other hand, a derogation may give a clear indication that certain exceptional measures are truly 'exceptional' and do not 'make the law'." The UN's Siracusa Principles, however, state that "A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the [International Covenant on Civil and Political Rights] would be adequate to deal with the threat to the life of the nation."[23] This would seem to support the Assembly's view that measures requiring a derogation should be a last resort.

25. Whilst the Court is the final arbiter of the lawfulness of derogating measures in individual cases, the Secretary General also plays a role. Article 15 of the Convention only requires States to notify the Secretary General of the measures taken and the reasons for them. Unfortunately, this lack of detail means that notifications vary considerably in form, content and level of detail. Certain past notifications have contained only a description of the situation giving rise to the emergency and a copy of the derogating measures, with no information on the rights that may be affected. This makes it difficult to predict the extent of possible interferences with protected rights and may complicate the Court's role of ensuring posterior judicial control. Most of the Covid-19-related notifications were generally better:[24] eight of them specified how and by whom the state of emergency had been declared and summarised the measures necessitating derogation; eight of them specified the (initial) duration of the state of emergency (between 30-60 days); six of them specified the rights that may be affected; and four of them clarified the role of parliament in declaring a state of emergency. Outside scrutiny of derogations would be greatly facilitated if notifications followed a standard pattern, addressing all of these significant issues.

26. The Convention gives the Secretary General an apparently passive role as repository of derogation notifications, but the wider institutional status of the office gives rise to further, as yet unexploited potential. In a 2018 resolution,[25] the Assembly proposed that the Secretary General take a more proactive approach, by providing prior advice to states on whether a derogation appears to be legally necessary, and if so, on how to formulate it as restrictively as possible. Another proposal was for the Secretary General systematically to open inquiries under article 52 of the Convention into whether a derogating State's law continued to ensure effective implementation of the Convention. On the basis of information provided in the course of this inquiry, the Secretary General would then engage in dialogue with the State in order to assist it in continuing to meet Convention obligations. The Assembly also proposed that the Committee of Ministers prepare a recommendation to member States on derogations, drawing on existing standards (including from the case-

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23. "Siracusa Principles on the Limitation and Derogation Clauses in the International Covenant on Civil and Political Rights", UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

24. The Serbian notification, however, despite taking three weeks to deliver (the Court has clarified that this should be done "without any unavoidable delay"), contained no information on which authority declared the state of emergency, on the relevant measures (only links to official websites, in Serbian), on the Convention rights affected or on the duration of the state of emergency. Insofar as it does not explicitly inform the Secretary General of the measures taken, and even indirectly does not do so in an official language of the Council of Europe, this notification may not satisfy even the minimal requirements of article 15.3.

25. Resolution 2209 (2018) "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights".

law of the Court) and good practice, and including a call on member States to co-operate with the Secretary General.[26] The aim of these proposals was to assist national authorities in understanding the legal complexities in this area taking a more harmonised approach in future, supported by the Council of Europe.

27. Unfortunately, the then-Secretary General responded to the Assembly's detailed proposals in very general terms and the Committee of Ministers replied that it did "not see at the present time any clear need to envisage a recommendation". Whilst complete uniformity is neither necessary, feasible nor desireable, the striking inconsistency of member States' approaches to the question of whether and how to derogate undermines the coherency of human rights protection across Council of Europe member States; greater harmonisation would help. The aftermath of the pandemic would be the right time to address this important issue.

2.4. Innovative surveillance and contact-tracing measures

28. Many measures proposed in response to the Covid-19 pandemic make innovative use of technologies such as closed-circuit television (CCTV), drone surveillance, facial recognition, and geolocalisation and proximity sensors on mobile phones. These tools can facilitate the tracking of infected persons and the tracing of people with whom they have been in contact, or the enforcement of rules on confinement and quarantine. They are also all forms of mass surveillance which generate huge amounts of data on individuals' behaviour, raising serious privacy concerns. As well as being technological innovations, they operate at the limits of current regulatory standards.

29. It is increasingly assumed that smartphone contact tracing applications will form part of many countries' responses to the pandemic. These apps would identify and inform people who have been in contact with an infected person so that they could present themselves for testing, or self-quarantine. Two main technical approaches are possible. The first cross-references geolocalisation data from users' phones to confirm proximity. The second uses the phone's own hardware to confirm the proximity of another phone within a certain distance for a certain amount of time, with the phones exchanging randomly generated codes. (In a sense, this scenario mimics transmission and infection by the virus, with the phones acting as proxies for their owners and the codes as a proxy for the virus.) Should the owner of a phone with this app become infected, then (i) either the codes emitted by their phone over, say, the previous two weeks would be transmitted to everyone else using the app (as in the collaborative Google/ Apple 'exposure notification' approach, or the DP-3T[27] protocol developed by a group of European academics), or (ii) the codes received by their phone would be uploaded to a central server, along with data identifying the user (as with the French 'StopCovid' app). Should someone's phone recognise the codes thus transmitted, they would be informed and could have themselves tested or self-quarantine.

