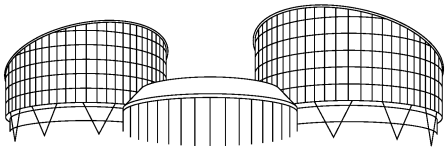

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Judicial Seminar 2022

Human rights protection in the time of the pandemic:
new challenges and new perspectives

Background Document

COUNCIL OF EUROPE
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Introduction

De l'avis de la Cour, il ne fait aucun doute que la pandémie de COVID-19 peut avoir des effets très graves non seulement sur la santé, mais aussi sur la société, sur l'économie, sur le fonctionnement de l'État et sur la vie en général, et que la situation doit donc être qualifiée de « contexte exceptionnel imprévisible » (*Terheş v. Romania* (dec.), 49933/20, § 39, 13 April 2020).

Few areas of life have remained untouched by the Coronavirus (COVID-19) pandemic, which has swept across Europe – and the rest of the globe – over the course of two years. It therefore stands to reason that the health crisis, and the action taken by member States in an effort to tackle it, is profoundly linked to questions related to upholding human rights. The aim of this year's Judicial Seminar is to discuss some of the most pertinent questions, with a focus on identifying the challenges posed by the COVID-19 pandemic and the new perspectives gained. It is hoped that ultimately, these lessons can serve as guidance to ensure that actors are more prepared and human rights are better insulated from further pandemic or health crisis situations.

Within the topic, three sub-themes have been highlighted for discussion during the Seminar: restrictions on human rights during the time of the pandemic; positive obligations on States during a pandemic; and proceedings before courts.

The first theme concerns the measures which States have put in place, often in an emergency context, in order to prevent and stem the spread and effects of COVID-19. These have involved restrictions to individual human rights and freedoms on a scale that is unprecedented in modern times, and ranging from nation-wide restrictions on free movement and assembly, to mass tracing and data collection, as well as the implementation of national vaccination and health pass systems.

The second theme concerns the duties which States owe to individuals within their jurisdiction to protect their rights in the context of a pandemic. Most obviously, this relates to the protection of a population's life and health, both in terms of taking adequate protective measures against the spread of the virus and in ensuring access to treatment and healthcare. Particular regard is to be had to the protection of vulnerable groups, and those who are under supervision of the State, such as detainees.

The third theme concerns the challenges faced and adaptations made in proceedings before courts during the pandemic At the regional level, the Court has reacted to the exigencies of the sanitary crisis and the measures put in place in its host State through changing aspects of its practice and functioning. It has also received applications relating to domestic court proceedings which, among other things, have been delayed, suspended or otherwise adapted in the light of the crisis.

Although the Court has received a large volume of applications relating to COVID-19, many have yet to be decided; and, at the same time, the fallout of the pandemic is expected to continue to develop in both the short and longer term. This means that drawing on the

experience of actors on the ground, in particular the domestic judiciary, is of particular importance for the purpose of exploring this year's Judicial Seminar theme. The Background Paper in addition utilises soft-law and regional comparative documents, where relevant, as complementary resources, while the Seminar itself will present an opportunity to exchange judicial experiences and best practices.

The Background Paper begins with an overview of the COVID-19 related interim measure requests received by the Court (chapter I), before exploring the three aforementioned sub-themes in the remaining chapters (chapters II-IV).

I. COVID-19 related interim measure requests

Between March 2020 and 30 April 2022, the Court processed 373 interim measure requests under Rule 39 of the Rules of Court related to the COVID-19 health crisis.

Interim measure requests from detention or reception centres and prisons

The vast majority of the COVID-19 related interim measure requests were brought by persons detained in prisons or kept in reception and/or detention centres for asylum seekers and migrants. The applicants mainly relied on Articles 2 and 3 of the Convention and requested the Court to take interim measures to remove them from their place of detention and/or to indicate measures to protect their health from the risk of being infected with COVID-19. Many of these requests were lodged against Greece, Italy, Turkey and France:

Requests lodged against Greece: These requests were lodged by the asylum seekers and migrants held in reception and identification centres in Greece. They requested to be transferred from the centres due to the overcrowding, lack of infrastructure and the threat of COVID-19. Rule 39 was applied in fifteen applications and only for particularly vulnerable persons, in particular, women with advanced pregnancy, women with newborns, old persons and unaccompanied minors with mental health issues. In those cases, despite the fact that the applicants asked to be transferred from the reception and identification centres, the Court did not ask the Government of Greece to transfer the applicants. The interim measures applied were (1) to guarantee to the applicants living conditions compatible with their state of health, (2) to provide the applicants with adequate healthcare compatible with their state of health. In coming to its decision, the Court took into account: the applicants' vulnerability and the general living conditions (overcrowding, lack of infrastructure etc.)

Requests lodged against Italy: These requests were mainly lodged by prisoners who wished to be released due to the alleged risk of contracting COVID-19 in prisons. In a number of cases the Court adjourned the examination of those requests and requested the parties to provide factual information. After having received information from the parties, the Court rejected those requests.

Requests lodged against Turkey: These requests were also filed by prisoners who wished to be released due to the alleged COVID-19 risks in prisons. Most of those requests were

incomplete and hence the applicants were asked to complete their requests. Interim measure requests which could be examined by the Court (as they were complete) were all rejected, since the applicants failed to show that they were under the risk of contracting COVID-19 in the places where they were detained.

Requests lodged against France: Most of the interim measure requests against France were lodged by either prisoners or migrants/asylum seekers in detention centres. These requests were rejected.

In an application against Russia, where there was a riot in a prison against the measures taken by the prison authorities within the context of COVID-19 pandemic, the Court applied Rule 39 for a limited period of time and asked the Government to have the applicant be examined by medical doctors and to ensure that the applicant have access to his lawyers. The interim measure was subsequently lifted, and the application was declared inadmissible.

The Court also received a handful of COVID-19 related interim measure requests against Belgium, Bulgaria, Cyprus, Germany, Malta and Romania lodged by prisoners. These interim measure requests were also examined on a case-by-case basis and rejected.

Other interim measure requests

The Court received a number of interim measure requests concerning compulsory vaccination schemes (see, for example, *Cohadier and 600 Others v. France,* no. 8824/22; *Abgrall and 671 Others v. France*, no. 41950/21 (press release); *Kakaletri and Others v. Greece,* no. 43375/21 (press release); *Theofanopoulou and Others v. Greece*, no. 43910 (press release); *Concas and Others v. Italy*, no. 18259/21).[1] These requests were lodged by medical professionals, employees working in medical facilities, firefighters and flight attendants who challenged the compulsory vaccination and/or draft legislations concerning vaccination scheme. The requests were rejected for being out of scope of application of Rule 39 of the Rules of Court. See also *Piperea v. Romania,* no. 14073/21 where the applicant was a law professional who challenged the draft legislation concerning vaccination scheme.

In a number of requests, applicants challenged the use of COVID-19 certificates which stipulated that only people in possession of the certificates would be allowed to attend public places and, in some cases, to use public transport. The requests were rejected for being out of scope (see *Mahut v. France*, no. 55120/21; *Mensi v. Italy*, no. 58126/21; *Livi and Others v. Italy*, no. 59682/21; and Scola v. Italy, no. 3002/22).

There have also been a few cases where the applicants requested that their expulsion/extradition be prevented on account of the effects of the pandemic in the prisons where they would be removed. These requests were rejected either for not being sufficiently substantiated or because the applicants would be vaccinated before being removed.

[1] See further chapter II: "Vaccination and health passes".

One of the first COVID-19 related interim measure requests was brought to the Court by an Italian company in April 2020. The company complained that, after having regularly paid for a stock of 125,000 medical face masks for the subsequent distribution in Italian public hospitals, Turkish authorities had blocked the supply at customs at the airport of Ankara. The request was rejected by the Court.

Lastly, the Court also received an interim measure request, in April 2020, from an association asking the Court to urge the Government of Spain to take all necessary measures to enforce a complete lockdown in Madrid, not allowing any person to leave or enter the city. This request was rejected.

