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### Local and regional elections in major crisis situations

Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee)

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#### Summary

The current COVID-19 pandemic as well as various other crises have exposed democracies in Europe and beyond to considerable challenges in maintaining the normal functioning of democratic institutions, including free and fair periodic elections. Be it a public health emergency, a natural disaster, or a situation of security threats, all these events have undermined the capacities of authorities to hold elections in line with international standards. Local democracy often comes under immense pressure during times of emergencies as the local and regional authorities are in the forefront of coping with the repercussions of the crises. In this context, the democratic legitimacy of elected local and regional representatives provided by free and fair elections is more essential than ever. The holding of local and regional elections in times of major crises may, however, entail risks to the life, health, and security of people as well as numerous practical difficulties which may result in postponement of elections. Election observation in times of crisis represents yet another challenge. This report acknowledges that not all electoral standards can be kept in major crisis situations. At the same time, it stresses that a minimum core of electoral principles have to be upheld for elections to be meaningful and to enjoy the trust of the public. For this purpose, the report provides useful guidelines based on international standards and best practices on holding and postponing local and regional elections in times of major crisis.

<sup>1</sup> Chamber of Local Authorities / R: Chamber of Regions  
EPP/CCE: European People's Party Group in the Congress  
SOC/G/PD - Group of Socialists, Greens and Progressive Democrats  
ILDG: Independent Liberal and Democratic Group  
ECR: European Conservatives and Reformists Group  
NR: Members not belonging to a political group of the Congress

## **RESOLUTION 455 (2020)<sup>2</sup>**

1. The Congress of Local and Regional Authorities of the Council of Europe refers, in particular, to:

a. The International Covenant on Civil and Political Rights (ICCPR) (1966);

b. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);

c. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950);

d. The Statutory Resolution CM/RES(2020)1 relating to the Congress of Local and Regional Authorities of the Council of Europe and the revised Charter appended thereto, adopted by the Committee of Ministers;

e. The European Charter of Local Self-Government (ETS No. 122, 1985) and its Additional Protocol on the right to participate in the affairs of a local authority (ETS No. 207, 2009);

f. The Venice Commission Code of Good Practice in Electoral Matters, Opinion 190(2002);

g. The Information Document of the Council of Europe Secretary General “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member States” (2020);

h. The Venice Commission report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency (2020);

i. Recommendation 419(2018) of the Congress of Local and Regional Authorities on Voting rights at local level as an element of successful long-term integration of migrants and IDPs in Europe’s municipalities and regions adopted on 6 November 2018.

2. The Congress refers to the COVID-19 pandemic as a perfect example of crisis situation that shows the difficulties states and electoral authorities may be confronted with regarding the decision to hold or postpone elections, at all levels of government, in the face of risks to the life, health and security of the population. It acknowledges that not all electoral standards can be kept in major crisis situations including pandemics, natural disasters or armed conflicts. However, it stresses that a minimum core of electoral principles have to be upheld at all times for elections, including at local and regional level, to be meaningful and to enjoy the trust of the public in a democratic, pluralistic and accountable political environment.

3. Against this background, the Congress points to the role of election observation as an internationally recognised barometer for the assessment of the democratic development of a country. Having been granted the mandate to observe elections at the grassroots’ level, it recalls the importance of this confidence-building measure within the set of statutory Congress activities which entails, in particular, the possibility to maintain a platform for dialogue with domestic authorities and to exchange with civil society, media representatives and domestic observers.

4. At the same time, the Congress recognises that major crisis situations may require also a “default strategy” as regards its core activities.

5. In the light of the foregoing, the Congress:

a. tasks its relevant bodies with developing an alternative strategy for on-site election observation as regards the rapid response to invitations from Council of Europe member States to observe grassroots’ elections during major crisis situations while maintaining the integrity of the environment (protection of the health and life of election observers, ensuring safety, respecting domestic rules and mitigating

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<sup>2</sup> Debated und adopted by the Statutory Forum on 28 September 2020 (see document CG-FORUM(2020)01-05final, explanatory memorandum), rapporteurs: Stewart DICKSON, United Kingdom (R, ILDG) and Jos WIENEN, Netherlands (L, EPP/CCE).

measures in place in the countries holding elections as well as in the countries of origin of the Congress election observers);

*b.* underlines that any alternative strategy for on-site election observation will be of a temporary nature only during the duration of a major crisis and is no substitute for a fully-fledged election observation mission in the frame of the statutory activities of the Congress.

6. On the basis of this initial report, the Congress commits itself to continued co-operation with the Committee of Ministers, the Parliamentary Assembly and the Venice Commission as well as with international partner organisations in order to collect, compare and evaluate good practice examples related to elections during the COVID-19 crisis in view of further recommendations with regard to the local and regional level of government.

### **RECOMMENDATION 444 (2020)<sup>3</sup>**

1. The Congress of Local and Regional Authorities of the Council of Europe refers, in particular, to:

a. The International Covenant on Civil and Political Rights (ICCPR) (1966);

b. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);

c. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950);

d. The Statutory Resolution CM/RES(2020)1 relating to the Congress of Local and Regional Authorities of the Council of Europe and the revised Charter appended thereto, adopted by the Committee of Ministers;

e. The European Charter of Local Self-Government (ETS No. 122, 1985) and its Additional Protocol on the right to participate in the affairs of a local authority (ETS No. 207, 2009);

f. The Venice Commission Code of Good Practice in Electoral Matters, Opinion 190(2002);

g. The Information Document of the Council of Europe Secretary General “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member States” (2020);

h. The Venice Commission report on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency (2020).

i. Recommendation 419(2018) of the Congress of Local and Regional Authorities on Voting rights at local level as an element of successful long-term integration of migrants and IDPs in Europe’s municipalities and regions adopted on 6 November 2018.

2. The Congress refers to the COVID-19 pandemic as a perfect example of crisis situation that shows the difficulties states and electoral authorities may be confronted with regarding the decision to hold or postpone elections, at all levels of government, in the face of risks to the life, health and security of the population.

3. It acknowledges that not all electoral standards can be kept in major crisis situations including pandemics, natural disasters or armed conflicts.

4. It stresses that a minimum core of electoral principles have to be upheld at all times for elections, including at local and regional level, to be meaningful and to enjoy the trust of the public in a democratic, pluralistic and accountable political environment.

5. In the light of the foregoing, the Congress requests that the Committee of Ministers invite the respective authorities of Council of Europe member States to:

a. take into account, for their decision whether to hold or postpone elections for all tiers of government during major crisis situations, existing recommendations highlighting international human rights law, international electoral standards and best practices;

b. use the ongoing COVID-19 pandemic as an opportunity to gain insight and gather experience with a view to identifying best practice examples as regards elections to be held in exceptional circumstances in the domestic context;

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<sup>3</sup> See footnote on page 2.

c. foster, on the basis of this initial report, continued co-operation between institutions of the Council of Europe dealing with electoral matters, notably the Venice Commission, the Parliamentary Assembly and the Congress itself, in order to compare and evaluate best practice examples in the international context with regard to the organisation of elections in extraordinary circumstances including relevant mitigating measures and alternative voting methods on the Election Day.

## EXPLANATORY MEMORANDUM<sup>4</sup>

### 1. INTRODUCTION

1. Throughout the past decades, various major crisis situations have exposed democracies in Europe and beyond to considerable challenges in maintaining the normal functioning of democratic institutions, particularly as regards the holding of elections. Be it the current COVID-19 pandemic, natural disasters or situations of armed conflict and terrorism, all these events, indeed in different perspectives, have undermined states' capacities to hold elections. In face of these challenges, states have opted for different approaches. Some countries have decided in favour of in-person elections despite the practical difficulties, as was the case during the first round of the 2020 local elections in France at the height of the COVID-19 pandemic or the national and local elections in Ukraine in 2014 and 2015 against the backdrop of the armed conflict in the East (where elections were postponed only in some territories). Other countries have relied, partly or exclusively, on remote voting methods, such as postal voting during the second round of the 2020 local elections in Bavaria (Germany) or during the 1996 post-conflict local elections in the city of Mostar in Bosnia and Herzegovina. In other countries, polls have been seriously disrupted due to the impacts of natural disasters. Even though such a situation never arose in any Council of Europe member State, a lesson can be learned from the local elections in New Orleans (US State of Louisiana) after the hurricane Katrina in 2005. Likewise, the United States experienced a situation unprecedented in Europe when the 2001 terrorist attacks in New York City made holding of mayoral elections originally scheduled for September 11 impossible. As a result, many elections have been postponed and held later than originally planned like the Spanish regional elections in Euskadi/Basque and Galicia, originally scheduled for April but moved to July 2020.<sup>5</sup> Likewise, in the United Kingdom, local elections in England were postponed for a year to May 2021 due to the outbreak of pandemic.<sup>6</sup> Both, holding and postponing elections in times of crisis, has implications for the political rights of individuals under states' jurisdictions.

2. There are different challenges for the authorities: On the one hand, a state has the obligation to protect the rights to health, life and security of the individuals under its jurisdiction. In doing so, states are obliged/expected to limit the risks of the crisis situation at hand. In case of public health crises, the spread of the disease needs to be contained by reducing human-to-human contact among voters and poll workers. Elections pose a risk in this regard: during the first round of local elections in France, voters as well as poll-workers reportedly were infected during polling and counting on Election Day. Similarly, in case of security threats, the crowding of people during elections creates an opportunity for targeted attacks and makes society vulnerable in the midst of a process vital to every democracy. Life and health of electoral participants may be at stake also as consequence of a natural disaster when the situation on the ground does not yet allow for the secure conduct of elections.<sup>7</sup> In all these situations, authorities are obliged to take measures to limit the risks to their populations. States' duty to protect (or the practical unfeasibility of elections at the moment) might thus call for mitigation measures to secure the health and life of their population during the elections, including a more widespread reliance on alternative voting methods.<sup>8</sup> A state may also decide for a postponement of elections.

3. At the same time, mitigation measures or the postponement of elections may encroach upon the right to political participation as well as upon the related freedoms of expression, association, assembly and movement. If an election is postponed indeterminately, the criterion of periodic elections is at stake. Resorting to alternative voting methods (e.g. exclusive postal or internet voting) or limitations during the election campaign may interfere with the electoral principles of universal, equal, free and secret suffrage and the freedom of assembly and pose challenges, more generally, to the integrity of elections. Interferences with (some of) these principles and/or the integrity of an election may likewise occur if elections are held with measures to secure the health of voters (e.g. limiting the presence of observers),

<sup>4</sup> Prepared with the contribution of Congress expert Prof. Dr. Christina BINDER, "Bundeswehr University of Munich", Germany.

<sup>5</sup> El País, 'Voters opt for traditional parties at regional elections in Galicia, Basque Country', 2020, <https://english.elpais.com/politics/2020-07-13/voters-opt-for-traditional-parties-at-regional-elections-in-galicia-basque-country.html>.

<sup>6</sup> BBC, 'Coronavirus: English local elections postponed for a year', 2020, <https://www.bbc.com/news/uk-politics-51876269>.

<sup>7</sup> A different but related problem is the destruction of electoral infrastructure through the natural disaster or in case of civil unrests/war. In such cases, the integrity of elections is at stake or voting may simply not be feasible as will be shown in more detail below.

<sup>8</sup> Alternative voting methods include sending the ballot by post (postal voting, mail-in ballot), casting the vote online through a computer or mobile phone application (electronic voting, e-voting, internet voting, online voting), or by means of voting by proxy or by mobile ballot box. These methods allow voters to cast their ballots either remotely or by involving other persons.

in case of an increased presence of security forces on Election Day or as a result of relaxed eligibility criteria for displaced voters. This illustrates the mentioned tension between a state's duty to protect (the rights to health, life or security) and its obligation to respect/not to interfere with the right to political participation and related political freedoms.

4. How to reconcile these dimensions and alleviate the tension? This report starts with an overview of different possible scenarios (Part 2). It then outlines the applicable international legal framework and analyses international human rights law – the rights to life, health and security as well as the right to political participation and related political freedoms (Part 3). In the next stage, it presumes that a state decides to hold elections and examines possible mitigation measures to limit the risks during elections that the respective crisis situation entails; whether in person and/or by alternative/remote voting methods (Part 4). On that basis, the report finally discusses parameters/factors which should guide states in their decision whether to hold or rather postpone elections (Part 5). A brief evaluation concludes (Part 6).

## 2. OVERVIEW: POSSIBLE SCENARIOS OF MAJOR CRISIS SITUATIONS AND RELATED CHALLENGES FOR THE CONDUCT OF ELECTIONS

5. States face challenges to the conduct of elections when major crises occur. In face of these crisis situations, states' capacity to protect the life, health and/or (physical) security of voters, poll workers and other election participants throughout different stages of electoral processes may be limited. At the same time, the practical feasibility of organising elections is frequently hindered by various obstacles in times of crisis (see below). Apart from practical obstacles, the conditions under which elections are held or postponed, e.g. during states of emergency and/or in reliance on alternative voting methods, will frequently have impacts on the realisation of the right to political participation and related political freedoms which are necessary for meaningful elections (the freedoms to expression, association and assembly as well as the freedom of movement). Put differently, the crisis situation as such (e.g. the destruction of infrastructure) as well as according mitigation measures that make elections possible during a crisis may have negative consequences for human rights and political freedoms as well as for the integrity of the electoral process. History shows different examples of elections being held or postponed in times of major crisis, be it public health crises, natural disasters or security threats in situations of civil unrest/armed conflict or terrorism. Each of these crisis situations implies different challenges from the abovementioned perspectives as shown in the following overview.