30. It seems that most, if not all European countries prefer the proximity-sensing approach, which involves processing of less data (only on occasional relative proximity, as opposed to constant absolute location). The data obtained can be processed in either one of two ways: centralised, with information on the identity of persons who have been in contact with one another stored on a central server; or decentralised, with personal data remaining on users' own phones and the central servers processing only the randomly generated codes, from which individuals cannot be identified. Here again there is an obvious and important difference in data protection terms, which is why many, although certainly not all, countries have preferred a decentralised approach.

31. It is generally considered that tracing apps would have little effect unless at least 60% of the population used them; in western Europe, this would mean 80% of smartphone owners (more where the proportion of the population owning smartphones is lower). This level of voluntary use has proved hard to achieve: in France, for example, during its first two weeks of operation, the StopCovid app was activated by only 1.7 million users, representing just 2.5% of the population.[28] A lack of public trust in the app, resulting in low levels of installation or use, would thus seriously undermine its effectiveness. Public trust can be reinforced by using primary legislation to establish the regulatory framework. Tracing apps should not be made compulsory, either directly or, by being a precondition for certain activities, indirectly. This is all the more so given that smartphone ownership is not spread equally across the population, with certain groups, such as the elderly or economically disadvantaged, being less likely to own one; any negative consequences of not using a tracing app would thus be discriminatory. In addition, to be truly effective, tracing apps depend on an accessible,

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26. Recommendation 2125 (2018) "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights".
27. "Decentralised Privacy-Preserving Proximity Tracing".
28. In this connection, it may be relevant that StopCovid takes a 'centralised' approach to personal data processing.

large-scale, rapid and accurate system to test for the disease. Indeed, where contact tracing (however it is done) leads to compulsory quarantine or self-confinement, testing should always be available to the people concerned so that those who are not infected can be released from such restrictions as soon as possible. This is implied by the principle of proportionality, which stipulates that restrictions must be minimised as much as possible; it might even be said to create a 'right to be tested' in these circumstances. Contact tracing apps should also be inter-operable between different European countries, so that they continue to function when people travel and can facilitate the reopening of borders.[29] Tracing apps can only be one part of a wider strategy; they will not by themselves be the solution to allow ending restrictions.

32. Mass surveillance and the collection and storage of data on individuals, even without their permission, is not absolutely prohibited by the Convention. The normal constraints of legality, necessity and proportionality, however, do apply.[30] Surveillance measures must have a foundation in law, and that law must be clear in its meaning, foreseeable in its application and adequately accessible. The sufficiency of existing law as a basis for innovative measures must therefore be assured before they are brought into operation, and any shortcomings must first be addressed.

33. The 2018 Modernised Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (CETS No. 223, "Convention 108+") is the Council of Europe's specialised instrument for data protection, representing the state of the art in international standards. The Chairperson of the Committee of Convention 108 and the Council of Europe Data Protection Commissioner have issued a "Joint statement on the right to data protection in the context of the COVID-19 pandemic".[31] This statement sets out Council of Europe standards in this area, which allow data processing for purposes related to the authorities' response to the pandemic under the following conditions:

– data subjects are made aware of the processing of personal data related to them;

– personal data is processed only to the extent that is necessary and proportionate to the explicit, specified and legitimate purpose being pursued;

– an impact assessment is carried out before data processing begins;

– privacy by design is ensured and appropriate measures are adopted to protect the security of data; Committee of Ministers' Recommendation CM/Rec(2019)2 on the protection of health-related data provides specific guidelines in this regard;

– data subjects are entitled to exercise their rights, including to correct data held on them and to a remedy for alleged violations of those rights;

– the principle of lawfulness is respected, meaning:

  - processing of data can be carried out either on the basis of the data subject's consent or some other legitimate basis laid down by law;

  - legitimate basis notably encompasses data processing necessary for the vital interests of individuals, and data processing carried out on the basis of public interest, such as in the case of monitoring a life-threatening epidemic;

– large-scale personal data processing can only be performed when, on the basis of scientific evidence, the potential public health benefits override the benefits of other alternative solutions which would be less intrusive.

– according to Convention 108+ (see Article 11) exceptions shall be "provided for by law, respect the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society"

  - where restrictions are being applied, those measures have to be taken solely on a provisional basis and only for a period of time explicitly limited to the state of emergency

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29. See for example "Interoperability guidelines for approved contact tracing mobile applications in the EU", eHealth Network, 13 May 2020. On 16 June, the EU member States agreed on technical specifications for interoperability of contact tracing apps.

30. For example, in Norway, the data protection authority temporarily banned the Smittestop app, which uses both GPS and proximity sensing technology and transmits personal data to the public health institute, on the basis that it was disproportionately invasive of privacy, given the low number of Covid-19 cases and the relatively low level of use of the app.

31. "Joint Statement on the right to data protection in the context of the COVID-19 pandemic", Alessandra Pierucci, Chairperson of the Committee of Convention 108, and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, 14 May 2020.

