

CDDH(2020)14
8 December 2020

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

Reflection paper for the CDDH on possible future work on the impact of the Covid-19 pandemic on human rights

Introduction

1. At its 103rd meeting (19 May 2020), the Bureau of the CDDH exchanged views on the response of the Council of Europe to the Covid-19 pandemic and possible future work of the CDDH on human rights related to the pandemic, as well as on lessons to be drawn at a later stage from this situation.¹ While noting that the crisis was still evolving and new issues would naturally arise, it held a preliminary brainstorming on possible future work by the CDDH on the impact of the Covid-19 pandemic.²

2. In the light of this discussion, the Bureau agreed on the importance of the CDDH continuing reflection on the subject and asked the Secretariat to prepare a reflection paper to feed its discussions at its 104th meeting (29 October 2020), as a preparation for a substantial exchange of views within the CDDH at its December Plenary.

¹ See paragraphs 24-27 of the meeting report of the 103rd CDDH Bureau meeting (CDDH-BU(2020)R103).

² These issues are enlisted in paragraph 26 and Appendix V to the meeting report (CDDH-BU(2020)R103).

3. The reflection paper served as a basis for the discussion by the Bureau at its October meeting.³ The Bureau invited the Secretariat to update the document to reflect the most recent developments and circulate it to the CDDH for the discussion at its December Plenary.

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³ See paragraphs 41-44 of the meeting report of the 104th CDDH Bureau meeting (CDDH-BU(2020)R104).

Reflection paper on possible future work by the CDDH on the impact of the Covid-19 pandemic on human rights

I. Introduction

1. The Covid-19 pandemic is an unprecedented sanitary crisis and public health emergency which had at the beginning of December 2020 infected 63.8 million persons worldwide (with 1.48 million casualties).⁴ Affecting simultaneously countries worldwide, the pandemic caused many Council of Europe Member States to establish lockdown and confinement measures which were in turn previously unexperienced and which interfered with numerous fundamental rights under the European Convention on Human Rights (ECHR). In particular, the sanitary crisis triggered derogations under Article 15 ECHR from ten Council of Europe Member States.

2. Apart from putting an immense burden on the public health services and having a vast impact on the world economy, the Covid-19 crisis also raised complex legal and ethical questions regarding a large number of human rights. This concerned notably Member States' efforts to fulfil their positive obligations under Article 2 ECHR (right to life) and Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment), as well as provisions under the (revised) European Social Charter (including the right to safe and healthy working conditions (Article 3), the right to protection of health (Article 11) and the right of elderly persons to social security (Article 23)). The restrictive measures adopted by virtually all Council of Europe Member States on the other hand resulted in interferences with a large number of other rights contained in the ECHR (e.g. the right to liberty; the right to free movement; the right to private and family life; freedom of religion; freedom of expression; freedom of assembly and association; the right to enter the territory of the state of which a person is a national; access to official information; data protection rights; the right to education; or the right to property regarding the economic effect of the lockdown measures). In the light of positive obligations by the State (e.g. to save as many lives as possible), there appears to have been uniform agreement in principle with the taking of restrictive measures, but not always on whether individual measures were necessary and proportionate (which will presumably keep courts in Europe occupied for a long time).

3. While the lockdown measures have concerned everybody, certain groups have been particularly affected. For example, mostly women and children suffered from an increased degree of domestic violence and abuse during confinement measures. Other vulnerable persons (e.g. older persons in care homes; persons with disabilities living in special facilities; prisoners; or immigration detainees) were at particular risks of being infected with the virus because they sometimes lived in institutions which may have not been sufficiently equipped for the concept of social distancing or unable to provide the necessary health care.

4. In her address at the St. Petersburg International Legal Forum on 10 April 2020, the Secretary General of the Council of Europe underlined that:

"We must also do everything possible to ensure that the epidemic does not lead to a weakening of the democratic foundations on which our civil and political rights and our freedoms rely. ... Europe,

⁴ Source: European Centre for Disease Prevention and Control (as of 2 December 2020; <https://www.ecdc.europa.eu/en>).

and indeed the wider world, have already been heavily affected, and the risk of further disruption is real. States are doing their best to protect their citizens, but unilateral actions have limits. So, there is an urgent need to co-ordinate states' responses, to exchange good practice, and to help each other in the quest for a quicker recovery.”⁵

5. In their so-called Athens declaration of 4 November 2020 (“Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law”), the Chairmanship of the Committee of Ministers – supported by 43 Council of Europe Member States - noted that:

“... national security and public safety can only be effectively protected in a democracy which fully respects the rule of law. This requires parliamentary control of a declared state of emergency and its duration, and judicial review of the measures taken in order to avoid abuse. We acknowledge that it is ultimately for the European Court of Human Rights to assess and decide whether measures taken by State Parties are in conformity with the European Convention on Human Rights. We underline that the European Convention on Human Rights, by defining the human rights that cannot be subject to derogation, clearly set red lines that cannot be crossed, even in times of a severe public health crisis.”⁶

6. At the same time, the declaration stressed the need to safeguard the right to health for all and other social and economic rights, such as the rights to social protection, to education, and to safe and healthy working conditions, on the basis of inclusiveness, non-discrimination, gender equality and women's empowerment.⁷

7. The Parliamentary Assembly (PACE) adopted at the autumn session of its Standing Committee (12-13 and 22-23 October 2020)⁸ four reports on the current Covid-pandemic, including on “The impact of the Covid-19 pandemic on human rights and the rule of law”.⁹ In the draft recommendation accompanying this report, the PACE:

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

⁵ The intervention is available under the following link: <https://www.coe.int/en/web/secretary-general/-/saint-petersburg-international-legal-forum>. The call for solidarity and international cooperation was also underlined by the UN Secretary General in his statement in April 2020: “Covid-19 and human rights - We are all in this together” (<https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>).

⁶ 130th Session of the Committee of Ministers (videoconference), 4 November 2020, Athens declaration of 4 November 2020 (“Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law”), available under:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a03445.

⁷ *Ibid.*

⁸ Note that the Standing Committee adopted these reports on behalf of the full Assembly which was unable to meet due to the Covid-pandemic.

⁹ The other three reports were as follows: “Democracies facing the Covid-19 pandemic”, “Humanitarian consequences of the Covid-19 pandemic for migrants and refugees” and “Upholding human rights in times of crisis and pandemics: gender, equality and non-discrimination”. Five other Covid-related reports are currently under preparation. For more information, see the PACE website specifically devoted to the Covid-19 pandemic: <https://pace.coe.int/en/pages/covid-19-special-page>

8. In light of this proposal by PACE, the CDDH may wish to proactively discuss its potential involvement and possible future work on the topic, given its role as the central steering committee in the Council of Europe with regards to human rights. The following paper aims at providing some stimulation for the discussion. It also sets out a number of possible options or avenues to address the topic, without necessarily establishing any preference for them.

II. Exceptional measures taken by Council of Europe Member States during the Covid-19 pandemic

9. The rapporteur for the PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” summarised the measures taken by the large majority of Council of Europe Member States during the pandemic as follows:

“States have taken a wide range of often broadly similar measures to limit the spread of Covid-19, almost always including severe restrictions on freedom of movement and assembly. Most European countries have introduced enhanced border controls, or even closures; many have restricted internal movement and/ or imposed rules on individual behaviour in public spaces (‘social distancing’); and a large number have ordered home confinement of everyone other than essential workers, with minimal exceptions only for basic needs. Covid-19 patients are often quarantined, to the extent that children have been prohibited from visiting their dying parents and grandparents in hospital. Such measures have an obvious impact on the enjoyment of protected rights. People are prevented from meeting friends and family, assembling for social, cultural, political or religious purposes, and moving freely even within their own neighbourhoods. Other measures also have a clear human rights impact, such as appropriation of private property for public health-related use, closure of private premises used for religious, cultural, sporting, recreational or commercial purposes, school closures, and postponement of elections and referenda. These measures are often of exceptional scope, being applied not just to specific groups, in certain places, for short periods, but to entire populations for weeks or months on end.”¹⁰

10. The taking of measures during the pandemic has required all Council of Europe Member States to take very difficult decisions while balancing competing interest in highly complex scenarios. As the Venice Commission put it in its “Interim report on the measures taken in the EU Member States as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights” in October 2020:

“Due to the pandemic, States are faced with the difficult task of having to find a balance between fundamental freedoms and principles of democratic decision-making on the one hand, and (prevention of the risk to) health policies and positive obligations that flow from the right to life as well as the necessity to effectively end this health crisis, on the other.”¹¹

11. While there have been inevitably interferences with almost all rights contained in the Convention, such interferences do not necessarily amount to violations of these rights, i.e. if the interferences are justified and correspond to the limitations contained in the respective rights. At the same time, the introduction of vaguely worded provisions (in particular criminal offences), the conferral of open-ended emergency powers or the discriminatory application of certain rules without justification may raise serious concerns under the Convention. Both

¹⁰ PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” (Rapporteur: Mr Vladimir Vardanyan), October 2020, paragraph 6.