6. The most recent, and still ongoing crisis, that has had serious impacts on the conduct of elections across the world, is the COVID-19 pandemic.<sup>9</sup> Earlier, similar challenges were posed by the Ebola outbreak in several Western African countries between 2014 and 2016.<sup>10</sup> This type of **public health crisis** is particularly challenging to elections as the spread of a contagious disease is facilitated by the crowding of people throughout the different stages of the electoral process, most importantly on Election Day. Human-to-human contact and transmissions among groups of voters queuing in and around polling station as well as contacts between voters and poll workers contribute to propagating the virus across the whole society.<sup>11</sup> This includes the most vulnerable members of society - persons who may not be willing to participate in elections for fear of getting infected. States thus face a tension between protecting the lives and health of their population on the one hand and ensuring periodic elections in accordance with international standards on the other.<sup>12</sup> In order to mitigate the existing risks while still holding elections, social distancing and strict sanitary rules may be imposed.<sup>13</sup> Alternatively, remote voting methods may be used to complement or even replace traditional voting to minimise the risk of human-to-human contact.<sup>14</sup> If the risks are considered too high, states may likewise decide to postpone the elections.

<sup>9</sup> International IDEA, 'Global overview of COVID-19: Impact on elections', 2020, <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

<sup>10</sup> IFES, 'Elections and COVID-19 – What We Learned from Ebola', 2020, <https://www.ifes.org/news/elections-and-covid-19-what-we-learned-ebola>.

<sup>11</sup> France Info, 'Elections municipales : à Saint-Ouen, un tiers des assesseurs ont déclaré des symptômes évocateurs du coronavirus', 2020, [https://mobile.francetvinfo.fr/sante/maladie/coronavirus/elections-municipales-a-saint-ouen-un-tiers-des-assesseurs-ont-declare-des-symptomes-evocateurs-du-coronavirus\\_3928917.html?fbclid=IwAR1zO0l1\\_Dfok1J1ppWqb34VXLSaRvGqeQJNwzn-39Dhq3GIEkOSiZ\\_UZQs](https://mobile.francetvinfo.fr/sante/maladie/coronavirus/elections-municipales-a-saint-ouen-un-tiers-des-assesseurs-ont-declare-des-symptomes-evocateurs-du-coronavirus_3928917.html?fbclid=IwAR1zO0l1_Dfok1J1ppWqb34VXLSaRvGqeQJNwzn-39Dhq3GIEkOSiZ_UZQs).

<sup>12</sup> C. Binder, A. Drnovsky, 'To Vote or Not to Vote?', 2020, <https://verfassungsblog.de/to-vote-or-not-to-vote/>.

<sup>13</sup> CNN, 'South Korea sees the largest turnout in almost 30 years in election held during coronavirus outbreak', 2020, <https://edition.cnn.com/2020/04/15/asia/south-korea-election-intl-hnk/index.html>.

<sup>14</sup> Euronews, 'Germany: Bavaria's municipal elections go ahead despite coronavirus concerns', 2020, <https://www.euronews.com/2020/03/15/germany-bavaria-s-municipal-elections-go-ahead-despite-coronavirus-concerns>.

7. **Natural disasters** pose a different challenge since they usually lead to the displacement of people and the destruction of infrastructure. When this coincides with elections, people, especially in the case of internal displacement (see internally displaced persons (IDPs)<sup>15</sup>) are likely to face obstacles to participate in the elections. For example, Hurricane Katrina that hit New Orleans during local elections in 2005 destroyed the electoral infrastructure and made voting insecure in many areas. As a remedy, wide postal voting options were provided to displaced voters as well as to those who could not vote in their home constituencies. The use of these postal voting options was however found overly cumbersome and many voters remained disenfranchised. This had a disproportionate impact on Afro-American voters and negatively affected candidates representing this community.<sup>16</sup> In other contexts, restrictive residency requirements linking the right to vote to the place where the voter is registered have posed obstacles.<sup>17</sup> For example, in the aftermath of the hurricane Sandy in 2012, the US State of New Jersey relaxed the existing residency requirements and allowed voters displaced by the hurricane to cast a provisional ballot in any polling station in the State. Election officials then transmitted the provisional ballots to the voters' respective home constituencies.<sup>18</sup>

8. In this situation, states have a positive obligation to ensure that displaced voters enjoy the same rights as other citizens.<sup>19</sup> It may be necessary accordingly, as detailed below, to counter disenfranchisement, that the requirements on IDPs' place of voting be relaxed and alternative voter documentation is admitted. This may need to be accompanied by substantial efforts of voter education as voters impacted by natural disasters are likely to lack according information. At the same time, none of these provisions should compromise the integrity of elections by opening room for electoral fraud.<sup>20</sup>

9. Lastly, elections can be affected by **security threats**. Similar to natural disasters, armed conflicts usually generate the displacement of people, both within and outside the country. Challenges that these voters may face during the conflict or in the post-conflict period are to a large degree comparable to those during natural disasters; with internal displacement being most prominent. In particular, the problems posed by restrictive residency requirements are often coupled with lacking personal documentation which leads to a situation when IDPs cannot prove their eligibility to vote.<sup>21</sup> For example, in Bosnia and Herzegovina, IDPs had to undergo a complicated and administratively burdensome process of identity verification to be allowed to vote.<sup>22</sup> In Georgia, IDPs were, for many years, denied by law to elect their representatives in places of their residence during their displacement because of the internal conflict.<sup>23</sup> Additionally, discrimination often plays a role when displaced voters belong to a minority group. In Croatia, for example, the law distinguished between displaced ethnic Serbs and Croats and discriminated systematically against the former in their access to voter registration and voting on Election Day.<sup>24</sup> Likewise, a lack of adequate and timely information on voting modalities can hinder the participation of IDPs as was the case for voters fleeing from the Chechnya region in Russia who received contradictory information on the modalities of their electoral participation during the 2003 Chechnya referendum.<sup>25</sup> Of particular relevance is the intimidation of voters, especially of IDPs, by

15 Internally displaced persons (IDPs), according to the United Nations Guiding Principles on Internal Displacement, are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border." This, however, is a descriptive definition, which does not confer a special legal status because IDPs, being inside their country, remain entitled to all the rights and guarantees as citizens and other habitual residents of their country. As such, national authorities have the primary responsibility to prevent forced displacement and to protect IDPs. See UNHCR, Emergency Handbook, 2020, [https://emergency.unhcr.org/entry/44826/idp-definition#:~:text=Internally%20displaced%20persons%20\(IDPs\)%2C,avoid%20the%20effects%20of%20armed](https://emergency.unhcr.org/entry/44826/idp-definition#:~:text=Internally%20displaced%20persons%20(IDPs)%2C,avoid%20the%20effects%20of%20armed)

16 W. Quigley, Katrina, 'Voting Wrongs: Aftermath Of Hurricane And Weak Enforcement Dilute African American Voting Rights In New Orleans', 2007, <https://scholarlycommons.law.wlu.edu/crsj/vol14/iss1/5>.

17 J. Grace, E. Mooney, 'Democracy and the Displaced: Political Participation Rights, in Particular the Right to Vote and to Be Elected', 2007, pp 8-10, [https://www.geneseo.edu/~iompres/grace\\_mooney\\_IDP\\_participation.pdf](https://www.geneseo.edu/~iompres/grace_mooney_IDP_participation.pdf).

18 M. Morley, 'Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks', 2017, pp 563-565, [https://law.emory.edu/elj\\_documents/volumes/67/3/morley.pdf](https://law.emory.edu/elj_documents/volumes/67/3/morley.pdf).

19 UNHCR, 'Handbook for the Protection of Internally Displaced Persons', 2009, <https://www.unhcr.org/en-uk/4794b5262.pdf>.

20 CoE Congress, 'Local Voting rights for the integration of migrants and IDPs', 2019, <https://rm.coe.int/booklet-a6-en-local-voting-rights-for-the-integration-of-migrants-demo/1680931f2e>.

21 UNHCR, 2009.

22 L. Prather, E. Herron, 'Enfranchising Displaced Voters: Lessons from Bosnia-Herzegovina', 2007, <https://pdfs.semanticscholar.org/b66f/6d9cb487e73b7a279a19dfbf8c32f08a8d11.pdf>.

23 E. Mooney, B. Jarrah, 'The Voting Rights of Internally Displaced Persons: The OSCE Region', 2004, pp 32-41, [https://www.brookings.edu/wp-content/uploads/2016/06/20041105\\_osce.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/20041105_osce.pdf).

24 J. Grace, E. Mooney, 'Democracy and the Displaced: Political Participation Rights, in Particular the Right to Vote and to Be Elected', 2007, p 11, [https://www.geneseo.edu/~iompres/grace\\_mooney\\_IDP\\_participation.pdf](https://www.geneseo.edu/~iompres/grace_mooney_IDP_participation.pdf).

25 OSCE/ODIHR, Preliminary Statement, 'Chechen Republic Referendum, Russian Federation, 23 March 2003', 2003, p 3, <https://www.osce.org/files/f/documents/7/c/16263.pdf>.



armed groups. In Moldova, IDPs crossing from Transnistria to cast their vote in Moldova during the 1998 and 2001 parliamentary elections faced obstruction and harassment from the *de facto* authorities.<sup>26</sup>

10. Elections held amid ongoing armed conflict are rare and authorities in these cases generally prefer to postpone elections as was the case in the 2015 local elections in Ukraine when elections were not possible for security reasons in some territories along the lines of contact administered by the military-civil administration of Ukraine.<sup>27</sup>

11. Another type of security threat became relevant after the September 11 terrorist attacks in 2001. Local elections in New York scheduled for the very same day were postponed accordingly because of the imminent danger of attacks against election participants and violent disruptions of the process. Other reasons for the postponement were breakdowns in public transportation that would impede voters and poll workers from getting to the polls and the inability of police to secure polling stations.<sup>28</sup> During the 2014 presidential and provincial elections in Afghanistan held in the backdrop of looming terrorist threats, life and security of voters and poll workers were protected by a high number of security personnel deployed in polling stations across the country on election day. Although the efforts to secure elections were praised by domestic and international stakeholders, recommendations were made to improve coordination and reduce the overstretching of security forces.<sup>29</sup>

12. Indeed, unstable domestic political situations may deteriorate to the point where elections should rather be postponed. Although not many elections have been held under such conditions, a lesson can be drawn from the 2017 constitutional referendum held in Turkey during the state of emergency after the failed coup attempt of July 2016.<sup>30</sup> As the Turkish example shows, elections may be most problematic in a situation when fundamental freedoms essential to a genuinely democratic process are curtailed by state-of-emergency measures.<sup>31</sup> Security considerations as well as measures to protect the rights to life, health and security need to be carefully balanced against the right to political participation/the integrity of the electoral process.

13. In all three scenarios/types of crisis situations, the protection of certain rights (to life, health and security) are in tension with the right to political participation and related political freedoms and, more generally, the integrity of the electoral process. Partly, the feasibility of elections is also at stake; e.g. when infrastructure breaks down or is destroyed due to natural disasters or armed confrontation. This calls for parameters to adjudicate the situation and decide whether elections should be held and, if so, with what kind of mitigation measures. Human rights standards may be drawn upon as relevant parameters.

### **3. AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE ON ELECTIONS IN MAJOR CRISIS SITUATIONS**

14. International human rights standards offer a framework on how to reconcile different human rights obligations in the face of major crisis situations. They guide states on how to live up to their duty to protect the rights to life, health and security while at the same time respecting the right to political participation and related political freedoms to the greatest possible extent, seeking to limit according interferences. More particularly, international human rights law provides two “layers” to reduce the tension between the respective human rights dimensions in face of the crisis situation: First, a state may derogate temporarily from its human rights obligations, including from the right to political participation (and related political freedoms), in reliance on a treaty’s derogation provisions in times of emergency (Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR)). Second, even without explicit derogation, there

26 E. Mooney, B. Jarrah, 2004, p 47.

27 OSCE/ODIHR, Final Report, 'Local Elections in Ukraine 25 October and 15 November 2015', 2016, <https://www.osce.org/files/f/documents/a/2/223641.pdf>.

28 M. Morley, 2017, pp 553-558.

29 OSCE/ODIHR, Final Report, 'Presidential and Provincial Council Elections in Afghanistan 5 April and 14 June 2014', 2014, pp 23-25, <https://www.osce.org/files/f/documents/e/5/129761.pdf>.

30 OSCE/ODIHR, Final Report, 'Constitutional Referendum in Turkey 16 April 2017', 2017, <https://www.osce.org/files/f/documents/6/2/324816.pdf>.

31 The - not very clear - amendment would give Parliament the possibility of deciding to hold early elections even during a state of emergency or under martial law. It seems unlikely that the conditions for the holding of free and fair elections can be met during a state of emergency or under martial law; ...'. Venice Commission, 'Compilation of Venice Commission Opinions and Reports on States of Emergency', 2020, p 28, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)003-e).

is some room for limitations of, e.g., the right to political participation (Article 25 ICCPR, Article 3 of Protocol 1 to the ECHR), the freedoms of expression, (association), assembly and movement (Articles 12(1), 21 ICCPR; Articles 10, 11 ECHR; Article 2 of Protocol 4 to the ECHR) to respond to the crisis situation, including by postponing elections or by resorting to alternative/remote voting methods.<sup>32</sup>

15. A closer scrutiny of the respective options thus seems warranted. What guidance can be derived from international human rights law for the conduct of elections in major crisis situations? We will first examine a state's duty to protect (the rights to life, health and security) (3.1), to then turn to the right to political participation and related political freedoms (3.2), discuss derogations in times of emergency (3.2.1) and interferences without explicit derogations which are nonetheless justified as necessary in a democratic society because of the crisis situation (3.2.2). On that basis, we argue that while international human rights standards give some leeway to states for situation specific solutions, they also set conditions and put limits to state action.