- it is crucial that specific safeguards are put in place and that reassurances are given that full protections are afforded to personal data once the state of emergency is lifted
- for data processing involving artificial intelligence systems, see further the Guidelines on Artificial Intelligence and Data Protection of the Consultative committee of the data protection convention.[32]

34. The Joint Statement makes clear that data protection rights are not incompatible with epidemiological monitoring. It also stresses that anonymised data is not covered by data protection requirements. The use of aggregated geolocation data to identify gatherings that breach confinement regulations or to indicate movements of persons away from an area with a high rate of infection would thus be permissible.

2.5. Functioning of the judicial system

35. Restrictions on freedom of movement and assembly have inevitably had an impact on the work of the courts, which – in accordance with article 6 of the Convention – involve public hearings to determine civil and criminal cases. Such hearings typically involve a considerable number of persons, variously including the parties/the defendant, the judge(s), in some countries jury members, lawyers, prosecutors, court clerks, stenographers, experts, witnesses, security personnel, members of the public and journalists. On the one hand, the principles of immediacy (physical presence of all actors) and publicity of court proceedings should apply in the interests of transparency, fairness, equality of arms and the trust of the general public in the functioning of the judiciary. On the other hand, imperative restrictions on freedom of movement and measures such as 'social distancing' are incompatible with the normal functioning of the courts.

36. Article 6 foresees exceptions to the public nature of court proceedings on different grounds, including in the interest of public order in a democratic society and "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Whilst there is no specific reference to public health as a ground for interference (unlike in the case of Articles 8 to 11 and others, as described above), measures to prevent the spread of a catastrophic pandemic should qualify as being justified by the need to uphold public order and protect the interest of justice, which should cover the protection of life and health of the actors of the justice system. The exclusion of the public, and even journalists, may thus be permissible.

37. Similar considerations apply to exceptions to the rule that all participants in the proceedings must be physically present. Witnesses can be heard and questioned by video conference, lawyers and prosecutors can plead in the same way. For this, however, appropriate infrastructures must be established as soon as possible, to prevent delays in proceedings which are particularly damaging in criminal proceedings (especially when the accused is in pre-trial detention, which may be subject to custody time limits) and in family law and child protection proceedings (where individuals may need to be protected against risks to their health and safety). As with the restrictions on 'limitable' rights, any exceptions must be limited in scope and duration to what is absolutely necessary for the protection of public order and in the interest of justice, and last no longer than the public health crisis persists.

38. The Covid-19 pandemic nevertheless inevitably delays the administration of justice, either because exceptional procedures are insufficient, or because the judges in charge prefer not to make use of them. This is their right, as judges enjoy independence not only in substantive decisionmaking, but also in managing their proceedings. The discretion of the courts is, however, not unlimited. In criminal proceedings and matters affecting civil rights, article 6 ensures that everyone has the right to trial within a reasonable time. This consideration is particularly relevant when the accused is in pre-trial detention, where article 5.3 requires either trial within a reasonable time or release pending trial. What is a 'reasonable time' in circumstances where few if any trials are taking place because of Covid-19-related restrictions, however, may be considerably longer than what would otherwise be 'reasonable'. The relevant authorities should nevertheless review decisions on pre-trial detention, bearing in mind that its duration would be prolonged. There may also be a need to consider additional compensatory measures where pre-trial detention, whilst still justified in the circumstances, lasts considerably longer than would otherwise be the case. In addition to detention cases, priority in the allocation of temporarily reduced judicial resources should be given to urgent cases involving, for example, family law, in particular cases involving child protection and the prevention of domestic violence. For other civil and criminal cases, article 6 of the Convention establishes the right to trial within a reasonable time. Whilst what is 'reasonable' may vary in the current circumstances, when the length of proceedings becomes excessive, people have a right to an effective remedy under article 13.

32. Committee of Convention 108, T-PD(2019)01, 25 January 2019

39. As noted above, article 13 of the Convention requires States to provide an effective remedy for alleged violations of protected rights. Whilst Article 13 does not require that this remedy be judicial, in practice that is often the case, especially for more serious allegations. As noted above, many of the measures introduced in response to the coronavirus pandemic interfere, often seriously and extensively, with protected rights; in some cases, they may be at or beyond the limit of what is a permissible, proportionate response. Provision of available and sufficient remedies must be maintained in order to avoid abusive, mistaken, unlawful or disproportionate use of emergency measures and to hold to account the officials who are responsible for implementing them. It is therefore essential that the judicial system, or whatever other remedial mechanism is intended to meet the requirements of article 13, continues to be able to adjudicate such cases.

40. A functioning judicial system is also essential to ensure the lawfulness of emergency measures both in general and in individual cases. Interference with a protected right in pursuit of a public interest is only permissible when it is based on appropriate law. Courts, notably constitutional courts or their equivalents, must be able to review emergency laws in order to ensure their compliance with the domestic legal framework and the state's international legal obligations. Constitutional and Supreme Courts in many member states have already received, and in some cases adjudicated on complaints relating to Covid-19 measures. For example:

– In Austria, more than 20 applications concerning violations of human rights by the government's Covid-19-related measures are pending before the constitutional court.