II. Restrictions on human rights during the time of the pandemic

Derogations

Governments of member States have faced enormous challenges on how to respond, following the worldwide health crisis. The unexpected and unprecedented spread of the pandemic, as well as the novel nature of the disease, prompted many States to take urgent and drastic measures, in an attempt to stem the tide of infections. From a human rights perspective, States have had to strike a balance between their positive obligation to protect their citizens' health, safety and well-being and their negative obligation not to disproportionately restrict citizens' freedoms.

This situation led a number of member States to issue a notification under Article 15 of the Convention as regards their compliance with their obligations under the Convention,[2] although many have since withdrawn their derogations. Other restrictive measures have been introduced on the basis that they are justified for the protection of health under the usual provisions of the Convention. Nevertheless, it is to be recalled that certain Convention rights cannot be justifiably interfered with, nor derogated from: in the COVID-19 context, this includes in particular the right to life (Article 2) and the prohibition of torture and inhuman or degrading treatment or punishment (Article 3). Moreover, derogations are subject to formal and substantive requirements.

The Secretary General of the Council of Europe has published a Toolkit for respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, which, *inter alia*, provides guidance to member States on making Convention-compliant derogations in this context.

At the regional and international level, States have derogated from, or "suspended" guarantees or rights contained in other human rights treaties including the International

[2] Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino and Serbia. See further https://www.coe.int/en/web/conventions/derogations-COVID-19.

Covenant on Civil and Political Rights[3] and the American Convention on Human Rights. The UN Human Rights Committee has issued a Statement on derogations from the International Covenant on Civil and Political Rights in connection with the COVID-19 pandemic. It noted that several States had failed to formally submit any notification, despite adopting emergency measures that seriously affect the implementation of their obligations under the Covenant; and provided guidance to States on so doing.

In that connection, the judgment of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, 21881/20, 13 March 2022 (not final) is to be noted, where the Court found that restrictions on public gatherings, aimed at tackling COVID-19, had amounted to a violation of Article 11 of the Convention (freedom of peaceful assembly). In so doing, it considered as relevant the fact that Switzerland had *not* had recourse to Article 15 of the Convention. Accordingly, it had been required to comply fully with the requirements of Article 11.[4]

See also several resolutions and recommendations of the Parliamentary Assembly of the Council of Europe on, *inter alia*, Democracies facing the COVID-19 pandemic, and the Impact of the COVID-19 pandemic on human rights and the rule of law.

During unprecedented times like these it can be insightful to look at the work of other regional human rights mechanisms. The African Court on Human and People's Rights has given an Advisory Opinion No. 001/2020 on the guarantees for the effective protection of the right to participate in government in Africa, in the context of the COVID-19 pandemic and crisis. https://www.african-court.org/cpmt/details-advisory/0012020 The Opinion concerned potential elections to be held in African countries during the COVID-19 pandemic. First, the African Court found that there should be an option to postpone elections if the conditions for their proper conduct were not met due to the pandemic, and that in any case, consultation with health authorities and civil society representatives should take place in order to ensure that the process is inclusive. Secondly, the African Court focused on the obligations of States Parties to ensure effective protection of the right of citizens to participate freely in the conduct of public affairs of their country in the context of an election held during a public health emergency or pandemic. The essence of the right of citizens to participate freely in the governance of their country through elections cannot be taken away, even in an emergency situation such as the pandemic, without undermining the integrity of the electoral process. Third, the Court addressed the obligations of state parties that decide to postpone elections due to a public health emergency or pandemic, such as the COVID-19 crisis. Among other things, the postponement of an election cannot absolve elected officials from the obligation of submitting to the electorate for legitimacy, such that the postponement of elections become a means of unduly extending the terms of office of elected bodies.

[3] The Centre for Civil and Political Rights has developed a Digital Rights Tracker that lists all the derogations that states have made under the International Covenant on Civil and Political Rights, and which can be found here: https://datastudio.google.com/u/0/reporting/1sHT8quopdfavCvSDk7t-zvqKIS0Ljiu0/page/dHMKB.

[4] See further Chapter II: "Freedom of assembly, association and religion", below.

The Inter-American Court of Human Rights has also issued a Statement on COVID-19 and Human Rights: the Problems and Challenges Must Be Addressed From a Human Rights Perspective and With Respect For International Obligations. It urged that the measures and adopted and implemented and efforts made by the States Parties to the American Convention on Human Rights to address and contain the situation, which involves issues of life and public health, are undertaken within the framework of the rule of law, with full respect for the Inter-American instruments for the protection of human rights and the standards developed in the Court's case law.

Lockdown, confinement and curfew measures

The decision of *Terheş v. Romania*, no. 49933/20, 13 April 2020 concerned a 52-day general lockdown imposed by the authorities to tackle the COVID-19 pandemic. The Court found the application to be inadmissible. Under a state of emergency as applied in Romania, no movement outside the home was permitted, except in a certain number of listed circumstances and on production of a document attesting to valid reasons for leaving home. The applicant complained that this confinement measure, with which he had to comply, constituted a deprivation of liberty contrary to Article 5 § 1 (e) of the Convention. The decision is noteworthy as the Court found that the measure complained of had been imposed under a state of emergency, with the aim of isolating and confining the entire population on account of a public-health situation which the competent national authorities had deemed to be serious and urgent. If the authorities had not taken extraordinary measures as a matter of urgency to stem the spread of the virus in the population, their lack of action would have had serious repercussions, primarily on the right to life and, secondarily, on the right to health.

The applicant had been free to leave his home for various reasons and could go to different places, at whatever time of day the situation required. The level of intensity of the restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty. Accordingly, the applicant could not be said to have been deprived of his liberty within the meaning of Article 5 § 1 of the Convention.

In *Magdić v. Croatia*, no. 17578/20, the applicant complains, *inter alia*, that a lockdown imposed by the authorities to tackle the COVID-19 pandemic violated his right to liberty of movement guaranteed under Article 2 § 1 of Protocol No. 4. The case has been communicated.

The communicated case of *E.B. v. Serbia*, no.s 50086/20 and 50898/20, concerns the measures put in place by the authorities during a declared state of emergency, in order to prevent the spread of COVID-19, which temporarily restricted the free movement of refugees, asylum seekers and migrants accommodated in asylum and reception centres. The applicants complain under Article 5 in conjunction with Article 14 of the Convention that a *de facto* 24 hour lockdown in the relevant asylum centre constituted an unlawful, arbitrary, unnecessary and collective deprivation of liberty. They also complain that the criteria for confinement and

procedures for permission to seek leave were too vague and that they did not have access to sufficient information, reasons for their confinement or access to judicial protection. They further allege that the measures were imposed on the basis of discriminatory criteria, which unjustifiably distinguished between refugees, asylum seekers and migrants accommodated in the centres, and the general population of Serbia, asylum seekers and aliens residing in private accommodation. One of the applicants moreover complains under Article 2 of Protocol No. 4 of a breach of her right to liberty of movement, which led to her and her husband losing their jobs, her children's inability to attend school classes, and the family's mental and physical suffering.

Bracci v. San Marino, no. 31338/21 concerns curfew measures put in place in the light of the pandemic. The applicant complains under Article 6 that she was denied access to a court to challenge the fine issued against her for a disputed breach of curfew. She also alleges that she suffered discrimination as she was only fined because she was Italian. The case has been communicated.

Freedom of assembly, association and religion

In *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, 13 March 2022 (not final), the Court found a violation in relation to measures introduced by a State aimed at stemming the spread of the virus. The applicant association, which aims to defend the interests of working and non-working persons and of its member organisations, alleged that it had been deprived of the right to organise or take part in any public gatherings, pursuant to a federal ordinance enacted during the early months of the pandemic. While the restrictions had pursued the legitimate aims of protecting health and the rights and freedoms of others, the Court found that they had not been necessary in a democratic society:

- The measures had amounted to a blanket ban, which had required particularly strong reasons to justify it, and had remained in place for a significant amount of time;
- Meanwhile, access to workplaces had continued even when they were occupied by hundreds of people, which the government had not explained;
- The penalties for a deliberate violation were very severe and were liable of having a chilling effect on potential participant or groups seeking to organise such events;
- The quality of parliamentary and judicial review was of particular importance in assessing the proportionality of measure. While it might not be expected, given the urgency of the situation, that very detailed discussions would be held at domestic level, especially involving Parliament, prior to the adoption of the measures, independent and effective judicial reviews was thereby all the more vital. Yet no such scrutiny had been performed by the domestic courts;
- Finally, and as noted above, Switzerland had not made a derogation under the Convention.