### 3.1. A state's duty to protect the rights to life, health and security

16. An obligation to contain the disease may first be found in a state's **duty to protect the life** of individuals under its jurisdiction as incorporated in Article 6 ICCPR and Article 2 ECHR. To draw on the right to life seems particularly plausible in severe cases where the further spread of the pandemic would put the life of persons at risk (e.g. when the capacities of hospitals are exhausted) or when security threats (e.g. of violent (terrorist) attacks/civil unrest) put the life of voters or polling personnel at risk. This also finds a basis in human rights monitoring institutions' case law. For example, the European Court of Human Rights (ECtHR) has stated previously that a state may be responsible if it knows about life threatening risks but fails to take the appropriate measures to prevent them. Thus, in *Budayeva et al v Russia*, the failure of Russian authorities to implement land-use planning and emergency relief policies in the light of the foreseeable risk of a mudslide that led to loss of life was considered a violation of the substantive and procedural aspects of Article 2 ECHR by the ECtHR.<sup>33</sup> Likewise in *Öneryıldız v Turkey*, when the municipal authorities of Istanbul had failed to prevent a looming methane explosion that happened in a rubbish tip or at least warn the inhabitants who were living near the tip about the dangers, the ECtHR held that the Turkish authorities had not taken the necessary preventive measures to protect the inhabitants and found a violation of Article 2 ECHR, the right to life.<sup>34</sup>

17. Similar protection may be derived from the **right to health** as incorporated *inter alia* in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) (as well as from Article 11 of the (rev) European Social Charter) and the obligations following therefrom to contain the crisis/limit the spread of the disease. Article 12(1) ICESCR recognises everyone's right to "the enjoyment of the highest attainable standard of physical and mental health." States also undertake measures for "the ... control of epidemic, endemic ... and other diseases" in accordance with Article 12(2.c) ICESCR.<sup>35</sup> In the face of a disease, a state may thus be required to adopt a range of measures including individual quarantines and isolations and even community quarantines (so called "*cordons sanitaires*") to live up to its duty to protect.<sup>36</sup> The concrete measures depend on the disease at hand and on what is required for its containment. In the context of the COVID-19 pandemic, anti-contagion policies, social distancing and quarantines prevail:<sup>37</sup> such measures have been considered as most effective from a scientific/empirical viewpoint and have been implemented by numerous countries.<sup>38</sup>

32 See e.g. Information Document of the Council of Europe Secretary General, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states', 2020, <https://rm.coe.int/sq-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

33 ECtHR, *Budayeva and Others v Russia*, 20 March 2008.

34 ECtHR, *Öneryıldız v Turkey*, 30 November 2004.

35 Art 12.2.c; see also General Comment No 14 of the Committee on Economic, Social and Cultural Rights which establishes the duty to of states "[t]o take measures to prevent, treat and control epidemic and endemic diseases; ...". Postponing elections could be such measure. UN Committee on Economic, Social and Cultural Rights "General Comment 20" Compilation of General Comments and General Recommendations adopted by human rights treaty bodies, 2006.

36 See respectively the possibility envisaged in Art 18 of the WHO's International Health Regulations: '1. Recommendations issued by WHO to States Parties with respect to persons may include the following advice: ... – implement exit screening and/or restrictions on persons from affected areas.' World Health Organization, International Health Regulations, 2005, <https://webcache.googleusercontent.com/search?q=cache:XV600tgr7kJ:https://apps.who.int/iris/rest/bitstreams/1031116/retrieve+&cd=1&hl=en&ct=clink&gl=fr>.

37 S. Hsiang and others, 'The Effect of Large-Scale Anti-Contagion Policies on the COVID-19 Pandemic', 2020, *Nature*, p 1, <https://www.nature.com/articles/s41586-020-2404-8>.

38 The list of countries changes. For constant updates, see the dynamic list in T. Hale and others, 'Oxford COVID-19 Government Response Tracker', 2020, <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>; See

18. What is more, a state may also be required to protect the **right to (physical) security** of voters (see Article 9 ICCPR; Article 5 ECHR). As the UN HR Committee affirmed in General Comment No 35 on Article 9 ICCPR, the right to security “obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors. States parties must take ... measures to prevent ... injury ...”.<sup>39</sup> Likewise, the ECtHR’s case law on Article 5 ECHR – while mainly related to detention cases – contains similar considerations.<sup>40</sup> Thus, according protection against security threats on election day is required also by the right to security.

19. In a nutshell, one may argue that, in view of the foreseeable danger of a contagious disease infection on Election Day, in case of natural disasters or relevant security threats, a state is required to protect the rights to life, health or security of people by adopting relevant mitigation measures and/or resorting to alternative voting methods (see below) or justified to even postpone elections. Interferences with the right to political participation and related political freedoms may become necessary accordingly.

### **3.2. The right to political participation and the related freedoms of expression, assembly and movement**

20. The right to political participation requires, in principle, the holding of periodic elections, based on universal, free, secret and equal suffrage.<sup>41</sup> Related freedoms of expression, assembly and movement allow for campaigning in the media and the conduct of electoral rallies etc. These rights and freedoms may be considerably restricted in times of a (major) crisis. The question thus arises of how to deal with interferences with the right to political participation and related political freedoms, e.g., when necessary social distancing measures or tightened security situations prevent election rallies and have repercussions on contestants’ right to assemble and their equal ability to campaign or when the (widespread, even exclusive) use of remote voting methods (e-voting, postal voting) has implications for the principles of universal or secret suffrage. How can these divergent human rights dimensions be reconciled? How to assess whether mitigation measures impacting on the integrity of the electoral process/the right to political participation are justified and may be accounted for as necessary trade-offs?

21. The two abovementioned options of a state to mediate between its duty to protect and its obligation to respect/not to interfere opens room for a certain margin of appreciation in decision making as is discussed in the following.

#### **3.2.1 Derogations in times of emergency**

22. The most “comprehensive” option for states are derogations in times of emergency. States can derogate – and indeed several have – from their obligations under civil and political rights treaties in face of the crisis situation. The conditions set in the respective treaties’ emergency clauses (Article 4 ICCPR; Article 15 ECHR) are similar: “In time of public emergency which threatens the life of the nation”, states may derogate from their obligations to the extent “strictly required by the exigencies of the situation.”<sup>42</sup> As outlined in paragraph 2 of the provisions, no derogation is permissible from certain absolute rights as the prohibitions of torture or slavery. Moreover, a state is obliged to inform the other

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respectively A. von Bogdandy, P. Villarreal, ‘International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis’, 2020, pp 18-19, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561650](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650).

<sup>39</sup> See HRC GC No 35, Article 9 (Liberty and Security of Person), para 9. (‘9. The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury. The right to personal security also obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors. ...’)

<sup>40</sup> See e.g. ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, 13 December 2012, para 239; see also ECtHR, *Storck v Germany*, 16 June 2005, para 102; ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010, paras 319-21; ECtHR, *Medova v. Russia*, 15 January 2009, paras 123-25. Overall see [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

<sup>41</sup> See for relevant case law on the right to political participation in Article 25 ICCPR, e.g. M. Nowak, ‘UN Covenant on Civil and Political Rights. CCPR Commentary’, 2005, p 563 *et seq.*; S. Joseph and M. Castan, ‘The International Covenant on Civil and Political Rights. Cases, Materials and Commentary’, 2013, pp 738-750; on the right to free elections in Art 3 of Prot 1 ECHR and relevant case law see W. Schabas, ‘The European Convention on Human Rights. A Commentary’, 2015, p 1011 *et seq.*; C. Grabenwarter, ‘The European Convention on Human Rights. Commentary’, Beck-Hart-Nomos, 2014, p 399 *et seq.*

<sup>42</sup> See Venice Commission, 2020, para 95.

states parties (ICCPR) or the Secretary General of the Council of Europe (CoE) (ECHR) of the derogation which allows for some international scrutiny of a state's measures (paragraph 3).<sup>43</sup>

23. The mentioned substantive requirements generally lend themselves for application in face of the various crisis situations. Major crisis situations, relating to security threats natural disasters or health emergencies, may be considered as threatening the life of the nation. Thus, for example, Guatemala derogated under Article 4 ICCPR in order to resolve the hazardous situation caused by Hurricane Mitch in 2001.<sup>44</sup> Likewise, Ukraine derogated under Article 15 of ECHR in the backdrop of the armed conflict in the eastern part of country in 2015.<sup>45</sup> Also, the respective measures, including a postponement of the elections, might arguably be required to contain the spread of the disease or limit according security threats. As relevant country examples show in relation to health pandemics, especially at the peak of the pandemic, social distancing/containment policies were necessary to flatten the curve of infections:<sup>46</sup> This is amply documented and supported by medical evidence.<sup>47</sup> Likewise, imminent security threats may require a postponement of elections overall as was the case in the aftermath of terrorist attacks in New York City in 2001;<sup>48</sup> or at least in the most affected areas like in the 2015 local elections in Ukraine when elections could not be held in certain areas along the line of contact between the warring parties.<sup>49</sup>

24. In light of the imminent emergency caused by the crisis situation, a state could thus derogate from the right to political participation, the freedoms of expression, assembly and movement. Neither of these rights is listed as non-derogable in the respective paragraphs 2 of Article 4 ICCPR/Article 15 ECHR. As regards states' obligations to notify the derogation: For example, in face of the current COVID-19 pandemic, in Europe, ten states have, so far, informed the Council of Europe Secretary General that they derogated from certain rights under the ECHR (although some have withdrawn the derogation since);<sup>50</sup> 22 states have done so under the ICCPR.<sup>51</sup> While not referring explicitly to the right to political participation, these derogations concerned related freedoms: for example, Latvia, North Macedonia, Moldova, Estonia, Georgia and Albania derogated *inter alia* from their obligations under Article 11 ECHR (freedom of assembly and association as well as from the freedom of movement (Article 2 of Protocol No 4 to the ECHR). Romania, Armenia, San Marino and Serbia did not explicitly mention the articles affected by their derogation.<sup>52</sup> Under the ICCPR, most derogations were generally either related to the freedoms of movement and assembly (Articles 12, 21 ICCPR) or framed in rather broad terms.<sup>53</sup>

43 See ICCPR article 4 (3); ECHR art 15(3); See also PACE Resolution 2209(2018) which recommends the CoE Secretary General to take a proactive role and provide timely supervision of derogations. Parliamentary Assembly of the Council of Europe, Resolution 2209, 2018, paras 20.1-3, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24680&lang=EN>; For details see K. Istrefi, 'Supervision of Derogations in the Wake of COVID-19: a Litmus Test for the Secretary General of the Council of Europe', 2020, <https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/>.

44 UNTC, 'Status of Treaties', ICCPR, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-4&chapter=4&clang=en).

45 CoE, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms', <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

46 See especially the experiences of some countries in R. M Anderson and others, 'How Will Country-Based Mitigation Measures Influence the Course of the COVID-19 Epidemic?', 2020, p 931, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30567-5/fulltext?utm\\_campaign=tlcoronavirus20&utm\\_content=120403755&utm\\_medium=social&utm\\_source=twitter&hss\\_channel=w-27013292](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30567-5/fulltext?utm_campaign=tlcoronavirus20&utm_content=120403755&utm_medium=social&utm_source=twitter&hss_channel=w-27013292).

47 See S. Hsiang and others, 2020.

48 M. Morley, 2017, pp 553-558.

49 OSCE/ODIHR, Final Report, 'Local Elections in Ukraine 25 October and 15 November 2015', 2016, pp 5-6. Note that, on the contrary, elections in the midst of looming security threats were held in 2014 in Afghanistan under mitigation measures provided by increased presence of security forces in polling stations on election day. (OSCE/ODIHR, Final Report, 'Presidential and Provincial Council Elections in Afghanistan 5 April and 14 June 2014', 2014, pp 23-25). Likewise, numerous examples of countries affected by the displacement of voters due to security threats or natural disasters show that elections can be held under various mitigation measures that facilitate full participation of affected voters. See for example J. Grace, E. Mooney, 2007.

50 As of August 2020, Albania, Armenia, Estonia, Georgia, Latvia, Republic of Moldova, North Macedonia, Romania, San Marino, Serbia. Council of Europe Treaty Office, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms', 2020, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

51 As of August 2020, Colombia, Dominican Republic, Kyrgyzstan, Peru, Argentina, Armenia, Chile, Ecuador, El Salvador, Estonia, Ethiopia, Georgia, Guatemala, Latvia, Republic of Moldova, Romania, San Marino, State of Palestine, Thailand, Namibia, Paraguay, Senegal; UNTC, 2020.

52 Some countries, such as Romania, have annexed laws which provide from derogation from similar rights; See for further details P. Zghibarta, 'The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19', 2020, <https://www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/>.