¹¹ Venice Commission, “Interim report on the measures taken in the EU member states as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights”, Opinion No. 995/2020, 8 October 2020 (CDL-AD(2020)018, October 2020).

the Secretary General¹² and the Commissioner for Human Rights¹³ of the Council of Europe published official statements on the responses to the pandemic by individual Council of Europe Member States in this respect.

12. The Athens declaration of 4 November 2020 (“Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law”) by the Chairmanship of the Committee of Ministers, which was supported by 43 Council of Europe member states, noted in this respect that:

“During a crisis and ensuing state of emergency, any exceptional measures taken must be:

- strictly necessary,*
- proportionate,*
- non-discriminatory,*
- applied only for as long as necessary and ended once the situation normalises,*
- in full conformity with the European Convention on Human Rights and other human rights obligations, and*
- under constant review.”¹⁴*

13. The CDDH could discuss the feasibility of preparing for the Committee of Ministers a guidance instrument to the Council of Europe Member States on exceptional measures taken during a pandemic, which could also apply to other scenarios (e.g. natural disasters). This could involve best practices and guidelines on the principles set out in the previous paragraph, on the basis of the established case-law by the European Court of Human Rights and additional, Covid-related guidance established by other Council of Europe bodies.

14. Particular inspiration could be taken from the Venice Commission’s list of “Principles governing the state of emergency” of May 2020 that should be applied in order to ensure compliance with Council of Europe standards during a state of emergency.¹⁵ These include the following principles: *the overarching principle of the rule of law; necessity; proportionality; temporariness; effective (parliamentary and judicial) scrutiny; predictability of emergency legislation; and loyal co-operation among state institutions.*¹⁶ The CDDH could also have regard to the Venice Commission’s “Rule of Law Checklist” (adopted in 2016 and endorsed by the Parliamentary Assembly in 2017) with specific benchmarks for the exceptions to the principle of legality in emergency situations.¹⁷

¹² See the official statement by the Secretary-General of 24 March 2020: <https://www.coe.int/en/web/portal/covid-19>.

¹³ See in particular concerns expressed by the Commissioner of Human Rights on restrictions during the Covid-pandemic on freedom of expressions in several Council of Europe member states (see as summarised in paragraph 8 of the PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” (Rapporteur: Mr Vladimir Vardanyan), October 2020. All statements are available on the website of the Commissioner for Human Rights in a section specifically devoted to Covid-19 (<https://www.coe.int/en/web/commissioner/thematic-work/covid-19>).

¹⁴ 130th Session of the Committee of Ministers (videoconference), 4 November 2020, Athens declaration of 4 November 2020 (“Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law”), paragraph 7.

¹⁵ Venice Commission, Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections (CDL-PI(2020)005rev, 26 May 2020).

¹⁶ *Ibid*, pp. 3-5.

¹⁷ Venice Commission, Rule of Law Checklist, May 2016, in particular pages 22-23; https://venice.coe.int.Rule_of_Law_Check_List.

15. Moreover, a thorough analysis of contributions by academic scholars and practitioners and other available sources on specific emergency laws enacted by Council of Europe Member States could be undertaken. Based on numerous contributions from the website “Verfassungsblog”¹⁸ on Covid-related emergency laws enacted by 16 different Council of Europe Member States, the PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” identified that the problems encountered could be divided into the following four main categories: 1. Restricting rights through measures of a type that is not foreseen for that purpose; 2. Restricting rights through measures based on laws that are insufficiently clear in defining the scope of permissible restrictions, or through measures that exceed the scope of restrictions permitted by law; 3. Use of retroactive legislation to legitimise measures taken without sufficient legal basis, in some cases despite retroactive legislation being forbidden; and 4. Lack of legal certainty, meaning instability and lack of clarity and accessibility of the restrictive emergency measures, taken individually and as a whole.¹⁹

16. The CDDH may also wish to discuss whether a possible consolidated non-binding instrument which takes stock of the problems encountered in Europe while taking emergency measures at the national level during the Covid-pandemic - and which could make concrete recommendations for future situations - could fill existing lacunae and provide valuable guidance, especially as a common position by the Committee of Ministers (i.e. of all 47 Council of Europe Member States).