In the light of the importance of freedom of peaceful assembly in a democratic society, and the topics and values promoted by the applicant association, the interference had been disproportionate to the aims pursued violated Article 11 (by four votes to three).

The Court also has a number of cases pending before it in relation to restrictions on freedom of assembly, association and religion in the context of the COVID-19 pandemic under Articles 9 and 11 of the European Convention:

Magdić v. Croatia, no. 17578/20, concerns the measures adopted by the Croatian authorities in the context of preventing the spread of the COVID-19 virus, including prohibitions on public gatherings comprising more than five people and the suspension of religious gatherings. The applicant alleges that the measures breached, *inter alia*, his right to freedom of religion and freedom of peaceful assembly.

The pending case of *Association of orthodox ecclesiastical obedience v. Greece*, no. 52104/20 concerns the inability to judicially review a temporary prohibition on collective worship in the light of the pandemic, on the grounds that the restriction was no longer in force when the application was examined by the domestic court. The Court has given notice of the application to the Greek Government and put questions to the parties under Article 6 § 1 (access to court) and Article 9 of the Convention.

Central Unitaria De Traballadores/AS v. Spain, no. 49363/20 concerns the right to organise and take part in a peaceful demonstration during the COVID-19 pandemic. The applicant, a workers' union, proposed to apply appropriate sanitary measures to prevent the spread of the virus and expressed its willingness to adopt any other measures that might be suggested, but the administrative authorities refused to authorise the demonstration. The Court has put questions to the parties under Article 10 (freedom of expression) and Article 11 of the Convention.

In *Jarocki v. Poland*, no. 39750/20, the applicant was prohibited from holding a planned walking protest with around a thousand people, in the light of the COVID-19 situation and the resultant risk to the health and life of the participants and the public. The applicant maintained that infections were low in the region, and has submitted detailed calculations as to the risk of infection during a distanced open-air gathering. The case has been communicated under Article 11 (freedom of peaceful assembly).

Nemytov v. Russia, no. 1257/21 and two other applications concerns the prohibition of public events in Moscow, introduced in response to the spread of COVID-19. Each of the applicants participated in solo demonstrations while the ban was in place, and were subsequently subjected to administrative arrest and/or sentencing to an administrative fine. One of the applicants staged his demonstration wearing a mask and gloves in August 2020, when a major part of the restrictions had been eased in Moscow, but the ban on public events remained in place. The case has been communicated, *inter alia*, under Articles 10 and 11 of the Convention.

Vaccination and health passes

The Committee on Bioethics (DH-BIO) Statement on human rights considerations relevant to "vaccine pass" and similar documents (4 May 2021) defines a "vaccination certificate" as providing evidence of the administration of a particular vaccine to the person for whom it is issued. "Passes" also contain information on whether someone has been previously infected with SARS-CoV-2 or the result of a COVID-19 test.

The roll-out of vaccination programmes and health passes is seen as a key tool in the arsenal of many States' fight against the COVID-19 pandemic. This raises a number of human rights questions, including the extent to which member States may justifiably make such schemes mandatory in the pursuit of public health.

Although not directly related to a COVID-19 vaccination scheme, the Court has dealt with compulsory vaccination of children against certain diseases in *Vavřička and Others v. Czech Republic* [GC], no.s 47621/13 and 5 others, 8 April 2021. The case concerned parents' general legal duty to vaccinate children against nine well-known diseases. Parents who failed to fulfil this duty without good reason could be fined and non-vaccinated children were not accepted in nursery schools (an exception was made for those who cannot be vaccinated for health reasons). The Court found no violation of Article 8 (right to respect for private life) of the Convention.

The vaccination duty and the direct consequences of non-compliance amounted to an interference with Article 8. A wide margin of appreciation was to be applied in the sensitive areas of a childhood vaccination duty and in healthcare policy matters; at the same time, the Court noted that a general consensus existed among Contracting Parties, strongly supported by international specialised bodies, that vaccination was one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination. The duty also encompassed the value of social solidarity, its purpose being to protect the health of all members of society, particularly those who were especially vulnerable and on whose behalf the rest of the population was asked to assume a minimum risk in the form of vaccination. Moreover, the Court found that, when a voluntary vaccination policy was not considered sufficient to achieve and maintain herd immunity, or such immunity was not relevant due to the nature of the disease, a compulsory vaccination policy might reasonably be introduced in order to achieve an appropriate level of protection against serious diseases. Finally, the measures had been proportionate to the legitimate aim of protecting the health and rights of others.

In the decision of *Zambrano v. France*, no. 41994/21, 7 October 2021, the Court rendered inadmissible the applicant's complaints concerning legislation on the management of the public-health crisis caused by the COVID-19 pandemic. The law introduced a transitional regime for lifting the public-health state of emergency and authorised the Prime Minister, among other measures, to limit travel and the use of public transport and to impose protective measures in shops. It also broadened the use of the health pass to other areas of daily life, such as bars and restaurants, department stores and shopping centres. The

applicant relied on Articles 3, 8 and 14 of the Convention, and on Article 1 of Protocol No. 12. In his view, by creating and imposing a health pass system, the laws in place on the management of the public-health crisis caused by the COVID-19 pandemic amounted to a discriminatory interference with his right to respect for private life and were intended primarily to coerce individuals into consenting to vaccination. Although it was not necessary to decide the issue of the applicant's victim status, the Court noted that that the applicant had complained *in abstracto* about the unsuitability and inadequacy of the health pass system and other measures for managing the COVID-19 crisis, without specifying their effect on his personal situation. Without being more specific, he had not shown that any coercion had existed on him as a person who did not wish to be vaccinated: there was no general duty to be vaccinated. See similarly *Livi and Others v. Italy*, no. 59682/21; *Scola v. Italy*, no. 3002/22, above.

In *Abgrall and 671 Others v. France*, no. 41950/21 (press release) the Court rejected the requests for interim measures submitted by 672 members of the French fire service. The applicants complained of the introduction of legislative provisions requiring certain categories of people to be vaccinated, and an occupational ban as well as suspension of salary for those who failed to comply. The Court considered that the applicants' requests for an interim suspension of the requirements lay outside the scope of Rule 39 of the Rules of Court. These measures were decided in connection with proceedings before the Court, without prejudging any subsequent decisions on the admissibility or merits of the case. See also *Kakaletri and Others v. Greece,* no. 43375/21 (press release); *Theofanopoulou and Others v. Greece*, no. 43910 (press release); *Cohadier and 600 Others v. France*, no. 8824/22.

Similarly, in the pending case of *Thevenon v. France*, no. 46061/21, the applicant complained of the imposition of compulsory vaccination on account of his occupation as a firefighter. The case has been communicated under Article 8 of the Convention, taken separately and in conjunction with Article 14 of the Convention, and Article 1 of Protocol No. 1 (protection of property).

Various Council of Europe bodies have issued relevant documents on the issues of vaccination and health passes. On the topic of health passes, the aforementioned DH-BIO Statement on human rights considerations relevant to "vaccine pass" and similar documents provides that such schemes should scrutinise the purposes of the use of vaccination certificates and passes, the risks of discrimination, protection of privacy and personal data, scientific uncertainties, and their impact on social cohesion and solidarity.

On 31 March 2021, the Secretary General issued an Information document on Protection of human rights and the "vaccine pass". The document addresses the human rights considerations related to "vaccine passes". It reaffirms that vaccines are an essential part of the strategy to combat the pandemic, which States are obliged to implement under international human rights law, but warns that the use of vaccination certificates for purposes other than strictly medical should be considered with the utmost caution. Such use could prevent the enjoyment of certain fundamental rights by individuals not holding the

certificates, raise concerns about the protection of privacy and personal data, and lead to an increase of criminal activities such as counterfeiting of vaccines or the issuing of false certificates, which would seriously compromise public health efforts.