53 UNTC, 2020.

Such derogations open room for states to counter the COVID-19 pandemic as well as, arguably, other crisis situations of a similar nature.<sup>54</sup>

25. Similarly, states have derogated from their international obligations in the face of military conflicts, terrorist threats and impacts of natural disasters. For example, in the backdrop of the conflict in the east of the country, Ukraine derogated in 2015 in the affected territories from the Articles 5, 6, 8 and 13 of the ECHR and Article 2 of Protocol No. 4 of ECHR (right to liberty and security, right to fair trial, right to privacy, right to effective remedy, right to freely move) as well as from Articles 9, 12, 14 and 17 of the ICCPR (right to liberty and security, right to liberty of movement, right to justice and a fair trial, right to privacy).<sup>55</sup> France derogated from the ECHR and the ICCPR in the wake of the Paris terrorist attacks in 2015.<sup>56</sup> Although there has never been derogation from the ECHR due to the situation of natural disaster, cases from around the world provide such examples like in Guatemala where in 2010 the government derogated from the Articles 12 and 21 of the ICCPR (freedoms of movement, freedom of assembly).<sup>57</sup>

26. In sum, especially at the height of the crisis situation, when the death toll during a pandemic is high and infections are rising or when security threats and the consequences of natural disasters are imminent, a temporary derogation from political rights and related freedoms in reliance on the respective treaty's emergency clauses may be justified in so far as this is required to fight the crisis. In fact, opinion is divided whether it is commendable that states derogate from their human rights obligations in times of emergency. Arguments in favour are the increased transparency and international scrutiny in view of states' reporting obligations under the respective paragraphs 3 of the Article 4 ICCPR and Article 15 ECHR. Opponents argue that, from an international human rights perspective, explicit derogations are not the best option since they limit the human rights monitoring institutions' (ECtHR, Human Rights Committee (HRC)) scrutiny of states' measures.<sup>58</sup>

### 3.2.2. Interferences as necessary in a democratic society

27. Indeed, an explicit derogation is not necessarily needed to justify interferences with the right to political participation and related freedoms.<sup>59</sup> A "flexibilization" of the right to political participation and related political freedoms is possible also in the framework of the respective provisions. All the above-mentioned rights – the rights to political participation, expression, assembly, (association), and movement – are relative rights whose enjoyment can be restricted under certain conditions: restrictions must be based on law, pursue a legitimate aim and be necessary in a democratic society. Some provisions explicitly refer to these conditions, such as Article 21 ICCPR or Articles 10 and 11 para 2 ECHR; others presuppose them implicitly, such as the right to political participation (Article 25 ICCPR; Article 3 of Protocol 1 to the ECHR) and the freedom of movement (Article 12 para 1 ICCPR; Article 2 of Protocol No 4 to the ECHR).

28. In light of a major crisis situation, to lawfully interfere with the respective political rights and freedoms, a state thus has to comply with the following conditions: The laws providing for the interference must be sufficiently clear and accessible to those concerned.<sup>60</sup> The measures (postponement of elections; restrictions of movement and assembly; mitigation measures on Election Day (see below, Part 4)) must pursue a legitimate aim (including public health or the protection of the

54 See Venice Commission, 2020, para 93.

55 CoE Treaty Office, Note verbale JJ7979C 2015, [http://www.rulac.org/assets/downloads/Ukraine\\_Derogation\\_ECHR.pdf](http://www.rulac.org/assets/downloads/Ukraine_Derogation_ECHR.pdf).

56 CoE, 'France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights', 2015, [https://www.coe.int/en/web/secretary-general/home/-/asset\\_publisher/oURUJmJo9jX9/content/france-informs-secretary-general-of-article-15-derogation-of-the-european-convention-on-human-rights](https://www.coe.int/en/web/secretary-general/home/-/asset_publisher/oURUJmJo9jX9/content/france-informs-secretary-general-of-article-15-derogation-of-the-european-convention-on-human-rights).

57 UNTC, 2020.

58 See for further reference respectively the Information Document of the Council of Europe Secretary General, 2020. There are, however divergent views: see for example A. Greene, 'States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic', 2020, <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>; For an overview see S. Molloy, 'Covid-19 and Derogations Before the European Court of Human Rights', 2020, <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/>. See also M. Scheinin, 'COVID-19 Symposium: To Derogate or Not to Derogate?', 2020, <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

59 See for example K. Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights', 2020, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>; See for a discussion also Martin Scheinin, 2020.

60 See respectively authoritatively, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights', 1984, paras 15-18 (esp. para 17: 'Legal rules limiting the exercise of human rights shall be clear and accessible to everyone').

rights (to life/health/security) of others); and they have to be necessary in a democratic society – *i.e.* they must be proportional.<sup>61</sup> On that basis, especially at the height of the crisis situation, certain interferences with the right to political participation and related political freedoms are arguably permissible.

### 3.3. Evaluation

29. A state's duty to protect the rights to life, health and security may allow for and even require limitations of the rights to political participation and related freedoms. This is amply shown by relevant examples. In terms of health emergencies, especially the rise of infections coinciding with the first round of local elections in France and the subsequent boost of the pandemic<sup>62</sup> showed the ever-present possibility that adopted measures may not be sufficient to protect the rights to life and health of a country's population. Likewise, the extensive physical damage due to the natural disaster in certain areas of New Orleans would have posed significant risks to the lives and health of voters and poll workers should elections be held despite the grave situation on the ground.<sup>63</sup> Finally, the security of voters was put in danger in Russia where voters, displaced by conflict in Chechnya, were required to return to their areas of origin to collect their voter certificates even though the territory remained unsafe due to the continuing hostilities.<sup>64</sup> Thus, as it is argued throughout this report and in line with international principles and good practices, an international human rights perspective gives room to states to lawfully restrict the right to political participation (and related political freedoms). Such restrictions may even be required in view of a state's duty to protect its population. At the same time, a framework is set for according derogations with conditions imposed on relevant state measures: most importantly, they have to be lawful and proportionate. On that basis, rather than to postpone the elections, a state may thus decide to conduct elections with according safeguards. A closer look at the different options seems warranted.

## 4. HOLDING ELECTIONS DURING MAJOR CRISIS SITUATIONS

30. When deciding to hold elections in times of a severe crisis, a state may apply mitigating measures to in-person voting in polling stations on Election Day as well as more generally during the whole electoral process. It may also rely on alternative voting methods to complement (or even replace) in person polling to minimise the risk the particular crisis entails. Eventually, when none of these two options or a combination thereof seems feasible or sufficient, domestic authorities may opt in favour of postponing elections as elaborated above.

31. In general, there are different options for mitigating measures or solutions to overcome some of the challenges posed by the crisis situation at hand. When it comes to a public health crisis such as the current COVID-19 pandemic, social distancing and hygienic measures are key especially on election day. In situations of natural disasters, the lack of physical access to polling stations needs to be rectified and the participation of persons displaced by the disaster be ensured, *e.g.* through remote voting. Finally, the security of election participants and the expression of their free will without intimidation must be ensured by the authorities when elections are held under the impression of security threats like terrorism or armed conflict.

32. In addition to mitigating measures also remote voting methods are an option. Depending on the situation at hand, they are a viable alternative or a complement to in-person voting. Postal and internet voting provide a possibility for voters to cast their vote remotely and thus avoid the risks entailed in the physical presence at the polling place. Alternatively, voting by mobile ballot box or by proxy offer another opportunity for voters to refrain from going to the polling stations and have instead poll workers coming to their homes or delegating their vote to selected representatives, respectively.

33. However, both, mitigating measures as well as alternative voting methods come at a price from the perspective of compliance with international electoral standards. They may also be difficult to be

61 For details on the balancing of rights and means, see O. De Schutter, 2010, p 314ff; See *e.g.* ECtHR where restrictions of movement were considered justified in light of a health emergency: *Directly interpreting restrictions of movement in the context of infectious diseases. Enhorn v Sweden* (ECHR, 25 January 2005) paras 43-45.

62 France Info, 2020; See also C. D Cotti and others, 'The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary', 2020, <https://www.nber.org/papers/w27187>.

63 The Wall Street Journal, 'Louisiana Seeks Funds to Reach Displaced Voters', 2005, <https://www.wsj.com/articles/SB112872930060863388>

64 E. Mooney, B. Jarrah, 2004, p 33.

implemented from the practical point of view, e.g. when they require amendments of the legal framework governing the elections which needs to be made sufficiently in advance or when the electoral infrastructure is destroyed by the crisis (the disaster/the conflict). Last but not least, funding, human resources etc. represent additional challenges. Therefore, as highlighted above, authorities may eventually take the decision to postpone elections when health risks are too high notwithstanding mitigating measures and/or remote voting methods in place. At the same time, none of the mitigating solutions may be sufficient or feasible in the required extent and the conduct of elections in line with international standards may not be guaranteed. When large portions of the electorate are likely to be *de facto* disenfranchised due to looming security or health threats or lack physical access to voting, domestic authorities may likewise opt for postponement. Before discussing relevant criteria for deciding between these options in Section 5, in the following, relevant mitigating measures (4.1) and alternative voting methods (4.2) are discussed.

#### 4.1. Mitigating measures

34. **Different mitigating measures/solutions for in-person elections** may be envisaged in accordance with the crisis situation at stake; be it a health emergency, a natural disaster or security issues. These will be discussed in turn.

##### a. *Public health crises/pandemics*

35. Various measures may be and have been envisaged to ensure the health of all participants during in-person elections to mitigate the risks which electoral activities entail.<sup>65</sup> Particularly necessary seems to be the prevention of overcrowding at all stages of the electoral process (polling and counting procedures; the election campaign; during the voter and candidate registration) and the provision of protective equipment to all participants.

36. Various countries have implemented according measures to **avoid or reduce crowding** during elections. For example, in the South Korean parliamentary elections, a comprehensive approach was adopted to reduce human-to-human contacts **on Election Day**: South Korean voters were encouraged to make use of in-person early voting options which were provided at any of the 3,500 polling stations nationwide. Along with early postal voting (see below) this helped to ensure that more than one fourth of all registered voters voted ahead of the Election Day.<sup>66</sup> The hours of voting or spreading out the turnout over more days; this has been envisaged by the Election Commission of Malaysia for the upcoming elections along with reducing the number of voters per polling station.<sup>67</sup> Likewise, establishing polling stations in bigger venues and limiting the number of persons present inside; or raising the overall number of polling stations have contributed to reduced crowding in and around polling stations on Election Day.<sup>68</sup> Another option is to introduce drive-in voting to avoid contact between voters and poll worker in the polling station.<sup>69</sup> Inside polling stations, markings and signs have been made to instruct voters to keep at least one-meter distance (preferably up to two meters) from each other (this was used, e.g., during the first round of local elections in France).<sup>70</sup>

37. Apart from polling procedures, restrictions were imposed for **campaign activities** as well to implement the required social distancing measures. For instance, in France, only campaign rallies with no more than one thousand persons attending were allowed.<sup>71</sup> In South Korea, most in-person election campaign activities were suspended and moved online, and also other remote, and more conventional,

65 In particular, this includes crowding and human-to-human contact which constitute a high risk of transmission of respiratory droplets among the crowd and/or people queuing. That can occur throughout different phases of the electoral process, such as campaign rallies, voter registration procedures, the training of electoral staff and observers and the administrative preparation of elections. However, the most critical phase are the polling procedures on election day. See C. D Cotti and others, 2020.

66 A. Spinelli, 'Managing Elections under the COVID-19 Pandemic: The Republic of Korea's Crucial Test', 2020, <https://www.idea.int/sites/default/files/publications/managing-elections-during-pandemic-republic-korea-crucial-test.pdf>.

67 International IDEA, 2020, *Featured case Malaysia*.

68 W. Fiddler, 'Voting in a Time of Pandemic: Why Shoal Lake 39 Felt Pressed to Hold an Election', 2020, <https://www.aptnnews.ca/national-news/voting-in-a-time-of-pandemic-why-shoal-lake-39-felt-pressed-to-hold-an-election/>.

69 Y. Dzhanova, 'States Are Taking Precautions to Keep Coronavirus from Disrupting Fall Elections', 2020, <https://www.cnbc.com/2020/05/10/coronavirus-states-take-precautions-to-prevent-disrupted-elections.html>.

70 Note, however, that the example of France has shown, that recommended (social distancing) measures may not always be sufficient to avoid transmission. F. Magnenou, 2020.

71 The Economist, 'France Suspends Local Elections Because of Covid-19', 2020, <https://www.economist.com/europe/2020/03/19/france-suspends-local-elections-because-of-covid-19>.

channels of reaching out to voters were used.<sup>72</sup> At times, however, election campaigning under such conditions seems to have resulted in an uneven playing field, as, e.g., noted by international observers during the pre-election period in Serbia where the incumbent enjoyed an advantage due to continued public appearances, often related to positive media coverage on government's handling of the pandemic situation, whereas campaign activities of opposition parties/candidates were reduced on grounds of general restrictions of political freedoms.<sup>73</sup>

38. Further measures in times of a pandemic may also be necessary for the procedures of **in-person voter registration and candidate nomination**. For the former, this may be the case especially in countries where active voter registration is in place or where voters' physical presence is necessary for certain registration procedures (e.g. the verification or correction of data entries in voter registers). Mitigation measures to reduce crowding at the registration office include, e.g., the assignation of scheduled timeslots for registration. The process of candidate nomination can be regulated in a similar manner. Also, both procedures can be, to a certain degree, conducted remotely.<sup>74</sup>

39. From the perspective of **hygienic and sanitary measures**, good practice indicates that wearing face masks and plastic gloves helps contain the transmission of the disease among those participating in elections. This was made mandatory in South Korea where widespread provisions were also implemented for the disinfection of voters' hands and polling station premises as well as objects frequently touched by voters. Further, voters in South Korea were temperature checked and those with higher temperature were sent to specially designated polling stations to be allowed to vote there which helped to ensure that the principle of universal suffrage was respected.<sup>75</sup> Observance of social distancing, hygienic/cough etiquette and handwashing among voters and poll workers can be encouraged by banners publicly displayed in and around polling stations (or across the country in general) and can be accompanied by a code of conduct providing for detailed instructions.<sup>76</sup> Voters may also be asked to bring their own pens to avoid transmission when signing the voter register as was the case in France.<sup>77</sup> In Serbia, voters were only encouraged, not obliged, to wear face masks when casting their ballot inside polling stations.<sup>78</sup>

40. Also for the **protection of poll workers**, a number of countries implemented strict measures, including personal protective equipment like face masks and plastic gloves which were made mandatory for polling staff as well as instructions to avoid touching the election materials (like voter IDs) and regular disinfections of places where voters pass. However, for example in Serbia, international observers noted that personal protective equipment was readily available but not used consistently.<sup>79</sup> In Serbia, infected voters in hospitals and quarantined at home were not allowed to vote but special polling stations were established in old age homes.<sup>80</sup> Regarding the training of electoral staff and election observers, virtual trainings may need to be developed and marketed as an alternative to in-person activities.