– In Bulgaria, around a dozen cases concerning the constitutionality of Covid-19-related measures have been filed before the constitutional court, including by the President and opposition parties.

– In Croatia, a dozen cases concerning the constitutionality of acts of the Civil Protection Directorate are pending before the constitutional court.

– In the Czech Republic, the Prague municipal court annulled some measures adopted by the Ministry of Health, stating that they should have been adopted by the government, and the constitutional court, by an eight-to-seven majority, dismissed a pilot case on procedural grounds.

– In France, the Conseil d'Etat (highest administrative court) banned the authorities from using drones to monitor compliance with confinement measures until a proper legal framework was established and ordered the government to lift a "general and absolute" ban on assembly in places of worship.

– In Germany, more than a thousand cases concerning Covid-19 measures are pending at various levels of jurisdiction, with some restrictive measures already having been annulled as disproportionate.

– In the Republic of Moldova, an opposition party has contested the constitutionality of the state of emergency before the constitutional court.

– In North Macedonia, the constitutional court provisionally suspended the special restriction on movement of minors and people over 67.

– In Romania, the constitutional court ruled that most fines issued by the police for breaching emergency regulations were based on an unconstitutional decree.

– In the Slovak Republic, MPs called on the constitutional court to review the compatibility of several measures taken under the state of emergency with the constitution, the Convention and the EU Charter of Fundamental Rights.

41. The CEPEJ has collected information from its network of liaison officers in national judicial systems and has also published the results of a survey by the Council of Bars and Law Societies of Europe (CCBE).[33] This information suggests certain tendencies across Council of Europe member States' judicial systems. Broadly speaking, the information shows a tendency to prioritise cases in the following categories:

– deprivation of liberty (in criminal proceedings) (mentioned in the information received on Austria, Denmark, Greece, Lithuania, Poland, Portugal, Serbia, Slovak Republic, Slovenia, Spain and Turkey);

– deprivation of liberty (on mental health grounds) (mentioned in the information on Poland, Serbia and Slovenia);

– domestic violence/violence against women (Italy, Poland, Serbia, Spain and Turkey);

– child protection (Italy, Lithuania, Poland, Portugal, Slovak Republic and Slovenia);

– family cases (mainly relating to alimony/support) (Italy, Serbia, Slovenia and Turkey);

33. See www.coe.int/en/web/cepej/compilation-comments.

– "fundamental rights" cases: (Italy and Portugal);

– cases approaching the statute of limitations (Bosnia and Herzegovina, Greece and Serbia);

– cases involving "irreversible harm" or "serious risks" (Poland, Slovak Republic and Spain);

– several responses referred to generic "urgent" cases (Austria (specifically criminal cases), Bosnia and Herzegovina, Croatia, Denmark (civil cases, where "critical"), Greece ("emergency cases") and Norway).

42. The information gathered by CEPEJ and the CCBE also showed considerable variety in the way that judicial systems used digital technology to conduct 'remote hearings' during the period of restrictions. In some countries remote hearings are possible in civil cases: Armenia, Finland (subject to judicial discretion, on defined conditions), Germany and Norway. In some countries they are possible in criminal cases: Azerbaijan (pre-trial detention and early release cases),[34] Czech Republic (a pilot project in prisons), Estonia (with the consent of the accused), Ireland (sentencing of persons in custody), Republic of Moldova (early release and complaints about detention conditions), Romania (urgent proceedings) and the Slovak Republic (interrogation of sentenced prisoners). In some countries remote hearings were possible in both civil and criminal cases: Croatia, France and the United Kingdom. The information on some countries indicated that remote hearings were possible but did not specify the type of case: Denmark, Greece, Latvia, Lithuania, the Netherlands, Poland, Portugal, Sweden and Ukraine. Some replies indicated that remote hearings were permitted in 'urgent' cases: Poland, Republic of Moldova and Romania. Only in Belgium and Cyprus was it stated that remote hearings were not permitted.

43. CEPEJ has also issued a "Declaration on Lessons Learnt and Challenges Faced by the Judiciary During and After the Covid-19 Pandemic", setting out seven principles:[35]

– *Human rights and the rule of law:* the right to liberty and security and the right to a fair trial "have to be protected at all times and become especially important during a crisis. The continuous functioning of the judiciary and of the services provided by justice professionals needs to be ensured … Trust in justice must continue even at a time of crisis."

– *Access to justice:* "Locking down courts might be necessary … but it should be done in a careful and proportionate manner … The public service of justice must be maintained as much as possible, including providing access to justice by alternative means … Special attention must be devoted to vulnerable groups … Judicial systems should give priority to cases which concern these groups".

– *Safety of persons:* "Safety measures need to be put in place to respect the physical distancing within court premises … Teleworking should be open to justice professionals."