Other sanitary measures

A range of further sanitary measures have been put in place by States for the purpose of stemming the spread of COVID-19 in public places. This includes social distancing regimes, obligations to wear face masks, and obligatory testing for presence of the virus, among others. Such measures entail restrictions upon individual freedom which may be met with some resistance. Enforcing such measures must, however, be proportionate and compliant with human rights guarantees.

This is the issue at hand in the communicated case of *Grgičin v. Croatia*, no.s 6749/22 and 7154/22. The first applicant boarded a train without wearing a face mask, in breach of official instructions that public transport passengers wear a mask. After refusing to put on a mask or leave the train, he was apprehended by police officers who carried him off the train and handcuffed him. The scene was witnessed by his son, the second applicant. The applicants were then escorted to the police station and stayed there for another two hours before release. The applicants complain under Article 3 of the Convention that the police used disproportionate force and that investigations into their allegations have not been effective at domestic level. They further complain that the violent arrest of the first applicant, and keeping the second applicant at the police station without care, exposed the latter to inhuman and degrading treatment.

Data protection and privacy

As part of an effort to track and combat the spread of infection, and to measure the success of public health initiatives, governments have turned to data collection tools, sometimes in the form of innovative technologies. Contact tracing applications and digital health passes are prominent examples of this. Yet such systems inevitably have implications for the protection of individuals' data and privacy, and must therefore be designed and implemented in a way which upholds Article 8 rights. While the Court has so far had little opportunity to examine these matters, a number of other Council of Europe bodies have provided guidelines and principles for member States to consider in this context.

The Chair of the Committee of Convention 108 and the Data Protection Commissioner of the Council of Europe have issued a Joint Statement on the right to data protection in the context of the COVID-19 pandemic (30 March 2020). It recalls that, while data protection can in no manner be an obstacle to saving lives, even in particularly difficult situations, data protection principles must be respected. The statement covers (i) general data protection principles and rules, (ii) processing of health-related data, (iii) large-scale data processing, (iv) data processing by employers, (v) mobile, computer data, and (vi) data processing in educational systems.

The Chair of the Committee of Convention 108 and the Data Protection Commissioner of the Council of Europe have also issued a Joint Statement on digital contact tracing (28 April 2020). This statement reminds governments of the need to decide whether large-scale personal data processing can be performed based on its effectiveness. Where public authorities decide to use digital contact tracing, the following considerations should guide the design and implementation of those systems: (i) trust and voluntariness, (ii) impact assessment and privacy by design, (iii) purpose specification, (iv) data sensitivity, quality, minimisation, (v) automated decision-making, (vi) de-identification, (vii) security, (viii) architecture, (ix) interoperability, (x) transparency, (xi) temporariness, and (xii) oversight and audit.

On 3 May 2021, the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data made a Statement on COVID-19 vaccination, attestations and data protection. The Statement addressed (i) national information systems supporting vaccination programmes and (ii) attestation of vaccination, negative test results or past COVID-19 infection. Any information system for managing vaccination programmes must be based on fair and transparent processing. Central solutions should be avoided where possible. The purposes for which personal data may be collected must be explicit, specified and legitimate. Organisational and technical measures must be implemented to ensure that only expressly authorised persons and staff can have access to the data, and storage periods for personal data should be a key concern. The Statement also affirms that the setting up of an attestation of vaccination, negative test results or past COVID-19 infection must be provided for by law, necessary and proportionate to the legitimate aim pursued. Upholding data protection principles must be central to all tools such as mobile applications for presenting attestation, barcodes or QR ("Quick Response") codes because of their privacy-invasive nature.

On 28 April 2021, the Committee of Ministers adopted a Declaration on the need to protect children's privacy in the digital environment. It, *inter alia*, raised concern about the consequences and impact of the COVID-19 pandemic on children as a result of increased online activities and use of online products and services, or of digital exclusion. Therefore, it called on member States to implement enhanced safety and safeguarding measures as regards the use of technology and processing of children's data, notably children's health-related data and data collected in education settings, to minimise potential adverse effects, including the public identification of a child as a COVID-19 carrier.

Freedom of expression, information disorder and the media

The COVID-19 pandemic and the domestic regulations related to it have also raised issues relating to freedom of expression. These range from concerns that information disorder might impede public health initiatives, to the fear that the crisis might be used as a pretext for restricting media freedom and the public's access to information.

The pending case of *Avagyan v. Russia*, no. 36911/20 concerns the conviction and fine (approximately 390 Euros) of a private individual for disseminating untrue information on the Internet, after she posted an online comment on social media alleging the non-existence of COVID-19 in the region. The applicant complains, *inter alia*, under Article 10 of the Convention that the impugned law fails to distinguish between dissemination of untrue information and sharing value judgments, that her opinion was based on other Internet publications and posed no risk to public health or security, and that the fine imposed upon her was excessive.

In the communicated case of *Jeremejevs v. Latvia*, no. 44644/21, the applicant, a social and political activist, was placed in detention and subjected to criminal investigation and security measures, in relation to videos that he had posted on Facebook. The videos contain interviews with health-care professionals concerning COVID-19 and the Government's control and prevention measures. He complains of a violation of his right to freedom of expression under Article 10.

The Council of Europe's Committee of experts on media environment and reform (MSI-REF) has issued a Statement on freedom of expression and information in times of crisis which underscores the importance of reliable journalism, based on the standards of professional ethics, to inform the public and to scrutinise the measures taken in response to the pandemic.

Financial damage to businesses

The pending case of *Toromag, S.R.O. v. Slovakia*, no. 41217/20 and 4 other applications concerns the issue of financial damage to businesses caused by the COVID-19 pandemic. The applicants were forced to close their business (fitness centres) by virtue of measures adopted by the Slovak Public Health Authority to prevent the spread of the virus. The applicants allege under Article 1 of Protocol No. 1 (peaceful enjoyment of possessions) that they have thereby incurred pecuniary damage and lost future income as well as clientele.

III. Positive obligations on States during a pandemic

The Court has acknowledged the very serious threat to public health from COVID-19, and that knowledge of the characteristics and dangerousness of the virus was very limited at the beginning of the pandemic; accordingly, States had to react swiftly. Furthermore, it has noted the competing interests at stake in the very complex circumstances of the pandemic, especially with regard to the positive obligations for the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, under Articles 2 and 8 of the Convention in particular (*Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, 13 March 2022 (not final), § 84).

Protection of health and other socio-economic rights

While the Court´s case-law does not acknowledge a "right to health" under the Convention, it has established a number of positive obligations concerning health under Articles 2 and 8, in particular concerning a preventive regulatory framework, including its effective functioning

by necessary measures to ensure implementation, supervision and enforcement (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, §§ 186-196, 19 December 2017; *Vasileva v. Bulgaria*, no. 23796/10, §§ 63-69, 17 March 2016; *İbrahim Keskin v. Turkey*, no. 10491/12, §§ 61-68, 27 March 2018).

The decision of *Le Mailloux v. France*, no. 18108/20, 5 November 2020, concerned the applicant's objections to the handling by the French State of the COVID-19 health crisis. Invoking Articles 2, 3, 8 and 10 of the Convention, the applicant complained in particular of restrictions on access to diagnostic tests, preventive measures and specific types of treatment, and interference in the private lives of individuals who, according to him, were dying of the virus on their own. The Court observed that the applicant's complaints related to the measures taken by the French State to curb the propagation of the COVID-19 virus among the whole population of France, but had not shown how he was personally affected. The application accordingly amounted to an *actio popularis* and the applicant could not be regarded as a victim, within the meaning of Article 34 of the Convention, of the alleged violations. The application was thus incompatible with the Convention and inadmissible.