41. Indeed, adequate training and trust in their protection is crucial in times of a pandemic especially for poll workers. As was shown in the democratic primaries in the US State of Wisconsin, a lack of trust in measures protecting the health of poll workers may result in difficulties to fill needed vacancies in polling stations. As a consequence, only a fraction of polling stations could be opened which resulted

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72 A. Spinelli, 2020.

73 OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, 'Parliamentary Elections in Serbia 21 June 2020', 2020, pp 2-4, <https://www.osce.org/files/f/documents/8/e/455155.pdf>; See also M. Vasovic, 'Serbia's President Turned the Pandemic into a Tacky Campaign', 2020, <https://balkaninsight.com/2020/05/07/serbias-president-turned-the-pandemic-into-a-tacky-campaign/>.

74 See example of Iceland where presidential candidates collect electronic signatures to support their nomination in L. Kyzer, 'Six Candidates Running for President', 2020, <https://www.icelandreview.com/politics/six-candidates-running-for-president/>.

75 A. Spinelli, 2020, p 3.

76 Ibid.

77 Euronews, 'Record Low Turnout in French Municipal Elections amidst Coronavirus Fears', 2020, <https://www.euronews.com/2020/03/15/france-voters-take-to-the-polls-amid-coronavirus-fears>.

78 N1, 'Serbia's doctor: Voters should wear face masks at polling stations', 2020, <http://rs.n1info.com/English/NEWS/a610080/Epidemiologist-Voters-should-wear-face-masks-in-polling-stations.html>.

79 See OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, Parliamentary Elections in Serbia 21 June 2020, 2020, p 4; see also Reuters, 'Masked and Gloved: Israelis in Quarantine from Coronavirus Vote in Election', 2020, <https://www.reuters.com/article/us-israel-election-health-coronavirus/masked-and-gloved-israelis-in-quarantine-from-coronavirus-vote-in-election-idUSKBN20P1BZ>.

80 Juzne Vesti, 'Oboleli od korone i oni u izolaciji ne mogu da glasaju, biračima se preporučuje kraće zadržavanje i maska', 2020, <https://www.juznevesti.com/Drushtvo/Oboleli-od-korone-i-oni-u-izolaciji-ne-mogu-da-glasaju-biracima-se-preporucuje-krace-zadrzavanje-i-mask-a-sr.html>.



in the overcrowding of voters on election day and contributed to the spread of the disease.<sup>81</sup> High standards of protection need to be applied to other agents involved in elections, like election observers, media persons and others.

42. Lastly, specific measures are necessary for **vulnerable groups** (the elderly, people with health conditions and/or hospitalised persons etc.) through the provision of adequate options for polling and according voter information. To reduce the risk of infection, persons from these groups should be allowed and encouraged to vote through alternative voting methods even if the general population votes in-person. For example, in South Korea, home voting provisions for hospitalized people were extended which guaranteed the enfranchisement of vulnerable citizens. Hence, polling stations could be relocated from areas close to independent or assisted living facilities, retirement communities, and care centres to decrease the risk of transmission.<sup>82</sup> Alternatively, separate polling stations only for vulnerable groups could be established.

43. In sum, the conduct of electoral activities at different stages of the electoral cycle, and especially in-person voting on election day, has proved to be risky but feasible also in times of pandemic under the condition that adequate measures are implemented and thoroughly adhered to by voters and poll workers.

#### **b. Natural disasters**

44. In case of natural disasters, the **mitigating measures are closely aligned to the obstacles faced**. As highlighted above, the main challenges to elections in times of natural disasters are twofold: the (internal) displacement of the eligible population (Internally Displaced Persons, IDPs) and the destruction of election infrastructure due to which the general population is unable to vote. Measures implemented by states in order to address challenges stemming from natural disasters thus usually revolve around overcoming various obstacles of legal, administrative and practical origin that often prevent the eligible population from voting. They relate to various dimensions of the electoral process. For broader context, the Congress addressed the issue of voting rights of IDPs in the 2018 report entitled '**Voting rights at local level as an element of successful long-term integration of migrants and IDPs in Europe's municipalities and regions**'.

45. Mitigating measures need first to be adopted in case of **lacking documentation**. Indeed, the lack of documentation that proves the identity of a person, including citizenship, residence and other details is often a problem for IDPs who have lost their belongings in the course of displacement. As a result, IDPs fail to provide evidence of their eligibility to register and vote, leading to their disenfranchisement.<sup>83</sup> Relevant mitigation measures thus require that these voters are provided with replacement documentation such as IDP certificates or regular ID cards that can be used for voter registration. These should be easily obtainable for them, meaning that administration should not be overly burdensome and practicalities such as travelling long distance or to unsafe areas should not be a major obstacle for IDPs. Changes of domestic legislation and administrative procedures may be required accordingly.<sup>84</sup>

46. Relevant mitigating measures need also to address restrictive residency requirements. Indeed, such **restrictive residency requirements** linking the exercise of electoral rights strictly to the place of voter's residence prior to displacement can be another obstacle to participation in the electoral process in case of natural disasters. Since most IDPs are displaced outside their regular electoral constituency, they cannot comply with the general rule that voters are registered in the constituency of their permanent residence, especially regarding local elections. Various examples evidence the problems faced. As was the case in Azerbaijan, it may be forbidden by law to change permanent residence and voting address without prior authorisation from administrative authorities. Even if possible, the administrative act may require excessive paperwork and bear significant costs and other obstacles.<sup>85</sup> In Armenia, only property owners or their relatives could register residence while others could do so only upon written notice by the owner notarised by a lawyer. Without registered residency, IDPs were not permitted to vote in the

81 Politico, 'Wisconsin Health Department: 36 People Positive for Coronavirus after Primary Vote', 2020, <https://www.politico.com/news/2020/04/27/wisconsin-tested-positive-coronavirus-election-211495>.

82 Centers for Disease Control and Prevention, 'Recommendations for Election Polling Locations', 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

83 J. Grace, E. Mooney, 2007.

84 UNHCR, 2009.

85 IFES, 'Internally Displaced Persons and Electoral Participation: A Brief Overview', 2016, p 8, <https://www.ifes.org/sites/default/files/idps-electoral-participation-october-2016.pdf>.

area of their actual residence.<sup>86</sup> A further problem arises when the change of residency has unreasonable consequences such as the loss of humanitarian assistance or creates obstacles to return.<sup>87</sup> To address these challenges, relevant mitigation measures include a reform of the domestic legal framework and administrative procedures to enable IDPs to register and vote in the area of displacement, without facing any adverse consequences. Absentee registration and voting arrangements should be established for IDPs to enable them to participate in elections in their area of origin while they are displaced.<sup>88</sup> This would also allow for participation in case of natural disasters.

47. **Voter education of IDPs** is another means of mitigation in case of natural disasters. Indeed, the lack of adequate information about voting modalities for IDPs and insufficient efforts in voter education and general campaigning towards IDPs represent another challenge to the participation of displaced voters in the electoral process. Confusing and late instructions provided by authorities or a lack of any instructions on registration and polling procedures can lead to low electoral turnout among IDPs and need to be addressed accordingly. Therefore, relevant mitigation measures may include targeted public information and outreach campaigns by the authorities in order to inform displaced voters well in advance about existing registration and voting arrangements in a language they understand. Also, political actors should be encouraged to reach out to IDPs during the campaign period.

48. Lastly, measures need to address the **limited physical access** of voters to registration centres and polling stations in the aftermath of a natural disaster and the ensuing destruction of physical infrastructure. Long distances, lack of safe and affordable transport, insecurity on the ground, inadequate voting arrangements and an insufficient number of polling stations because of damaged election infrastructure may be limiting factors for the electoral participation of especially women, older persons and persons with disabilities.<sup>89</sup> Relevant mitigation measures should attempt to tackle these issues. Still, one has to acknowledge that it may not always be possible to hold in-person elections in the aftermath of a natural disaster. For example, in the 2005 New Orleans local elections after hurricane Katrina, the level of destruction immediately before election day was so significant that in-person voting was abandoned and remote voting measures were implemented instead (see below).<sup>90</sup> In any case, should elections be held in a situation of natural disaster, significant efforts need to be made to make election administration fully operational and to ensure that safe, accessible and affordable transportation to and from polling stations as well as safe voting on the ground is available for displaced and other voters. For this purpose, efforts may need to be made to repair critical road infrastructure or to establish possible alternatives to make access to polling stations possible.<sup>91</sup>

49. Some of the proposed mitigating measures may however compromise the integrity of the electoral process, leading for example to voter impersonation due to relaxed provisions of voter identification or multiple voting by a single voter in different constituencies due to changes in the voting address. Relevant mitigation measures need to be carefully considered as regards their potentially detrimental impact on the integrity of the electoral process.

### **c. Security threats**

50. To an extent, organising elections under security threats (e.g. by armed groups or in case of conflict and unrest or in the wake of a terrorist attack) has similar challenges as holding elections in situations of natural disaster. Similar mitigating measures may be required accordingly as regards lacking documentation, restrictive residency requirements, voter education and limited physical access to voting. The similarity is due to the displacement of persons that both situations tend to generate. Moreover, armed conflicts may also result in the displacement of people outside the country (*i.e.* political refugees) seeking to avoid entanglement between warring parties or domestic persecution.<sup>92</sup> This happened for example in post-war Bosnia and Herzegovina where a number of refugees were allowed

86 OSCE/ODIHR Election Observation Mission Final Report, 'Parliamentary Election, Republic of Armenia, 30 May 1999', 1999, p 13.

87 OSCE/ODIHR Election Observation Mission Final Report, 'Parliamentary Elections, Republic of Georgia, 31 October and 14 November 1999', 2000, pp 14, 16, 22.

88 UNHCR, 2009.

89 J. Grace, E. Mooney, 2007.

90 Ibid.

91 UNHCR, 2009.

92 ICRC, 'Displacement in times of armed conflict: How international humanitarian law protects in war and why it matters', <https://www.icrc.org/en/document/ihl-displacement>.

to vote from abroad (see below).<sup>93</sup> In addition to relevant mitigation measures addressing the abovementioned legal, administrative and practical obstacles that voters are exposed to (no matter if they are displaced or not); further measures to mitigate the risk of pressure and intimidation by armed groups or insecure access to the polling station are needed when, e.g., a terrorist threat is imminent. A category *per se* are cases of internal political instability and imposed state-of-emergency measures affecting voting procedures. Mitigating measures are required accordingly (see below).

51. Political pressure and **voter intimidation** by armed groups imposed on voters during armed conflicts or communal tensions represent a major threat to the exercise of the right to political participation. These risks need to be mitigated at different stages of the electoral process, from voter registration, to obtaining the necessary identity documentation, through to the casting of ballots and even the arrival of elected officials to assume their duties of office.<sup>94</sup> In general, to mitigate such risks, an increased presence of security units throughout the electoral process may be needed. Such forces should be adequately trained to provide protection against pressure and avoid the intimidation to voters. They should also be composed of both, men and women, and, if applicable, also integrate members of minorities. This contributes to their legitimacy and furthers the trust of voters and poll workers. In any case, safeguards must be in place to ensure that the security forces which are deployed on Election Day do not interfere with the electoral process and limit their activities strictly to protecting election participants from possible pressure and the intimidation by armed groups.<sup>95</sup> Importantly, elections can only be free, fair and legitimate if voters can participate without fear of risk, intimidation or harm. Relevant mitigating measure are necessary to address this.