– *Monitoring case flow, quality and performance:* "This includes triage of cases and possible prioritisation and redistribution of cases based on objective and fair criteria and ensuring quality justice."

– *Cyberjustice:* "The recourse to information technologies offers the opportunity for the public service of justice to continue functioning during the health crisis. However, its rapid emergence and excessive use may equally bring negative consequences. IT-solutions … must always respect fundamental rights and principles of a fair trial [and] their use and accessibility for all the users should have a clear legal basis."

– *Training:* "Judicial training should adapt to the emerging needs, including the use of IT… The closure of courts … can allow justice professionals to devote more time to training from home. [There should be] specific training on teleworking [and] on the new types of cases arising from the COVID-19 pandemic."

– *Forward-looking justice:* "The COVID-19 pandemic has also been an occasion to introduce emergency innovative practices. A transformation-strategy for judiciaries should be developed to capitalise on the benefits of newly implemented solutions … Transforming the judiciary for the future should be approached in a positive manner and always with respect for fundamental rights guaranteed in the ECHR."

34. In addition, on 25 June, the Azerbaijani Parliament adopted amendments to the Criminal Procedure Code allowing wider use of videoconferencing in criminal proceedings.
35. See https://rm.coe.int/declaration-en/16809ea1e2.

44. The Council of Europe's Consultative Council of European Judges (CCJE) has drawn up a list of issues relating to "the functioning of courts in the aftermath of the Covid-19 pandemic".[36] Along with practical problems, this document also includes valuable reflections described as "overarching considerations":

– States may overlook the importance of the role played by courts to provide effective remedies against emergency measures and adjudicate other cases relating to the pandemic [here one can note that many of these cases will involve new and/or previously untested laws, including laws establishing a state of emergency and decrees adopted under those laws].

– Judicial systems that are already under-financed may struggle to address challenges related to the crisis and may face even greater difficulties if financial constraints lead to further budgetary cuts.

– Some measures introduced in response to the health crisis may become permanent (for example remote hearings and the use of electronic means for other procedures, such as submitting applications and documents), and the crisis may present opportunities for other positive changes.

– States should develop an action plan for the courts in the aftermath of the pandemic, so that they can make their proper contribution to the return to normal life, including through the resolution of pandemic-related litigation [and, one could add, the prompt resolution of the inevitable serious backlog of cases that will have arisen whilst the courts were mainly closed].

– International courts will also be affected, including the European Court of Human Rights, especially if cases are not effectively resolved at national level. To this end, consistency of judicial outcomes both within and between national judicial systems will be important.

– A positive role of courts in resolving problems related to the pandemic could help restore public trust in judicial systems.

– The situation of courts is likely to be affected by the impact of the pandemic on other sectors, such as legal firms whose activities were more or less interrupted, prisons seeking to reduce over-crowding etc.;

– Attention should be paid to the risk of "rule of law backsliding" in some member States.

45. Both CEPEJ and the CCJE agree that the pandemic should be taken as a learning experience. The acceleration of previous tendencies (such as increasing use of digital solutions) and the introduction of innovative approaches should be carefully examined with a view to enhancing the efficiency and effectiveness of judicial systems in future.

2.6. The situation of detainees

46. The situation of detainees makes them particularly vulnerable to infection and the negative consequences of prolonged physical isolation. A special Council of Europe Annual Penal Statistics report (SPACE) found that in 34 of 45 prison administrations studied, inmates and/or prison staff had contracted Covid-19.[37] The CPT recently issued a "Statement of Principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic". This included the following principles:

– Take all possible action to protect the health and safety of detainees;

– Respect and implement World Health Organization (WHO), national health and clinical guidelines;

– Ensure adequate provision of staff with the necessary support, training and protective equipment;

– Ensure that additional Covid-19-related restrictions on detainees conform to the procedural safeguards of article 5 of the Convention;

– Make concerted efforts to use alternatives to deprivation of liberty and review, in the light of the new circumstances, decisions to deprive persons of their liberty – especially in relation to persons detained in overcrowded facilities;

– Pay special attention to the health care needs of detainees falling within vulnerable or high-risk groups, including older people and those with pre-existing medical conditions;

36. See https://rm.coe.int/the-functioning-of-courts-in-the-aftermath-of-the-covid-19-pandemic/16809e55ed.
37. "Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the short-term impact of the COVID-19 on prison populations", SPACE-I Report, 18 June 2020.

– Even where non-essential activities are suspended, ensure that fundamental rights are protected, including personal hygiene and daily access to the open air, and compensate for restrictions on visiting rights by allowing greater access to alternative means of communication;

– Ensure daily meaningful human contact for any detainee placed in isolation or quarantine;

– Maintain fundamental safeguards against ill-treatment, including access to a lawyer and a doctor and notification of custody, in all circumstances and at all times, using precautionary measures (for example protective masks) as appropriate;

– Ensure continued access to all places of detention, including those where detainees are quarantined, for independent monitoring bodies.