Near the beginning of the COVID-19 pandemic, the European Committee of Social Rights issued a Statement of interpretation on the right to protection of health in times of pandemic (21 April 2020). The statement urged State Parties to ensure that the right to protection of health under Article 11 of the European Social Charter was given the highest priority in policies, laws and other actions taken in response to a pandemic. The right to protection of health dictated that States Parties must: (i) take all necessary emergency measures in a pandemic; (ii) take all necessary measures to treat those who fall ill in a pandemic; (iii) take all necessary measures to educate people about the risks posed by the disease in question; (iv) implement precautionary measures; (v) be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities; (vi) protect the right of access to healthcare without discrimination; (vii) aim to achieve health equity; (viii) operate widely accessible immunisation programmes; and (ix) protect the right to protection of health not merely theoretically, but also in fact.

The Committee on Bioethics (DH-BIO) made a Statement on human rights considerations relevant to the COVID-19 pandemic in April 2020. It wished to highlight some of the human rights principles laid down in the Convention on Human Rights and Biomedicine ("Oviedo Convention") which are of particular relevance in the current pandemic. They include the principle of equity of access to health care, right to privacy of information, a possibility to make restrictions on the exercise of the rights and protective provisions, requirements related to consent in emergency situations, and the conditions under which research on persons in emergency situations can be carried out.

Further, the DH-BIO Statement on COVID-19 vaccines emphasises the critical importance of equitable access to vaccination during the current and future pandemics. The principle of

equitable access to healthcare requires that, within each group as defined by the prioritisation process, each person will be able to receive a vaccine. Procedures developed for vaccine distribution within the groups, as defined by the prioritisation process, must be non-discriminatory in design and in impact. Access to vaccination services should be tailored to the needs of persons in vulnerable situations having difficulties in accessing health services. The public should be provided with clear, accurate, understandable and reliable information about available vaccines and how to access them. Educational messages should be developed to help overcome barriers to vaccination. The objectives of the vaccination campaign, as well as the criteria for prioritisation of different groups of the population for vaccination, should be communicated transparently. The vaccination services and the vaccines to which equitable access is to be provided must be of appropriate quality.

On 24 March 2021, the European Committee of Social Rights adopted a Statement on COVID-19 and social rights. With that statement, it aimed to highlight those Charter rights that are particularly engaged by the COVID-19 crisis. These are (i) employment and labour rights, including full employment and employment services, the right to a safe and healthy working environment, just working conditions, including fair remuneration, the right to organise and collective bargaining, gender equality and the world of work, and the rights of migrant workers; (ii) social security, social and medical assistance and the fight against poverty and social exclusion; (iii) right to education; (iv) rights of different categories of people, namely children and families, women, older persons, and persons with disabilities; and (v) right to housing.

See also the Parliamentary Assembly of the Council of Europe Resolution and Recommendation on Overcoming the socio-economic crisis sparked by the COVID-19 pandemic.

Protection of vulnerable groups, including against violence

The pandemic has been capable of exacerbating and compounding already-existing hardship and inequalities, particularly among vulnerable groups such as migrants, ethnic minorities and Roma, people with disabilities and children (see, for example, the decision of the European Committee of Social Rights of *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece,* complaint No. 173/2018, § 229, 26 January 2021). Member State action – or a lack thereof – in response to the pandemic has been capable of disrupting access to social rights of those most in need, while confinement measures, the closure of services and institutions has exposed certain groups to increased risk of violence.

The decision of the European Committee of Social Rights of *European Roma Rights Centre (ERRC) v. Belgium*, complaint no. 195/2020, 29 June 2021, concerned the right to work, protection of health, social security, social and medical assistance, protection against poverty and social exclusion, housing, the right of the family to social, legal and economic protection, the right of children and young persons to social, legal and economic protection and non-

discrimination under the European Social Charter. The ERRC alleged that, following a police operation in April 2020 targeting two Travellers' sites, families, including children, sick persons and a pregnant woman, had their caravans and property seized. It argued that these actions were carried out without consideration of the proportionality of the measure and without offering an alternative solution in return, such as provision of alternative accommodation, access to water, sanitation, electricity, food and medical services, and had placed the affected families in direct exposure to hardships and health risks associated with COVID-19, in breach of the above-mentioned rights under the Charter. The Committee declared the complaint admissible and decided that it was not necessary to indicate to the Government any immediate measures.

Validity v. Finland, complaint no. 197/2020 before the European Committee of Social Rights concerns the right to protection of health, the right of persons with disabilities to benefit from social welfare services and to independence, social integration and participation in the life of the community, as well as non-discrimination. Validity (Mental Disability Advocacy Centre) alleges that the response of the Government to the COVID-19 pandemic in spring 2020 violated the rights of persons with disabilities under these Charter provisions, in that the Government failed to adopt appropriate measures to protect the life and health of persons with disabilities during the pandemic, and adopted restrictive measures which led to the complete isolation of persons with disabilities in institutions, with a ban on accepting any visits. The complaint has been declared admissible.

The Council of Europe has produced a number of soft law instruments underscoring the need to protect against increased risks of violence and discrimination during the pandemic. A set of Guidelines on upholding equality and protecting against discrimination and hate during the COVID-19 pandemic and similar crises in the future (2021), adopted by the Committee of Ministers, are designed to serve as a practical tool for member States in adapting their work on upholding equality and protecting against discrimination and hate during the COVID-19 pandemic and similar crises in the future. They address the issues of (i) preparedness, outreach and information, (ii) protection and access to services and benefits, (iii) hate speech and different forms of violence, (iv) prevention, assessment and oversight of discrimination and other human rights violations, and (v) digitalisation, artificial intelligence and contact tracing.

The Advisory Committee on the Framework Convention for the Protection of National Minorities Statement on the COVID-19 pandemic and national minorities (28 May 2020) highlights a number of ways in which the pandemic, and member State responses thereto, risk having a disproportionate impact on persons belonging to national minorities and calls on member States to effectively address those challenges, guided by the provisions of the Framework Convention and other Council of Europe Standards.

The Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) have made a Declaration on the implementation of the Convention during the COVID-19 pandemic (20

April 2020). Noting that violence against women and girls, as well as domestic violence, tend to increase in times of crisis,[5] the Committee declares possible action and measures to take during the COVID-19 pandemic under selected provisions of the Istanbul Convention. They are divided into four main categories: (i) integrated policies (gender-sensitive policies, comprehensive and co-ordinated policies, financial resources, non-governmental organisations and civil society, data collection and research), (ii) prevention (general obligations, awareness-raising, training of professionals, preventive intervention and treatment programmes, participation of the private sector and the media), (iii) protection (information, general support services, specialist support services, shelters, telephone helplines), and (iv) prosecution (general obligations, immediate response, prevention and protection, risk assessment and risk management, emergency barring orders, restraining and protection orders).

The Statement by the Lanzarote Committee Chairperson and Vice-Chairperson on stepping up protection of children against sexual exploitation and abuse in times of the COVID-19 pandemic (3 April 2020) calls on State Parties to continue upholding children's rights in line with the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), which requires them to take specific measures to protect all children and to prevent and respond to sexual abuse and exploitation. State Parties must ensure that all children are confined in safe environments, and must be informed of their right to protection against sexual violence and of the services and measures in place.

See also several resolutions and recommendations of the Parliamentary Assembly of the Council of Europe on, *inter alia*, the Impact of the COVID-19 pandemic on children's rights, and Humanitarian consequences of the COVID-19 pandemic for migrants and refugees.

Individuals deprived of their liberty

Member States have positive obligations towards those deprived of their liberty under their authority. Not only must the State ensure detainees are kept in adequate conditions, which do not pose a risk to their health or life, it also must take certain steps to ensure detainees' enjoyment of other Convention rights. The pandemic has added new challenges to this area of human rights protection.