III. Derogations from Council of Europe human rights treaties during the Covid-19 pandemic

17. The Covid-19 pandemic triggered the largest number of derogations from human rights treaties worldwide, including with regard to Council of Europe treaties.²⁰ In total, 10 Member States have formally derogated from the ECHR under its Article 15.²¹ At the beginning of December 2020, nine of these States had withdrawn their derogations.²² No Member State derogated from the (revised) European Social Charter. In this context, it should be underlined that a derogation under Article 15 ECHR (which implies that the restrictions go beyond what might be permitted under the “normal” limitation clauses) should be distinguished from declaring a state of emergency (which is often the precondition for invoking exceptional provisions of domestic law).²³

18. In the present context, several observations are of interest. Firstly, the notices of derogation appeared to have varied in scope and content, which could be explained by the constitutional diversity of Member States. Some Member States have not specified any

¹⁸ “Verfassungsblog.de” is an academic and journalistic open access forum of debate on topical events and developments in constitutional law and politics in Germany, the emerging European constitutional space and beyond.

¹⁹ PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” (Rapporteur: Mr Vladimir Vardanyan), October 2020, paragraph 16.

²⁰ Note in this respect that, according to Article 15, paragraph 2 ECHR, no derogations are possible from Articles 2, 3, 4 (paragraph 1) and 7 ECHR.

²¹ These member states were: Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania, San Marino and Serbia.

²² For more information, see the Council of Europe Treaty Office website for the ECHR: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO

²³ For the distinction between the two concepts see: Venice Commission, “Interim report on the measures taken in the EU member states as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights”, Opinion No. 995/2020, 8 October 2020 (CDL-AD(2020)018, October 2020, pages 5 and 6.

particular ECHR rights from which they wished to derogate (which is in principle not objectionable). The majority of derogating States identified the right to respect for private and family life, freedom of movement, freedom of assembly and association and the right to education. Few States derogated from the right to liberty and one State derogated from the right to a fair trial. What these countries had in common was presumably the belief that derogations were necessary in order to allow for the far-reaching lockdown measures which temporarily prevented the exercise of a number of rights (e.g. attending religious ceremonies or peaceful assemblies, or visits of family members).²⁴

19. In turn, 37 Member States did not derogate from the ECHR and decided instead (at least implicitly) that any measures taken during the Covid-19 pandemic would be justified by the limitations enshrined in the substantive rights. One may argue that there exists a certain danger that courts may construct “ordinary” limitation grounds in an expansive (and possibly permanent) manner when emergency powers are not introduced with a derogation. According to the Council of Europe Directorate of Legal Advice²⁵, both options have their merits and the likelihood of abuse of power is no more or less likely depending on whether a State declares an emergency and derogates or whether, instead, relies on ordinary legislation and regular restriction clauses. In that line, the Council of Europe did neither appear to encourage nor discourage the avenue chosen by Member States to derogate from the ECHR when implementing the lockdown measures.²⁶

20. While it is for the ECtHR to decide on any applications which deal with measures taken during the Covid-19 pandemic, this will presumably take several years (in particular in light of the requirement to previously exhaust domestic remedies before lodging an application with the ECtHR). This would be irrespective of which of the two basic paths (i.e. derogation under Article 15 ECHR or relying on the limitations of the substantive ECHR-rights) Member States have chosen.

21. The Council of Europe has in the past issued material on the issue of derogations. The ECtHR has published on its website a “Guide on Article 15 of the Convention – Derogation in time of emergency” (which was last updated in December 2019) as well as a respective Factsheet in April 2020. In April 2020, the Secretary General issued a toolkit for all 47 Member States of the Council of Europe on “Respecting democracy, rule of law and human rights in the framework of the Covid-19 sanitary crisis” which covers four key areas, amongst them the issue of “Derogation from the European Convention on Human Rights in times of emergency”. It should also be noted that the present derogations made in the context of the Covid-19 pandemic were the first ECHR-derogations since the Parliamentary Assembly of the Council of Europe (PACE) adopted in April 2018 its resolution 2209(2018) on “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”.²⁷

²⁴ See for more details K. Istrafi/I. Humburg: *To notify or not to notify: derogations from human rights treaties*, 18 April 2020, *Opinio Iuris* (Academic blog on international law).

²⁵ See the presentation by its Director, Mr J. Polakiewicz, *Protection of human life and public health in the context of the pandemic*, at a webinar organised by the Greek Presidency of the Committee of Ministers on 17 June 2020.