47. As noted above, quarantine and confinement measures may have a particular impact on detainees' contact with their lawyers and families. Such contacts are an important reporting channel that safeguards against ill-treatment of detainees; if such communications are interrupted, the risk of ill-treatment may increase, raising issues under article 3 of the Convention (prohibition of torture) and, potentially, article 2 (right to life). For detainees awaiting trial or preparing appeals, lack of contact with their lawyers raises fair trial-related issues under article 6. Detainees also retain the right to private and family life, even if its exercise is justifably limited as part of their sentence. Denial of meaningful contact with friends and family members, for example, may nevertheless raise issues under article 8. Persons deprived of their liberty in the context of armed conflicts will be especially vulnerable and guarantees of their health and safety are thus particularly important.

48. Several States have proceeded with or are considering the early release of certain categories of prisoner, such as those convicted of non-violent offences, those with only a certain short time remaining on their sentences and those who would be at particular risk from the disease. Indeed, the SPACE-I report states that over 128 000 detainees were released, almost 103 000 of these in Turkey alone. Early release is a difficult but necessary choice, balancing between the public interest in criminal justice and the need to protect prisoners against risks to their health and lives that would be incompatible with any lawful detention regime. Early release must, however, be based on objective, non-discriminatory criteria and must not exclude categories such as opposition politicians and activists, critical journalists and academics, or lawyers and other human rights defenders, especially those whose imprisonment gives rise to suspicion of political motivation.[38]

2.7. Corruption risks

49. As the President of the Council of Europe's Group of States against Corruption (GRECO) has observed, "As countries face undeniable emergencies, concentration of powers, derogations from fundamental rights and freedoms, and as large amounts of money are infused into the economy to alleviate the crisis (now and in the near future), corruption risks should not be underestimated. It is therefore most important that anti-corruption is streamlined in all COVID-19, and more generally, pandemic-related processes."[39] To this end, the President of GRECO issued guidelines covering six areas:

– *Procurement systems:* "While emergency legislation is time efficient to procure critical medical supplies, it may soften the necessary "checks and balances" on public spending. Procurement systems can also become vulnerable targets for lobbyists … Greater transparency is key to preventing corruption. Procurement officials should be prohibited from being employed by any businesses with contracts with the [offices] exercising supervision or control."

– *Bribery in medical-related services:* "Corruption risks can be a major concern for hospitals and other medical or medicalised structures struggling to cope with COVID-19, since they face shortages in staff and equipment ... Petty bribery is also an issue that has emerged again in the pandemic context (for access or priority access to medical services, tests and equipment, body collection and burial procedures, circumventing quarantine rules, etc.) even in countries where this was very uncommon." "The Council of Europe Criminal Law Convention on Corruption requires states to criminalise active and passive bribery in the private sector … and covers also healthcare providers."

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38. See "COVID-19: Rapporteur calls on Spain and Turkey to include politicians in early prison releases prompted by Coronavirus", Boriss Cilevičs, Rapporteur on "Should politicians be prosecuted for statements made in the exercise of their mandates", 3 March 2020; "Covid-19: Monitors urge Turkish authorities to ensure any prisoner release is non-discriminatory", co-rapporteurs of the Assembly's Monitoring Committee, 3 April 2020; "Covid-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe", Council of Europe Commissioner for Human Rights, 6 April 2020.
39. "Corruption Risks and Useful Legal References in the Context of Covid-19", Greco(2020)4, 15 April 2020.

– *Corruption in new research and development:* "Another process vulnerable to corruption is the investment in research and development of drugs and vaccination against Covid-19 … Huge amounts of money are being invested … Therefore, it would be necessary to increase the capacity, authority and public accountability of State institutions entrusted with regulatory and control functions in relation to the management of public resources." In this context, GRECO also mentions "risks of conflicts of interest, when health or economic interests are at major stake, e.g. preferential treatment in delivery of services for friends or family members, cronyism, nepotism and favouritism in the recruitment, and more generally, the management of the health care workforce", along with the need for transparency of lobbying of senior public decision-makers ("persons entrusted with top executive functions") and insider trading.

– *Risks of Covid-19-related fraud*: namely "financial scams related to COVID-19, including in relation to falsified medical products." In this connection, GRECO underlines the importance of the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No.211, "the Medicrime Convention"), which requires states to criminalise the manufacturing of counterfeit medical products; supplying or offering to supply, or trafficking such products; falsification of documents; and the manufacture, stocking, importing, exporting, supplying or offering to supply, or placing on the market of medicinal products without authorisation and medical devices not in compliance with regulatory requirements. On 8 April 2020, the Committee of the Parties of the Medicrime Convention issued its own, specific advice on application of the convention in the context of Covid-19.[40]

– *Oversight and the protection of whistleblowers in the health sector:* "As emergency legislation shifts power towards the executive, the oversight role of the other branches of power (legislative, judiciary), institutions (ombudsman, anticorruption agencies and other specialised bodies dealing with corruption) and civil society (e.g. community-based responses, information sharing and tracking measures systems, establishment of hotlines for public reporting, etc.) is key. Media have a particular role to play and a specific responsibility … Of particular importance is the need to ensure the protection of persons (whistleblowers) reporting suspicions of corruption, irrespective of the reporting lines they choose to pursue … Whistleblowing can be key in the fight against corruption and tackling gross mismanagement in the public and private sectors, including the health sector."