To date, the Court has had the opportunity to examine several such cases:

The judgment of *Feilazoo v. Malta*, no. 6865/19, 11 March 2021 concerned, *inter alia*, the conditions of the immigration detention of a Nigerian national, including time spent in *de facto* isolation and a subsequent period where the applicant had been placed with new arrivals in COVID-19 quarantine. The Court held that there had been a violation of Article 3 of the Convention on account of the applicant's inadequate conditions of detention. In

[5] The Court similarly noted, in *Tunikova and Others v. Russia,* no. 55974/16 and 3 others, 14 December 2021, § 150, that "the COVID-19 pandemic has further aggravated the [domestic] situation and brought about a substantial increase in the number of domestic violence complaints."

particular, the Court was concerned about the applicant's assertion, not rebutted by the Maltese Government, that following an isolation period the applicant had been moved to other living quarters where new arrivals (of asylum seekers) were being kept in COVID-19 quarantine. There was no indication that the applicant had been in need of such quarantine – particularly after an isolation period which, moreover, had lasted for nearly seven weeks. Thus, the measure of placing him, for several weeks, with other persons who could have posed a risk to his health, in the absence of any relevant consideration to that effect, could not be considered as a measure complying with basic sanitary requirements.

In *Fenech v. Malta*, 19090/20, 1 March 2022 (not final) the applicant, who is detained on remand and who lacks a kidney, complained of his detention conditions and the adequacy of measures taken by the State to protect his life and health against potential COVID-19 infection. The Court founds as follows:

- In the absence of information to that effect, it could not speculate as to whether the applicant's condition would be of a life-threatening nature should he contract COVID-19. He had not been infected after more than a year and a half since the start of the pandemic and had not availed himself of the opportunity to be vaccinated against the disease. However, the Court could not exclude that Article 2 might be applicable in certain COVID-19 related cases (Article 2 complaint inadmissible);
- The authorities were obliged to put certain measures in place aimed at avoiding infection, limiting the spread inside the prison, and providing adequate medical care in case of contamination. Preventive measures had to be proportionate to the risk but without imposing an excessive burden on the authorities in view of the practical demands of imprisonment and the novel global pandemic situation. In the circumstances of the case, the authorities had put in place adequate and proportionate measures (no violation of Article 3);
- The restrictions to which the applicant had been subject during his detention in a dormitory (no access to the gym, his family, church or other activities) had been put in place in the specific context of a public health emergency. When family visits had been suspended, alternative measures had been put in place allowing the applicant to maintain regular contact with his family, and the situation had been endured by persons at liberty all over the world (no violation of Article 3).

Ünsal and Timtik v. Turkey, no. 36331/20, 8 June 2021 concerned the compatibility of the conditions of detention with a detainee's state of health given a hunger strike during the COVID-19 pandemic and the management of the situation by the authorities. The Court declared the application inadmissible as being manifestly ill-founded. Making an overall assessment of the relevant facts on the basis of the evidence adduced before it, it concluded that this was not a situation in which the necessary medical care or treatment of the detainees required measures other than those adopted.

Numerous applications relating to detention conditions under Articles 2 and 3 of the Convention are currently pending before the Court. They encompass complaints that the authorities failed to implement necessary measures in order to protect the health of prisoners in the context of the COVID-19 pandemic (*Vlamis v. Greece*, no. 29655/20; *Rus v. Romania*, no. 2621/21 – alleged overcrowding preventing social distancing), including in relation to persons already suffering from health complications (*Faia v. Italy*, no. 17222/20; *Riela v. Italy*, no. 17378/20; *Maratsis and Others v. Greece*, no.s 30335/20 and 30379/20).

Hafeez v. United Kingdom, no. 14198/20 concerns a sixty year old applicant with "a number of health conditions" and facing extradition to the United States of America. He complains, *inter alia*, of the possible prison conditions to which he would be subjected in the event of extradition. The Court communicated the case to the parties, asking the Respondent Government whether, having particular regard to the ongoing COVID-19 pandemic, the applicant would face a real risk of a breach of Article 3 of the Convention on account of the detention conditions which he would face on arrival (see similarly *Krstic v. Serbia*, no. 35246/21).

In a similar vein, *Gardea v. the Netherlands,* no. 27091/21 concerns an applicant infected with HIV and facing expulsion to Liberia. He argues, *inter alia*, that the availability of treatment there is not dependable, particularly since the outbreak of the COVID-19 pandemic, and that his removal would accordingly breach Article 3 of the Convention.

The pending case of *Khokolov v. Cyprus*, no. 53114/20, concerns the applicant's ongoing detention since October 2018 for the purpose of his extradition to Russia to stand trial. In October 2020 the applicant was informed that, due to the restrictive measures relating to COVID-19 in place by both Cyprus and Russia, the two states had decided to suspend his extradition. The applicant complains, in particular, that he has been unlawfully and arbitrarily deprived of his liberty, as a result of unjustified delays on the part of the domestic authorities in effecting his extradition. The Court has put questions to the parties.

Complaints also extend to detainees' ability to exercise certain Convention rights in the light of restrictions put in place following the pandemic:

Spinu v. Romania, no. 29443/20 concerns the refusal of the domestic authorities to allow a prisoner to continue to participate in his church mass outside the prison building, on the basis that only absolutely necessary activities could be conducted outside the prison during the pandemic, and that moral and religious assistance to detainees was accordingly interrupted. The applicant complains of a breach of his right to freedom of religion under Article 9 of the Convention.

In *Szal v. Poland*, no. 53780/20, the applicant was a prisoner employed by an external company and received remuneration for his work. In March 2020, he was informed that he would no longer be allowed to leave the prison for work due to COVID-19 restrictions. The applicant stopped being paid but was not formally terminated. At domestic level, he argued unsuccessfully that he was eligible for payment by virtue of the COVID-19 measures put in

place by the authorities for regular employees, and asked for equal treatment between prisoner-workers and employees in general. The case has been communicated under Articles 6 and 14 of the Convention.

In a number of other communicated cases, the applicants complain under Article 8 (respect for private and family life) of long-lasting prohibitions on family visits in prisons, in connection with the COVID-19 pandemic (*Michalski v. Poland*, no. 34180/20; *Guhn v. Poland*, no. 45519/20).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic (20 March 2020) reminds all actors that protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty and offers ten principles to be applied by all relevant authorities responsible for persons deprived of their liberty within the Council of Europe area. In its Follow-up statement (9 July 2020), the Committee highlighted positive measures, such as the increased use of non-custodial measures as alternatives to detention, steps taken to facilitate detained persons' contact with the outside world to counter-balance restrictions imposed for public health reasons, immigration detention centres being temporarily withdrawn from service, and improvement of medical screening upon admission.

The Council for Penological Co-operation Working Group (PC-CP WG) also published a COVID-19 related Statement at the beginning of the pandemic. In its statement, the PC-CP WG summarised (i) key principles and recommendations contained in the European Prison Rules (2006) as well as in the Committee of Ministers' Recommendations no. R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prison, and no. R(98)7 concerning the ethical and organisational aspects of health care in prison, (ii) some practices introduced by prison services in Europe, (iii) some practices introduced by probation services in Europe, and (iv) emergency measures introduced by a number of countries aimed at decreasing prison numbers and reducing prison overcrowding.

Maintaining family life

Measures put in place in the light of the pandemic have raised a number of challenges for States in upholding their positive obligations under Article 8 of the Convention. One such example is the establishment and maintenance of contact and residence arrangements, which may be impeded during the imposition of confinement and other restrictive measures.

This was the issue at hand in the decision of *D.C. v. Italy,* no. 17289/20, 15 October 2020. In April 2020 the applicant filed for a separation and requested shared custody of his son, who had been taken by the child's mother after leaving the conjugal home a month earlier. Given the restrictions put in place on the justice system in the light of the pandemic, the applicant

also requested that the procedure be declared urgent. His request was rejected by the domestic court, which fixed a first hearing at the end of October 2020 in order to take urgent interim measures in the interest of the child. The application was struck out after the applicant informed the Registry that he no longer wished to maintain his application, in the light of an anticipated earlier first hearing in June 2020.

The judgment of *Q and R v. Slovenia*, no. 19938/20, 8 February 2022 concerned the length of foster care permission proceedings for the applicants' grandchildren, which had so far lasted almost six years and were pending at first instance following remittal. While the restrictions necessitated by the pandemic could have understandably had an adverse effect on the processing of cases before the domestic courts, that could not absolve the State from its responsibility for the length proceedings. In particular, the case would have been dealt with during the periods of restrictions had it been classified as urgent. Given the limited nature of contact between the first applicant and her grandchildren, the importance of what had been at stake for her (her wish to look after her grandchildren following her daughter's death) had called for special diligence on the part of the authorities. That was especially so taking into account the effect of the passage of time on the relationship between the first applicant and her grandchildren. The Court accordingly found a violation of Article 6 § 1 of the Convention.

As noted in the previous sub-section, there have also been complaints made by prisoners under Article 8 as to long-lasting restrictive measures on family visits, put in place with a view to limiting the spread of COVID-19 (*Michalski v. Poland*, no. 34180/20; *Guhn v. Poland*, no. 45519/20).

Protection against corruption and crime

Addressing yet another challenge presented by the COVID-19 pandemic, the Group of States against Corruption (GRECO) has issued Guidelines on corruption risks and useful legal references in the context of COVID-19 (21 April 2020). As countries face undeniable emergencies, concentration of powers, derogations from fundamental rights and freedoms, and as large amounts of money are infused into the economy to alleviate the crisis (now and in the near future), risks of corruption should not be underestimated, including in the private sector. The health sector was particularly exposed, because of the immediate need for medical supplies, overcrowded medical facilities and overburdened medical staff. Various typologies of corruption in the health sector include, but are not limited to, (i) the procurement system, (ii) bribery in medical-related services, (iii) corruption in new product research and development (R&D), including conflicts of interest and the role of lobbying, and (iv) COVID-19-related fraud. Of particular importance is the need to ensure the protection of persons (whistleblowers) reporting suspicions of corruption, irrespective of the reporting lines they choose to pursue.

In a similar vein, the Committee of the Parties of the MEDICRIME Convention has issued Advice on the application of the Convention in the context of COVID-19. It addresses the issue

of criminals exploiting shortages in public health systems and supplying falsified medical products. States are advised to (i) fulfil their obligations under the MEDICRIME Convention, (ii) respect the WHO and national health and clinical guidelines on fighting the pandemic, (iii) work together, (iv) make staff available to detect and stop trafficking of falsified medical products, (v) prevent an unauthorised diversion from States' health systems and supply lines of vital medical products, (vi) ensure cooperation between national agencies and services, (vii) proactively act to prevent or address criminality, (viii) cooperate domestically and internationally, and (ix) provide information to victims on the impact of falsified medical products on their health.

In a Human Rights Comment of 19 January 2021, the Human Rights Commissioner also noted that the pandemic has exacerbated systemic problems and risks of corruption in the context of health and social care, which in turn acts as an important barrier to healthcare access.

At the same time, the substantive and procedural human rights guarantees of those suspected of involvement in such activities are not to be disregarded. The communicated case of *Narbutas v. Lithuania*, no. 14139/21 is of note in that regard. The applicant has been suspected of trading in influence – it has been alleged that he organised the purchase of a large number of COVID-19 testing kits by the Government, acting as an intermediary between the latter and a foreign pharmaceutical company, for which he received a profit of over EUR 300,000. At the time of lodging the application, the pre-trial investigation was still pending. The applicant makes a number of complaints under Articles 3, 5, 6, 8 and 10 of the Convention and under Article 1 of Protocol No. 1 in relation to the treatment he had been subjected to during the investigation and the related procedures. Among other things, he argues that he was unlawfully placed in detention and under house arrest, during which time he was banned from going to a hospital to obtain required treatment; that the criminal proceedings against him have been unfair; that investigating officials and prominent politicians made public statements which infringed his right to be presumed innocent; that the publicity surrounding the case damaged his reputation; and that he was banned from discussing the case in the media.

IV. Proceedings before courts

Functioning of the European Court of Human Rights

As the Court has itself acknowledged, the extent and insurmountable nature of the practical difficulties linked to the early period of the pandemic has affected all parties of Court proceedings, applicants and respondent States alike, but has also required the Court to take measures, in accordance with the terms of the Convention and the Rules of the Court, to maintain the exercise of its core, adjudicative functions pursuant to Article 19 of the Convention and ensure that it was not put in peril (*Saakashvili v. Georgia* (dec.), no.s 6232/20 and 22394/20, 1 March 2022, § 52).

At the height of the sanitary crisis, the Court maintained its essential activities, including the handling of priority cases and the examination of urgent requests for interim measures under Rule 39 of the Rules of Court. The six[6]-month time-limit for the lodging of applications, under Article 35 (admissibility criteria) of the European Convention on Human Rights, was suspended for applications introduced during a certain time period. That extension was considered in the decision of *Saakashvili v. Georgia*, no.s 6232/20 and 22394/20, 1 March 2022, where, in the normal course of events, the application would have exceeded the time-limit. Weighing the legal considerations behind the six-month rule against the need to preserve the cornerstone of the Convention mechanism under Article 34 (individual applications), the Court confirmed that to achieve this balance, the running of the six-month period could legitimately be considered to have been suspended during the most critical phase of the pandemic for three calendar months in total. This was also consistent with the general principle of public international law of *force majeure* as well as that of *contra non valentem agere nulla currit praescriptio*. The extension was of an exceptional nature and had to be understood to be strictly related to the unprecedented situation at hand. Any legal certainty concerns had been effectively catered for by the measures publicly announced by the Court's President, which provided a clear timeframe. Accordingly, the applicant had three additional months to lodge an application.

The Court has continued to hold hearings, which are customarily organised in Grand Chamber cases and more exceptionally in other Chamber cases, and to preserve their public character. While the physical presence of the public at the hearings was not possible due to sanitary restrictions and to the fact that the building of the Court was closed to all external visitors, the webcasting of the hearings – available since 2007 – continued to be ensured, making the entirety of the hearings available to the public on the afternoon of the very day of the hearings. The Court has adopted 'Guidelines on hearings by videoconference', which allow the President of the Grand Chamber or of the Chamber to decide to conduct these proceedings through videoconference technology, depending on the sanitary conditions prevailing in Europe, and in particular in the Court's host State and in the States where the parties to a case are based. Hearings by videoconference are conducted in accordance with the relevant provisions of the Rules of Court. In order to preserve the public character of hearings by videoconference (Article 40 of the Convention, Rule 63 of the Rules of Court), the proceedings were recorded and are made available for viewing on the Court's website in the usual way (not live streaming). The Court conducted ten public hearings via videoconferencing during the first two lockdown periods in France.

A novel issue threatening protection of judicial human rights in the context of COVID-19 arose in the decision of *Zambrano v. France*, no. 41994/21, 21 September 2021. Using the internet site "nopass.fr", the applicant had chosen to oppose the health pass system introduced in France, by inviting visitors to his site to join him in lodging a collective application with the

[6] In line with Protocol No. 15, the relevant part of which entered into force on 1 February 2022, the time-limit for lodging applications has now been reduced to four months.

Court and to submit multiple applications through an automatically generated and standardised application form. Almost 18,000 applications had already been sent to the Court as a result of this technique. The objective had not been to win the cases, but on the contrary to paralyse the Court's operations and to "derail the system" in which the Court was a "link in the chain". It was clear that a major surge in applications was liable to affect the Court's ability to fulfil its mission. The applicant's "legal strategy" was manifestly contrary to the purpose of the right of individual petition, the spirit of the Convention and the objectives pursued by it. The Court accordingly found that there had been an abuse of the right of application.[7]

Other regional human rights bodies, including the Court of Justice of the EU and the Inter-American Court of Human Rights, have similarly adopted adaptation measures in order to ensure their continued functioning during the pandemic.

Functioning of domestic courts and legal mechanisms

The sanitary precautions which States have put in place in response to the pandemic have created challenges for the continued functioning of domestic justice processes and of the judiciary. Restrictive measures have risked impeding proceedings and administrative processes, which, moreover, has meant that those being held in pre-trial detention are faced with potential prolongation of their deprivation of liberty. A shift towards digital solutions in response to the challenges facing the justice sector during the pandemic also raises questions as to infrastructure and equal digital access, as well as the more fundamental issue of whether these solutions are fully compatible with Convention rights, including its fair trial guarantees. The Court has already had occasion to examine some of the issues which may arise in this context:

The decision in *Bah v. Netherlands*, no. 35751/20, 22 June 2021 concerned the impossibility for the applicant, a Guinean national, to be heard in his immigration detention appeal in person or by tele- or videoconference due to initial infrastructure problems during the COVID-19 pandemic. The Court declared the application inadmissible as being manifestly ill-founded, finding that the applicant had been entitled to take proceedings within the meaning of Article 5 § 4 (right to a speedy decision on the lawfulness of detention) of the Convention and that, in the circumstances of the present case those proceedings met the requirements of that provision. The Court noted in particular the difficult and unforeseen practical problems with which the State had been confronted during the first weeks of the COVID-19 pandemic, the fact that the domestic court had made concrete efforts to enable the applicant's presence at his hearing and had explained in detail why it had not been possible to hear him, the importance of the applicant's other applicable fundamental rights and the general interest of public health. Moreover, the applicant had benefitted from adversarial proceedings during

[7] See further above, chapter II: "Vaccination and health passes".

which he had been represented by and heard through his lawyer who had attended the hearing by telephone and with whom he had had regular contact.

See similarly the communicated case of *Rusu v. Romania*, no. 53021/20, where the applicant complains under Article 6 § 3(c) (right to defend oneself in person) that he was unable to take part in hearings due to COVID-19 restrictions.

In its decision in the case of *Fenech v. Malta*, no. 19090/20, 23 March 2021, the Court declared the application partly inadmissible. The case concerned the aftermath of the applicant's arrest in 2019 on suspicion of involvement in the assassination of a noted Maltese journalist. Due to the spread of COVID-19, national measures were introduced which led to the suspension of criminal proceedings, until lifted on order of the competent authority. Domestic courts retained discretion to hear urgent cases or related matters, and the proceedings resumed three months later. The applicant made an unsuccessful *habeas corpus* petition, alleging unlawful detention due to the decision to suspend all proceedings for an unspecified time. The applicant's complaints under Articles 5 §§ 1(c) and 3 of the Convention were manifestly ill-founded: among other things, the temporary suspension had been due to exceptional circumstances surrounding a global pandemic which, as the Constitutional Court had held, had justified such lawful measures in the interest of public health, as well as that of the applicant. The applicant's complaints under Articles 5 § 4 (speedy review of lawfulness of detention) and 6 § 1 (access to court) of the Convention were also manifestly ill-founded: the domestic court had considered that proceedings could still continue had the applicant so requested. Moreover, the proceedings had continued in respect of his requests for bail and the *habeas corpus* application it was deciding.

As *Q and R v. Slovenia*, no. 19938/20, 8 February 2022, demonstrates, however, the challenges presented to the justice system by the COVID-19 pandemic are not a panacea for excessive length of proceedings. In that case, civil proceedings for foster care permission, which had lasted approximately six years, were found to have breached Article 6 § 1 of the Convention, notwithstanding that the length had been partly due to pandemic-related measures.[8]

Ait Oufella and Others v. France, no. 51860/20 and 3 others concerns the adaptation of certain rules of criminal procedure on the basis of emergency legislation in the context of the COVID-19 pandemic, and in particular the automatic extension of periods of pre-trial detention. The four applications were received from individuals who were in custody at the time: they complain that their detention has been extended without any decision by a judge. The case has been communicated under Article 5 §§ 1, 3, 4 and 5 of the Convention.

In *Jovanović v. Serbia* (dec.), no.s 9291/14 and 63798/14, 23 March 2021, the Court had to determine whether a new legal framework establishing a mechanism for redress for parents of missing newborn children in State-run hospitals was adequate for the purposes of Article 13 (effective remedy) of the Convention. In finding that it was no longer justified to continue

[8] See further Chapter III: "Mantaining family life".

the examination of the applications and declaring them inadmissible, the Court had regard to the impact that COVID-19 and related measures had had upon the functioning of the mechanism. In particular, the six-month deadline for those affected to institute proceedings had been further extended by regulations adopted as a consequence of the pandemic. Moreover, it had been understandable that training for relevant authorities had been provided mainly through online activities and projects, in the light of the pandemic and state of emergency declared in response.

Several bodies of the Council of Europe have issued documents relating to the functioning of justice during the pandemic:

The Consultative Council of European Prosecutors prepared an Opinion No. 15 (2020) on the role of prosecutors in emergency situations, in particular when facing a pandemic (19 November 2020). Its aim was to determine how prosecution services could, without hampering their functional autonomy, fulfil their mission with the highest quality and efficiency, respecting the rule of law and human rights, in the context of the COVID-19 pandemic. The opinion addresses (i) international and constitutional provisions in case of emergencies and their influence on the work of prosecutors, (ii) implementation of the usual functions of prosecution services and prosecutors in emergency situations, including (a) implementation of the functions of prosecution services and prosecutors in the field of criminal law and (b) implementation of functions of prosecution services and prosecutors outside the criminal law field, (iii) existing, new or extended functions of prosecution services and prosecutors in response to emergency situations, (iv) overcoming challenges faced by prosecution services and prosecutors in emergency situations, and (v) international co-operation and difficulties during the pandemic. The Opinion also contains recommendations on the role of prosecutors in the COVID-19 pandemic.

The Statement of the President of the Consultative Council of European Judges (CCJE) on the role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges (24 June 2020) underscores that the principle of the independence of the judiciary should not be called into question during pandemic. CCJE standards for the appointment, promotion and disciplinary procedures of judges should be retained and observed at all times. In the context of the pandemic, there is a risk that member States may overlook the significance of the role of courts. Member States should provide the necessary resources for courts to fulfil their functions, to address and recover from the pandemic. Courts should adapt to the circumstances, while taking into account that new types of cases are likely to reach courts. The courts' caseloads are likely to increase considerably; allocation and prioritisation of cases will therefore be required.

The European Commission for the Efficiency of Justice (CEPEJ) has also made a Declaration on lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic (10 June 2020). In the context of the pandemic, the CEPEJ reminds member States of the following important principles: (i) Human rights and the Rule of Law, (ii) access to justice, (iii)

safety of persons, (iv) monitoring case flow, quality and performance, (v) cyberjustice, (vi) training, and (vii) forward looking justice.

The first open-access platform on COVID-19 related cases has been developed by the University of Trento and WHO, and launched in December 2021. The "COVID-19 Litigation Database" systematically collects and analyses information about legal challenges brought before courts in respect of public health interventions to address COVID-19 in different countries across the world. The aim is to shed light on the role of courts within global crises like the present one. It is based on the premise that courts are increasingly being asked to play a gatekeeping role – to ensure the rationality, reasonableness and proportionality of governmental interventions aimed at tackling the pandemic – in cases which require consideration of complex scientific and legal issues, in short time frames and with limited scientific evidence. The database will be continuously updated.

Conclusion

The COVID-19 pandemic will likely continue to have a profound effect upon the operation of State and regional institutions, and by extension, the human rights of citizens across Europe and beyond. This Background Paper illustrates the diversity of human rights issues implicated by the health crisis; the difficult balancing act faced by member States in fulfilling their positive obligations while respecting individual freedoms (chapters II and III); and some of the functional challenges faced and adaptations made within judicial systems (chapter IV).

As the Paper demonstrates, the Court's case-law on human rights during the health crisis is still developing: moreover, with a large number of received and pending applications before it, and the continued, evolving nature of the pandemic, it is forecast to continue expanding for many years to come. In addition to this body of jurisprudence, the standards developed by other Council of Europe, regional and international bodies, as well as intra-State knowledge-sharing, can be of real value as member States look for solutions, both to enduring and evolving human rights challenges resulting from COVID-19.

This year's Judicial Seminar offers an opportunity for a vital exchange on experiences and good practices in the light of the some of the diverse, complex and significant human rights challenges arising out of the pandemic and identified here. In turn, the knowledge gained and lessons learned can serve as inspiration for current and future responses to emergency health situations.