52. Also, mitigation measures need to address further related risks. Namely, the risks posed by the **insecurity in accessing polling procedures** during a violent conflict, armed tensions or an imminent terrorist attack. Under such circumstances, states should set some minimum conditions for voters to access polling procedures in order to ensure that they can exercise their right to vote freely and without the risk of physical harm or fear thereof. Security on the way to and at polling stations should be enhanced, including by ensuring that adequate numbers of trained security officers are deployed as described in the case of pressure and intimidation above.<sup>96</sup> Alternative absentee arrangements can be made such as in-person voting in another location from the home constituency or postal voting (see below).<sup>97</sup> When a terrorist attack occurs during or immediately before Election Day, it will likely damage the polling place or render it a crime scene, thereby making it unavailable for voting. In response, election officials could attempt to redirect voters to a nearby replacement polling station.<sup>98</sup> In any case, voters assigned to any polling location that election officials shut down due to a terrorist attack, whether because the polling location is the site of the attack or as a precautionary measure, should be entitled to an adequate alternate means of voting before the polls close.<sup>99</sup>

53. Finally, mitigating measures need to address situations of **internal political instability** induced, for example, by an attempted coup. These pose very specific security threats to the holding of elections and are likely to lead to their postponement. If elections are held nevertheless, the major obstacle to elections in these situations will be the possible instability of state institutions and the danger of infiltrations and fights between supporters and challengers of the regime. Immediate state action to counter undemocratic attempts to disrupt legitimate government and ensure orderly conduct of elections may require detainment and criminal prosecution of suspected perpetrators<sup>100</sup> as well as ensuring that voters can access polling procedures and vote without physical harm and intimidation (see above). However, practice has shown that implementation of such measures under these circumstances often leads to the curtailment of civil and political rights which is, in turn, incompatible with democratic elections.<sup>101</sup>

93 S. Bagshaw, 'Internally Displaced Persons and Political Participation: The OSCE Region, The Brookings Institution Project on Internal Displacement', 2000, p 8.

94 J. Grace, E. Mooney, 2007.

95 Ibid.

96 UNHCR, 2009.

97 IFES, 2016, p 12.

98 Note, however, that even if other polling places are operational and available for voters from places targeted by terrorist attacks, voters may reasonably prefer to abstain from voting for fears of follow-up attacks.

99 M. Morley, 2018, p 597.

100 See Venice Commission, 'Opinion On the Protection of Human Rights in Emergency Situations', 2006, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)015-e).

101 See above the case of Turkey in Part 2; For further reference see OSCE/ODIHR, Final Report, 'Constitutional Referendum in Turkey 16 April 2017', 2017, <https://www.osce.org/files/f/documents/6/2/324816.pdf>; See also PACE, 'The functioning of democratic institutions in Turkey', 2017, <http://semantic->

54. Overall, a variety of mitigation measures may be adopted to enable elections also in major crisis situations. Still, the mentioned mitigation measures may not be sufficient for all domestic situations. Thus, it may likewise become necessary to (additionally) rely on alternative voting methods.<sup>102</sup> These will be discussed next.

#### 4.2. Alternative voting methods

55. Especially the current COVID-19 pandemic has (re-)opened the debate about alternative methods to complement (or even replace) traditional in-person voting in order to avoid human-to-human contact amongst voters and poll workers on Election Day while maintaining voter turnout. Alternative voting methods include sending the ballot by post (also called: postal voting, mail-in ballot), casting the vote online through a computer or mobile phone application (also referred to as: electronic voting, e-voting, internet voting, online voting), or by means of voting by proxy or by mobile ballot box. These methods allow voters to cast their ballots either remotely or by involving other persons; some of them can be utilised to expand early voting provisions. In the face of the current pandemic, a growing number of states have provided for alternative/remote voting or is considering doing so in the upcoming elections in 2020 or 2021.<sup>103</sup> Earlier, alternative voting methods have played a role in enfranchising voters displaced by conflict or natural disasters or served generally as an alternative for voters during extraordinary situations.<sup>104</sup> Remote voting can also be used locally when in-person voting is not possible in certain areas, e.g. in case of a localised natural disaster. However, their use remains limited during large-scale natural disasters or dire consequences of armed conflicts when infrastructure (roads, services etc.) breaks down. Therefore, the use of these methods remains situation-specific and depends on the factors elaborated below.

56. **Postal voting** has become one of the most discussed options to replace/complement in-person voting especially during the COVID-19 pandemic. In some states, postal voting has been introduced for this purpose, mostly where such provision had already been provided for in the legal framework, for example for out-of-country voters, for voters with disabilities, for voters in hospitals and prisons or as a general option of voting when certain conditions are met (e.g. early registration or provision of a specific reason). Postal voting was successfully used for the regional elections in the federal state of Bavaria in Germany as well as in South Korea where provisions were made for early voting by postal ballot. In Bavaria, local elections were held amid the COVID-19 pandemic, with voters being free to decide to vote in-person or by post in the first round and voting by all-postal vote in the second round where the sanitary situation had deteriorated.<sup>105</sup> The considerable success, demonstrated by high electoral turnout, is also due to Bavaria's previous long-standing experience with postal voting which is considered trustworthy amongst voters, many of whom have grown accustomed to voting in this manner.<sup>106</sup> Further, postal voting was used in Bosnia and Herzegovina to enfranchise refugees who

[pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbncvbnceG1sL1hSZWYvWDJlURXLWV4dHluYXNwP2ZpbGVpZD0yMzU2NiZsYW5nPUVO&xsl=aHR0cDovL3NiYWVudGlicGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwYUERGlnhzbA==&xsltparams=ZmlsZWlkPTIzNTY2](https://pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbncvbnceG1sL1hSZWYvWDJlURXLWV4dHluYXNwP2ZpbGVpZD0yMzU2NiZsYW5nPUVO&xsl=aHR0cDovL3NiYWVudGlicGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwYUERGlnhzbA==&xsltparams=ZmlsZWlkPTIzNTY2)

<sup>102</sup> Even the postponement of elections may be called for. See below, Part 5 for according parameters of assessment.

<sup>103</sup> Postal voting has been implemented in Bavaria, South Korea, Geneva and in a number of US primary elections this year. Likewise, a large number of US states consider that subnational elections will be held through postal voting as well as this option is foreseen for the upcoming elections in Australia and New Zealand. For updated info see International IDEA, 2020. Postal voting was also introduced in Poland, though in a lesser degree than had been initially planned, see updated info in N. Kalandadze, 'Switching to All-Postal Voting in Times of Public Health Crises', 2020, <https://www.idea.int/news-media/news/switching-all-postal-voting-times-public-health-crises-lessons-poland>. In addition, note that postal voting has long been in use in several established democracies in Europe, e.g., Germany, Ireland, Spain, Switzerland and, for voters abroad, e.g. in the Netherlands, Norway, Sweden, but also in Hungary. It was also used, for example, in Bosnia and Herzegovina and Kosovo in order to ensure maximum inclusiveness of the election process. For an overview of states' practices and their compatibility with international standards see Venice Commission, 'Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe', 2004, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2004\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)012-e).

<sup>104</sup> As mentioned above, this includes primarily postal voting, e.g. in post-war local elections in Bosnia and Herzegovina for voters displaced abroad from the city of Mostar; in local elections in the US for voters in New Orleans in the aftermath of hurricane Katrina, as well as in several other countries where postal voting is accessible for voters upon request in situation like sickness, elderly voters, persons with disabilities or voters abroad as used to be the case in Germany where, however, postal voting provisions were made universal as is the case in a number of European countries (e.g. Austria, Finland).

<sup>105</sup> Euronews, 2020; See also that in the Indian state of Bihar, postal voting will be allowed for voters infected with COVID-19. R. Chopra, 'Bihar on its mind, Election Commission to allow postal ballots for Covid-affected', 2020, <https://indianexpress.com/article/india/bihar-polls-ec-covid-patients-postal-ballots-6471458/>.

<sup>106</sup> Voting by post has long been an option for registered voters in Bavaria without providing a specific reason and accessible also for those temporarily abroad. Thus, existing legal provisions and procedures in place to deliver, collect and process the ballots resulted in voters' confidence in the process demonstrated by higher voter turnout than during the previous local elections despite the pandemic.

had fled from the country due to conflict and could not vote otherwise in the 1996 local elections in Mostar; conversely postal voting was not made possible for IDPs who remained in the country.<sup>107</sup> Less successfully was the postal voting used during the local elections in New Orleans (US State of Louisiana) in the aftermath of the hurricane Katrina where a number of voters could not access polling stations and vote in person: Besides overly cumbersome postal voting procedures and a lack of voter information provided by authorities, the postal ballots were also delivered late or not at all. As a result, many voters remained disenfranchised, especially those from disadvantaged communities.<sup>108</sup>

57. Unlike traditional paper-based methods, **new voting technologies (NVTs)** provide electronic means to cast and count votes, using information and communications technologies.<sup>109</sup> Perhaps the most commonly known NVT which regained prominence in debates especially during the COVID-19 pandemic is **internet voting**. However, contrary to postal voting, nearly no country has ever employed internet voting in response to a major crisis situation. In fact, only a handful of countries in the world rely on internet voting regularly while several others have tested this method but later returned to traditional voting.<sup>110</sup> A relatively recent exception to the most limited use of internet voting in crisis situations were elections in New Jersey where in the aftermath of superstorm Sandy in 2012 voters were allowed to vote via e-mail and fax. This was however broadly criticised by experts for lacking safeguards to ensure the secrecy of the vote and to prevent voter impersonation.<sup>111</sup> Due to the high levels of planning, preparation and testing needed, it is unlikely that countries which do not already have the systems in place would be able to introduce NVTs, and in particular internet voting, as an immediate response to a crisis situation like pandemics, natural disasters or security threats.

58. Two more traditional methods that have been considered or have been used in times of crisis are proxy voting and voting by mobile ballot box. **Proxy voting** is a form of voting whereby a registered voter may delegate his or her voting power to a representative, to enable a vote in absence. Proxy voting can, under certain conditions,<sup>112</sup> offer a further option especially for vulnerable groups to participate in an election without being required to visit a polling station. For instance, proxy voting is in use in France where voters normally have to apply for permission personally, but due to the COVID-19 crisis certain groups of voters could request that a policeman come to their home to assess the application in advance. The exception was granted to persons in quarantine or confined due to illness, to those who could not move due to a disease or disability, and to persons living in retirement facilities.<sup>113</sup> In general terms, voting by proxy in a crisis situation is possible in countries where this option is provided by law. For instance, proxy voting is widely used in the Netherlands where this practice has a long-standing tradition, however not without criticism as was pronounced in the Congress report on the 2018 Dutch local elections.<sup>114</sup> Also, in the United Kingdom a provision exists for “emergency proxy for an election” for those voters who are prevented from voting for unexpected circumstances and can apply for this after the deadline for regular proxy voting upon a confirmation.<sup>115</sup>

59. Voting by **mobile ballot**, on the contrary, entails poll workers bringing the ballot box to a voters address. This method is often used in elections to allow voters to cast their ballot who cannot come to the polling station due to their impaired mobility. In times of major crisis such as a pandemic, the use of mobile ballot boxes could be expanded to a wider group of voters, e.g., voters infected with COVID-19 or voters of risk groups. In any case, high standards of protection must be applied when poll workers deliver the mobile ballot box to the voter. For example, this method is considered for older voters, voters with medical conditions, voters in rest homes and hospitals and for prisoners in the upcoming general elections in New Zealand.<sup>116</sup> In the 2000 presidential elections in Georgia, mobile ballot boxes were

107 J. Grace, E. Mooney, 2007, p 12.

108 Ibid.

109 See for example Venice Commission, Collection of reports Using New Technologies in Electoral Process, An online meeting held on 21 July 2020.

110 Estonia, some cantons in Switzerland, tested e.g. in Norway.

111 Los Angeles Times, 'Voting rights coalition describes problems in N.J., other states', 2012, <https://www.latimes.com/politics/la-xpm-2012-nov-06-la-pn-voting-rights-problems-election-day-20121106-story.html>.

112 Strict rules should apply to prevent electoral fraud. See Venice Commission, 'Code of Good Practice in Electoral Matters', 2002, I.3.2.v, <https://rm.coe.int/090000168092af01>.

113 IFES, 'Elections Held and Mitigating Measures Taken During COVID-19', 2020, [https://www.ifes.org/sites/default/files/elections\\_held\\_and\\_mitigating\\_measures\\_taken\\_during\\_covid-19.pdf](https://www.ifes.org/sites/default/files/elections_held_and_mitigating_measures_taken_during_covid-19.pdf).

114 Congress, 'Information report on municipal elections in the Netherlands (21 March 2018)', 2018, p 7, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016808e4a9d>.

115 London Borough of Hounslow, 'Voting by proxy', 2020, [https://www.hounslow.gov.uk/info/20043/elections\\_and\\_voting/1262/voting\\_by\\_proxy/3](https://www.hounslow.gov.uk/info/20043/elections_and_voting/1262/voting_by_proxy/3).

116 New Zealand Electoral Commission, '2020 General Election COVID-19 and the 2020 General Election', 2020, <https://vote.nz/elections-and-more/all-events/2020/2020-general-election/covid-19-and-the-2020-general-election/>.

placed close to the line which determined the border between Georgia and separatist Abkhazia to give an opportunity to vote to those who remained displaced after the conflict.<sup>117</sup>

60. To conclude, alternative/remote voting methods broaden the range of options a state has when holding elections in times of major crisis. At the same time, though, these methods have rarely been used exclusively to replace in-person voting. This is for a variety of reasons, including most importantly the practical and legal feasibility of employing alternative voting methods shortly before elections as well as the weaker guarantees for safeguarding the integrity of elections, most importantly the secrecy of the vote.<sup>118</sup> From the practical feasibility point of view, the implementation of alternative voting methods is arguably less difficult when the physical infrastructure in the country is intact and security conditions are under the control of the government (*i.e.* in situations of public health emergencies). In any case, alternative voting methods seem suitable to complement rather than replace traditional voting, also in times of crisis.<sup>119</sup>

### Excursus 1: international observation of elections held in major crisis situations

61. The **physical deployment of election observers** will generally be very difficult, if not impossible, when elections are held in major crisis situations. Threats to life, health and security of observers are simply too huge and practical feasibility of deploying a mission may be insurmountable. At the same time, it may be necessary to have certain international observation for the sake of the integrity of the electoral process.<sup>120</sup> Thus, during the ongoing COVID-19 pandemic, limited election observation missions under tightened security measures have been deployed, as of September 2020, to Serbia, Croatia, North Macedonia, Poland and Montenegro.<sup>121</sup> In the past, election observation missions have been deployed in volatile security environments, for example in Afghanistan, Pakistan and Iraq.<sup>122</sup>

62. Default options and **alternative strategies** may be necessary in case that physical presence of observers in the country is not possible, including remote meetings with key stakeholders (e.g. the Central Election Commission, candidates, political parties, domestic observers, civil society, domestic observers, the media), co-operation with domestic NGOs and international partners who are in the country on election day to allow for some physical observation of the electoral process. While such alternative strategies obviously cannot replace the deployment of an election observation mission, it at least allows for remote presence, some degree of observation, maintains a platform for the dialogue with local authorities/stakeholders and therefore should have some beneficial effects as regards the integrity of the electoral process even when done remotely.

63. **Physical presence of an election observation mission in a limited format** will be conditioned by various factors. In the first place, travel restrictions may be in place that do not allow international observers to come to the country or allow only certain nationals to do so, thus limiting the composition

117 OSCE/ODIHR, Final Report, 'Presidential Election in Georgia 9 April 2000', 2000, <https://www.osce.org/files/f/documents/1/2/15579.pdf>.

118 However, despite these risks and challenges, there is a growing acceptance of these methods as alternatives to in-person voting under conditions defined by international standards. Venice Commission, 2002, I.3.2; as well as other provisions of the Code.

119 It was held that, in light of international good practice, in-person voting should always be possible and available to voters when they preferred. Venice Commission, 2002, II.2.b.

120 See respectively excerpts of the Preamble of the 2005 Declaration of Principles for International Election Observation: "International election observation expresses the interest of the international community in the achievement of democratic elections, as part of democratic development, including respect for human rights and the rule of law. ... International election observation has the potential to enhance the integrity of election processes, by deterring and exposing irregularities and fraud and by providing recommendations for improving electoral processes. It can promote public confidence, as warranted, promote electoral participation and mitigate the potential for election-related conflict. It also serves to enhance international understanding through the sharing of experiences and information about democratic development...".

121 OSCE/ODIHR, 'Elections in 2020', <https://www.osce.org/odihr/elections/2020>. Note that most of these missions were composed only of the core team of experts and no systematic observation of Election Day was conducted. However, for example during the recent parliamentary elections in Montenegro, also long-term observers were deployed to observe the electoral process in the regions. Additionally, note that at some of these missions, for example in the presidential elections in Poland, observers from the Parliamentary Assembly of the Council of Europe were present. CoE PACE, 'PACE to assess the Presidential election in Poland', <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7932&lang=2>. Reportedly, social distancing measures were observed during meetings with interlocutors and personal protective equipment like face masks was used.

122 OSCE/ODIHR, 'Elections in Afghanistan', <https://www.osce.org/odihr/elections/afghanistan>; EU EODS, 'EOM Reports', <http://www.eods.eu/eom-reports/>.

of a mission.<sup>123</sup> Second, international observers may be required upon the arrival in the country to stay in quarantine or take a test when a public health crisis such as the current COVID-19 pandemic is ongoing. Here, the latter is naturally the only possible option and it is up to the inviting state's authorities to facilitate solutions that are conducive to the conduct of observation activities. Third, the personal composition of the mission needs to be adjusted to the crisis situation at hand. For example, during the current COVID-19 pandemic or in insecure environments, it is not recommended for persons from vulnerable groups to participate in missions due to age limitations or health risks.<sup>124</sup> Further, social distancing should be adhered to both during meetings with interlocutors and on the Election Day and personal protective equipment like face masks should be provided and used. In any case, the number of observers on the ground should be limited.<sup>125</sup>

64. Observing elections in times of major crisis entails a number of technical difficulties, regardless of whether observation activities are conducted in person or remotely. Often, transparency of electoral processes is significantly reduced due to the contingencies of the crisis at hand. Similarly, deadlines may be shortened and decisions taken by authorities affecting the process may be made abruptly without due deliberation. Possible impacts on state-of-emergency measures on observation activities if effective, need to be also taken into consideration.<sup>126</sup> When alternative voting provisions like remote voting or early voting are in place, observation activities need to be adjusted accordingly to follow these processes.<sup>127</sup> Remote analysis may need to be necessary in some cases.<sup>128</sup> In case of pandemic or insecurity, some areas within the country may not be accessible due to increased risk of infections or injuries. Whereas meetings with key stakeholders in the relatively secure environment of the capital may be feasible, observations throughout the country on Election Day is likely to be very limited. Therefore, cooperation with partners from other international organisations and domestic election observers can provide an opportunity to follow the course of Election Day as well as developments in the pre-election period in the country.

## **Excursus 2: considerations in relation to the postponement of elections**

65. Postponement of elections often comes with various impacts on the regulatory framework governing elections. This includes practical considerations regarding, for example, the setting of different legal timeframes/deadlines, the registration of voters and candidates, the determination of the duration of campaign and monitoring of campaign finance, and the procedures for election dispute resolution. Importantly, different situations need to be distinguished. Elections can be cancelled, meaning that electoral processes like voter and candidate registration are discontinued and a new process is launched from the scratch for the new election. Alternatively, elections can be also delayed/postponed, meaning that ongoing electoral processes and their timeframes are suspended and restored once the postponed election is announced/held.<sup>129</sup> A variant of the latter is the postponement of merely the second round of elections.<sup>130</sup>

66. The difference is however not always clear like, for example, in the 2020 postponed presidential elections in Poland where the elections were held only *de jure* but no voting took place on the Election Day until new elections were announced and held almost two months later.<sup>131</sup> In terms of particular impacts of election postponements, after the 2020 postponed elections in Poland, it was criticised that legal amendments to the electoral law adopted between the originally scheduled and the postponed election jeopardised the stability and clarity of the election legislation and had practical implications for

123 World Politics Review, 'How Election Observers Are Adapting to COVID-19', 2020, <https://www.worldpoliticsreview.com/trend-lines/28902/how-election-observers-are-adapting-to-covid-19>.

124 EFOR Policy Brief no. 89, Planning election observation during the COVID-19 pandemic, 2020, <https://expertforum.ro/en/files/2020/08/PB-89-observation.pdf>.

125 Ibid.

126 Global Network of Domestic Election Monitors, 'Guidance on Election Monitoring During the COVID-19 Pandemic', 2020, <https://gndem.org/stories/guidance-on-election-monitoring-during-the-covid-19-pandemic/>.

127 Ibid.

128 World Politics Review, 'How Election Observers Are Adapting to COVID-19', 2020.

129 IFES, 'Legal Considerations When Delaying or Adapting Elections', 2020, [https://www.ifes.org/sites/default/files/ifes\\_covid-19\\_briefing\\_series\\_legal\\_considerations\\_when\\_delaying\\_or\\_adapting\\_elections\\_june\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid-19_briefing_series_legal_considerations_when_delaying_or_adapting_elections_june_2020.pdf).

130 In case of the latter, most probably, no alteration/update concerning voter and candidate registration is necessary with respect to the postponement. In line with the general rule, the voter register needs to be updated between the rounds with regard to recently deceased voters, those who turned 18 years of age, and citizens who changed residence, if relevant for voting (e.g. local elections). Venice Commission, 2002, I.1.2.vi.

131 OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, 'Republic of Poland – Presidential Election, 28 June 2020', 2020, p 1, <https://www.osce.org/files/f/documents/4/9/455728.pdf>.

candidate registration, campaigning and campaign finance, voting methods, and resolution of election disputes.<sup>132</sup>

67. In this regard, it is essential that any changes made between the two election dates do not, or to the most minimal extent possible, interfere with the fundamental principles of democratic elections, namely the universal, free, equal and secret suffrage.<sup>133</sup> This includes preserving an equal level playing field among contestants, most importantly refraining from abusing the postponement of elections as a means of giving an advantage to the incumbent. In practical terms, the length of time between originally scheduled and postponed elections is an important factor. The shorter the gap between the originally scheduled and the postponed election is, the less impact may be expected due to discontinuation of the electoral processes. When only the second round is postponed, generally, no issues should arise in terms of voter or candidate registration, except for regular situations like updating the voter register between rounds in terms of deleting deceased voters, adding voters who reached voting age and reflecting changes in residency of voters where relevant.<sup>134</sup> In any case, decisions should be transparent, consultative and inclusive both on the legal and procedural level and legal certainty along with stability must be preserved.<sup>135</sup>

68. In particular, as regards voter registration, the process of registering voters should be re-started when elections are postponed to duly update electoral registers and, most importantly, achieve enfranchisement of newly eligible voters as was the case in 2020 local elections in Spain where elections were postponed in two regions due to the outbreak of the pandemic.<sup>136</sup> Likewise, sufficient deadlines should be provided for candidates to re-register, if required, for the postponed election and existing requirements for collection of signatures should be adjusted accordingly. For example, in Poland, candidates registered for the originally scheduled elections were re-registered upon request.<sup>137</sup> In Romania, candidates for the postponed 2020 local elections were allowed to register with half the number of support signatures previously required.<sup>138</sup>

69. With regards to the regulation of an election campaign, the preservation of the equal level playing field and of legal certainty is essential. An illustrative example is Poland where the regulation of election campaigning suffered from uncertain legal grounds and campaigning and campaign finance were in a legal limbo during the period between the *de facto* cancelled elections of 10 May and the date of passing a new law on postponing elections on 2 June.<sup>139</sup> On a positive note, the new law established updated ceilings for campaign spending limit, allowing additional fifty per cent of the original ceiling for candidates registered for the original date of elections and allowing the same ceiling of fifty per cent for the newly registered candidates, taking into account the shorter duration of the election campaign between the cancelled and the newly announced elections.<sup>140</sup> Finally, deadlines in election dispute resolution should not be negatively affected by election postponement.<sup>141</sup>

### 4.3. Evaluation

70. Clearly, the conduct of elections is not easy in times of major crisis but should not be considered as impossible with adequate measures to protect the life, health and security of voters, the electoral staff and of observers.<sup>142</sup> In principle, the latter considerations can be balanced with safeguarding the integrity and the principles of free and fair elections. It may however come at a considerable cost and require according trade-offs.

132 Ibid; OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, 'Republic of Poland – Presidential Election, Second Round 12 July 2020', 2020, [https://www.osce.org/files/f/documents/9/e/457210\\_0.pdf](https://www.osce.org/files/f/documents/9/e/457210_0.pdf).

133 Venice Commission, 2002.

134 Venice Commission, 2002, I.1.2.vi.

135 Venice Commission, 2002.

136 IFES, 2020, p 17.

137 OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, 'Republic of Poland – Presidential Election, 28 June 2020', 2020, p 2.

138 IFES, 'Legal Considerations When Delaying or Adapting Elections', 2020, p 17.

139 OSCE/ODIHR, Statement of Preliminary Findings and Conclusions, 'Republic of Poland – Presidential Election, 28 June 2020', 2020, p 3.

140 Ibid.

141 Ibid, p 4.

142 See for example M. Maley, 'Electoral Management Under Covid-19, 2020, University of Melbourne', [https://law.unimelb.edu.au/data/assets/pdf\\_file/0003/3393066/WP71\\_Maley.pdf](https://law.unimelb.edu.au/data/assets/pdf_file/0003/3393066/WP71_Maley.pdf).



71. Hence, states are usually faced with the possibly difficult choice of postponing or rather holding elections: the question to be asked accordingly is how to strike the “ideal” balance between the necessary protection of the rights to life/health/security and the obligation to realise the right to political participation by holding elections?

## 5. PARAMETERS ON WHETHER TO HOLD OR TO POSTPONE ELECTIONS

72. As regards the decision whether to hold or rather postpone elections, an international human rights and best practices perspective offers guidance and puts limits to state action; e.g. an election cannot be postponed indeterminately. Within this frame set by international human rights law, it will be up to a state to decide in accordance with the domestic situation whether to hold an election notwithstanding the crisis situation and implement according mitigation measures (including increased/exclusive reliance on alternative voting methods) or rather postpone the election. What parameters can be drawn upon by a state for guidance when faced with this difficult decision?

73. Various parameters come to mind. They include, perhaps most importantly, the **extent of the crisis situation**. For example, in case of health emergencies, this includes the **spread/intensity of the pandemic**. According criteria can be the curve of infections, the reproduction factor (R below or over 1), the number of hospitalised persons, the number of persons in intensive care, the capacities of a state's hospitals etc. On the basis of these data, in consultation with national health authorities, a state will have to assess the probability/extent to which the holding of elections (with according mitigation measures) may contribute to a further spread of the disease. Can the health-risk for electoral officials and voters be reasonably reduced through the adoption of mitigation measures?<sup>143</sup> For example, the local elections in England were postponed for a year due to the outbreak of pandemic.<sup>144</sup> On the contrary, authorities in Romania decided, after an initial postponement, to hold local elections in September 2020 despite the steep rise of COVID-19 cases in the country.<sup>145</sup> Likewise, is a meaningful election observation possible without incurring undue health risks for observers? Or is the remaining risk too high which would warrant the postponement of the specific election?

74. Similarly, when it comes to **natural disasters and security threats**, the fundamental element to consider is the extent of destruction resulting from the crisis situation at hand. Is the general physical infrastructure, like roads, railways etc., functional so that voters, observers and poll workers can get to the polls and administer elections, respectively? Further, is electoral infrastructure such as polling stations and tallying centres operational and adequately staffed? Is it in a state's capacity to put all necessary infrastructure back in place before Election Day and employ adequate mitigating measures to facilitate the electoral process? Or should the state instead provide voters with an alternative voting method via e.g. postal voting? Postal voting may however not be possible in situations of large-scale natural disasters and violent outbreaks as infrastructure is likely to be non-operational. All these elements need to be considered before the decision to hold or postpone elections is made all while keeping in mind that these challenges are often localised and what counts for certain parts of the country may be different elsewhere and thus different mitigating measures or alternative methods may be appropriate.

75. Moreover, the situation on the ground in most affected areas may still be dangerous due to continuing hostilities, related risks of voter intimidation by armed actors, or health risks related to the aftermath of a natural disaster. Is the state capable of **mitigating** these **risks** by employing security units and ensuring the security of election participations so that people can vote freely and without fear for their lives? No doubt, if elections are held under these circumstances a careful balance needs to be reached as regards to the risks voters and poll workers can reasonably be exposed while ensuring that elections still comply with international electoral standards. For instance, during the 2015 local elections in Ukraine, the government decided to postpone elections that were to be held in municipalities located immediately along the line of contact between the warring parties even though they were still under government control.<sup>146</sup>

143 For possible mitigation measures, see above, Part 4.

144 BBC, 'Coronavirus: English local elections postponed for a year', 2020, <https://www.bbc.com/news/uk-politics-51876269>.

145 Romania Insider, Local elections in Romania: Election campaign starts with special COVID-19 safety rules, 2020, <https://www.romania-insider.com/local-elections-campaign-start-2020>.

146 OSCE/ODIHR, Final Report, 'Local Elections in Ukraine 25 October and 15 November 2015', 2016.

76. Special consideration needs to be given to the decision to hold or postpone elections in case of a **terrorist attack** committed shortly before or on Election Day. Arguably, a decision needs to be reached depending on the magnitude and scale of the attack. On the one hand, in a situation when only a few polling stations are affected, one could argue that cancelling elections throughout the whole country is unnecessary and even dangerous as it sets a precedent to disrupt the electoral process in the whole country by a limited terrorist attack and may undermine political stability of the country as such. On the other hand, if numerous coordinated attacks are committed, this undoubtedly gives grounds for suspending and postponing elections.<sup>147</sup>

77. In addition, **financial and logistical considerations** will play a role.<sup>148</sup> These include a state's (financial and operational) means to implement according mitigation measures during the elections: additional/alternative polling stations; deploy security personnel; provide for disinfectants etc (see above, Part 4). A state will have to assess whether it has the capacities and also the manpower to implement what is required to reduce the risk of infection or the security threats on the Election Day. Also, in case of a destruction of electoral infrastructure: at what costs can elections be made possible? Another parameter is whether a state has the experience and the capacities to implement postal voting and/or rely on new voting technologies in addition to – or even instead of – in-person elections. Does the legal framework provide for these options? Are according arrangements for alternative voting methods in place? Practically speaking, in case of postal voting: is the postal service reliable?<sup>149</sup>

78. Another important factor is the possible protection of **vulnerable groups**, especially of older persons, persons with certain underlying health conditions (in case of pandemics) or potentially targeted minorities (in case of security threats) on the Election Day.<sup>150</sup> Is a state able to make arrangements to protect these groups against infection and/or the security threat at stake; e.g., through secure mobile-voting; proxy-voting or by making them vote remotely or in separate polling stations? Indeed, a state should assess on a more general basis whether elections in times of a pandemic or other major crisis situations disproportionately exclude certain groups of voters, such as the mentioned risk groups, people in rural communities, the poor, members of minorities or illiterate persons who either do not dare to vote in view of related (health or security) risks or have – where remote voting is provided for – less access to and familiarity with internet- or postal-voting.<sup>151</sup> The latter would raise issues in terms of non-discriminatory/equal participation. Similar considerations apply when infrastructure is destroyed because of natural disasters: are certain groups concerned disproportionately affected?

79. More generally, **turn-out considerations** may play a role for the decision whether to hold or rather postpone elections. A state should assess whether people will be willing to vote notwithstanding the crisis situation and also whether they will be able to vote given the various obstacles that may have arisen as a result of the crisis: a very low turn-out risks to de-legitimise the results especially when members of the above-mentioned groups are disproportionately excluded. In France, for example, holding the first round of local elections by in-person voting amidst of the COVID-19 pandemic resulted in a record-low turn-out.<sup>152</sup> On the contrary, during the local elections in Bavaria (Germany) and in South Korea, the increased reliance on remote voting led to higher turnouts.<sup>153</sup>

80. Especially in the context of security threats and natural disasters, a large number of voters can be displaced and thus face the risk of disenfranchisement due to various obstacles of legal, administrative and practical nature to registering and voting. In such situations, it is up to domestic authorities to consider mitigation measures to facilitate voting by displaced voters and/or put in place alternative/remote voting provisions. The question however is whether it is feasible to implement these measures (e.g. shortly before elections) and if not, whether genuine elections are possible when a large portion of the population cannot vote and thus elections should rather be postponed. For example, the feasibility of the implementation of postal voting for voters displaced by the hurricane Katrina in New

147 M. Morley, 2018, pp 597-600.

148 Venice Commission, 2020, para 114. '... organizing elections during a state of emergency may be financially more difficult for the state institutions than postponing the elections, as some special arrangements are probably necessary due to security reasons. ...'.

149 For details on the possible measures see above Part 4.

150 Among health conditions classified as risk are lung or heart disease, diabetes or conditions that affect their immune system. 151 Venice Commission, 2020, para 112. '... turnout is likely to be lower where the elections are held during an emergency situation. Most often, elderly people or most vulnerable groups of voters (either in the armed conflicts or emergencies due to pandemics or natural disasters) are the groups of voters who do not participate as actively as otherwise. ...'.

152 The Economist, 'France Suspends Local Elections Because of Covid-19', 2020, <https://www.economist.com/europe/2020/03/19/france-suspends-local-elections-because-of-covid-19>.

153 Deutsche Welle, 'Coronavirus Affects Election Turnout in France', Bavaria, 2020.

Orleans was underestimated by the authorities, with ensuing shortcomings in delivering the postal ballots to affected voters of whom a large number remained disenfranchised on Election Day.<sup>154</sup>

81. Another factor is the **legal/constitutional framework** and whether there is a legal basis to postpone elections (or introduce alternative voting methods).<sup>155</sup> In times of major crisis, as was shown, an adaptation of voting modalities may become necessary, such as the increased reliance on remote voting. Even the postponement of an election may be warranted. Does the existing legal/constitutional framework provide for such options? Or are amendments necessary? The more the stability of a legal framework is at stake, the more complex it will be to alter the rules of the electoral process, *e.g.*, by postponing elections.<sup>156</sup> Even if one accepts a more flexible approach to the required stability of the election law in times of a crisis,<sup>157</sup> a lack of transparency and resulting insecurity will negatively impact on voters' trust and an election's legitimacy.<sup>158</sup> All these will be relevant factors for a state to decide how to proceed.<sup>159</sup> In any case, utmost transparency towards all electoral stakeholders (parties, candidates, voters, observers, ...) will be required and procedural safeguards (involvement of the Parliament; not only the executive branch in case of amendments) must be maintained.<sup>160</sup> Another parameter is the overall **political situation**. A state may face different scenarios, depending on local conditions: for example, there might be a risk of turbulences/civil unrest when deciding to hold elections: certain groups of voters may feel excluded or the trust of voters may be reduced in case of widespread/exclusive reliance on remote – mostly postal – voting methods. Conversely, there may likewise be unrest if voters fear a possible cementation of political power and abuse, for instance when elections are postponed for an indefinite period.<sup>161</sup> The decision is thus necessarily situation specific. In any case, an as inclusive process as possible, resulting either in the holding of elections with mitigation measures or the postponement of elections, seems necessary.

82. From the perspective of the obligation of states to respect the right to political participation, perhaps the most important parameter is the **probability of holding elections in accordance with international standards notwithstanding the scope of the crisis**.<sup>162</sup> A state will have to consider whether and to what extent the principles of universal, free, equal and secret suffrage can be upheld notwithstanding the measures adopted to mitigate the risk of spread of a disease, of voter disenfranchisement or of security threats on the Election Day. Be it limitations of human-to-human contact during public health emergencies, loosening of rules for voter registration and identification for displaced voters, or raising presence of security forces during polling, the state authorities need to decide what restrictions and mitigating measures can ultimately be accepted as possible trade-offs. For example, to what extent does an election campaign which predominantly takes place in social media

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154 The Wall Street Journal, 'Louisiana Seeks Funds to Reach Displaced Voters', 2005.

155 As regards the legal basis *eg* in times of emergency, this is different. See Venice Commission, 2020, para 97: '...Under several constitutions an extraordinary situation will postpone, or provide an opportunity to postpone upcoming elections, for example by extending the term of parliament (Croatia, Italy, Germany, Greece, Poland, Lithuania, Slovenia, Spain, Hungary and Canada). Similarly, a situation of emergency may prohibit the dissolution of parliament (Germany, Spain, Portugal, Poland, Hungary, Russia). In Turkey, a declared state of war causes elections to be postponed (Article 78 of the Constitution). In Estonia, the parliament, the President, and representative bodies of local authorities may not be elected, nor may their authority be terminated during a state of emergency or a state of war. If the term of office of the parliament, the President or representative bodies of local authorities should expire during a state of emergency or a state of war or within three months after the termination of a state of emergency or a state of war, that term is extended. In these cases, new elections are called within three months following the termination of the state of emergency or the state of war.'

156 Indeed, good electoral practice requires the electoral law should generally not be changed/alterd less than a year before the election, except in technical matters. Venice Commission, 2002, II.2.b.

157 Even if not foreseen, changes may indeed still be possible. As affirmed by the Venice Commission: during a pandemic it may not be possible to follow all principles governing elections as in normal times. Venice Commission, 2020, para 98; The stability of the legal framework might thus be relativized in times of pandemic, as possible trade off. See *ibid*, para 110.

158 The consequences of a lack of transparency were shown by the negative example of the Polish Presidential elections which were originally scheduled for beginning of May, should have been conducted entirely by remote/postal-voting to finally be postponed only a few days before the envisaged election day. EPDE, 'Timeline of the Election Chaos', 2020, <https://www.epde.org/en/news/details/timeline-of-the-election-chaos.html>.

159 See also Venice Commission, 2020, para 118: 'A related question is who should decide on the postponement of elections: rules should be clear and competences well attributed/established.'

160 See above, Section 4.

161 Venice Commission, 2020, para 101 respectively. See also *ibid*, para 102 as regards the list of measures against such abuse, including judicial oversight, limitations in time as regards postponement, qualified majorities in parliament etc; See also United Nations Sustainable Development Group, 'Policy Brief: COVID-19 and People on the Move', 2020, p 21, <https://unsdg.un.org/resources/policy-brief-covid-19-and-people-move>.

162 See Venice Commission, 2020, para 96. In these circumstances, the fairness of the elections might be doubtful. In order for the elections to be in accordance with the main principles stated in the Code of Good Practice in Electoral Matters – universal, equal, free, secret and direct suffrage –, it must be possible not only to give a vote, but also to have open and fair electoral campaigning. Venice Commission, 2002, I.3.1.

affect the level playing field among candidates? And does this imply an unfair advantage for the incumbent? Are the risks that the loosening voter registration regulations for displaced voters will lead to widespread election frauds? How high is the probability/likelihood that government security forces present in and around polling stations will themselves exert pressure on voters? Alternatively, is reliance on remote voting methods such as internet or postal voting disproportionately affecting the right to universal or secret suffrage and, more generally, the integrity of the elections? And is it even realistic to implement the alternative voting methods in situations where the physical and electoral infrastructure is damaged also in view of the necessary safeguards to prevent fraud? In sum, an assessment will need to be made to what extent the integrity of elections can be upheld in times of major crises and elections be conducted in accordance with international standards.<sup>163</sup>

83. All these factors together will/should make a state opt either in favour of holding or rather postponing elections. A context specific decision is to be taken accordingly on the basis of the domestic conditions in a particular state. International human rights law gives some margin/leeway to states in this decision; but it also offers guidance but also puts limits to state action.

## **6. CONCLUDING REMARKS**

84. The current COVID-19 pandemic shows that states may face the difficult decision to hold or postpone elections in times of major crisis. In the case of both possibilities, a state's obligation to protect the rights to life, health and security of its population will require restrictions of the right to political participation and related political freedoms. Ultimately, situation-specific decisions are called for. International human rights law leaves according leeway to states to decide in accordance with domestic conditions which option is best for a particular situation. At the same time, human rights law gives guidance as to whether to go forward or rather postpone elections and also sets limits to state action.

85. In any case, one thing is certain: major crisis situations are extraordinary times. Not all electoral standards can be kept in face of a crisis.<sup>164</sup> Mitigation measures and also alternative/remote voting methods which are adopted to contain the spread of the disease, counter a natural disaster or reduce a security threat will imply certain limitations to the right to political participation and related freedoms. Still, a minimum core of electoral principles have to be upheld at any time for elections at all levels of government to be meaningful and to enjoy the trust of the public. Human rights law, international electoral standards and best practices at least provide some elements and guidance for this.

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<sup>163</sup> See Venice Commission, 2020.

<sup>164</sup> *Ibid.*