– *The private sector:* "The private sector faces increased corruption risks during this crisis. These risks include facilitation payments/bribes to push ahead processes that may have stalled due to shortages of staff or closure of public offices, falsification of documents to meet the conditions of State aid schemes for pandemic relief measures, bypassing product certification requirements, non-certification of alternative supply chains, donations, lack of resources to supervise misconduct by individual employees, etc."

50. GRECO recognises that independent media reporting forms an important part of the safeguards against corruption. Indeed, the media have already reported on situations of concern. For example:

– In Romania, a businesswoman bought a majority share in an inactive alternative medicine company, on the day that the World Health Organization declared a pandemic. Within eight days, this company was awarded a no-bid contract to supply personal protective equipment (PPE), which it purchased in Turkey and sold to the government at a 40% profit. The businesswoman has been described as a former protégé of the current prime minister when he was deputy mayor of Bucharest and later transport minister (which he denies), and has a conviction for organised crime. Protective masks supplied under the contract were reportedly of dangerously poor quality.[41]

– In Slovenia, a series of deals worth a total of €80 million were struck following 'one-day' calls for bids. The largest contracts all went to companies whose total revenue in previous years had been far below the value of these single deals, in one case representing an 11 000% increase in annual income. A company controlled by one of Slovenia's richest men, with no previous business interests in the medical sector, received a €25.4 million government contract to supply protective equipment.[42] The national public television station reported claims by a whistleblower at the national procurement agency that the economy minister had intervened personally in favour of another company, despite its products having

40. https://rm.coe.int/cop-medicrime-covid-19-e/16809e1e25.
41. "The Convict and Coronavirus: Romania's Million-Mask Mess", RISE Romania/OCCRP, 15 April 2020.
42. "Opaque Coronavirus Procurement Deal Hands Millions to Slovenian Gambling Mogul", Oštro/OCCRP, 3 April 2020.

been poorly evaluated by a committee of medical experts; the minister denied any wrongdoing.[43] Normal procedural safeguards in public procurement had been suspended following the Covid-19 outbreak.

– Ukraine's response to the pandemic was reportedly disrupted after the newly-appointed health minister delayed giving approval for procurement decisions, insisting first on the appointment of a deputy head of the national medical procurement body. The minister reportedly described the nominee as his "trusted person", an expression that can imply an insider who influences procurement decisions in the interests of a powerful patron – even though the procurement body had been specially designed to resist corruption and the nominee was ineligible for the post due to a previous conviction for dishonesty. The minister was subsequently dismissed, although the decision did not refer to these allegations.[44]

– Chinese-made antibody tests for Covid-19 are being rebranded and resold by western companies. Independent checks have shown this brand of test in particular to be unreliable, producing a high rate of false negatives, and the World Health Organization (WHO) has advised against using this type of test for clinical diagnosis. The manufacturer, however, claims accuracy rates of well over 90%. A Dutch company resold millions of the test around the world, claiming that it had been "developed and produced under very strict EU and Dutch regulations. These regulations leave no room for error and thus makes for a very reliable and safe product." An Italian company also resold what appear to be the same tests, claiming to have manufactured them itself. Whilst rebranding and reselling are legal, the promotion of unreliable medical products as reliable is not and can have devastating consequences.[45]

51. It may be that the examples mentioned above are explicable and involve no wrongdoing. Credible reports of misconduct must, however, be investigated and appropriate action taken. This is especially important given the sums of public money involved and the budgetary difficulties many public authorities will soon face, following pandemic-related economic contraction.

52. Several countries have already acted on reports of the sort of misconduct highlighted by GRECO. In Russia, for example, the authorities seized around 1 800 ventilators manufactured in 1999-2000 that lacked the required certification and registration documents, and arrested members of the group that had been offering them for sale to a hospital in the Moscow region. In Bosnia and Herzegovina, police are investigating how a raspberry farm with no previous experience in medical procurement, owned by a television presenter, was given a government contract by the head of the Civil Protection agency to import 100 ventilators form China, paying $55,000 each despite international market prices being between $7 000 and $30 000.[46] The Italian procurement agency, Consip, revoked €28 million of contracts previously awarded to a private company for the supply of protective masks, following media reporting that the company was under criminal investigation for earlier misconduct;[47] the media's investigations had been possible because Consip had published information on the contracts, which underlines the importance of transparency.