²⁶ Note also that the Committee of Legal Advisers on Public International Law (CAHDI) discussed the issue at its 59th meeting (24-25 September 2020), but the meeting report has not yet been made publicly available.

²⁷ In that resolution, the PACE made a number of recommendations to Council of Europe Member States which had then recently derogated from Article 15 ECHR as well as to all 47 Member States. Moreover, the PACE recommended an enhanced role of the Secretary General of the Council of Europe to both provide advice to states having made use of Article 15 ECHR and to open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention. Note that some legal scholars have also suggested that the

22. The CDDH may wish to consider whether the practice for derogations could be further enhanced in light of the experience during the Covid-19 pandemic. For example, it appears that some of the Member States which derogated under Article 15 ECHR did not properly advise the Secretary General and other Council of Europe Member States on the measures taken (e.g. by merely providing a link to the website of the governments where all national legislation is only available in the official language of that Member State). Moreover, the practice by derogating Member States in providing the Secretary General with follow-up information once the derogation had been notified appeared to have been rather uneven.²⁸ The envisaged duration of the emergency measures varied amongst the ten Council of Europe Member States from 30 to 60 days. The PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” stated in this respect that:

“... notifications vary considerably in form, content and level of detail. ... Outside scrutiny of derogations would be greatly facilitated if notifications followed a standard pattern, addressing all ... significant issues. ... the striking inconsistency of member States’ approaches to the question of whether and how to derogate undermines the coherency of human rights protection across Council of Europe member states; greater harmonisation would help.”²⁹

23. The CDDH may wish to consider whether the elaboration of guidance and good practices for Council of Europe Member States could bring some added value for future situations. This could form part of a larger instrument addressing other pandemic-related issues. It could also cover best practices from recent experiences during the Covid-19 pandemic, in order to provide Member States with a useful tool on the conditions and limits for derogations, as well as practical matters.

IV. The protection of vulnerable groups under the Covid-19 pandemic

24. While the lockdown measures taken by many Council of Europe Member States have directly concerned every member of society, certain vulnerable groups have been particularly affected. For example, mostly women and children suffered from an increased degree of domestic violence and abuse during confinement measures. Other vulnerable persons (e.g. older persons in care homes; persons with disabilities living in special facilities; prisoners; or immigration detainees) were at particular risks of being infected with the virus because they lived in institutions which may not have been sufficiently equipped for the concept of social distancing or unable to provide the necessary health care. This was particularly stressed by the Secretary General during her intervention at the St. Petersburg Legal Forum in April 2020, when she mentioned *“the impact of the Covid-19 pandemic for the gravely ill, people in extreme hardship, older persons, and those deprived of their liberty, including many migrants”*.³⁰ In this respect, the question may arise to what extent High Contracting Parties have positive obligations to protect the substantive rights

Secretary General uses her powers under Article 52 ECHR more broadly in the context of Covid-19 with regard to States where there are reasonable grounds that the pandemic has been used as an excuse to disproportionately interfere with civil and political rights (see the intervention by P. Leach at the webinar “The Council of Europe: the conscience of Europe in a time of crisis”, 21 April 2020 (<https://www.youtube.com/watch?v=LrHejIHHAfQ&feature=youtu.be>)).

²⁸ See in this connection also the comments by P. Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19*, EJIL Talk! (Blog of the European Journal of International Law), 11 April 2020.

²⁹ PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” (Rapporteur: Mr Vladimir Vardanyan), October 2020, paragraphs 25-27.

³⁰ The intervention is available under the following link: <https://www.coe.int/en/web/secretary-general/-/saint-petersburg-international-legal-forum>

of such vulnerable groups in light of the pandemic, or whether the application of general lockdown measures to such vulnerable groups could be discriminatory (Article 14 ECHR).

25. Any possible future work by the CDDH on the Covid-19 pandemic and human rights could not leave out the situation of these particular vulnerable groups. However, a different question is whether the CDDH should focus on the human rights of one particularly vulnerable group. A specific human rights-instruments tailored to the situation of one particularly vulnerable group may be problematic for two reasons.

26. Firstly, it may be difficult to select one vulnerable group amongst the numerous groups which were affected by the Covid-19 pandemic. For example, the Council of Europe's Commissioner for Human Rights has issued separate statements since the outbreak of the pandemic regarding the Covid-19-influenced situation of older persons, persons in long-term care facilities, prisoners, persons with disabilities, immigration detainees, Roma and travellers, LGBT persons and the exposure of women to gender-based violence.³¹ Giving preference to one vulnerable group over other groups would require convincing reasons for the selection.

27. Secondly, past discussion in the CDDH on future projects has occasionally focused on the question to what extent work should concentrate on the rights of specific groups of right-holders, in order to avoid further fragmentation of human rights which by their nature apply to all individuals. This argument was, for example, raised by some delegations in 2011 during a discussion on the feasibility of an instrument on the protection of the human rights of older persons, after previous CDDH-work had included a recommendation on the rights of members of the armed forces (2009) and on the rights of LGBT persons (2010). The fact that the respective proposal was nevertheless eventually implemented and resulted in "Committee of Ministers Recommendation (2014)2 to member States on the promotion of human rights of older persons" suggests that the CDDH to a certain extent does (and should) focus on the rights of particular groups. However, one may wonder whether the Covid-19 pandemic - and the resulting lockdown measures taken by many Council of Europe Member States which interfered into the rights of everyone – would be the most suitable occasion to exclusively focus on the rights of one specific group of right-holders.

28. An approach which could accommodate the above concerns would be – in case the CDDH will be tasked by the Committee of Ministers with the elaboration of a certain Covid-related instrument - to have a single instrument which is devoted to the protection of human rights in emergency situations such as a pandemic. Such instrument could focus on the human rights of all members of society, while devoting individual chapters to particularly vulnerable groups and their specific situations. The CDDH has opted for this approach in the past for example in the preparation of the "Committee of Ministers Recommendation (2016)3 to member states on Human Rights and Business" which sets out individual chapters for the specific protection of workers, children, indigenous persons and human rights defenders. The CDDH may wish to consider whether a similar approach could also be feasible in a possible instrument dealing with the response to the Covid-19 pandemic.

³¹ All statements are available on the website of the Commissioner for Human Rights in a section specifically devoted to Covid-19: <https://www.coe.int/en/web/commissioner/thematic-work/covid-19>

V. Focusing on selected rights which have been particularly impacted by the responses to the Covid-19 pandemic

29. The CDDH could focus on selected rights which have been specifically impacted upon by the responses to the crisis. These could be both civil and political rights enshrined in the ECHR or the economic, social and cultural rights as enshrined in the (revised) European Social Charter.

30. A suitable example could be the right to freedom of expression (Article 10 ECHR). On the one hand, it is of utmost importance in a democratic society that journalists are able to critically comment on the manner in which a government is tackling a pandemic, and to have access to information and official documents (see in this regard the importance of the Council of Europe Convention on Access to Official Documents ("Tromsø Convention"), which entered into force at the beginning of December). At the same time, "fake news" with regard to Covid-19 has been spreading fast on social networks which can in certain circumstances cause casualties³² and which, if unprevented, may trigger States' positive obligations under Article 2 ECHR. At the same time, measures by States to prevent damage from fake news can easily be abused to suppress legitimate reporting, if the underlying legislation is too broad and does not respect the limitations for interferences under Article 10 ECHR.

31. However, it should be borne in mind that for certain individual rights other committees in the Council of Europe may likewise have a strong focus and interest (e.g. the Steering Committee on Media and Information Society with regard to the freedom of expression, or the Bioethics Committee with regard to ethical aspects of the right to life³³). In the same vein, any challenges posed by the Covid-pandemic on the judicial systems of Council of Europe Member States - both with regard to its functioning under the pandemic (including the use of "cyber justice" and the prioritisation of pending cases) and the additional workload through new cases brought against the Covid-related measures taken by governments - have a direct impact on Articles 6 and 13 ECHR, but are also already dealt with by the European Commission for the Efficiency of Justice (CEPEJ)³⁴ and the Consultative Council of European Judges (CCEJ).³⁵ As far as Articles 3 and 5 ECHR are concerned, the Committee for the Prevention of Torture (CPT) published in March 2020 a "Statement of principles relating to the treatment of persons deprived of their liberty in the

³² The fake news that drinking methanol could cure Covid-19 had apparently caused 700 deaths in Iran at the beginning of the pandemic: <https://www.independent.co.uk/news/world/middle-east/iran-coronavirus-methanol-drink-cure-deaths-fake-a9429956.html>

³³ Note that in June 2020 the Bioethics Committee launched its new action plan on human rights and biomedical technologies, with a particular focus on Covid-19. Governance of technologies, equity in health care and physical and mental integrity are at the heart of this five-year strategy.

³⁴ Launching new guidelines on 11 June 2020, the European Commission for the Efficiency of Justice (CEPEJ) has urged governments to invest in cyber justice, offer online access, remote hearings, train justice professionals to work from home, and invest in computer infrastructure. It stated that the Covid-19 pandemic is an opportunity to transform traditional court functioning for the better, as long as high-quality justice and respect for individual rights are at the forefront of changes. At the same time, it warned that the speed of change should not threaten basic rights, and stressed that cases involving the most vulnerable, such as the elderly or people with disabilities, should be given prominence, along with cases arising directly from lockdown, such as domestic abuse. The guidelines were contained in a "Declaration on lessons learnt and challenges faced by the judiciary during and after the Covid-19 pandemic" (<https://www.coe.int/en/web/cepej/impact-and-lessons-of-the-health-crisis-on-the-efficiency-of-justice-and-the-functioning-of-judicial-systems>).

³⁵ The Consultative Council of European Judges (CCEJ) has drawn up in May 2020 a "List of issues relating to the functioning of courts in the aftermath of the Covid-19 pandemic" (<https://www.coe.int/en/web/ccje/-/functioning-of-courts-in-the-aftermath-of-the-covid-19-pandemic>).

context of the Covid-19 pandemic”.³⁶ Moreover, any corruption risks from the large amount of money infused into the economy to alleviate the crisis (and their possible impact on the right to health) have been addressed by the Group of States against Corruption (GRECO).³⁷ Finally, in a crisis where almost all fundamental rights have been affected in one way or another, a particular choice and a decision to adopt a narrow and specific focus on one fundamental right would require convincing reasoning and justification.

VI. Focusing on newly established measures which interfere with human rights

32. The CDDH could also choose to address novel restrictive practices taken by some Member States during the sanitary crisis which are rather unprecedented and may impact on various human rights, both in a positive and negative manner, mirroring a potential conflict between positive obligations on the one hand and negative obligations on the other. One example could be innovative surveillance and contact-tracing apps and their potential impact on human rights. Contact-tracing apps are used to identify people who may have been in contact with someone diagnosed with a virus in order to provide them with information about prevention and treatment. This may lead to the slowing down the spread of the virus. Such apps can be developed in very different manners, and consequently also may vary significantly in their impact on human rights.

33. The use of such apps (or similar surveillance technology) is seen by some observers as problematic since there is a high danger that the information derived from their use is subject to abuse. Moreover, it is feared that the introduction of such measures could be regarded as a “trojan horse” which could be extended to other causes and well beyond the actual duration of a sanitary crisis.³⁸ There is also a risk of discriminatory treatment and unequal access to health information (e.g. with regard to those persons who do not own a smart phone). Many human rights issues however depend on the exact functioning of such apps (e.g. whether information is anonymised). Design options to minimise the impact on rights include avoiding centralised databases, not using location or identifying proximity or interaction data, and data deletion.³⁹ Tech companies, non-profits organisations, civil society and academics are actively investigating how apps could be designed to minimise the impact on privacy.⁴⁰

34. In this respect, it should be noted that the Chair of the Council of Europe’s Data Protection “Convention 108” Committee and the Council of Europe’s Data Protection Commissioner have issued a joint statement on 28 April 2020. In this statement, they underlined that data protection rights are not *per se* incompatible with epidemiological monitoring, provided that adequate safeguards are put in place to prevent risks to personal

³⁶ The statement (and a follow-up statement) are available under: <https://www.coe.int/en/web/cpt/home>.

³⁷ On 21 April 2020, GRECO has published guidelines addressed to its 50 Member States aimed at preventing corruption in the context of the health emergency caused by the Covid-19 pandemic, in particular owing to surges in the urgent need for medical supplies and the simplification of procurement rules, overcrowded medical facilities and overburdened medical staff: <https://www.coe.int/en/web/corruption/greco-guidelines>.

³⁸ See Y.N. Harari, *The world after coronavirus*, Financial Times, 20 March 2020.

³⁹ L. Mac Gregor, *Contact-tracing apps and human rights*, EJIL Talk! (Blog of the European Journal of International Law), 30 April 2020. The author also suggests a threefold test which States should apply if they consider introducing the use of contact-tracing apps: “1. Is there scientific justification for the use of contact tracing apps as a means to fulfil states’ obligations to protect the rights to health and life? 2. If there is, does the design and deployment of contact tracing-apps meet the tests of legality, necessity and proportionality? 3. Has the State put in place measures to prevent harm to human rights in the future, by preventing mission creep and the normalisation of contact-tracing apps?”

⁴⁰ *Ibid.*

data and privacy.⁴¹ In the same vein, the PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” stated that, if it comes with sufficient human rights safeguards, the use of aggregated geolocation data to identify gatherings that breach confinement regulations or to indicate movements of persons away from an area with a high rate of infection would be permissible.⁴²

VII. Establishing proper procedures for taking stringent measures to respond to a sanitary crisis

35. The CDDH could approach the subject from a more procedural angle to provide guidance on establishing appropriate processes when considering whether and to what extent restrictive measures which interfere with human rights should be taken in response to a sanitary crisis. This could involve appropriate processes to weigh competing interests; to ensure transparency; to properly establish and assess scientific evidence; to involve all relevant stakeholders in the decision-making process; as well as to respect the legal requirements established by the ECHR for measures taken.

36. In particular, the role of human rights impact assessments when taking measures regarding the pandemic could be further explored. The CDDH could elaborate guidance for Member States when having the choice between compulsory restrictive measures and recommendations addressed to the population, or guidance on ensuring coherence of policies and measures within their territories where differing responses were adopted by different regions in response to the crisis.

VIII. Conclusions

37. The Covid-19 pandemic has been an unprecedented health crisis which has impacted on almost the whole catalogue of fundamental rights. Practically all Council of Europe institutions have already responded to the crisis in various different forms (e.g. through resolutions, guidelines, action plans, declarations, statements, comments, toolkits, videoconferences and webinars).⁴³ In view of the PACE recommendation on “The impact of the COVID-19 pandemic on human rights and the rule of law”, the CDDH would be well-advised already at this stage to take note of the proposal that PACE has invited “*the Committee of Ministers to give terms of reference to the appropriate inter-governmental committee or committees to review national experience of responding to the Covid-19 pandemic, with a view to pooling knowledge and experience and identifying good practice on how to ensure an effective response to public health emergencies that respects human rights and the rule of law...*”.⁴⁴

38. This raises the question in what form the CDDH – as the central steering committee for human rights in the Council of Europe – can contribute to the overall response of the organisation to the Covid-19 pandemic. At the forthcoming December Plenary, the CDDH is invited to reflect on possible future work which would address the Covid-19 pandemic’s impact on human rights, and from which angle this topic could be approached.

⁴¹ The statement can be found under the following link: <https://rm.coe.int/covid19-joint-statement-28-april>.

⁴² PACE report on “The impact of the Covid-19 pandemic on human rights and the rule of law” (Rapporteur: Mr Vladimir Vardanyan), October 2020, paragraph 29.

⁴³ For details, see the special website established by the Council of Europe on the matter (“Covid-19: Human rights are more important than ever in times of crisis”: <https://www.coe.int/en/web/portal/covid-19>).

⁴⁴ See above, paragraph 7 of the present paper (with further references).

39. The present reflection paper – which is not meant to be a feasibility study – has identified a number of issues which the CDDH could use as elements to feed into a substantive discussion at its December Plenary. On the basis of this, the following elements appear to be particularly relevant:

- (i) Hold a seminar on lessons to be drawn from the crisis and comparing perspectives on measures taken during the crisis;
- (ii) Carry out further work on the human rights safeguards for exceptional measures taken during a pandemic (including possible safeguards against abuse);
- (iii) Provide practical guidance for Member States which choose to derogate from the ECHR under Article 15 of that Convention;
- (iv) Emphasise the particular situation of vulnerable groups during a pandemic and identify issues which these groups have in common (instead of focusing on one particular group);
- (v) Provide guidance for Member States to establish proper procedures for taking stringent measures to respond to a sanitary crisis (including human rights impact assessments and input for making an informed choice between compulsory and voluntary measures);
- (vi) Focus on selected rights which become particularly important during a sanitary crisis, whether civil and political (e.g. the right to life; freedom expression and access to official information) or economic and social (e.g. the right to health);
- (vii) Focus on novel technologies (e.g. contact-tracing apps; surveillance technology) which have been introduced by some Member States during the pandemic and provide guidance whether and how such measures can be reconciled with human rights;
- (viii) Undertake an exchange of views among the Member States and collect their practices to assess the impact of various decisions on human rights and fundamental freedoms, in order to identify effective solutions and the need to apply the European standards accordingly;
- (ix) Establish a collection of (or database with) different national court decisions which have responded to measures which interfere with human rights. This could also include, if already available, any decisions from the European Court of Human Rights.