53. There are further corruption risks in connection with the economic support and stimulus packages, which will be worth trillions of euros in total, that governments have already begun administering in response to the collapse in economic activity. Transparency, accountability and effective independent oversight, in accordance with Council of Europe and other international standards, will be absolutely essential. As the United Nations Office on Drugs and Crime (UNODC) has observed, "While recognizing the need for urgent action to prevent economic and social collapse, the lack of sufficient accountability and oversight mechanisms in the allocation and distribution of economic stimulus packages increases the risk that corruption and fraud will weaken the impact of the measures being taken and result in a shortfall of desperately needed aid reaching the intended beneficiaries, impacting the least powerful among the population."[48]

54. To this end, the UNODC recommends that public authorities take account of the following considerations (for further details, see the document referenced in footnote 35):

– Clear, objective and transparent criteria for the qualification of intended beneficiaries and recipients;

– Account for the risks and vulnerabilities of disbursement and targeting methods;

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43. "Rushed PPE procurement leads to rash of corruption scandals", *BNE Intellinews*, 29 April 2020; "Slovenian PPE, Ventilator Scandal: New Revelations, No Confidence Motion Against Economy Minister", *Total Slovenia News*, 4 May 2020.
44. "Procurement Nightmare: The Wasted Weeks Of Ukraine's Coronavirus Response", *RFE/RL*, 8 April 2020.
45. "Uncertain Diagnosis: The Murky Global Market for Coronavirus Antibody Tests", OCCRP, 6 May 2020.
46. "Bosnian Raspberry Farm Granted Contract to buy Ventilators", OCCRP, 28 April 2020.
47. "Covid-19: revocato l'appalto per le mascherine alla cooperative sotto inchiesta", IRPI Media, 8 April 2020.
48. "Accountability and the prevention of corruption in the allocation and distribution of emergency economic rescue packages in the context and aftermath of the COVID-19 pandemic", UNODC.

– Open clear communication and outreach channels to raise awareness and understanding of beneficiaries;

– Use of technology for efficient, transparent and accountable disbursement of resources;

– Comprehensive auditing, oversight, accountability and reporting mechanisms to monitor the disbursement process and verify appropriate receipt;

– And for the future, preparation is the key to prevention; establish the legislative framework before the crisis.

3. Conclusions and recommendations

55. The gravity of the Covid-19 pandemic and the urgency with which Council of Europe member States are being forced to take drastic measures in response is putting modern European standards on human rights and the rule of law under unprecedented stress. All member States have taken exceptional measures in response to this exceptional threat. Whether or not these measures have been successful from a public health perspective, they should be carefully monitored for compliance with European standards and studied in order to learn lessons for the future. This report is an early opportunity to take note of some of the problems that have arisen, recall the applicable standards and make proposals for greater resilience in future.

56. In a few countries, governments are cynically exploiting public fears in order to undermine democracy, human rights and the rule of law, with the aim of destroying checks and balances and perpetuating their grip on power. Alongside this, there is now open debate on whether authoritarian regimes are better suited than liberal democracies to respond to the Covid-19 pandemic – even if the facts have shown clearly that they are not. Europe has experience, still within some people's living memory, of authoritarian regimes that came to power on the back of national crises, and of the dangers such regimes pose to international peace and security. Indeed, the Council of Europe was established after the Second World War in order to prevent any future descent into authoritarianism.

57. But the Covid-19 pandemic need not mean regression and on the whole, European democracies have proved themselves capable of effective response without betraying their fundamental values. Even radical measures may be perfectly democratic, so long as they respect the principles of human rights and the rule of law described in this report. As an extreme stress-test of national systems, this experience is nevertheless an opportunity to learn positive lessons for the future, in order to ensure that when the next pandemic comes, authorities can respond quickly and effectively in full respect for human rights and the rule of law. To this end, the rapporteur puts forward the proposals for action by member States, the Secretary General of the Council of Europe and the Committee of Ministers set out in the attached draft resolution and recommendation.

Appendix – Dissenting Opinion[49] by Ms Sopio Kiladze (Georgia, SOC), member of the Committee on Legal Affairs and Human Rights

1. Paragraph 15 of the Explanatory Memorandum mentions that:

> *"In Georgia, parliament approved a Presidential Decree that authorised the government to restrict rights in some areas without always specifying the nature or scope of those restrictions".*

This fact is misinterpreted or deliberately distorted. To better clarify our argument:

2. The source of the article needs to be examined. The quotes of the person is unreliable due to his political bias. Therefore they can't be taken seriously.

3. The Constitution of Georgia authorises the President, government and parliament to issue and approve a joint Decree on the restriction of the specific human rights. Under the previous governments, the relevant constitutional bodies were restricting the human rights through blanket norms without any specification of the space and form of the restriction. This year, a completely different practice has been established according to which the Decree includes not just blanket norms on the restriction, but precisely specifies the space and form of the relevant restriction. Thus, we think that the criticism reflected in the explanatory memorandum has no ground. We strongly believe that the way the relevant provisions of the Decree are specified, can be even effectively used as a best practice by other Council of Europe member countries.

49. Rule 50.4 of the Assembly's Rules of Procedure: "The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote."