MYKOLAS ROMERIS UNIVERSITY

LAW SCHOOL

INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

LILIIA NAHORNA
INTERNATIONAL LAW

COVID-19 RESTRICTIONS AND IMPACT ON HUMAN RIGHTS

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Supervisor –
Professor, Doctor
Lyra Jakulevičienė

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LIST OF ABBREVIATIONS

HRs - Human Rights

ECHR - The European Convention on Human Rights

ICCPR - The International Covenant on Civil and Political Rights

WHO - World Health Organization

SARS - severe acute respiratory syndrome

ECtHR - The European Court of Human Rights

IHRL - International Human Rights Law

UN - The United Nations

UDHR - The Universal Declaration of Human Rights

CoE - The Council of Europe

IHR - International Health Regulations

PHEIC - Public Health Emergency of International Concern

SARS - Severe Acute Respiratory Syndrome

PCR - Polymerase Chain Reaction

ICESCR - The International Covenant on Economic, Social and Cultural Rights

ILO - International Labour Organization

PPE - personal protective equipment

HCWs - Health care workers

US - The United States

UK - The United Kingdom

INTRODUCTION

The relevance of the topic. During the whole stages of societal development, human rights (HRs) were facing different challenges. However, after the Second World War, an approach to the HRs protection has significantly changed with its later strengthening. A new threat for HRs appeared, when starting from a cluster of pneumonia cases in Wuhan, China on 31 of December 2019[1], society faced one of the biggest catastrophes of the 21st century, the outbreak of novel coronavirus disease (hereinafter COVID-19, SARS-CoV-2 or coronavirus). The Constitution of the World Health Organization (WHO) stresses that «the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being…»[2]. Consequently in light of such a threat to the right to health a rapid reaction became essential. The WHO declared COVID-19 a public health emergency of international concern (PHEIC) on 30 January 2020, and later on 11 March COVID-19 reached a pandemic level[3].

Responding to the danger, countries started to use different strategies which they presumed to be necessary and effective to curb the spread of COVID-19. The WHO started to provide various guiding documents concerning the management of an outbreak for states from the beginning of January 2020[4]. At the same time, the states' reactions continued to be not identical, including such aspects as a time of response and scope of measures. For example, even before the reported cases of coronavirus in Mongolia, the Mongolian government prohibited public gatherings[5]; Italy was the first country in Europe to suspend flights from and to China on 30 January 2020 and the next day declared a state of emergency[6].

The obligation to protect the population from the spread of infectious disease made the right to health the centre of response. However, mental health which is also protected by this right has significantly deteriorated during the COVID-19 pandemic. The lack of the strategies targeted to ensure the fulfilment of the right to the highest attainable standard of mental health

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[1] "Archived: Who Timeline - Covid-19," World Health Organization (World Health Organization),27 April 2020, https://www.who.int/news/item/27-04-2020-who-timeline---covid-19.

[2] World Health Organization. "*Constitution of the World Health Organization*". American Journal of Public Health 36, no. 11 (November 1, 1946): pp. 1315-1323, preamble.

[3] "About the Virus, Coronavirus Disease (COVID-19) Pandemic," World Health Organization (World Health Organization,), https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov.

[4] "Timeline: Who's Covid-19 Response," World Health Organization (World Health Organization), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#!

[5] "Covid-19 Civic Freedom Tracker," The International Center for Not-for-Profit Law, The European Center for Not-for-Profit Law, other partners (ICNL), https://www.icnl.org/covid19tracker/?location=&issue=&date=&type=.

[6] Ibid. See «Italy suspends all China flights as coronavirus cases confirmed in Rome», https://www.thelocal.it/20200131/italy-suspends-all-china-flights-after-coronavirus-cases-confirmed-in-rome/

(hereinafter the right to mental health) in pandemic showed the huge gap in regulation of this issue. The connection can be seen between the restrictions of freedom of movement and their effect on the right to mental health. Due to the high transmissibility, quarantine, lockdown, isolation and self-isolation, curfews, international and interstates travel restrictions, borders closure became the notable part of response. Thus, apart from the negative effect on the right to mental health these measures substantially impacted the right to freedom of movement itself. Moreover, freedom of movement being widely restricted provoked the chain of legal issues, inter alia, disproportionate and/or discriminatory effect of measures on elderly people, asylum seekers, women and children, migrant workers, and affected the enjoinment of other connected rights, apart from the right to mental health. Thus, the separate analysis of these areas is important for the improvement of regulations of future epidemics and pandemics. For the aforementioned, the right to mental health and freedom of movement were chosen as the basis of the research.

Health emergency caused by the spread of SARS-CoV-2 gave a possibility for states to derogate[7] from certain rights according to the provisions of International Human Rights Law (IHRL), for example, Article 15 of the European Convention on Human Rights and Fundamental Freedoms (ECHR, The Convention)[8] and Article 4 of the International Covenant on Civil and Political Rights (ICCPR, The Covenant)[9]. Also, some HRs can be limited without the procedure of derogation if established by the article prerequisites exist (incl. freedom of movement)[10]. At the same time, states' actions have to be precisely limited and conditioned by the emergency[11].

Considering that HRs became a universal value and it is a particular priority for every nation to fulfil, promote and protect them, it is of utmost importance to analyse in which way they are impacted by the outbreak of COVID-19. Namely, the question arises whether the measures taken to combat the spread of coronavirus were proportionate, timely, extremely necessary, justifiable and adequate to protect the population, or states started to unreasonably neglect HRs and implement the policies which have a negative effect on them.

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[7] «To derogate» should mean a State's possibility to officially limit or suspend the exercise of certain HRs during emergency on the contemporary basis in the strictly regulated manner.

[8] Council of Europe". 1950. «European Convention for the Protection of Human Rights and Fundamental Freedoms». *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html, art. 15

[9] UN General Assembly. 1966. «International Covenant on Civil and Political Rights». United Nations. Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html, art. 4

[10] See e.g. Art. 12, «International Covenant on Civil and Political Rights» note 9

[11] Ibid. notes 8,9

The scientific research problem is formulated in the following way: What effect do the measures implemented to curb the spread of COVID-19 have on certain rights protected under the IHRL?

The scientific novelty. The novelty is explained as this work is dedicated to a broad analysis of the impact of measures taken during the health crisis which is still not overcome today, and it shows how they affected concrete HRs protected under the IHRL. Namely, the right to mental health and freedom of movement which includes the right to move and reside freely, the right to leave the country's territory, and the right to enter own's country. Also, the work indicates the legal issues caused by the restrictions of free movement, and indicates insufficiency of the right's to mental health protection. In addition, it provides a comparison with previous health crises and measures taken at that time with a reaction to COVID-19, also it briefly touches on the position of vulnerable groups of society and the risk of stigmatisation and discrimination during COVID-19. Moreover, the research includes the study of recent case law and provides an analysis of how the coronavirus crisis affected the field of HRs itself and the new concerns appeared before the international community.

Level of analysis of the research problem. The chosen topic includes a wide variety of interlinked issues which have to be systematised and analysed to provide a full picture of COVID-19 impact on HRs. It is important to notice that even the outbreak of COVID-19 is a reality for the last 2 years, the level of analysis of this problem by different authors in scientific articles, papers, and blogs indicates its high priority.

In the article «COVID-19 pandemic and derogation to human rights»[12] Audrey Lebret analyses the provisions of prominent HRs instruments which permits the states to derogate from the protected rights in cases of public emergencies, such as coronavirus crisis and highlights the obligation of states to protect the vulnerable groups from disproportionally restrictive measures. With a focus on the vulnerable groups, this article does not disclose the rights of the general population, which was affected.

«Human Rights in a Pandemic»[13] written by Alexander Zhebit besides the evaluation of problems faced by HRs in the period of limitations, derogations, and abuses connected to coronavirus, focuses on the analysis of societal reaction on the anti-pandemic measures and assess whether the policies implemented nationally and internationally can promote change in

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[12] Audrey Lebret, "COVID-19 pandemic and derogation to human rights." *Journal of Law and the Biosciences* 7, no. 1 (2020): lsaa015.

[13] Alexander Zhebit, "Human Rights in a Pandemic." Outlines of global transformations: politics, economics, law 13, no. 5 (2020): 219-252. DOI: 10.23932/2542-0240-2020-13-5-13

HRs, taking into account already existing issues in this field and discussing the HRs position in hard times. The article does not touch such aspects as the measures used by states and recommended by the WHO in other health crises, such as the 2003 severe acute respiratory syndrome (SARS) outbreak.

The works «COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights»[14] by Sanja Jovic˘ic´ and «State responsibility for the (public) right to health and security in times of Covid pandemic: European perspective»[15] by Bachmann, Sascha-Dominik Oliver Vladimir and Sanden, Joachim base their research on the ECHR and case law of the European Court of Human Rights (ECtHR, The Court), arguing for the actions required by states in public health emergencies. Based on the ECHR the articles have presented the perspective from the European side leaving the space for further analysis under the international HRs legislation.

Separate dimensions of the topic and the assessment of certain HRs during COVID-19 in concrete countries were highlighted, for instance, by Jonathan Pugh[16] in the United Kingdom, Anne Fornerod[17] in France, Natalia Varlamova[18] in Russia, Nehaluddin Ahmad[19] in India. Nevertheless, considering the pandemic's impact on international society there is a demand for the wider analysis consisting of estimation of the data from various countries and a cumulative effect of the measures on IHRL.

The Master Thesis **aim is two-fold** 1) firstly, to determine whether the right to mental health and the right to freedom of movement have been infringed in course of international and national anti-pandemic measures and define the need in the improvement of international and national emergency legislation and response strategies; 2) secondly, to identify the areas

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[14] Sanja Jovičić, «COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights." In *ERA Forum*, vol. 21, no. 4, pp. 545-560. Springer Berlin Heidelberg, 2021.

[15] See Sascha Dov Bachmann, and Joachim Sanden. "COVID-19 And The Duty of A State to Protect the Public's Health and Security During A Pandemic-A European Convention on Human Rights Perspective." *Indonesian Journal of International & Comparative Law (2020)* (2020); Sascha-Dominik Bachmann, and Joachim Sanden. "State Responsibility for the (Public) Right to Health and Security in Times of COVID Pandemic: A European Perspective." *Indon. J. Int'l & Comp. L.* 7 (2020): 407.

[16] Jonathan Pugh, "The United Kingdom's Coronavirus Act, deprivations of liberty, and the right to liberty and security of the person." *Journal of Law and the Biosciences* 7, no. 1 (2020): lsaa011.

[17]Anne Fornerod, "Freedom of Worship during a Public Health State of Emergency in France." *Laws* 10, no. 1 (2021): 15.

[18] Н. В. Варламова, Локдаун как способ реагирования на пандемию COVID-19: анализ в контексте Европейской конвенции о защите прав человека // Вестник Санкт-Петербургского университета МВД России. – 2020. – No 3 (87). – С. 15–25. DOI: 10.35750/2071-8284-2020-3-15-25. / N. V. Varlamova, "Lockdown as a response to the COVID-19 pandemic: analysis in the context of the European Convention on Human Rights». *Vestnik of St. Petersburg University of the Ministry of Internal Affairs of Russia*. – 2020. – No 3 (87) – P. 15–25. DOI: 10.35750/2071-8284-2020-3-15-25.

[19] Nehaluddin Ahmad, "Protecting the rights of minorities under international law and implications of COVID-19: An overview of the Indian context." *Laws* 10, no. 1 (2021): 17.

of concern caused by the restrictions of freedom of movement, which must be considered in course of preparedness strategies for future health emergencies.

The following objectives are set up in order to achieve the aim of the research:

1) To reveal the concept of HRs protection, and the obligation of states to protect HRs on international and national (constitutional) levels, inter alia, in the situation of a health emergency, such as the outbreak of coronavirus;

2) To disclose the requirements established in the ECHR and ICCPR which permit states to limit or derogate certain HRs on the example of COVID-19 pandemic;

3) To examine and compare the effect of the measures on HRs taken in previous public health crisis invoked by coronavirus disease - SARS 2003 and COVID-19;

4) To evaluate the impact of the anti-pandemic restrictions on selected HRs, and assess whether the measures taken on national levels resulted in infringement of HRs and violation of the international HRs protection standards;

5) To discuss the areas of concern caused by the anti-pandemic measures and possible initiatives in the IHRL and on national levels that can improve preparedness of states for the legal challenges, which are faced during health emergencies.

The significance of the work is reflected in the theoretical and practical dimensions of the issue researched. The results can be used by students willing to study the aspects covered in the work. There is no knowledge of all consequences of the catastrophe[20], but the work is essential for scientific society because the analysis of measures and their impact on HRs during the different stages of the pandemic is helpful for the understanding of a specific's consequence nature. For policymakers, it is necessary to estimate the need for further development of emergency legislation both nationally and internationally so that this work can be considered for this purpose. Also, predicting the number of applications in, for instance, ECtHR[21] this research is handy for practicing lawyers as it analysis the effect on concrete HRs.

Methodology. The topic researched demands the examination of a wide range of information, as it includes various aspects of legal science. Thus, methodological pluralism underlines the work:

1) The doctrinal method permits the analysis of already existing articles, books, papers, etc. which include important findings contributing to a more complex study of the topic.

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[20] See Zhebit, *supra* note 13, p.219
[21] See Lebret, *supra* note 12, p. 15

2) The linguistic method is essential, as it creates a possibility to examine more sources, such as foreign scientific works, legal instruments, and case law.

3) The legal-doctrinal research allows the application of legal requirements for the sequential analysis of justification of the concrete anti-pandemic measure.

4) The comparative research allows defining the main difference in approaches used by states to curb the spread of coronavirus and compares the reaction to SARS 2003 and COVID-19.

5) The critical research is vital, as one of the objectives of the thesis is to define possible international initiatives in the IHRL, deal with the predictability of measures applicable, and stronger HRs protection in epidemics and pandemics.

6) The historical method allows to refer to the experience of previous infectious disease outbreaks, including SARS 2003 and see the differences in approaches towards the measures implemented then and now.

7) The statistical method allows estimating the level of restrictions spread and correlation between the restrictions and their effect on HRs.

The structure of the Master Thesis consists of the introduction, two chapters, where the first chapter is divided into four, and the second one into two subchapters. The second subchapter in the second chapter includes two sections. The recommendations and conclusions are provided. The first chapter represents the position of HRs in International Law and their limits, the first subchapter considers the concept of HRs protection, while the second subchapter examines previous public health crises and their consequences for HRs, and discloses the rules of limitation and derogation from HRs under the ECHR and ICCPR. The second chapter provides a comparison between SARS 2003 and COVID-19 outbreak measures. The second chapter analyses the compliance of anti-pandemic measures with the international HRs standards. Consequently, all the subchapters are devoted to the examination of the impact on selected HRs.

Defence statement. Unpreparedness of states to the crisis invoked by the COVID-19 pandemic reflected in untimely, unsystematic, and disproportionate measures led to infringement of certain HRs, revealed the gap in protection of the right to mental health comparing to physical health, and emphasised the need in international and national emergency legislation improvements, regardless of the well-developed international HRs framework and existence of the International Health Regulations (IHR) adopted by the WHO.

1. THE LIMITS OF THE IMPLEMENTATION OF FUNDAMENTAL HUMAN RIGHTS

Today one of the main aims of every nation is not to merely recognise HRs, but to actively support their implementation by individuals. The proper operation of a legal system and relations inside is a result of several interlinked aspects, including the fulfilment, promotion, and protection of HRs, also as limitation of their exercise in certain cases stipulated by the provisions of national and international law. It is essential to point out, that not every right has the same level of protection[22], and as so states can limit its implementation in the specific cases, at the same time the implementation of some rights cannot be limited at all.

The outbreak of the COVID-19 pandemic is an example of a situation that demanded a rapid and solid reaction to curb the spread of infectious disease turned into the number of HRs restrictions. Consequently, for a better understanding of the need in measures implemented by states, it is useful to consider the «*boundaries*»[23] of the implementation of HRs.

To begin with, the unimpeded exercise of the rights by individuals is the key indicator that the standards of IHRL are fulfilled and the democratic values prevail. The «*boundaries*» of HRs implementation are notably influenced by society[24], and the approach towards the scope of one or another right is affected by various factors and even today is not identical in different countries. For instance, Belarus remains the only country in Europe with the permitted death penalty[25]. On the contrary, while in the period of adoption of the ECHR article 2 protecting the right to life was created in a manner which permitted the execution of a capital punishment prescribed by law[26], with the passing of time and redefining of the value of individuals' life it has been changed in Europe. Protocol No. 6 to the ECHR was firstly

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[22] Kkienerm, "Counter-Terrorism Module 7 Key Issues: Limitations Permitted by Human Rights Law," Counter-Terrorism Module 7 Key Issues: Limitations Permitted by Human Rights Law, July 2018, https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/limitations-permitted-by-human-rights-law.html.

[23] Author's note « *boundaries*» should mean the logically and legally well-grounded level of implementation of specific HRs. Where some boundaries derive clearly from the common practice and undisputed (e.g. nobody has a right to torture the other person), and some demands the evaluation on a case to case basis.

[24] М. А. Краснов, "Ограничение прав человека или поиск их естественных пределов?." *Право. Журнал высшей школы экономики* 2 (2009), с. 107. / M. A. Krasnov, "Limitation of human rights or the search for their natural limits ?." Right. Journal of the Higher School of Economics 2 (2009), p. 107.

[25] OSCE's Office for Democratic Institutions and Human Rights (ODIHR), "The Death Penalty in the OSCE Area. *Special Focus: Is the death penalty inherently arbitrary?",* Background Paper, 2020 *ISBN 978-3-903128-58-3*, https://www.osce.org/files/f/documents/b/b/466467.pdf

[26] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html.

adopted with the only possibility of the death penalty in the time of war[27], and then Protocol No. 13 to the ECHR fully prohibited capital punishment with no right to reservation or derogation[28].

It is generally accepted that fundamental rights are not given and exist because the states decided so, but belong to every person from birth[29], and their enshrinement in constitutions and international treaties testifies that the states recognise HRs as the guarantee of the proper operation of the legal system and a value demanding the strong protection. Generally, there are a plethora of factors affecting the limits of HRs implementation, including religious, moral, historical, philosophical, cultural, etc. However, from the legal perspective, the factor which plays a significant role in the interpretation of the «*boundaries*» is the existence of the rights of others. Referring to an American jurist Oliver Wendell Holmes Jr. who said: "The right to swing my fist ends where the other man's nose begins"[30] it is presumable, that the «*boundaries*» of HRs implementation of one individual include its balance with the rights of other individuals. Thus, it could be said that the «*boundaries*» of HRs implementation have been formed mostly with the influence of: 1. the understanding of the scope of certain rights by society on different stages of its development; 2. the need in a balance between the rights of individuals and certain societal values.

The limitations implemented in the national and international legal instruments do not itself establish the «*boundaries*» of HRs implementation but approve that they already exist creating the rules aimed to facilitate the peaceful common existence of individuals[31]. The sense of the measures targeted to curb the spread of the COVID-19 is first of all reflected in the desire of states to stop the transmission of a lethal virus, thereby protecting health of the

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[27] Council of Europe. 1983. "*Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty*", ETS 114, https://www.refworld.org/docid/3ae6b3661c.html.

[28] Council of Europe. 2002. "*Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*", ETS 187, https://www.refworld.org/docid/3ddd0e4c4.html.

[29] І. С. Загоруй, "Поняття права людини: теоретико-правові підходи до розуміння прав людини." Вісник Луганського державного університету внутрішніх справ імені ЕО Дідоренка 2 (2016): 66-82. / I. S. Zahoruy, "The concept of human rights: theoretical and legal approaches to the understanding human rights." Bulletin of Luhansk State University of Internal Affairs named after EO Didorenko 2 (2016): 66-82.

[30] *This quote usually, however no always id referred to this author.
Bob Hooper, "Freedom, Responsibility, and Accountability", (THE HAYS DAILY NEWS)(July 14, 2016), https://www.hdnews.net/474620df-b1ff-5873-a1ef-54229ac61a4f.html [https://perma.cc/9XST-YKX6] (Cited from: Deborah Alexander, "The Elasticity of Protected Speech: A Balance of Breadth," Mitchell Hamline Law Review: Vol. 47: Iss. 2 , Article 5. (2021), https://open.mitchellhamline.edu/mhlr/vol47/iss2/5, Deborah.)

[31] В. И. Казачкова,"Есть ли у прав человека естественные пределы?." *Скиф. Вопросы студенческой науки* 8 (24) (2018). / V. I. Kazachkova, "Do human rights have natural limits?" Scythian. Student Science Issues 8 (24) (2018).

population, preventing the increase of lethal cases and fulfil the requirements of IHRL, respectively.

The life and health of individuals are unarguably considered as the utmost important values in society. Thus, it is consistent, that the states started to implement measures to protect the right to life and the right to health. Therefore, the measures taken during the pandemic highlighted the line where the right to life and health of individuals and the population itself has to be protected throughout the limitation of the implementation of other rights, for instance, of the right to freedom of movement, freedom of assembly, etc. Nevertheless, it does not exclude that on a basis of case-to-case analysis some measures can be unlawful, unnecessary and/or disproportionally with a violative impact on HRs.

1.1. The essence of the concept of HRs protection: The retrospective analysis

To understand the importance of HRs in current IHRL the retrospective analysis of the concept of HRs protection establishment is useful. It will contribute to the further estimation of whether the concept is followed today and the protection is effectively performed in a time of the worldwide COVID-19 pandemic. While emergencies challenge the established order, they also enhance the chances to indicate the gaps which must be addressed. Thus, understanding the HRs protection concept is beneficial for the assessment of whether the new concerns appeared before the IHRL.

A modern understanding of the concept of HRs protection and of its standards appeared not a long time ago. The main development in the field of HRs protection started after the Second World War. At the same time, public health, as well as the right to health, evidently, had also became the issues of active protection in the same period with the WHO foundation in April 1948[32]. By the wording of article 1 of its Constitution the WHO showed that the main idea of health protection is human-centric, and it is not targeted to eliminate the disease at any cost, but to ensure the people's life in safe conditions[33]. Thus, the link between HRs and the health-protective actions started to become visible, and nowadays in the COVID-19 constitutes an important condition of implementation of measures aimed to curb the spread of the disease.

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[32] Marcos Cueto, Theodore M. Brown, and Elizabeth Fee.""*The World Health Organization: A History"*. Cambridge University Press, 2019.
[33] World Health Organization. 1946. "*Constitution of the world health organization*". American Journal of Public Health 36, no. 11: pp. 1315-1323.

International cooperation permitted to build a stronger and more effective system of safeguards, which not only allows individuals to receive protection from the violative actions of the private actors, but to seek justice when the actor of violation is the state. That is also relative to the cases of health crises like the COVID-19 pandemic, because consolidated international efforts can give the impetus to the faster cessation of the disaster. Moreover, being obliged by the international HRs treaties, states possibly more tend to estimate the consequences of measures they are willing to implement. As correctly pointed out by David Miller HRs protection is not limited to separate states, but is the common responsibility[34].

The COVID-19 pandemic reality made article 12 of the ICESCR especially valuable, as it protects the right to health and obliges the states to facilitate its realisation through the actions, including the ones aimed to provide an effective response to the spread of diseases[35]. Besides, the wording of the article is highly important, as it includes the *mental* component of the right to health. As the COVID-19 anti-pandemic measures, such as, lockdown, self-isolation and quarantine, significantly changed life of all the people around the world, it is important to evaluate the effect on the right to mental health of these and other restrictive measures. Thus, the subsequent parts provide the analysis of the right to mental health in the COVID-19 pandemic.

With the global change in approach towards HRs, the standards of its protection significantly strengthened also on the national levels. Namely, from the middle of the 1970s substantial part (> 50%) of the constitutions all over the world were written[36]. Nowadays the constitutions of different states include the HRs making them secure on the highest level. For example, the Constitution of Ukraine recognises health of the population the national value, includes the section devoted to HRs protection, and permits the limitation of certain rights in emergency situations, such as the case of the COVID-19 pandemic to protect the population[37].

Given the above, at first fragmented and not comprehensive, the concept of the HRs protection has been widely developed internationally throughout the time and significantly impacted the national standers of HRs protection. Today HRs takes it place among the biggest values of society. At the same time, the threats to HRs still periodically appear. Today, the

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[34] David Miller, "The responsibility to protect human rights." *Legitimacy, justice and public international law* 48 (2009), p. 232

[35] UN General Assembly. 1966. "*International Covenant on Economic, Social and Cultural Rights."* United Nations, Treaty Series, vol. 993, p. 3, https://www.refworld.org/docid/3ae6b36c0.html.

[36] David R. Boyd, "The environmental rights revolution: a global study of constitutions, human rights, and the environment." UBC Press, 2011., p. 4

[37] Верховна Рада України. 1996. «*Конституція України*»./Verkhovna Rada of Ukraine. 1996. "Constitution of Ukraine ".

COVID-19 pandemic became one of such threats, consequently, states have to protect the population when health emergency appears. For public health protection, the limitation or derogation of certain rights is permitted, however, the balance between measures taken and the rights protected is a factor indicating the compliance of restrictions with the norms of IHRL. Therefore, the anti-pandemic measures introduced by states in conjunction with the obligation to protect HRs require broad analysis which is performed in the next parts.

1.2. The analysis of the public health emergencies preceding COVID-19 and its legal consequences for HRs

The outbreaks of infectious diseases throughout history have always left a trace on society, in some cases provoking the great crises but at the same time stimulating the progress in the scientific and legal spheres, especially in the latest epidemics and pandemics. The well-known cases of plagues, for instance, the 430–26 B.C. Athenian, the 165–180 AD Antonine and the 541 AD[38] Justinian plagues at the time had spread fear and horror, caused uncertainty in the effectiveness of law, had an impact on trade as one of the main sources of its spread, and even became one of the factors impacted the future of the Roman Empire[39].

The ground-breaking point in the setting of the strategies aimed to prevent and stop the spread of the diseases is the introduction of quarantine. This tool was firstly used in Ragusa in 1377, Sicily to prevent the possible danger of the plague (the Black Death) spread from arrivals, the immediate entry on the territory had been prohibited, and the 40 days quarantine on a nearby island was mandatory[40]. Later in the period of the Great plague in England, this method was estimated as effective in the scientific society, nevertheless, the eyewitnesses and plague survivors claimed its ineffectiveness and unnecessary strictness[41]. The problem, however, is always in the way the tools are used, and as so even the most effective ones can become HRs violative, thus in every case the precise analysis of the effect of the measures is

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[38] Sergio Sabbatani, Roberto Manfredi, and Sirio Fiorino. "The Justinian plague (part one)." *Le infezioni in medicina* 20, no. 2 (2012): 125-139.

[39] Damir Huremović, "Brief history of pandemics (pandemics throughout history)." In *Psychiatry of pandemics*, pp. 7-35. Springer, Cham, 2019.

[40] Ibid, p. 19

[41] Александр Вилейкис, "Первый карантин: как чума стала политическим заболеванием." Философско-литературный журнал «Логос» 31, no. 2 (141) (2021). / Alexandr Vileikis, "The first quarantine: how the plague became a political disease." Philosophical and literary journal "Logos" 31, no. 2 (141) (2021).

required. Not only to restore justice and protect the victims of violations but to use the experience for future precautions and protective mechanisms in law.

The purpose of the subchapter is to analyse the recent cases preceding the COVID-19 pandemic, to evaluate the reaction mechanism in the time of already existing strong HRs framework, and IHR adopted by the WHO as the noticeable instrument to follow in emergencies. The revised IHR applicable in health emergencies listed below is a result of the WHO's reaction to the outbreak of SARS-CoV in 2003[42]. Considering that SARS 2003 had a notable impact on changes in development of the framework towards prevention, control and containment of the health emergencies, and belongs to the same family of viruses caused the outbreak of COVID19 — coronaviruses[43] (coronaviridae), the separate analysis and the comparison of measures taken in response to SARS 2003 and COVID-19 are performed in the separate section.

For clearness, the terminology used should be explained. An epidemic is characterised by an increased number of disease cases, untypical and unusual, which affects a defined population[44]. The term pandemic describes the epidemic which has spread to a number of countries and as so poses a global threat to public health[45]. The state of emergency notion implemented in the legal instruments on the national and international level is wider and does not specifically limited to the health alerts. Lastly, the public health emergency of international concern (PHEIC) is the concept developed under the WHO's IHR. The PHEIC means «an extraordinary event»[46] expressed in the threat to public health through the spread of the disease within the number of countries, which can demand internationally coordinated response[47], this term is not limited to infectious diseases exclusively, but also covers the spread of chemical, biological or radioactive agents[48].

In the aftermath of the SARS 2003 epidemic the need for stronger and coordinated collective effort towards international public health protection from spread of diseases, and

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[42] Lawrence O. Gostin, and Rebecca Katz. "The International Health Regulations: the governing framework for global health security." *The Milbank Quarterly* 94, no. 2 (2016): 264-313.
[43] The National Institute of Allergy and Infectious Diseases. Coronaviruses, last reviewed on August 18, 2021, https://www.niaid.nih.gov/diseases-conditions/coronaviruses
[44] Peter P. Calow, Encyclopedia of ecology and environmental management. John Wiley & Sons, 2009.
[45] de Lima Gasque, Natália, Fábio Andrade Dias, Francielli Gonçalves Rodrigues, Maria Vitória Nogueira Marvulli, and Nelson Russo de Moraes. "COVID-19 AND THE GREAT PANDEMICS OF HUMANITY: a historical and sociological view." *Revista Observatório* 6, no. 3 (2020): a17en-a17en., p. 3
[46] World Health Organization. 2005. "*International health regulations"*, third edition. World Health Organization.
[47] Ibid.
[48] Ibid.

more coordinated response to the appearing public health threats became evident[49]. Thus, the IHR have been substantially revised in 2005[50]. From the moment of the entry into force in 2007 of the revised IHR, the PHEICs appeared and had been declared by the WHO six times. Namely, in 2009 Swine flu (H1N1 influenza virus); in 2014 Poliovirus, 2014 Ebola, 2016 Zika virus, 2018–20 Kivu Ebola, and the COVID-19[51]. Consequently, these are the recent cases that led to international concern, the brief analysis of the 2009 Swine flu, 2014 Ebola, and 2014 Poliovirus outbreaks are provided.

The novel H1N1 influenza outbreak began in March 2009 in Mexico and the USA, taking into account the unusual category of groups stricken by it, the speed and volume of its dissemination internationally[52], the WHO recognised it as PHEIC in April 2009[53] and soon in June categorised it as the pandemic[54]. The recommendations provided by the WHO and actual measures taken by states in response to H1N1 vary palpably, while the WHO tried to maintain the purpose of the IHR to protect the trade and travel from unnecessary restrictions, China, for example, banned travels to and from Mexico[55]. Generally, the Chinese authorities acted quite intensively and aggressively with quarantine and surveillance methods towards people with and without symptoms of flu[56]. Following the spread of the swine flu throughout the country the USA besides travelling restrictions and quarantine requirements, also used such measures as schools closure and wide vaccination campaign, where in some states it was obligatory for certain groups[57].

In the case *Parker v. St. Lawrence County* the infant daughter of the plaintiff was vaccinated in the course of fight with the H1N1 influenza strategy confirmed by the executive order on the state and local levels, recommending the administration of the vaccination[58]. It was argued that the vaccination of the plaintiff's daughter without her permission caused «the

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[49] David P. Fidler, "Revision of the World Health Organization's International Health Regulations." *American Society of International Law Insights* 8, no. 8 (2004).
[50] Ibid.
[51] Lucia Mullen, Christiana Potter, Lawrence O Gostin, et al. «An analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations.» BMJ Global Health 2020;5:e002502. doi:10.1136/ bmjgh-2020-002502
[52] Gregory P. Campbell, «Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict." *San Diego Int'l LJ* 12 (2010): 497.
[53] Annelies Wilder-Smith, and Sarah Osman. "Public health emergencies of international concern: a historic overview." *Journal of Travel Medicine* 27, no. 8 (2020): taaa227.
[54] "Swine Flu I Who Emergency Situation Overview," World Health Organization (World Health Organization), https://www.who.int/emergencies/situations/influenza-a-(h1n1)-outbreak.
[55] Kathleen S Swendiman, N. L. Jones, and E. C. Liu. "The 2009 influenza pandemic: selected legal issues." Congressional Research Service R40560., p. 9
[56] See Campbell, *supra* note 52, p. 498
[57] See Swendiman, Jones, Liu, *supra* note 55, p. 25
[58] *Parker v. St. Lawrence County*, 102 A.D.3d 140, 954 N.Y.S.2d 259 (App. Div. 2012).

negligence and battery upon her child»[59]. During the hearing in the state trial court the defendant demanded to dismiss the case under the preemption clause of the Public Readiness and Emergency Preparedness Act (PREP) claiming the immunity to «covered person», the last did not accept the motion to dismiss the case, but the appellate court did. The Appellate Division of the Supreme Court of New York stated that the immunity from tort claims extends to «covered persons» who administrated the anti-pandemic measure (vaccination) even when it was performed without parental consent[60]. From this case it can be seen that the period of public health emergencies substantively extends the powers of administrative authorities, nonetheless notably increasing the tension between HRs compliance and the scope of emergency containment rules and policies.

The year 2014 brought up two dangers for public health simultaneously - Poliovirus (hereinafter Polio) and Ebola Virus Disease (EVD)[61]. The existence of two threats appeared to be a great challenge, and also made the WHO operate at its highest capacity. However, it is important to mention that while the declaration of PHEIC in the Ebola case, which provoked the outbreak in the substantial number of countries presenting its rapid transmissibility was notably delayed[62], the declaration of Polio PHEIC took place when the number of disease cases was considerably small[63]. These circumstances provoked controversial discussions, however, such a reaction to Polio spread can be possible justified by the previous long and persistent work toward the eradication of the disease, and unusual for its outbreak season and territories[64]. In the process of fight with the spread of Ebola in 2014, attacks on the right to information from the side of the most affected countries were detected, as they tried to hide the real impact of Ebola thereby depriving the population of necessary disease-related information[65] acting not in line with the IHR. The forced mass quarantines in Guinea, Liberia, and Sierra Leone in the areas where at the time of its enforcement there was no need in this measure[66] also raised concern about the fulfilment of the right to freedom of movement,

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[59] Ibid.
[60] Ibid.
[61] Mohammed A. Soghaier, Khwaja MI Saeed, and Khushhal K. Zaman. "Public Health Emergency of International Concern (PHEIC) has declared twice in 2014; polio and Ebola at the top." *AIMS public health* 2, no. 2 (2015): 218.
[62] See Mullen, Potter, Gostin, *supra* note 51, p. 2
[63] Ibid.
[64] R. Bruce Aylward, "Making history: from a public health emergency to a polio-free world." (2014): 466-466.
[65] Florence Shu-Acquaye, «The Ebola Virus Prevention and Human Rights Implications," University of Massachusetts Law Review: Vol. 12 : Iss. 1 , Article 1. (2017), http://scholarship.law.umassd.edu/umlr/vol12/iss1/1, p. 34
[66] Patrick M. Eba, "Ebola and human rights in West Africa." *The Lancet* 384, no. 9960 (2014): 2091-2093.

liberty and security. This is far non-exhaustive list of examples of the effects on the protected rights, but it has already shown that the emergencies are still very dangerous for HRs and that some states neglect the mechanisms implemented in the IHR. Moreover, the measures considered reiterate that during health emergencies HRs become subject to restrictions, both necessary in purpose to curb the disease and unnecessary ones, which are implemented in HRs violative manner.

1.3. The comparison of the COVID-19 pandemic with the SARS 2003 epidemic and the analysis of measures taken to curb the spread of disease in both cases

The outbreak of SARS 2003 causing atypical pneumonia started in Guangdong, in November 2002, but officially in China it was proclaimed only in the middle of February 2003, while the WHO's reaction came only in March 2003[67]. Thus, one of the main problems affiliated with the SARS 2003 outbreak was a late notification of the international community about the unknown infectious disease. The Chinese authorities were reluctant due to the fact, that the knowledge about the rapidly spreading disease could lead to the measures affecting economy, so they were postponing the SARS 2003 outbreak public disclosure.[68] Besides, the measures aimed to curb the spread of the virus had been started only when China officially notified the international community, but the strictness of the measures led to the appearance of the tension between the obligation to protect public health and to follow the HRs provisions, restricting them in a non-violative way[69]. The manner of excessively restrictive sanitary, quarantine and other measures posed a danger for the variety of rights, including, for example, the right to freedom of movement and freedom of speech[70]. The situation with Chinese reaction in SARS 2003 emergency later made international society, first of all, in the face of the WHO complexly improve the strategy in cases of the public health threat signals, and prioritise the protection of HRs during the process of prevention, control and containment of the diseases.

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[67] Amena Ahmad, Ralf Krumkamp, and Ralf Reintjes. "Controlling SARS: a review on China's response compared with other SARS−affected countries." *Tropical Medicine & International Health* 14 (2009): 36-45.

[68] Benjamin Mason Meier, Dabney P. Evans, and Alexandra Phelan. "Rights-Based approaches to preventing, detecting, and responding to infectious disease." In *Infectious Diseases in the New Millennium*, pp. 217-253. Springer, Cham, 2020., p. 238

[69] Ibid.

[70] Ibid. p. 238-239.

With regard to the beginning of SARS-CoV-2 spread, the official notification to Beijing's WHO office happened on 31 December[71], at the same time according to some scholars by the 16th of December the patients with the clinical characteristics of SARS started to be hospitalised[72], and there is a suggestion by the other scholars that the coronavirus started its spread in China way earlier, allegedly on 17 November, and in January already crossed the borders entailing the international spread[73]. Thus, if the Chinese authorities possessed the information about the cases of SARS like virus circulating in China, which following the experience of the SARS 2003 epidemic possess a real threat of becoming PHEIC, they should have informed the WHO about it within 24 hours. Otherwise not informing breaches article 6 of the IHR[74]. Moreover, before the notification the information about pneumonia cases like SARS have already started to circulate immediately after the chain of assumptions inside the medical community.

Li Wenliang the ophthalmologist who posted about the virus in the medical student's group at the end of December, later was accused in the «rumours sharing» by the Chinese police[75]. Consequently, such a reaction, especially considering the death of Li Wenliang from COVID-19 on 7 February created a space for thoughts that Chinese authorities intentionally attempted to suppress the disclosure[76] like in the case of SARS 2003, and also produced the conspiracy theories that the virus was developed on purpose[77], as so generated grounds for stigmatisation and exacerbated attitude toward their nationals. Both examples show that the problems arising from the delayed notification lead to the negative consequences, and even

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[71] See Zhebit, *supra* note 13, p. 223

[72] Chaolin Huang, Yeming Wang, Xingwang Li, Lili Ren, Jianping Zhao, Yi Hu, Li Zhang et al. "Clinical features of patients infected with 2019 novel coronavirus in Wuhan, China." *The lancet* 395, no. 10223 (2020): 497-506.

[73] David L. Roberts, Jeremy S. Rossman, and Ivan Jarić. "Dating first cases of COVID-19." *PLoS pathogens* 17, no. 6 (2021): e1009620., p. 4

[74] World Health Organization. 2014. "*International health regulations*" (2005), third edition. World Health Organization., art. 6

[75] Zhuang Pinghui, "Dr Li Wenliang: who was he and who did he become a coronavirus 'hero'?" South China Morning Post, February 7, 2020, https://www.scmp.com/news/china/society/article/3049561/dr-li-wenliang-who-was-he-and- how- did-he-become-coronavirus-hero. (Cited from: Василий Борисович Кашин, Вероника Александровна Смирнова, and Иван Валерьевич Аксенов. "Информационно-политическое измерение эпидемического кризиса COVID-19 в Китае." *Международная аналитика* 11, no. 1 (2020): 27-41. с. 30/ Vasily Borisovich Kashin, Veronika Aleksandrovna Smirnova, and Ivan Valerievich Aksenov. "The Information and Political Dimension of the COVID-19 Epidemic Crisis in China." International Analytics 11, no. 1 (2020): 27-41. p. 30)

[76] Василий Борисович Кашин, Вероника Александровна Смирнова, and Иван Валерьевич Аксенов. "Информационно-политическое измерение эпидемического кризиса COVID-19 в Китае." *Международная аналитика* 11, no. 1 (2020): 27-41. с. 30/ Vasily Borisovich Kashin, Veronika Aleksandrovna Smirnova, and Ivan Valerievich Aksenov. "The Information and Political Dimension of the COVID-19 Epidemic Crisis in China." International Analytics 11, no. 1 (2020): 27-41. p. 30

[77] See Zhebit, *supra* note 13, p. 223

the speed of notification has changed compared to SARS 2003 epidemic, the issue's subject matter remained.

With the outbreak of SARS the WHO described it as a new serious threat by the disease's nature and speed of the spread[78]. Thus, there were no appropriate schemes of therapies or developed vaccines[79]. The other difficulty was the lack of advanced laboratory testing capacities, widely used in the COVID-19 pandemic. The Polymerase Chain Reaction (PCR) tests were not developed in epidemic 2003 as fast as needed[80], therefore the essential part of the prevention was the collection of travel-related data and cases of contacts with SARS positive individuals[81]. Besides, lockdown which is an extreme measure, isolation, quarantine, screening of travellers from affected zones were implemented (non-exhaustive list)[82].

Considering the distinction in the number of SARS cases states were adopting measures of different intensity. For instance, in the US, the quarantine and isolation were grounded on a «voluntary» basis, even when there was a reason to suspect that the person can be infected with SARS, the United States Centres for Disease Control and Prevention provided the recommendation for voluntary 10 days home isolation[83]. In comparison, the Singaporean Ministry of Health implemented strictly regulated and supervised 10 days quarantine for probable and suspected cases, which was controlled by the unexpected visits of medical personnel, calls and in some cases video surveillance installed by the private firm empowered by the government[84]. The last measure mentioned is highly controversial. The level of intrusion in the right to privacy in this case can be assessed as unnecessary or disproportionate, because the less restrictive measures such as phone calls and visits already took place at that time, which make the establishment of video surveillance excessive.

At the time of SARS 2003 before the revision of the IHR in 2005, some European countries have already started to modify their legislation with the inclusion of mandatory

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78 "Prevention and Control of Severe Acute Respiratory Syndrome (SARS)", https://apps.who.int/iris/bitstream/handle/10665/127601/WP_21HMM-SARS-WorkPap-17-7-2003.pdf?sequence=1&isAllowed=y.

79 See Ahmad, Krumkamp, and Reintjes, *supra* note 67, p. 37

80 Ibid. "Prevention and Control of Severe Acute Respiratory Syndrome (SARS)"

81 Ibid.

82 Ibid.

83 Amena Ahmad, Roberta Andraghetti, (World Health Organization) Report On «Control Measures Implemented by the Non- European SARS Affected Countries» Hamburg, March 2007., p. 93

84 Ibid., p. 49

quarantine[85]. Within the EU member states the measures were also diverse, where generally travel restrictions included gathering and processing of personal data from passengers arriving from affected zones or if the traveller expressed SARS symptoms, Cyprus and Malta put visa restrictions for those arriving from such zones[86].

In the present case of the COVID-19 pandemic the measures developed, introduced and recommended by the WHO in response to SARS 2003 took place, also including the usage of positive experience from various states. However, the striking differences in the threat level possessed by two coronavirus outbreaks, make it is impossible to state that their scope is in any way identical. In the work «Insights from the comparisons of SARS-CoV and COVID-19 outbreaks»[87] the authors presented the factors why the spread of SARS-CoV-2 is way more dangerous comparing to SARS 2003, inter alia: 1) it's more contagious; 2) it led to the pandemic, where SARS 2003 reached the epidemic level; 3) the period of the outbreak is higher; 4) different consequences[88]. With the dramatically high numbers of states, territories and people infected by COVID-19, SARS 2003 was obviously of less volume with 8,422 confirmed cases[89] in 29 countries[90]. Thus, when the early case detection and isolation became the most effective measures to combat the SARS 2003 epidemic in the comparably short term[91], they appeared not as effective in rapid curbing the COVID-19 pandemic.

From the perspective of the viruses spread scale, the intensity of measures, the speed of eradication (the COVID-19 at the moment of present work has not been overcome[92]) these two cases are incomparable, but from the perspective of the highly intrusive impact on HRs and IHRL in general, they are. After the Second World War, the obligation to protect HRs became mainly clear and accepted, but the lack of officially reflected legal tights between the actions in health emergencies and the obligation to always consider the protection of HRs was making a «*room for manoeuvre*» in such cases. The close connection between the HRs

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[85] European Commission, SANCO - Public Health Directorate, G4 Unit – Communicable, Rare and Emerging Diseases Report by the Commission «MEASURES UNDERTAKEN BY MEMBER STATES AND ACCESSION COUNTRIES TO CONTROL THE OUTBREAK OF SARS» 280503V3, 05.06.2003., p. 5

[86] Ibid., p. 10

[87] Wen-Yi Liu, Yen-Ching Chuang, Ting-Jun Liu, Ching-Wen Chien, and Tao-Hsin Tung. "Insights from the comparisons of SARS-CoV and COVID-19 outbreaks: The evidence-based experience of epidemic prevention in China." *Medicine* 100, no. 6 (2021): e24650., p. 2

[88] Ibid.

[89] Yang J Li B, Zhao F, et al. Prevalence and impact of cardiovascular metabolic diseases on COVID-19 in China. Clin Res Cardiol 2020;109:531–8. (Cited from: See «Insights from the comparisons of SARS-CoV and COVID-19 outbreaks: The evidence-based experience of epidemic prevention in China.» *supra* note 87.)

[90] See Ahmad, Krumkamp, and Reintjes, *supra* note 67, p. 36

[91] See Meier, Evans, and Phelan, *supra* note 68

[92] Author's note, the latest updates were included in December 2021.

protection and the achievement of effective results in response to the public health threats has been firstly emphasised in the HIV/AIDS pandemic[93]. However, explicitly the link has been indicated after the SARS 2003 epidemic. Namely, the revised in 2005 IHR have triggered the shift towards the human-based approach when reacting to emergencies, proclaiming it as a principle in Art. 3 of the IHR[94].

The WHO plays an important role in gathering and processing of disease-related information to provide the population with high-quality guides and recommendations[95], therefore building the fundament for states to share it on the national level. The IHR installed a mechanism of action in the unusual and unexpected cases of threat to public health, where the states bound by them have to report such cases to the WHO within 24 hours[96]. The notification is a very important measure that cannot be neglected in order to rapidly curb the spread of disease, but as indicated in the previous scenarios the states tend to postpone and hide the fact of the outbreak. An issue here is the lack of «a robust review and accountability mechanism»[97] which constitutes an important tool for the enhancement of the IHR provisions followed by the states. Meanwhile, the reaction of the WHO in some cases can also be delayed, additionally, the recommendations provided are not binding, so eventually, the measures remain at the discretion of the national authorities. When the outbreak occurs, but there is no official information about it, the consequences are dangerous for several reasons, including the expansion of time for the disease to spread and the appearance of the threat to freedom of expression. In the case of Li Wenliang who was fined by the police for sharing the information about the unusual virus, it can be seen that the enhancement of the HRs status and their more specific regulation in emergencies is needed.

Undoubtedly, it is always a crucial point of every extraordinary event of how the information about it is presented. With the stance of the speed of data flows, the number of sources, phenomenons as fake news and echo chambers today states tend to supervise the quality of information to prevent disinformation or dissemination of fear and anxiety globally.

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93 JM Mann, S Gruskin, MA Grodin, *et al*. *Health and human rights: a reader*. New York: Routledge, 1999: 11–18. (Cited from Sekalala, Sharifah, Lisa Forman, Roojin Habibi, and Benjamin Mason Meier. "Health and human rights are inextricably linked in the COVID-19 response." *BMJ Global Health* 5, no. 9 (2020): e003359.)

94 World Health Organization. 2014. "*International health regulations*" (2005), third edition. World Health Organization.

95 Ibid.

96 Ibid.

97 Preben Aavitsland, Ximena Aguilera, Seif Salem Al-Abri, Vincent Amani, Carmen C. Aramburu, Thouraya A. Attia, Lucille H. Blumberg et al. "Functioning of the International Health Regulations during the COVID-19 pandemic." *Lancet (London, England)* 398, no. 10308 (2021): 1283-1287., p. 1284

When during SARS 2003 the media services prior to the official disclosure retranslated it as an unknown disaster that can put everyone at risk[98] it provoked both panic and the attacks on freedom of speech. That is why the authorities have to timely disclose the disease-related information. Given the above, as it was accepted in the aftermath of the SARS 2003 epidemic that the previous IHR of 1969 were inadequate[99], the case of the COVID-19 pandemic again return this point to a discussion, but this time about the IHR 2005, because the extraordinary events still show the states' tendency of non-compliance with the IHR mechanisms and provoke violations of various HRs. In the reality of the COVID-19, the mere proclamation of HRs protection as a principle in disease responses showed its inefficiency. The widening of the HRs' place in the IHR seems as a right step for more precise regulation, as well as the improvement of rules of using the concrete measures, making the measures itself and their limits more foreseeable for the population.

1.4. The outbreak of COVID-19 pandemic as the legal ground to implement the measures restricting HRs

The states conduct is strictly regulated by the customary rules, international and national legislative acts. The new era of human-centric protection came after the II World War and is ingrained in the modern legal systems. Though there are still striking differences in governmental approaches due to the different level of development, social, economic, and cultural particularities of the nation, the main direction toward human dignity, equality, democracy and improvement of the living standard is appointed. The spread of infectious diseases is an extraordinary event demanding scrutiny in the reaction and measures.

With the outbreak of pneumonia cases recorded in 2019 in Wuhan, China[100] the spread of indicated COVID-19 virus started rapidly and widely. As of December 2021, the number of states and territories with recorder COVID-19 cases constitutes 222[101], the number of cases

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98 Joshua D. Reader, "The Case Against China Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic." *Colum. J. Asian L.* 19 (2005): 519.

99 Armin Von Bogdandy, and Pedro Villarreal. "International law on pandemic response: a first stocktaking in light of the coronavirus crisis." *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* 2020-07 (2020)., p. 6

100 Marco Ciotti, Silvia Angeletti, Marilena Minieri, Marta Giovannetti, Domenico Benvenuto, Stefano Pascarella, Caterina Sagnelli, Martina Bianchi, Sergio Bernardini, and Massimo Ciccozzi. "COVID-19 outbreak: an overview." *Chemotherapy* 64, no. 5-6 (2019): 215-223.

101 "Coronavirus Cases:" Worldometer, COVID-19 coronavirus pandemic, https://www.worldometers.info/coronavirus/.

comprises 267,530,013[102] (the number changes daily) and what is more demonstrative is the mortality which stands for 5,289,855 confirmed cases[103]. The numbers reaffirm, that neither international society and health-protective organisations like the WHO, nor national health and public authorities were not ready to face such a threat, and until now there is no visible tendency towards the end of the health crisis. The COVID-19 pandemic made it essential to focus on the health sector, while other sectors, like the economic one, are dramatically impacted, the chance of hard financial instability increased[104]. In its turn that leaves the trace on the implementation of the provisions promoted by the IHRL, for instance, the obligation to facilitate the increase in the standards of living which is tightly interlinked with the economy. Also, the restrictions faced by the population during the process of coronavirus curbing in a notable manner impacted, and challenged various HRs.

The ICCPR and ECHR which are ratified by 173 states[105] and 47[106], respectively, include the provisions relevant to the protection of public health, which is required by the COVID-19 pandemic, by the restrictions of certain HRs. Namely, limitations and derogation clauses. The derogation is possible under article 4 of the ICCPR[107] and Article 15 of the ECHR[108]. In the meantime, emergency concerned the number of legislative layers, activating the national emergency strategies, the WHO's framework, the obligations enshrined in IHRL to follow and act in compliance with the norms and procedures of HRs treaties even when limitation or derogation imposed.

Some provisions of the instruments include the wording which permits to limit the right's implementation and still stay in line with the treaties, as long as they are legal and necessary, for instance, articles 8-11 of the ECHR and 12, 18-19, 21-22 of the ICCPR. These

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[102] Ibid. The last update in work: 08.12.21

[103] Ibid. The last update in work: 08.12.21

[104] Mrinal Gupta, Ayman Abdelmaksoud, Mohammad Jafferany, Torello Lotti, Roxanna Sadoughifar, and Mohamad Goldust. "COVID-19 and economy." *Dermatologic therapy* 33, no. 4 (2020): e13329-e13329.

[105]"- OHCHR Dashboard," - OHCHR Dashboard,, https://indicators.ohchr.org/. See International Covenant on Civil and Political Rights (2021).

[106] "Full List," Treaty Office, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005. See Chart of signatures and ratifications of Treaty 005 - Convention for the Protection of Human Rights and Fundamental Freedoms» (Status as of 02/10/2021).

[107] UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html, art. 4

[108] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html, art. 15

articles list *public health protection* as the legal ground of restrictions[109], with no necessarily declared public emergency[110], in contrast to the proclamation of derogation. Article 4 of the ICCPR recognises «public emergency which threatens the life of the nation existence of which is officially proclaimed»[111], as a legal ground which permits states to derogate from their obligations insofar the situation demands, in a non-discriminatory manner and without breach of the other obligations before the international law[112]. The obligation of notification is put on the states willing to derogate, and as so they have to inform the Secretary-General of the UN at the beginning and end of such derogations[113]. This highlights that the measures are exceptional and have to be temporary, that is clarified in the General Comment № 29 on Article 4[114]. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) is a secondary source that was developed to establish the standards and limits of HRs restrictions in emergencies, and as so should be considered. Consequently, applying the principles, restrictions must be legal, necessary, proportionate, temporary and reviewable[115].

Article 15 of the ECHR contains a mostly similar provision, however separately mentioning *the war* as a ground, and then «public emergency threatening the life of the nation»[116]. Both articles include a prohibition to derogate from certain rights. In the case, *Lawless v Ireland*[117] the meaning of «*public emergency threatening the life of the nation*» was pointed as «natural and customary sufficiently clear»[118] and referred to «an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to

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[109] See Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html; and UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html.

[110] Eric Richardson, and Colleen Devine. "Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights." *Mich. J. Int'l L.* 42 (2020): 105.

[111] UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations. Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html.

[112] Ibid.

[113] Ibid.

[114] UN Human Rights Committee (HRC). 2001. "*CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency"*, CCPR/C/21/Rev.1/Add.11, https://www.refworld.org/docid/453883fd1f.html.

[115] Nina Sun, "Applying Siracusa: A call for a general comment on public health emergencies." *Health and Human Rights* 22, no. 1 (2020): 387.

[116] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html art. 15

[117] *Lawless v Ireland* (No 3) No. 332/57, 1 July 1961 Strasbourg

[118] Ibid.

the organised life of the community of which the State is composed»[119]. Thus, assessing «public emergency threatening the life of the nation»[120] it has to be widespread (affects the whole population) and have a negative impact on the established order of living[121].

Analysis of the COVID-19 pandemic as a legal ground for the HRs restrictive measures also has to take into account norms of the IHR adopted by the WHO, as it aims to regulate the public health response to the health threats[122]. Being considered as PHEIC the measures recommended by the WHO, and also those listed in the IHR are in place of use (e.g. isolation, quarantine, collection of data from arrivals, etc.). Besides, the provisions of national constitutional and legal acts are involved in the COVID-19 response, to take a step from the established order by the enactment of the emergency regimes and restrict the rights[123], and/or to justify states' derogation from the international instruments, such as ICCPR and ECHR.

The outbreak of COVID-19 rapidly became the public health threat, PHEIC, pandemic and as rapidly had been recognised as an emergency threatening the proper functioning of the existing order. It falls within the purpose of public health protection as a legal ground for limitations under the ICCPR and ECHR, as the states are nationally and internationally obliged to protect public health, as well as the right to life and health of individuals - two rights mostly endangered by the coronavirus[124]. The questions could arise from the criteria of necessity, proportionality and non-discriminatory basis of a concrete measure. Thus, the measure itself can be extraordinary and restrictive, however, on the case-by-case basis, its need and justification can be challenged. The COVID-19 pandemic allows to invoke the procedure of derogation (art. 4 ICCPR, art. 15 ECHR), possessing a serious threat to life of the people by the nature of its international spread, and the real challenge for the operation of society in the normal way. However important precondition of derogation is the notification, namely, the measures and reasoning have to be presented to the authoritative organs, the Secretary-General of the UN and the Secretary-General of the Council of Europe (CoE)

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[119] Ibid. para. 28

[120] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html, art. 15

[121] Ibid.

[122] World Health Organization.2005. "I*nternational health regulations"*, third edition. World Health Organization.

[123] Sean Molloy, «Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes: Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building, 2020.» International Institute for Democracy and Electoral Assistance (International IDEA), 2021.

[124] Nadia Rusi, and Fjorda Shqarri. "Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat during the COVID-19 Crisis." *Academic Journal of Interdisciplinary Studies* 9, no. 5 (2020): 166-166.

depending on the legal instrument. Article 18 of the ECHR emphasises that the measures have to be taken only in purpose to deal with the health emergency[125].

Thus, for the purpose of the legal justification of actions taken to curb its spread, both the limitation or derogation clauses are possible in use. However, the measures even if taken to curb the spread of the virus, but during their precise analysis appear to be excessive must be recognised as violative towards HRs. The procedure of derogation had been used by 10 states under the art. 15 of the ECHR[126] and 26 states have notified the UN Secretary-General under the art. 4 of the ICCPR about emergency regime activation and HRs restrictions[127].

Generally, in the COVID-19 case where the limitation can be used, the choice in favour of derogation may seem like an «excuse» for an unlimited power with no consideration of fundamental rights as the forefront value, at the same time it can be estimated as a will of states to protect themselves in an official way from possible HRs violation's claims[128]. To reiterate, the restrictions that are implemented during the pandemic are not legally justified by the mere existence of SARS-CoV-2, but by the recognition of its spread as a threat to public health. Not the virus, but, for instance, the epidemic or pandemic instigated by its spread creates the possibility for states to resort to measures restrictive for HRs.

2. IMPACT OF COVID-19 ON SELECTED HUMAN RIGHTS

The national and international reaction to the coronavirus outbreak realised through the measures to curb its spread triggered the restrictions of the various civil and political rights protected under the IHRL, inter alia the right to freedom of movement, freedom of assembly, the right to private life, freedom to manifest one's religion. The impact on freedom of movement will be analysed in regard to the civil and political rights. The economic, social and cultural rights also have been significantly affected. The following part will be focused on the social right, namely the right to mental health. More precisely the analysis will be based on the impact of the anti-pandemic measures on the mental component of health, including the

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[125] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html, art. 18

[126] The last update: 30.11.21. See "Derogations Covid-19." Treaty Office, https://www.coe.int/en/web/conventions/derogations-covid-19.

[127] The last update: 30.11.21. See " United Nations (United Nations), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND. See Notifications under Article 4 (3) of the Covenant (Derogations).

[128] See Rusi and Shqarri, *supra* note 124, p. 169

consideration of the difficulties appeared before the certain categories of the population, and the assessment of the general tendencies among the states in the field of the mental health protection. Also, it separately evaluates the right to mental health of the health care workers (HCWs) during the COVID-19 pandemic, and the right to fair and favourable conditions of work as a tightly connected right.

2.1. The impact of COVID-19 on the right to mental health

The main aim of the anti-pandemic measures is the protection of public health, and as so the right to health. The provisions of the ICESCR and the WHO's Constitution[129] referring to health do not limit it to the physical condition only, but also include the mental state[130]. Moreover, the physical and mental components of health are strongly interlinked, thus the poor mental state can lead to the deterioration in physical health[131].

However, the right to mental health being fully integrated in the right to health under the international framework is often neglected and remains out of the legal agendas and strategies in different states. Moreover, because the mental condition of individuals was the tabooed issue for a very long time[132], the right to mental health can be mistakenly perceived as the right related only to the people with the diagnosed mental disorders and/or their care. Nevertheless, it does not correspond to the reality because the right to mental health is protected in the exact same manner as the right to psychical health under the ICESCR[133]. Which, inter alia, means that the proper protection of the right includes the actions of states to prevent the deterioration of mental health. Thus, neither it related exclusively to people with diagnosed disorders, nor means the *post factum* treatment. Also, the right to mental and

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129 The WHO also includes social well-being as a component of health.

130 See UN General Assembly.1966. "*International Covenant on Economic, Social and Cultural Rights».*United Nations. Treaty Series, vol. 993, p. 3, https://www.refworld.org/docid/3ae6b36c0.html, art. 12; and World Health Organization.1946. "*Constitution of the world health organization*". American Journal of Public Health 36, no. 11: pp. 1315-1323.

131 "Mental Health Is a Human Right," American Psychological Association (American Psychological Association), https://www.apa.org/international/pi/2018/12/mental-health-rights.

132 "The Right to Mental Health," OHCHR, https://www.ohchr.org/EN/Issues/Health/Pages/RighttoMentalHealth.aspx.

133 See e.g. UN Committee on Economic, Social and Cultural Rights (CESCR). 2000. "General Comment No. 14: *The Right to the Highest Attainable Standard of Health*" (Art. 12 of the Covenant), E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html.; United Nations General Assembly. Human Rights Council. «Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health», 28 March 2017, pp. - 3, 8, 9; "Mental Health Is a Human Right," OHCHR, https://www.ohchr.org/EN/NewsEvents/Pages/MentalHealthIsAhumanright.aspx.; Council of Europe. Rachel Hammonds. Commissioner for Human Rights Issue paper «Protecting the right to health through inclusive and resilient health care for all», February 2021, pp. - 10, 13, 16, 28, 30, 33;

physical health are the core rights which influence the quality of people's life, and cannot be fully guaranteed without the fulfilment of other rights[134]. Such rights, inter alia, as the right to freedom of movement, right to work, education, food and housing are integrated in the complex of factors important for the improvement of the health standard[135]. Thus, to follow the obligation to protect the right to health it is not sufficient to take actions connected to the health system itself.

In response to the health threat caused by the COVID-19 pandemic states started to enact the emergency legislations, introduce the regime of emergency on its territories[136], invoke the limitation or derogation clauses under the international HRs treaties. The outcome of these steps reflected in the empowerment of state's authorities to introduce the measures limiting the implementation of various HRs. For instance, due to the adoption of such measures as school closure, prohibition of gathering and events, restrictions of free movement (not exhaustive list) the Republic of Latvia informed the Secretary-General of the CoE about the declared state of emergency, and invoked the derogation from articles 8 right to respect for private and family life, article 11 freedom of assembly and association of the ECHR, Art. 2 of Protocol to the ECHR - the right to education, and Art. 2 of Protocol 4 - the right to freedom of movement according to Art. 15 of the ECHR on 15 of March[137]. With the limitations introduced, the change of the normal life course and routine had come, creating the absolutely new and unknown order of living which in its turn impacted the mental health of the population due to the various factors, including the duration of the health crises and changes affiliated with it.

To highlight the length of the period of intensive measures requiring the restrictions of HRs, and as so continuation of their effect on mental health, it is noteworthy that after the full withdrawal of derogation that took place on 6 April 2021, Latvia again informed the CoE about the new derogation under article 15 of the ECHR on 21 October[138]. The decision is caused by the increase of the COVID-19 cases, spread of a new strain of coronavirus and

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134 UN Committee on Economic, Social and Cultural Rights (CESCR). 2000. "General Comment No. 14: *The Right to the Highest Attainable Standard of Health*" (Art. 12 of the Covenant), E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html.

135 Ibid.

136 110 countries. See «the COVID-19 Civic Freedom Tracker», *supra* note 5

137 Council of Europe. Notification - JJ9012C Tr./005-225 Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms from Latvia (ETS No. 5). 16 March 2020

138 Council of Europe. Withdrawal of Derogation related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5). 6 April 2021, https://rm.coe.int/notification-jj9210c-tr-005-276-latvia-withdrawal-of-derogation-to-the/1680a209cb

introduction by the Cabinet of Ministers of Republic of Latvia of emergency on 11 October with its extension for a notable period until 11 January 2022[139].

The measures as social distancing, the obligation to wear masks, quarantine, isolation and self-isolation, travelling restrictions, prohibition of gatherings, educational institutions closure are directed towards the protection of public through the protection of the physical component of health, considering the meaning of physical health as a «normal state of properly functioning, undamaged organism»[140]. Thus, while all the efforts to protect public health have been directed through the measures protecting its physical state it becomes important to examine their impact on mental dimension of health. Namely, it is vital to identify the preconditions of mental health deterioration in the period of pandemic, as the right to mental health is neither limited to the absence of mental disorders[141] nor to medical treatment only[142], and as so demands preventive regulations to be at place. For states as those who entitled to contribute to the achievement by the population of the highest attainable standard of health[143] it is crucial to learn from the tendencies traced in the COVID-19 pandemic. It will contribute to risks assessment prior to the adoption of restricting measures taking into account the known outcomes for mental health of the population. Thus, the states will be prepared to implement the supportive and preventive regulations, or adjust the strictness of some measures considering their excessive negative impact of the right to mental health.

The WHO describes mental health as a condition of prosperity reflected in the ability of individuals to understand their own capacities, to handle the typical life's stressors, to work in an efficient manner, and to make contributions to their social surrounding[144]. Analysis of the effect of the anti-pandemic measures on mental health through the definition given by the

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139 See Council of Europe. JJ9288C Tr./005-281 Note Verbale (incl. annex), Strasbourg, 25 October 2021, https://rm.coe.int/1680a44998.; "During Four-Weeks Period, Latvia Will Put in the Maximum Efforts to Control the COVID-19 Pandemic," Ministru kabinets, https://www.mk.gov.lv/en/article/during-four-weeks-period-latvia-will-put-maximum-efforts-control-covid-19-pandemic.

140 D. N. Ushakov, "The explanatory dictionary of the Russian language (4 volumes)." (1935). (Cited from: Koipysheva, E. A., Lebedinsky, V. Y., and Koipysheva, M. A. "Physical health (definition, semantic content, study prospects)." In *The European Proceedings of Social & Behavioural Sciences EpSBS*, pp. 601-605. 2018.)

141 "The Right to Mental Health," OHCHR, https://www.ohchr.org/EN/Issues/Health/Pages/RightToMentalHealth.aspx.

142 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html.

143 Ibid.

144 "Mental Health: Strengthening Our Response," World Health Organization (World Health Organization), https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response.

WHO is contributory towards the understanding of the fields of specific attention, risk areas which needs to be considered in the process of improvement of health related strategies and action plans. Response to the health threat cannot be considered as the mere issue of legal field, but it is a complex system where scientific, medical and legal fields has a strong connection. To recapitulate, the scientific and medical base has to guide the legal response, otherwise the necessity of measures is questionable. The tendencies of mental health deterioration have to stimulate the states to improve the response strategies with precautionary measures strengthening their preparedness to protect public health as a complex of physical and mental health.

From the WHO's definition it is possible to emphasise the 4 components essential for mental health (in the following analysis the components 3 and 4 of the definition are merged):

1. *The appropriate condition of the individual's prosperity in which the one understands own capacities*[145]. From the beginning of the COVID-19 outbreak and with the introduction of isolation, quarantine and lockdown people in different countries were obliged to stay at home most of the time. Consequently, that caused the substantial change in their routine, occupational status, habits, weakened their social ties, created difficulties to develop hobbies, and finally blurred the understanding of own's abilities. For example, the category of Germans who were involved in physical activities on the regular basis before the pandemic, and have been visiting the sport facilities, experienced the change in routine with the closure of sport centres as one of the anti-pandemic measures. While some people started to exercise at home, the others faced such obstacles as childcare obligation occurred after the suspension of kindergartens and schools operation, increase in working hours or inability to motivate themselves to exercise without a group, etc.[146]. The last reason expressed in the lack of motivation caused by the limited social interaction one more time highlights the importance of social activity for the wellbeing, and shows the side effects of isolation and quarantine for the health of the population. The absence of motivation does not itself indicates the problems with mental health, however it can contribute to its deterioration in the combination with another factors. Besides, sport has the positive impact on mental health as it promotes

[145] Ibid.

[146] Michael Mutz, and Markus Gerke. "Sport and exercise in times of self-quarantine: How Germans changed their behaviour at the beginning of the Covid-19 pandemic." *International Review for the Sociology of Sport* 56, no. 3 (2021): 305-316., p. 314

endorphins production and assists in the stress management[147]. Thus, such changes in lifestyle and routine in combination with caused by the pandemic workload, instability in financial sphere, higher demand to provide a childcare, lack of motivation can serve as feasible factors provoking stress, fear, anxiety and insecurity. The blur of the understanding of own capacities is highly possible in the unstable and very restrictive towards personal liberties case of the COVID-19 pandemic, especially when there are no clear understanding of when people can start to manage their own life again. Thus, from the beginning of the restrictions introduction the specific steps aimed to support public mental health should have been taken by states.

2. *The appropriate condition of the individual's prosperity in which the one is able to handle with «the normal stresses of life»[148]. «*The normal stress of life» in the context of the COVID-19 pandemic is not the concept that prevailed. The international spread of disease, that is deathly dangerous, the mortality rate with more than 5,289,855 cases[149] and the HRs restrictions of the worldwide scale have already testified that it is impossible to define these stress factors as normal. The example of a state action which facilitate the fulfilment as a part of threefold state's obligation to respect, promote and fulfil the right to mental health[150] can be traced in Italy. Namely, The Ministry of Health and Civil Protection of Italy introduced the free psychological assistance number aimed to support the mental health of its population. It reported over 50,000 calls, especially in the period of lockdown[151]. According to the data collected, the negative psychological effects (e.g. anxiety, stress, depression, etc.) were associated with the pandemic and strict isolation obligation[152]. Thus, the coronavirus pandemic being the extraordinary and unprecedented case substantially changed the life of the population and created the new stress factors, which are out of the concept of «the normal stress of life», which also demands new and rapid reactions to protect mental health.

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147 Елена Викторовна Колосова, «Физическая культура и спорт как профилактика эмоциональных перегрузок у студентов» *Страховсике чтения*: 194. / Elena Viktorovna Kolosova, «Physical education and sport as a prevention of emotional overloads in students» Strakhovskie chteniya: 194.

148 See "Mental Health: Strengthening Our Response", *supra* note 144

149 See «Worldometer», *supra* note 101

150 United Nations. Human Rights Council. A/HRC/41/34, Report of the Special Rapporteur «on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health», 12 April 2019. p. 5

151 "Press release"n.189, 11 June 2020. Oltre 50mila telefonate al numero verde 800.833.833. Supporto psicologico attivo per tutto il mese di giugno, https://www. salute.gov.it/portale/nuovocoronavirus/ dettaglioComunicatiN uovoCoronavirus.jsp?lingua=italiano&id=5570. (Cited from: Maria Rosaria Gualano, Giuseppina Lo Moro, Gianluca Voglino, Fabrizio Bert, and Roberta Siliquini. "Monitoring the impact of COVID-19 pandemic on mental health: a public health challenge? Reflection on Italian data." *Social psychiatry and psychiatric epidemiology* 56, no. 1 (2021): 165-167.

152 "Press release"n.189, 11 June 2020. Oltre 50mila telefonate al numero verde 800.833.833. Supporto psicologico attivo per tutto il mese di giugno, https://www. salute.gov.it/portale/nuovocoronavirus/ dettaglioComunicatiN uovoCoronavirus.jsp?lingua=italiano&id=5570.

3. *The appropriate condition of the individuals' prosperity in which the ones are able to work in an efficient manner and make contributions to their social surrounding*[153], (components 3 and 4 of the definition are united). According to the International Labour Organization (ILO) during the COVID-19 pandemic every state has experienced the decreasing tendencies in the level of employment and national earnings[154]. These factors triggered the overall negative effect on economy of the states, deteriorating the consequences of the health crisis by causing the financial instability. In March, 2020 the probable loss of the employment was estimated by the ILO in 5.3 million cases in the better scenario[155]. Besides, the formed unemployment crisis led to the deterioration of the progress in gender-equality of workers, and again highlighted and strengthened the inequalities within the social groups[156]. The inequality reflected in women's workload at home provoked by the closure of schools and kindergartens led to the additional obligation of childcare. The regress is traced in the fact that the obligations to raise the child have been put on women disproportionally justifying it by the concept of «traditional responsibilities»[157]. Reference to this role model in such a manner significantly undermined the societal changes of the last years in the perception of women' position, as so challenging the gender equality.

Considering that all the components of mental health's definition suggested by the WHO were affected by the COVID-19 pandemic the impact on mental health of the population is evident and substantial, and it appears as a serious challenge for the protection of the right to health as a complex system. For states to follow the obligation to fulfil the right to mental health in health emergencies, the measures must be adopted in conjunction with mechanisms aimed to support the mental condition of the population. For instance, implementing the restrictions, which lead to the threat of unemployment, states, inter alia, should provide an assistance in smooth transition to work from home, which can protect people from job loosing[158]. Such steps have been done by, for example, in countries of the

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153 See "Mental Health: Strengthening Our Response", *supra* note 144

154 International Labour Office. «*World employment and social outlook: trends 2021*.» Geneva, Switzerland: International Labour Organization, 2021.

155 "Almost 25 Million Jobs Could Be Lost Worldwide as a Result of Covid-19, Says Ilo," COVID-19: Protecting workers in the workplace: Almost 25 million jobs could be lost worldwide as a result of COVID-19, says, March 18, 2020, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_738742/lang--en/index.htm. (Cited from: Wolfram Kawohl, and Carlos Nordt. "COVID-19, unemployment, and suicide." *The Lancet Psychiatry* 7, no. 5 (2020): 389-390.)

156 See «*World employment and social outlook: trends 2021*.», *supra* note 154

157 Ibid.

158 "Tackling the Mental Health Impact of the COVID-19 Crisis: An Integrated, Whole-of-Society Response," OECD, May 12, 2021, https://www.oecd.org/coronavirus/policy-responses/tackling-the-mental-health-impact-of-the-covid-19-crisis-an-integrated-whole-of-society-response-0ccafa0b/.

Organisation for Economic Co-operation and Development, however, not from the beginning of restrictions implementation[159]. Thus, for the future cases of public health threats, measures of that kind have to be adopted simultaneously with the restrictions.

In accordance with the worldwide survey[160] which took place from 23 of December 2020 to 8 of January within the 23,004 participants, the data collected showed that in the vast majority of represented countries respondents affirmed the expectation of the negative impact on their mental health from the last six month[161]. Out of 28 represented countries only in 6 of them people indicated the positive effect for this period. The answers received within the respondents from Canada, The Great Britain and Hungary showed the most worrying tendencies. Taking Canada separately as the main example, the trends traced in the surveys[162] performed by the Statistics Canada in collaboration with the Public Health Agency of Canada indicated that with the flow of time the pandemic represents the long-term effect for the mental health of Canadians[163]. The percentage of «depression, anxiety or post-traumatic stress disorder»[164] symptoms within Canadians from 18 years and older increased on 4% from fall 2020 where the results made up 21%, also the surveys reiterated the strong tights between the financial stability and mental issues[165].

With respect to the above-mentioned the following steps taken by Canada before the coronavirus outbreak and during the COVID-19 pandemic goes in compliance with the general and specific obligations to protect the right to mental health established by article 12 ICSECR, and represents the good practises towards the citizens' mental health support. Particularly, in Canada steps to fulfil the right to mental health have been actively taken.

First of all, the surveys with the analysed data were performed by the Canadian national bodies. The conducted researches constitute the concrete promotional action of the Canadian Government to supervise and improve the achievement of the highest attainable standard of

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159 Ibid.

160 Simona Varrella, "Impact of Covid-19 on Mental Health Worldwide 2021," Statista, March 19, 2021, https://www.statista.com/statistics/1218053/impact-of-covid-19-on-mental-wellbeing-worldwide/.

161 Ibid.

162 Statistics Canada Government of Canada, "Survey on Covid-19 and Mental Health, September to December 2020," The Daily - , March 18, 2021, https://www150.statcan.gc.ca/n1/daily-quotidien/210318/dq210318a-eng.htm.
Statistics Canada Government of Canada, "Survey on Covid-19 and Mental Health, February to May 2021," The Daily - , October 4, 2021, https://www150.statcan.gc.ca/n1/daily-quotidien/210927/dq210927a-eng.htm.

163 Ibid.

164 Ibid.

165 Ibid.

mental health[166]. Secondly, the Government of Canada developed the well-structured informative web page on its official website to support the population during the pandemic, and ensure the access to the necessary data. This web page, inter alia, provide the possibility to receive a private support from Wellness Together Canada, includes information for specific groups, such as Indigenous people, seniors, youth and young adults, indicate the contacts of territorial authorities responsible for the control of mental health[167]. The distribution of the mental health related information, including the separate information for specific risk groups affected by the pandemic, and information about the availability of treatment services by the state also goes in compliance with the obligation under article 12 ICSECR[168]. Besides, for the purpose of the strategy development and the reaction to occurring dangers for mental health the Mental Health Commission (The Commission) operates in Canada. The Commission empowered by the Government is a non-profit organisation funded by Health Canada[169]. The Commission has developed a separate «resource hub» with the COVID-19 and mental health related information, including the recommendations for reforms in the area of mental health protection[170], which are essential considering the significant deterioration of mental health. Moreover, thought the financial related support, for example, to farmers, small businesses, agriculture business, vulnerable Canadians, the contribution to accessibility of food for those who are in the difficult financial situation because of coronavirus etc.[171] the Canadian Government showed a good practise of the realisation of tights between the social well-being, income and mental health. Thus, in the way of the response to the deterioration of mental health within its population, Canada is a great example of the state that took the active steps under the general and specific obligations to fulfil the right to mental health in the meaning of article 12 ICSECR.

In the meantime, considering that generally before the COVID-19 pandemic mental health has already been under the scrutiny of the international society due to the aggravated

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166 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html., para 37

167 Public Health Agency of Canada, "Government of Canada," COVID-19: Taking care of your mental and physical health during the pandemic - Canada.ca (/ Gouvernement du Canada, November 2, 2021), https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/mental-health.html.

168 Ibid. «General Comment No. 14» (iii)

169 "About," Mental Health Commission of Canada, October 8, 2021, https://mentalhealthcommission.ca/about/.

170 "Resource Hub: Mental Health and Wellness during the Covid-19 Pandemic," Mental Health Commission of Canada, https://mentalhealthcommission.ca/covid19/.

171 Canadian Public Health Association. 2021. «Canada's Initial Response to the COVID-19 PANDEMIC»

dynamic[172], the states should have been acknowledged and concerned about the mental health deterioration during the COVID-19 pandemic. The UN[173], The European Commission[174], and the WHO itself[175] have already raised the alert about worrying condition of the mental health of the population in pandemic. However, the data analysed above testifies that the huge gap can be seen in the preparedness strategies. The immediate reaction towards the support and protection of mental health is a great indicator, nevertheless not sufficient. Consequently, not the response itself but the prevention of such a negative effect on mental health has to be the leading aim for states. Moreover, the right to health protected by article 12 ICESCR absorbs plenty of factors affecting it, including the wide range of financially-depended ones, such as, for instance, food and housing[176]. The analysis of the statistical data from Denmark has clearly shown that the increase of the unemployment rate[177] correlates with the concern about the possible economic crisis and about the quality of living[178] within the various groups of the Danish population. It indicates that besides the strong strategy and preparedness for the protection of the right to mental health separately, there is a demand in the management and distribution of financial capacities in the period of the crises. The right to mental health in the meaning of the ICSECR emphases the influence of the various determinants, which affecting the full realisation of the right and which must be considered by states (incl. economic conditions)[179]. Thus, financial support of the vulnerable groups, those suffering from the work-related or other economic issues provoked by the health crisis is crucial. The possibility to afford the essentials such as the food and housing are the factors affecting the adequacy of living and as so the right to health - mental and physical components.

The right to mental health of the Health Care Workers during the COVID-19 pandemic:

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172 United Nations. 2020. Policy Brief: «COVID-19 and the Need for Action on Mental Health»

173 Ibid.

174 "Mental Health," Public Health - European Commission, https://ec.europa.eu/health/non_communicable_diseases/mental_health_en.

175 "Facing Mental Health Fallout from the Coronavirus Pandemic," World Health Organization (World Health Organization), https://www.who.int/news-room/feature-stories/detail/facing-mental-health-fallout-from-the-coronavirus-pandemic.

176 UN Committee on EconomicSocial and Cultural Rights (CESCR). 2000. «General Comment No. 14: *The Right to the Highest Attainable Standard of Health*» (Art. 12 of the Covenant), E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html

177 Published by Statista Research Department and Oct 6, "Denmark: Unemployment Rate before/after COVID-19," Statista, October 6, 2021, https://www.statista.com/statistics/1121537/unemployment-rate-before-and-after-the-coronavirus-outbreak-in-denmark-by-region/.

178 Amy Clotworthy, Agnete Skovlund Dissing, Tri-Long Nguyen, Andreas Kryger Jensen, Thea Otte Andersen, Josephine Funck Bilsteen, Leonie K. Elsenburg et al. "'Standing together–at a distance': Documenting changes in mental-health indicators in Denmark during the COVID-19 pandemic." *Scandinavian journal of public health* 49, no. 1 (2021): 79-87.

179 UN Committee on EconomicSocial and Cultural Rights (CESCR). 2000. «General Comment No. 14: *The Right to the Highest Attainable Standard of Health*» (Art. 12 of the Covenant), E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html

Considering the negative effect of the coronavirus pandemic on mental health, and consequently the right to mental health, the health care workers constitute a group of a particular risk being the forefront response power. The cases of the spread of infectious diseases have the various consequences for the mental state of the HCWs[180]. One of the risk reasons is the conditions of work of the medical personnel. The connection between the safe and healthy conditions in the working environment protected as a crucial part of the right to just and favourable conditions of work under the ICESCR article 7(b) and the right to health, including the mental state is inextricable[181]. The states' authorities are responsible for the development of the protective policies to contribute to the safeguard of workers.[182] The provision obliges states to ensure the safe and healthy environment of employees on the permanent basis without the reference to the concrete period or occupations. Taking into account the role of the HCWs as a front line force in the COVID-19 response, the quality of their working conditions demands a special scrutiny.

The medical personnel appeared in the hazardous environment by the mere nature of the SARS-CoV-2 disease as those who most closely interact with the coronavirus positive patients. The aggravating factors such as the lack of the necessary personal protective equipment (PPE)[183] and psychological overload[184] even more emphasised the significance of the support needed for HCWs. Besides the lack of PPE, according to the American Nurses Association survey the requirement to reuse the PPE received the vast majority of nurses (79%), also the extended usage of the N95 masks (respirators) was indicated by 36% of respondents[185]. While the essential task of the PPE such as mask or respirator is to protect the person most effectively, it can be done only if the exploitation is correct. The PPE is a highly important part to ensure the most favourable, safe and healthy working conditions of the

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[180] Max Denning, Ee Teng Goh, Benjamin Tan, Abhiram Kanneganti, Melanie Almonte, Alasdair Scott, Guy Martin et al. (2021) Determinants of burnout and other aspects of psychological well- being in healthcare workers during the Covid-19 pandemic: A multinational cross-sectional study. PLoS ONE 16(4): e0238666. https://doi.org/ 10.1371/journal.pone.0238666.

[181] UN Committee on Economic, Social and Cultural Rights (CESCR). 2016. «General comment No. 23 (2016) *on the right to just and favourable conditions of work*» (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, https://www.refworld.org/docid/5550a0b14.html.

[182] Ibid.

[183] Sangeeta Mehta, Flavia Machado, Arthur Kwizera, Laurent Papazian, Marc Moss, Élie Azoulay, and Margaret Herridge. "COVID-19: a heavy toll on health-care workers." *The Lancet Respiratory Medicine* 9, no. 3 (2021): 226-228. p, 226

[184] Töres Theorell, "COVID-19 and working conditions in health care." *Psychotherapy and psychosomatics* (2020): 1.

[185] American Nurses Association. Personal protective equipment survey. May, 2020. https:// www.nursingworld.org/~49cd40/globalassets/ covid19/ppe-infographic-june-5-2020.pdf (Cited from: L. McCauley, and Hayes, R. "Taking responsibility for front-line health-care workers." *The Lancet Public Health* 5, no. 9 (2020): e461-e462.)

medical personnel during the pandemic, and it is needed during the various types of activity. For instance, medical masks, respirators, gloves, eye protection and other PPE is required in the process of treatment and during special procedures with the COVID-19 positive patients[186]. The reuse of some PPE notably decreases the efficiency of the protection because it was not intended to be used more than once, as in the case reported with the N95 respirators[187]. The negative tendency of the PPE reuse on mental condition of HCWs had been recorded during the first stages of the pandemic[188].

The situation of the permanent work-related stress became a reality for the HCWs. The shortage of PPE, the rapidly changing nature of disease related information, the absence of the necessary trainings[189] is the non-exhaustive list of challenges for mental health and safe working conditions of the HCWs. Moreover, being in the position of the constant direct contact with the virus-carriers the possibility to get ill or to «bring» the virus to the household and endanger the relatives increased significantly, the workload which seriously hit the HCWs, the number of the lethal cases within their patients, friends and colleagues,[190] all these factors made a huge contribution to the deterioration of the mental health condition of HCWs.

The health care personnel's working conditions in Ukraine have been analysed, inter alia, within the ILO-WHO partnership[191] and by the UN Human Rights Monitoring Mission in Ukraine[192], the concern have been raised in both cases. Some of the key issues indicated in relation to the obligation to provide the safe and healthy working conditions were the deficit in the PPE and its quality, and the absence of assistance with the appearing mental health problems[193]. Besides, the Trade union of HCWs of Ukraine raised an alert in relation to the shortage, quality and inadequacy of the PPE, inter alia, pointing out their request for the free

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186 World Health Organization. 2020. «Rational use of personal protective equipment for coronavirus disease (COVID-19): interim guidance». World Health Organization. No. WHO/2019-nCov/ IPCPPE_use/2020.1.

187 Bory Kea, Alicia Johnson, Amber Lin, Jodi Lapidus, Jennifer N. Cook, Calvin Choi, Bernard P. Chang et al. "An international survey of healthcare workers use of personal protective equipment during the early stages of the COVID−19 pandemic." *Journal of the American College of Emergency Physicians Open* 2, no. 2 (2021): e12392., p. 2

188 Ibid.

189 See Mehta, Machado, Kwizera, Papazian, Moss, Azoulay, and Herridge, *supra* note 183

190 Ibid. p.,226

191 "Healthcare Workers Urgently Need Upgraded Working Conditions, Safety and Health Protection against COVID-19 in Ukraine," World Health Organization (World Health Organization), https://www.who.int/news/item/05-05-2021-healthcare-workers-urgently-need-upgraded-working-conditions-safety-and-health-protection-against-covid-19-in-ukraine.

192 The Office of the UN High Commissioner for Human Rights, The UN Human Rights Monitoring Mission in Ukraine. 2021. «Impact of COVID-19 pandemic on healthcare workers in Ukraine»

193 Ibid.

supply of PPE[194]. Additionally, the Ukrainian HCWs faced the decrease of the wages in the certain periods of the pandemic, at the same time money from the specific fund accumulated to combat the COVID-19 pandemic have been used in a questionable manner in not health-related purposes[195]. All these factors indicate the failure of the Ukrainian authorities to follow the obligations of article 12 ICESCR. On the contrary, the example of a good practise on national level can be found in Spain, where at least two trade courts recognised that the failure to provide the PPE, as well as its provision not in the appropriate quality and quantity to the HCWs led to the violation of their fundamental rights[196]. Inability to supply the HCWs with the necessary protective equipment caused a direct danger to their health, making their working conditions unsafe and inadequate[197]. Besides, the specific attention was given to the predictability of the COVID-19 outbreak in Spain, which made the obtainment of the PPE essential, but failed to be timely performed by the responsible entities[198]. However, in general, the concern about the protection of the HCWs has been estimated as international within the ILO-WHO partnership, and it is stated that countries have to facilitate the ensuring of the safe and healthy working conditions and financial security[199].

Taking into consideration that the distress experienced by the HCWs in the period of the infectious disease spread has been already evident before the outbreak of COVID-19 and

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194 Професійна спілка працівників охорони здоров'я України. 2020. №04-09/62 "*Щодо забезпечення медичних працівників засобами індивідуального захисту*" / Trade Union of Healthcare Workers of Ukraine. 2020. №04-09 / 62 «Regarding the provision of medical workers with personal protective equipment.»

195 M. Shevtsova, the Heinrich-Böll-Stiftung Washington, DC, and the Heinrich-Böll-Stiftung European Union, Brussels, «COVID-19 pandemic case study: Ukraine», December 2020. p., 8,9.

196 See Laura Ochoa. Clyde & Co LLP, "Covid-19 Spain: An Important Judgment on the Coronavirus," Clyde & Co (Clyde & Co LLP, June 12, 2020), https://www.clydeco.com/en/insights/2020/06/covid-19-spain-an-important-judgment-on-the-corona?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration; and José María Pimentel, Sara Toribio. 16i - https://www.16i.co.uk/, "Thoughts on the First Rulings of the Labour Jurisdiction in Spain Concerning Force Majeure," DAC Beachcroft, https://www.dacbeachcroft.com/en/gb/articles/2020/september/thoughts-on-the-first-rulings-of-the-labour-jurisdiction-in-spain-concerning-force-majeure/.

197 Ibid.

198 Ibid.

199 See «Healthcare workers urgently need upgraded working conditions, safety and health protection against COVID-19 in Ukraine» *supra* note 191

confirmed by many authors[200], the reality of the current pandemic indicates that states failed to take actions required to prevent the deterioration of the mental health condition within the HCWs even having substantial information in regard to the specific risk factors. While such protection is required to satisfy the obligations to protect the right to mental health[201]. Thus, the huge gap is evident in the strategies targeted to protect mental health of the HCWs. Beside, the right to just and favourable conditions of work among the HCWs, as an important component promoting the right to health, has been massively challenged in the COVID-19 pandemic by, inter alia, the shortage, quality and accessibility of the PPE. Thus, inability of countries to supply the medical personnel with the essential protection aggravated the condition of their mental health, as a result the right to the highest attainable standard of health (mental component considered) among the HCWs has been significantly challenged.

To reiterate, in order to fulfil the obligation to protect the right to health, it is insufficient to implement the measures targeted only on the physical's state protection. The COVID-19 pandemic demanded the adoption of the measures which had a feasible negative affect on the mental health of the population around the world. With the efforts to curb the spread of the coronavirus through the HRs restrictions, the states should have developed the strategies aimed to prevent the massive deterioration of mental health. In order to fulfil the obligation to protect the right to mental health, states have general and specific obligations to take active steps[202]. For example, applying the requirements reflected in the General Comment No. 14[203] on the case of the COVID-19 pandemic the states, in her alia, should examine the tendencies within the population, ensure the access to information related to the distress provoked by the

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[200] Muller A.E., Hafstad E.V., Himmels J.P.W., Smedslund G., Flottorp S., Stensland S.Ø., Stroobants S., Van de Velde S., Vist G.E. The mental health impact of the covid-19 pandemic on healthcare workers, and interventions to help them: a rapid systematic review. *Psychiatr. Res.* 2020 doi: 10.1016/j.psychres.2020.113441; Serrano-Ripoll M.J., Meneses-Echavez J.F., Ricci-Cabello I., Fraile-Navarro D., Fiol-deRoque M.A., Pastor-Moreno G., Castro A., Ruiz-Pérez I., Zamanillo Campos R., Gonçalves-Bradley D.C. Impact of viral epidemic outbreaks on mental health of healthcare workers: a rapid systematic review and meta-analysis. *J. Affect. Disord.* 2020;277:347–357. doi: 10.1016/j.jad.2020.08.034.; Wu P., Fang Y., Guan Z., Fan B., Kong J., Yao Z., Liu X., Fuller C.J., Susser E., Lu J., Hoven C.W. The psychological impact of the SARS epidemic on hospital employees in China: exposure, risk perception, and altruistic acceptance of risk. *Can. J. Psychiatr.* 2009;54:302–311. doi: 10.1177/070674370905400504. (Cited from: D. Zaçe, I. Hoxhaj, A. Orfino, A. M. Viteritti, L. Janiri, and M. L. Di Pietro. "Interventions to address mental health issues in healthcare workers during infectious disease outbreaks: a systematic review." *Journal of psychiatric research* (2021)., p. 320)

[201] United Nations. Human Rights Council. A/HRC/44/48, Report of the Special Rapporteur «on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health», 15 April 2020. p. 15

[202] Office of the United Nations High Commissioner for Human Rights. «Frequently Asked Questions on Economic, Social and Cultural Rights».p. 27. Fact Sheet No. 33, December 2008, https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf

[203] UN Committee on EconomicSocial and Cultural Rights (CESCR). 2000. «General Comment No. 14: *The Right to the Highest Attainable Standard of Health*» (Art. 12 of the Covenant), E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html

COVID-19 pandemic and how to deal with it, support the population with psychological assistance. The important contribution can also be reflected in the specific recommendations connected to the concrete restrictions. The limitations imposed on freedom of movement constituted the notable factor for the deterioration of mental health. Thus, in conjunction with information about the importance of staying at home, information about the value of the socialisation by, for example, the means of video conferences, messages and phone calls can be necessary. Besides, failure to provide the population with a sufficient financial assistance during the increased unemployment period also impacted the right to mental health, as it has the strong tights with the economic stability. The HCWs who are the front line power in the process of combat with the pandemic experienced the mental health deterioration caused by the number of factors, where inability of governments to ensure the safe and healthy working conditions made the huge contribution. In some cases, the HCWs faced the wedge shortage and had to work longer without the just payment. Countries all over the world experienced the negative tendencies in the field of mental health of the population[204]. At the same time, the problem has been evident even before the pandemic, thus it indicates the insufficient regulation of this question. The authorities of some countries as Canada took different steps to analyse the condition of its citizens' mental health during the pandemic and develop the strategies and policies to improve the situation, while in some cases the states fully neglected this issue. For example, the mental disorders are not even recognised among the occupational diseases of Ukrainian HCWs[205][206]. The right to mental health is an essential component of the right to health, thus introducing the restrictions to protect public health, states should consider the possible consequences for the mental state and include preventive and supportive mechanisms in the preparedness and response plans established for the cases of health emergencies. Apart from that, the general improvement of the protection can be achieved if the right to mental health will be more separated as a right. The tendency of consideration of the right to health as the one connected to physical condition prevails in the society. Due to

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[204] "VU Researchers Found How the Beginning of the COVID-19 Pandemic Affected Lithuanians' Psychological Well-Being," Vilnius University, January 29, 1970, https://www.vu.lt/en/news-events/news/8752-vu-researchers-found-how-the-beginning-of-the-covid-19-pandemic-affected-lithuanians-psychological-well-being.

[205] Кабінет Міністрів України, Постанова № 1662 "Про затвердження переліку професійних захворювань", 8 листопада 2000 р. Київ / Cabinet of Ministers of Ukraine, Resolution№ 1662 "On approval of the list of occupational diseases", November 8, 2000 Kyiv, https://zakon.rada.gov.ua/laws/show/1662-2000-п#Text.

[206] See «Impact of COVID-19 pandemic on healthcare workers in Ukraine», *supra* note 192

the different factors, mental health still tends to be neglected[207], left without the proper budgeting, regulation and promotion[208]. The COVID-19 experience showed that the protection of mental health remains in a shadow comparing to physical health and requires more broad and substantial regulation. The separation can contribute to the change of perception towards mental health within the population, improve regulation and protection of the right to mental health. Which is vital, because even physical health remains in a «dominant position» being, for example, more promoted and substantially more funded than mental health[209] it is evident that mental and physical health are interlinked. Thus, only with the strengthening of the framework towards the protection of the right to mental health, the states will be able to fully satisfy their obligations to guarantee the highest attainable standard of health.

2.2. The impact of COVID-19 on the right to freedom of movement

In the globalised world of the 21st century freedom of movement takes a special place in the process of personal growth and formation[210], and in some ways even serves as an engine of progress. Today the international interaction is a part of the concept of «normal life»[211] for various groups such as students, migrant workers, business-related professionals, etc. Different stimulating factors of the international mobility are presented all over the world and within the EU in particular. For instance, the Erasmus+ program encourages students as one of the participants' categories to gain the experience of the abroad studies, contributing to the personal and professional development[212]. However, during the COVID-19 pandemic the opportunity to participate in the Erasmus+ program was limited due to the borders closure[213], possibility to have international mobility or in some cases continue the studies abroad has also

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[207] "The Right to Mental Health," OHCHR, https://www.ohchr.org/EN/Issues/Health/Pages/RightToMentalHealth.aspx.

[208] United Nations. Human Rights Council. A/HRC/35/21, Report of the Special Rapporteur «on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health», 28 March 2017. p. 3

[209] See "Mental Health Is a Human Right,", *supra* note 133

[210] UN Human Rights Committee (HRC), *CCPR. 1999. «General Comment No. 27: Article 12» (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, https://www.refworld.org/docid/45139c394.html.

[211] Author's note. In this context «normal life» should mean the typical person's routine.

[212] "Erasmus+," Home | Erasmus+, November 3, 2021, https://erasmus-plus.ec.europa.eu/.

[213] Dennis Farrington "Article - the Consequences of Covid-19 on the Education System: The Legal Perspective," Education, https://www.coe.int/en/web/education/article-the-consequences-of-covid-19-on-the-education-system-the-legal-perspective?p_p_id=56_INSTANCE_u8RwKDEmBRvN&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-4&p_p_col_count=1.

been challenged. The lockdown put international students in a complicated position of uncertainty with closed university, limited possibility to work and visa-related issues[214].

Free movement of persons, capital, goods and services constitutes one of the important values of the EU[215]. This policy aims to facilitate the tight interstate cooperation within the EU, which in its turn is highly important for the economy[216]. Thus, freedom of movement is not only essential as the fundamental right of individuals, but also as a practical tool for business, education, vocational trainings, cultural development, leisure activities, etc. Moreover, it is crucial for the vulnerable groups such as persons in seek of asylum[217], because fleeing from the countries where they are persecuted or tortured freedom of movement plays an essential role in the process of the protection achievement.

It is important to consider that freedom of movement is complex in its nature, and is not limited just to the right to move without the additional legal burden. Namely, article 12 of the ICCPR protects *the right to move freely* within the territory *and choose the place of residence* for persons whose presence on the country's territory is legally grounded[218]. The second paragraph protects *the right to leave the territory* of one's own and any other country[219]. Besides, *the right to enter owns country* is also covered by Art. 12(4)[220]. As determined, during the pandemic, coronavirus being able to transmit through the contacts between people[221] provoked states to limit the movement and the mentioned contacts, respectively[222]. All the rights protected under freedom of movement have been restricted. In general overview by such measures:

1. *The right to move and reside freely*: quarantine, isolation and self-isolation, stay-at-home orders, lockdown, curfews, internal travel bans (e.g. between various municipalities);

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214 Andreas Schleicher. The Organisation for Economic Co-operation and Development, 2020. The IMPACT OF COVID-19 ON EDUCATION INSIGHTS FROM Education at a Glance 2020, p. 9-10.
215 European Union. 2007. *Consolidated version of the Treaty on the Functioning of the European Union*, 2008/C 115/01,: https://www.refworld.org/docid/4b17a07e2.html
216 "Single Market," European Union, July 1, 2021, https://europa.eu/european-union/topics/single-market_en.
217 Kathryn Libal, Scott Harding, Marciana Popescu, S. Megan Berthold, and Grace Felten. "Human Rights of Forced Migrants During the COVID-19 Pandemic: An Opportunity for Mobilization and Solidarity." *Journal of Human Rights and Social Work* (2021): 1-13.
218 UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html., art., 12
219 Ibid.
220 Ibid.
221 World Health Organization. 2019 Novel Coronavirus (2019-nCoV): Strategic preparedness and response plan, 4 February 2020.
222 United Nations. COVID-19 and Human Rights We are all in this together, April 2020.

2. *The right to leave the country*, as well as *enter owns country*: international travel bans, border closures, lockdowns.

Consequently, the measures required by the epidemiological situation can make freedom of movement the subject of limitation or derogation as a non-absolute right[223]. According to IHRL it is possible to restrict it even without the official introduction of the emergency situation, using the limitation clause[224]. At the same time, the right to enter own's country demands the specific scrutiny, as the possibility of its restriction is not regulated by the general limitation clause of Art. 12(3) ICCPR[225]. The justifiable reasons to limit the person's right to enter own's country (not limited to citizenship) barely exists[226]. Thus, the striking difference can be seen between the limitation of the right of foreigners to enter the country and those who enter own's country. Especially taking into account the institute of citizenship separately, which highlights a strong link between the person and its country. For instance, the Constitution of Finland in article 9 guarantees that the finish citizen cannot be prohibited from entry[227]. Besides, the Constitutions of some countries[228] prohibit restrictions of HRs, including freedom of movement without the introduction of emergency, so that even permitted on international, such act can be challenged on national level.

On international level the limitation clause in relation to freedom of movement is included in article 12(3) of the ICCPR[229] and states that restrictions of the above mentioned rights are permissible only if legal (prescribed by law), necessary for the protection of specific interests, inter alia, public health, and compatible with another HRs[230]. Also, the restrictions imposed must be proportionate and not more intrusive than it is required for the protection of the listed in article interests[231]. The important condition when restricting the rights is non-discriminative manner of its implementation and enforcement[232].

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223 "Fundamental Rights," Migration and Home Affairs, https://ec.europa.eu/home-affairs/pages/glossary/fundamental-rights_en.
224 The Office of the UN High Commissioner for Human Rights, «Emergency measures and Covid-19: Guidance», 27 April 2021., p. 1
225 See Richardson and Devine, *supra* note 110. p. 141
226 UN Human Rights Committee (HRC), *CCPR. 1999. «General Comment No. 27: Article 12» (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, https://www.refworld.org/docid/45139c394.html.
227 *Constitution of Finland* [Finland],11 June 1999, https://www.refworld.org/docid/4e5cf5f12.html, art. 9.
228 See e.g., *The Constitution of Ukraine,* art. 64
229 UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html, art. 12
230 Ibid.
231 UN Human Rights Committee (HRC), *CCPR. 1999. «General Comment No. 27: Article 12» (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, https://www.refworld.org/docid/45139c394.html.
232 See «Emergency measures and Covid-19: Guidance», *supra* note 224

Evaluating the necessity of one or another measure it is vital for authorities to consider the scientific base[233] and the justification suggested by the health experts[234]. The Hague-based Dutch Court of Justice in its ruling highlighted that the curfew is the great intrusion into freedom of movement[235]. Namely, it stated that the introduction of curfew has not been proved to be explicitly necessary by the Government considering the slightly reducing coronavirus trends[236]. Adding, that on the previous pandemic stages when the epidemiological situation was putting the high pressure on the medical system of the country the curfew has not been imposed[237]. Besides, the introduction of curfew has been based on the emergency power, however, due to the absence of explicit emergency it should have been grounded by the proper law instead[238]. The Dutch appellate court overturned the ruling, however, at that time the Government has already adopted the proper law to make the curfew more legally grounded[239]. Moreover, by the time of ruling the epidemiological situation has changed and the concern about a new wave of the disease has been raised by the experts[240].

Generally, despite the worldwide usage, the effectiveness of certain measures is not equally assessed in the different sources, making their necessity the subject to discussion. On the one side, quarantine, isolation and stay-at-home orders considered to be effective in the process of the virus containment and unloading of the treatment providers - HRWs[241]. In contrast, the usefulness of restrictions which significantly affect international traffic (e.g. travel bans, borders closure) can be in some way justified on the earliest stages of the outbreak in the sense of the activation of preparedness strategies[242]. Nonetheless, in general,

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233 Commission on Human Rights.1984. «Siracusa principles on the limitation and Derogation provisions in the International covenant on civil and political rights.» New York, (Cited from: S Sekalala, Forman L, Habibi R, et al. Health and human rights are inextricably linked in the COVID-19 response. BMJ Global Health 2020;**5**:e003359. doi:10.1136/ bmjgh-2020-003359)

234 See Richardson and Devine, *supra* note 110. p. 137

235 "Covid: Dutch Crisis as Court Orders End to Covid Curfew," BBC News (BBC, February 16, 2021), https://www.bbc.com/news/world-europe-56084466.

236 Al Jazeera, "In Wake of Riots, Dutch Court Orders Gov't to Lift Covid Curfew," Coronavirus pandemic News | Al Jazeera (Al Jazeera, February 16, 2021), https://www.aljazeera.com/news/2021/2/16/lift-covid-night-time-curfew-court-tells-dutch-government.

237 Ibid. "Covid: Dutch Crisis as Court Orders End to Covid Curfew,"

238 Ibid. "In Wake of Riots, Dutch Court Orders Gov't to Lift Covid Curfew,"

239 Reported by Bart Meijer; Edited by Nick Macfie "Dutch Appeals Court Says Coronavirus Curfew Was Right Move," Reuters (Thomson Reuters, February 26, 2021), https://www.reuters.com/article/us-health-coronavirus-netherlands-court-idUSKBN2AQ1CC.

240 Ibid.

241 See «COVID-19 and Human Rights We are all in this together», *supra* note 222.

242 "Updated Who Recommendations for International Traffic in Relation to Covid-19 Outbreak." World Health Organization. World Health Organization, 29 February 2020. https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak.

such restrictions are ineffective and can be even harmful[243]. Thus, adopting the concrete measures it is highly important to consider their scientific and medical reasoning to satisfy the criteria of necessity. However, in the COVID-19 pandemic it is evident that the policymakers decided to act more intensively than it had been suggested by the WHO, particularly in regard to the travelling restrictions. With the appearance of an Omicron variant of COVID-19 the WHO in its travel advice keep saying that the travel restrictions (incl. borders closure) are not effective to curb the international spread of infectious disease such as COVID-19 (incl. Omicron variant), but restrictions of this kind make the life of people more complicated instead[244].

On the regional level, freedom of movement is enshrined in article 2 of the Protocol 4 to the ECHR and covers *the right to move and reside and leave the country*[245]. While the ECHR is ratified by all 47 members of the CoE[246], the protocol protecting freedom of movement ratified by the 43 member states, Turkey and the United Kingdom have signed but not ratified it, Greece and Switzerland have not taken any legal actions[247]. Nevertheless, all 4 countries are bound by the ICCPR[248] and have a legal obligation to protect freedom of movement from unlawful intervention.

With the possibility to limit or derogate from freedom of movement, measures affecting it were of different intensity, scope and duration during the stages of the outbreak[249] and were still in place as of December 2021 in various countries. It is noteworthy that the IHR - the most relevant legal instrument to control and respond to the spread of the infectious diseases aims to do so in a manner the least harmful for the international trade and traffic[250]. Thus, from the beginning of the outbreak the WHO in its recommendations tried to pursue this aim. The travel advice introduced on 10 January 2020 stated that information the WHO possessed

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[243] World Health Organization. 2019 Novel Coronavirus (2019-nCoV): Strategic preparedness and response plan, 4 February 2020. p. 10

[244] "Who Advice for International Traffic in Relation to the SARS-COV-2 Omicron Variant (B.1.1.529)," World Health Organization (World Health Organization), 30 November 2021, https://www.who.int/news-room/articles-detail/who-advice-for-international-traffic-in-relation-to-the-sars-cov-2-omicron-variant.

[245] Council of Europe.1963. «*Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*», ETS 46, https://www.refworld.org/docid/3ae6b3780.html.

[246] See "Full List," , *supra* note 106

[247] "Full List," Treaty Office, Chart of signatures and ratifications of Treaty 046. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=046.

[248] See "- OHCHR Dashboard,", *supra* note 105

[249] See "Covid-19 Civic Freedom Tracker,", *supra* note 5, See «*movement*», https://www.icnl.org/covid19tracker/?location=&issue=24&date=&type=.

[250] World Health Organization. 2005. "*International health regulations"*, third edition. World Health Organization., art. 2

was insufficient to understand the full picture of the transmissibility of the virus and as so any specifically restricting recommendations were not provided[251]. The WHO continued to emphasise that strong traffic-related measures are proper on the early stages of the outbreak containment, but must be limited in time, proportionate and reviewable[252]. Nevertheless, with the evolution of the outbreak more and more states started to limit or suspend international traffic, and introduce the quarantine for travellers[253]. Also, the movement within the national territory had been restricted on the early stages of the outbreak in some states, for instance, Iraq on 4 March 2020 put limitations on movement in the Kurdistan Region[254], at the same time, some steps to support the trade were also initiated[255], which goes in compliance with the IHR purpose.

To reiterate, freedom of movement has the connection with the implementation of other rights, is important for the individual's development[256], and has been widely restricted during the COVID-19 pandemic[257]. The response to the COVID-19 outbreak and measures affecting freedom of movement varied significantly depending on the country. Thus, it is essential to analyse the particular national examples to receive a broad picture of issues appeared, and as so consider the need in tighter international cooperation in the events of infectious diseases transmission. The harmonisation of strategies can contribute to the strengthening of the standards of HRs protection particularly in cases of public health threat. The spread of SARS-CoV-2 qualifies as a legal ground to limit or derogate from freedom of movement, however it does not automatically make all the measures legal, reasonable and proportionate to achieve the protection of public health. The variety of measures restricting liberty of movement not

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251 "Who Advice for International Travel and Trade in Relation to the Outbreak of Pneumonia Caused by a New Coronavirus in China," World Health Organization (World Health Organization), https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china.

252 "Key Considerations for Repatriation and Quarantine of Travellers in Relation to the Outbreak of Novel Coronavirus 2019-Ncov," World Health Organization (World Health Organization), https://www.who.int/news-room/articles-detail/key-considerations-for-repatriation-and-quarantine-of-travellers-in-relation-to-the-outbreak-of-novel-coronavirus-2019-ncov.

253 "Updated Who Recommendations for International Traffic in Relation to Covid-19 Outbreak," 29 February 2020 World Health Organization (World Health Organization), https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak.

254 Kurdistan Regional Government. Prime Minister Masrour Barzani chairs special meeting on coronavirus, issues additional measures, March 2020, https://gov.krd/english/government/the-prime-minister/activities/posts/2020/march/prime-minister-masrour-barzani-chairs-special-meeting-on-coronavirus-issues-additional-measures/ (Cited from: The COVID-19 Civic Freedom Tracker, INT'L CTR. FOR NOT-FOR-PROFIT L., See Iraq *movement*, https://www.icnl.org/covid19tracker/?location=&issue=24&date=custom&date_from=2020-02-01&date_to=2020-03-10&type=)

255 Ibid. «Prime Minister Masrour Barzani chairs special meeting on coronavirus, issues additional measures», March 2020

256 See *«General Comment No. 27: Article 12», supra* note 210

257 Alessandra Spadaro, "COVID-19: Testing the limits of human rights." *European Journal of Risk Regulation* 11, no. 2 (2020): 317-325.

only impacted this freedom itself, but instigated the outbreak of serious legal problems, which are identified in the following sections. Consequently, not only the impact on freedom of movement must be the sole subject of evaluation, but the legal issues caused by restrictions. This is an important part of the preparedness strategies for the future outbreaks. Emphasising the areas of concern, the stronger protection of various HRs can be achieved. Also, a separate assessment of the EU member states reaction is contributory for the indication of the concrete concern zones relevant to the union. Consequently, the following sections are devoted to the analysis of the impact of anti-pandemic measures on freedom of movement both within the EU and generally, and legal issues appeared or escalated as an outcome of adopted policies.

2.2.1. COVID-19 and the right to freedom of movement in the EU Member States

As it has been mentioned in the previous part, freedom of movement constitutes one of the core values of the EU functioning, so the EU member states have to consider it, restricting this freedom. Thus, it is important to analyse how liberty of movement has been impacted during the COVID-19 pandemic by the restrictions adopted on the national levels of the EU member states and which legal issues caused by the restrictions demand scrutiny.

Travel restrictions and border closures became the key areas of regulation in relation to freedom of movement during the COVID-19 pandemic in the EU. The recommendations for the harmonisation of the approaches towards isolation and quarantine have been provided, but not on the early stages of the pandemic[258]. In the beginning of the pandemic the European Commission explained the necessity of the EU external borders closure for the non-essential travels limited in time for 30 days with a possibility of extension, save the right of entry for certain categories of people[259]. At the same time in March the substantial number of the EU

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[258] See e.g., Council Recommendation (EU) 2020/1475 of 13 October 2020 «on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic» (Text with EEA relevance)Text with EEA relevance, http://data.europa.eu/eli/reco/2020/1475/2021-06-16;
Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 «on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic» (Text with EEA relevance), http://data.europa.eu/eli/reco/2021/961/oj;
European Commission DIRECTORATE-GENERAL FOR HEALTH AND FOOD SAFETY Public health Health security and Vaccination. EU health preparedness: «Recommendations for a common EU approach regarding isolation for COVID-19 patients and quarantine for contacts and travellers». Agreed by the Health Security Committee on 11 January 2021, https://ec.europa.eu/health/sites/default/files/preparedness_response/docs/hsc_quarantine-isolation_recomm_en.pdf.

[259] The Commission to the European Parliament the European Council and the Council COVID-19, Communication: «Temporary Restriction on Non-Essential Travel to the EU» COM/2020/115 final (Cited from: The European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU - Fundamental Rights Implications, 1 February to 20 March 2020, ISBN 978-92-9474-948-2 doi:10.2811/009602 TK-AQ-20-001-EN-N).

member states have already closed not only the external, but also the internal borders[260]. With the evolution of the epidemiological situation the recommendations towards the gradual reopening of external and internal borders of the EU have been formulated[261], however, as on December 2021 the restrictions of different kind are still at place within the EU member states. Since the active travel bans have started from the beginning of March 2020 and were still present in November 2021[262], the impact on freedom of movement within the EU can be assessed as significant and prolonged in time.

Considering the experience of the concrete EU member states, it is evident, that the measures which significantly interfere in freedom of movement have been implemented in every country[263]. Also, some states reintroduced the limitations which were earlier lifted or eased[264]. Being an essential part of the EU policy freedom of movement of the EU citizens and members of their families is a subject of special regulation and can be limited in the explicitly established cases. The general principles stipulated in article 27 of the Directive 2004/38/EC[265] provide three grounds for the limitation of free movement of the EU citizens and their family members. Namely, public policy, public security and public health[266]. Broadly, public health as a legal ground of restrictions is represented in article 29 of the Directive 2004/38/EC, where the «diseases with epidemic potential»[267] listed as a justifiable reason. Thus, considering that the SARS-CoV-2 spread provoked a pandemic and affected

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[260] The European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU - Fundamental Rights Implications, 1 February to 20 March 2020, ISBN 978-92-9474-948-2 doi:10.2811/009602 TK-AQ-20-001-EN-N.

[261] See e.g., Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction ST/9208/2020/INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020H2169&qid=1635330758603;
Council Recommendation (EU) 2021/89 of 28 January 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction;
Council Recommendation (EU) 2021/892 of 3 June 2021 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction;
Council Recommendation (EU) 2021/1782 of 8 October 2021 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction ST/12521/2021/INIT

[262] All the EU Member States on the date 08.10.21 have travel restrictions. See e.g., "Covid-19 Travel Regulations Map* (Powered by Timatic)," IATA, 2021, https://www.iatatravelcentre.com/world.php.

[263] See "Covid-19 Civic Freedom Tracker,", *supra* note 5

[264] E.g. Estonia reintroduced mandatory quarantine for certain countries (e.g. Germany, Switzerland, Poland), decided to use own criteria assessing if the foreign country is considered as risk area, etc. TravelBans, travel safe. See Estonia, «full restrictions», https://travelbans.org/europe/estonia/

[265] The European Parliament and the Council of the European Union. Directive 2004/38/EC of 29 April 2004on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038.

[266] Ibid.

[267] Ibid, art. 29

every EU member state[268] the restrictions of freedom of movement of the EU citizens and their family members to prevent the transmission can be justified in light of the Directive's 2004/38/EC provisions.

Besides, the COVID-19 pandemic being a serious threat to public health, also gave the EU members the authorisation to limit or derogate from freedom of movement both under the international HRs framework (ICCPR), and under the regional one (ECHR). According to article 2 of the Protocol 4 to the ECHR for the limitation to be permissible it has to be legal and necessary to protect the public health[269]. The vast majority of the EU member states restricted freedom of movement using the limitation clause. The mechanism of derogation guaranteed by Art. 15 of the ECHR in the context of the COVID-19 public health threat out of 27 EU member states has been used by 3 countries - Estonia, Latvia and Romania[270].

Regardless of the legal ground of restrictions, the issues with their justification have already begun from the earliest stages of the outbreaks in the EU members. For instance, in Hungary the state of danger (emergency), which gave a legal impetus for the adoption of the extraordinary measures limiting free movement[271] gave the prime minister power to «rule by decree», and was declared with no indication as if it was temporary with the fixed time boundaries[272]. Temporality is a vital element of the emergency regime, as stated by the Venice Commission, limited duration is required by the mere nature of the emergency's definition[273]. However, the aforementioned decision has not been changed even after the wide national and international reaction from the legal experts[274]. Thus, not following the formal requirements of time limitation and adoption of measures by law, the governors undermined the requirements of IHRL, creating a ground to challenge the legality of measures.

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[268] As on December 2021 the substantial number of the COVID-19 cases have been recorded in all the EU member states. See European Centre for Disease Prevention and Control. "Covid-19 Situation Update for the EU/EEA, as of 3 December 2021," European Centre for Disease Prevention and Control, https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea.

[269] Council of Europe.1963. «*Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*», ETS 46, https://www.refworld.org/docid/3ae6b3780.html.

[270]"Derogations Covid-19," Treaty Office, https://www.coe.int/en/web/conventions/derogations-covid-19.

[271] See "Covid-19 Civic Freedom Tracker," *supra* note 5, See «emergency», «Hungary».

[272] Quinn C. Hungary's Orban Given Power to Rule By Decree With No End Date. Available: https://foreignpolicy.com/2020/03/31/hungarys-orban-given-power-to-rule-by-decree-with-no-end-date/. (Cited from Sharifah Sekalala, Lisa Forman, Roojin Habibi, and Benjamin Mason Meier. "Health and human rights are inextricably linked in the COVID-19 response." *BMJ Global Health* 5, no. 9 (2020): e003359.)

[273] European Commission for Democracy through Law (Venice Commission) CDL-PI(2020)003-e Compilation of Venice Commission Opinions and Reports on States of Emergency, Strasbourg, 16 April 2020, https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e.

[274] "Hungary: Parliament Approves Indefinite Rule by Decree despite Widespread Protests," European Council on Refugees and Exiles (ECRE), https://ecre.org/hungary-parliament-approves-indefinite-rule-by-decree-despite-widespread-protests/.

Within the EU member states which decided to derogate, in general, the procedural requirements of article 15 of the ECHR have been followed. Estonia notified the CoE about the declaration of the state of emergency that took place on 12 March 2020[275]. In the notification various restrictions of freedom of movement were listed. By the order №32[276] in accordance with the Emergency Act[277] Estonia established the two weeks quarantine for arrivals, who eligible to entry Estonia, save the possibility to leave the place of the quarantine in case of danger to life or health of the quarantined person, or with the authorisation of the HCWs or the police[278]. In the notification Estonia stated that the measures are conditioned by the urgency of the situation and do not breach another obligations of the international law[279], which generally fulfils the formal requirements of notification about the measures and their purpose[280]. However, more precise scientific and medical argumentation of the measures' necessity could have served as the additional protective barrier from the arbitrariness in derogation cases caused by the public health threat, making states to provide, for example, more information related to the spread of disease on its territory, the number of confirmed cases, death rate, etc.

Latvia in its notification to the CoE listed such measures as, for example, recommendations to refrain from the overseas tourist and business trips to zones affected by the virus, requiring the services assisting in the tours selection to suggest their clients not to travel or postpone the trips to the risk countries[281]. Visa restrictions were put until the end of the emergency situation, also border crossing had been limited[282]. Besides, the order highlighted that in case of the breach of the measures the responsibility is provided according to the administrative or criminal procedure[283]. It is noteworthy that the Government of the Republic of Latvia on the regular basis was notifying the CoE about the extension of the

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275 Council of Europe. JJ9017C Tr./005-229 Note Verbale, Strasbourg, 20 March 2020 *see:* Permanent Representation Estonia to the Council of Europe. No. 1-16/6, Annex to the Note verbale JJ9017C dated 20 March 2020 ETS No. 5 – Article 15, https://rm.coe.int/16809cfa87

276 Council of Europe. JJ9017C Tr./005-229 Note Verbale, Strasbourg, 20 March 2020 *see:* Order No. 32 Order of the person in charge of the emergency situation on the restriction of the freedom of movement after crossing the State border, 16.03.2020, https://rm.coe.int/16809cfa87

277 Riigikogu. «Emergency Act». Passed 08.02.2017, amended 2021, https://www.legislationline.org/download/id/9734/file/EST_emergency%20act.pdf

278 Ibid. «Order No. 32 Order of the person in charge of the emergency situation on the restriction of the freedom of movement after crossing the State border»

279 Ibid. «No. 1-16/6, Annex to the Note verbale JJ9017C dated 20 March 2020 ETS No. 5 – Article 15»

280 Lawless v. Ireland (no. 3), 1 July 1961, Series A no. 3 (Cited from: European Court of Human Rights. Guide on Article 15 of the European Convention on Human Rights, updated on 30 April 2021, https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf)

281 Council of Europe. Derogations Covid-19, See *Latvia,* https://www.coe.int/en/web/conventions/derogations-covid-19

282 Ibid.

283 Ibid.

emergency regime and the measures affecting the implementation of rights, progressively changing their intensity and gradually withdrawing from the certain rights derogation[284]. Constant informing from the Latvian side goes in line with the requirement of article 15(3) of the ECHR[285]. The last notification from Latvia regarding the derogation caused by the new strain of coronavirus has been registered by the Secretariat General on 21 October, 2021[286]. Among others Latvia reintroduced some strict measures related to liberty of movement, such as curfew[287].

In comparison to the Estonian and Latvian notification the Romanian one included more detailed reasoning of measures' necessity. Inter alia, the reference has been made to the positive experience of the other countries, indication of the increasing tendencies of the coronavirus's spread on the territory of Romania and the need in protection of economy[288]. Besides, the Romanian authorities also cooperated with the CoE on the constant basis[289]. Among the restrictions of free movement the borders closure, isolation and quarantine for arrivals from the states affected by coronavirus had been listed[290].

Nonetheless, despite the fact of the proper notification about derogation given to the CoE, the manner in which measures restricting free movement have been enforced in Romania provoked a concern beginning from the failure to properly notify its population about derogation from the Convention[291]. Namely, the Romanian population has discovered about the derogation not directly from the official Romanian sources, but from the press, which in its turn received the information from the French media platform[292]. Thus, the Romanian Government put its citizens in the position where the full picture of the effect on

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284 Council of Europe. JJ9012C Tr./005-225 Note Verbale, Strasbourg, 16 March 2020 See*:* Cabinet Order No. 103 On the Declaration of Emergency Situation , 12.03.2020 (mended on 13 March 2020 and 14 March 2020), https://rm.coe.int/16809ce9f2

285 Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html.

286 Council of Europe.JJ9288C Tr./005-281Note Verbale, Strasbourg, 25 October 2021, https://rm.coe.int/1680a44998.

287 "Curfew and Strong Restrictions on Non-Essential Services and Public Gatherings Announced in Latvia," Ārlietu ministrija, https://www.mfa.gov.lv/en/article/curfew-and-strong-restrictions-non-essential-services-and-public-gatherings-announced-latvia.

288 Council of Europe. JJ9014C – CORRIGENDUM (*) Tr./005-226, NOTE VERBALE, Strasbourg, 18 March 2020 See*:* The President of Romania. On the establishment of the state of emergency in the territory of Romania , Part I, No. 212/16.03.2020, https://rm.coe.int/16809cee30

289 Council of Europe. Derogations Covid-19, See *Romania*, https://www.coe.int/en/web/conventions/derogations-covid-19

290 Ibid.

291 Amnesty International. "Romania 2020 Archives,", 2021, https://www.amnesty.org/en/location/europe-and-central-asia/romania/report-romania/.

292 Hedwig Bicskei, «*Human Rights amis coronavirus pandemic: a case study of Romania*», revista do Ministério Público do estado de Goias

their rights, including freedom of movement had been not presented, as so among others the right to information was challenged in this case. Also, the Romanian population became aware of derogation from the ECHR only after 7 days from the actual date, according to the Helsinki Commission[293]. Therefore, from the one side the formal procedure enshrined in article 15(3) ECHR[294] requiring to notify the CoE has been followed, but from the other, legitimate question here is the quality of law, namely accessibility and foreseeability of its real impact on the public.

It is noteworthy, that regardless of derogation, the first case connected to the COVID-19 restrictions considered by the ECtHR has been brought against Romania. The content of the ECtHR's reasoning is valuable for the analysis of possible violations of freedom of movement, even the right invoked in the case was the right to liberty. Particularly, *Terheş v. Romania*[295] concerned the claim about the violation of article 5 ECHR caused by the introduction of lockdown in response to COVID-19 in Romania from 24 March to 14 May 2020[296]. The case was declared inadmissible because the nation-wide lockdown prohibiting to freely leave the place of residence being of general nature, without any specific burden on the applicant (e.g. surveillance) and with legally established grounds to leave the residency place did not lead in this case to deprivation of liberty and cannot be considered as the house arrest[297]. Thus, the Court has not proceeded to the examination of the legality of derogation. However, it cannot be excluded, that the Court would have done so, if the case was related to freedom of movement. Primarily, the Court several times pointed out that the applicant has not invoked article 2 of Protocol 4, showing the will to demonstrate not the restriction of movement per se, but liberty deprivation[298]. Otherwise the claim could have been also analysed under article 2 of Protocol 4[299], as the restrictions depriving the person to leave his/

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293 Orsi Sarány, Transylvania Now.. Bucharest "forgot" to inform the public about the suspension of the human rights convention, Mar. 24, 2020, https://transylvanianow.com/bucharest-forgot-to-inform-the-public-about-the-suspension-of-the-human-rights-convention/ (Cited from: Hedwig Bicskei, «*Human Rights amis coronavirus pandemic: a case study of Romania*», revista do Ministério Público do estado de Goias)

294 Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html, art. 15

295 *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021

296 European Court of Human Rights. 2021. «*Guide on Article 2 of Protocol no. 4 to the European Convention on Human Rights*», https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c)

297 See *Terheş v. Romania*, *supra* note 295, para. 42, 43

298 See *Terheş v. Romania*, *supra* note 295, para. 38

299 See «*Guide on Article 2 of Protocol no. 4 to the European Convention on Human Rights*», *supra* note 296 para. 101

her house without authorisation interferes with freedom of movement[300]. Another important factor that significantly affected the case's outcome was the lack of information about the concrete circumstances of the individual, meaning that as the personal difficulties in regard to lockdown were not provided the measure's burden had been evaluated generally for the population[301]. Therefore, would it be the case with detailed personal experience not strictly connected to article 5 of the Convention, the alternative outcome could be possible. In the meantime, the possible case in regard to freedom of movement during the COVID-19 restriction can appear against Croatia. Namely it has been notified about the application 17578/20 submitted by Dalibor Magdić[302] which includes the alleged violation of freedom of movement caused by the similar restrictions as in *Terheş v. Romania*. Croatia did not derogate from article 2 of Protocol 4[303], however limited the right's implementation, so if the personal circumstances in conjunction with interfering freedom of movement measures will be indicated, the Court will provide a legal analysis on the merits.

With respect to the aforementioned, derogation itself is insufficient to completely justify the measures which interfere with HRs and it does not mean that individuals cannot apply to the ECtHR in case of ones' rights violation, it just put the state in a «stronger position» comparing when there was no derogation used[304]. In other words, derogation is not a *carte blanche,* thus the measures themselves, the process of their adoption, the way and intensity of their enforcement are essential. In this regard, the following example from Romania is relevant.

The Romanian Constitutional Court in its Decision no. 152/2020[305] among the issues, have examined consequences of non-compliance with the emergency measures enacted in the process of the pandemic containment[306]. The relevant part of the case is connected with the enforcement of such measures as quarantine, isolation and stay-at-home orders. The legal acts

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[300] See «*Guide on Article 2 of Protocol no. 4 to the European Convention on Human Rights*», *supra* note 296 para. 58

[301] See *Terheş v. Romania, supra* note 295, para. 36

[302] *Magdić v. Croatia* (no. 17578/20), published on 31 May 2021, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-210389%22]}

[303] See "Derogations Covid-19,", *supra* note 126

[304] Л.М. Туманов, Энтин В.А., (общ ред.). «Комментарий к Конвенции о защите прав человека и основных свобод и практике ее применения», НОРМА, 2002 - 336 с. ISBN 5-89123-658-3 (НОРМА)/V.A. Tumanov, L.M. Entin, (general ed.). «Commentary on the Convention for the Protection of Human Rights and Fundamental Freedoms and the Practice of its Application», NORMA, 2002 - 336 p. ISBN 5-89123-658-3 (NORMA)

[305] Curtea Constituțională a României, Decizia nr. 152/2020, publicată în Monitorul Oficial al României nr. 387 din 5 mai 2020, http://legislatie.just.ro/Public/DetaliiDocumentAfis/225555/ Constitutional Court of Romania, Decision no. 152/2020, published in the Official Journal of Romania no. 387 of May 5, 2020, http://legislatie.just.ro/Public/DetaliiDocumentAfis/225555

[306] Ibid.

that include the measures and rules of compliance are, inter alia, the Presidential Decree no. 195 and military ordinances issued in accordance with the Government Emergency Ordinance no. 1/1999, article 28. In accordance with this legal framework, breach of the aforementioned measures can lead to fines from 2,000 (404.12 Euro) up to 20,000 lei (4,040.58 Euro on 29.10.21) for natural person, and in certain cases fines can be combined with another administrative sanction[307]. Comparing the sanction to the average salary in Romania it turned to be excessive and disproportionate[308]. Another major problem indicated was vague and not clearly predictable definition of the actions which breach the measures, that consequently creates a danger of arbitrariness from the side of the responsible authorities, such as the police[309]. As a result, not clearly limited power of the police provoked the unduly fines from the first days of quarantine[310]. The level of fines has been recognised unconstitutional, and the legal basis of established offences as lacking certainty, accuracy and predictability by the Romanian Constitutional Court[311].

Therefore, applying the «foreseeability» criteria of the «lawfulness test» developed by the ECtHR practise[312] the lack of clarity of actions that violate established order in this case prevents the measures to be legal, and as so freedom of movement restrictions are unjustified. However, the good practise from this example can be traced, namely in the fact that People's Attorney (Romanian Ombudsman) acted rapidly and according to the powers for Constitutional claim[313] referred the questions about the norms infringing the fundamental rights during the COVID-19 pandemic to the Constitutional Court.

To reiterate, such measures as quarantine, isolation, border closures, international and national travel bans, curfews and/or stay-at-home order have been widely used within all the EU member states. The area specifically regulated during the COVID-19 pandemic on the EU

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307 Ibid.

308 Diana Ungureanu, "Fundamental Rights In Courts and Regulation (FRICoRe)" Judicial Training Project. Summary Romania, Constitutional Court, 6 May 2020, no. 152., https://www.fricore.eu/fc/content/romania-constitutional-court-6-may-2020-no-152

309 Bianca Selejan-Gutan: *Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis, VerfBlog,* 2020/5/21, https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/, DOI: 10.17176/20200521-133211-0.

310 The Group of NGOs for Democracy, 'Amenzi abuzive', 21 April 2020, https://www.stareademocratiei.ro/2020/04/21/amenzi-abuzive/ (Cited from: The European Union Agency for Fundamental Rights. «Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications», Country: Romania, 4 May 2020, https://fra.europa.eu/sites/default/files/fra_uploads/ro_report_on_coronavirus_pandemic_may_2020.pdf)

311 See «Decision no. 152/2020» *supra* note 305

312 See «*Guide on Article 2 of Protocol no. 4 to the European Convention on Human Rights*», *supra* note 296, para. 141

313 The People's Attorney. «The Observance of Human Rights and the exceptional measures ordered during the period of the state of emergency and the state of alert» (March 16 - September 10, 2020), Bucharest, September

level is connected to travel bans and borders closure. The cooperation in this particular fields has been notable, however, the intensity of measures and specific rules within the concrete EU members can also be traced. The approach towards the rules of quarantine and isolation, however, lacks harmonisation on the EU level. Moreover, cases from some member states indicate the areas of concern. Namely, the failure to follow the procedures of adoption and enforcement of HRs restrictive measures, the insufficiency of medical/scientific justification of measures' necessity, establishment of disproportionate sanctions for their violation, the lack of clarity in definitions, which make the results of their breach not foreseeable, the failure to properly notify the population about derogation from the ECHR, etc. These examples challenge the legality and proportionality of the adopted measures making them violative towards the right to freedom of movement.

Besides, the areas of particular concern caused by the restrictions of freedom of movement have been discovered. Namely, the increase in domestic violence severely affecting women and children, inequality, disproportionate and discriminatory effect on certain groups, inter alia, elderly people, asylum seekers, migrant workers, marginalised groups[314]. Thus, the analysis of the listed issues is separated and provided in the following paragraphs.

A. *The impact of freedom of movement restrictions on elderly people during the COVID-19 pandemic*

In general, the additional burden on movement of elderly people within the EU member states and internationally stemmed from the indication of the COVID-19 risk groups in which they are included[315]. However, the question is whether the wider restrictions of movement of elderly people stayed in the frame of justified measures and were the least intrusive ones necessary for the protection of public health, not excessive, disproportionate and as so discriminatory. The consequences associated with the policies restricting liberty of movement that separately targeted elderly people are, for example, the escalation of age discrimination and inequality, increase in isolation and segregation based on age and creation of additional

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[314] See e.g. United Nations. COVID-19 and Human Rights We are all in this together, April 2020., pp.- 8, 11; "Protecting Children from Violence in the Time of Covid-19," UNICEF DATA, August 2020, https://data.unicef.org/resources/protecting-children-from-violence-in-the-time-of-covid-19-brochure/; United Nations. Policy Brief: «The Impact of COVID-19 on older persons», May 2020; Amnesty International. Amnesty International Report 2020/21, «THE STATE OF THE WORLD'S HUMAN RIGHTS», 2021.

[315] "Covid-19 High Risk Groups," World Health Organization (World Health Organization), https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups.

obstacles for the exercise of rights in equal manner[316]. Which by the nature of the outcomes put elderly people in a disadvantaged position comparing to the rest of the population.

The Military Ordinance no. 3/2020 on measures to prevent the spread of COVID-19 in Romania stipulated general prohibition to leave the places of residence, excluding the cases of the essential need[317]. At the same time, people who are older than 65 years were obliged to stay at the place of residence most of the time, with the permission to go outside only in specific hours from 11.00 to 13.00 o'clock with a valid reason[318]. To leave the house not in established hours elderly people should pursue the «professional interest or agriculture activities»[319].The similar practices requiring the elderly people to isolate and to not leave the home took place internationally[320] and not referred only to Romania.

The Croatian Government recommended elderly people to refrain from leaving home even in case they have regularly-scheduled medical screening or hospital appointment[321] unless the urgent case appears. Notwithstanding that it was a recommendation, it had the impact on the access to health care, and instead of the effect of strengthened protection challenged the right to health. It is noteworthy that both legal binding restrictions and recommendations can be considered discriminatory[322]. The recommendation directed to elderly people to stay at home even in the case of the scheduled medical check-up is discriminatory as comparing to the other groups of the population the right to health care of elderly people was additionally burdened. The authorities of Malta required certain vulnerable groups, including people over 65 years old to be segregated in their places of residence from

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316 HelpAge International. «Age discrimination and older persons», Submission by HelpAge International for the Third Intersessional meeting for dialogue and cooperation on Human Rights and the 2030 Agenda for Sustainable Development, January 2021

317 Ministerul Afacerilor Interne. Ordonanța militară nr. 3/2020 privind măsuri de prevenire a răspândirii COVID-19, 24 martie 2020 / The Ministry of Interior. Military Ordinance no. 3/2020 on measures to prevent the spread of COVID-19, March 24, 2020, https://lege5.ro/Gratuit/gm3dknrtgizq/ordonanta-militara-nr-3-2020-privind-masuri-de-prevenire-a-raspandirii-covid-19.

318 Ministerul Afacerilor Interne. Ordonanța militară nr. 3/2020 privind măsuri de prevenire a răspândirii COVID-19, 24 martie 2020 / The Ministry of Interior. Military Ordinance no. 3/2020 on measures to prevent the spread of COVID-19, March 24, 2020, https://lege5.ro/Gratuit/gm3dknrtgizq/ordonanta-militara-nr-3-2020-privind-masuri-de-prevenire-a-raspandirii-covid-19 (Cited from: See *"Covid-19 Civic Freedom Tracker,",supra* note 5)

319 Ibid

320 Sarah Harper, "The COVID-19 pandemic and older adults: institutionalised ageism or pragmatic policy?." *Journal of Population Ageing* 13, no. 4 (2020): 419-425.

321 Government of the Republic of Croatia. Coronavirus protection measures, Situation with the disease caused by the new COVID-19 coronavirus (SARS — CoV-2), 16 March 2020, https://vlada.gov.hr/coronavirus-protection-measures/28950 (Cited from: «Age discrimination and older persons», *supra* note 316)

322 Bridget Sleap, HelpAge International. «Age-based Measures and COVID-19: time for change, time for a UN convention on the rights of older persons», p. 30 in Issue Focus Human Rights of Older Persons and COVID-19, ASEM Global Ageing Center Vol. 01 No. 02 Fall/Winter 2020.

other people[323]. The Government of the Czech Republic adopted the resolution No. 1029 in October 2020, which forbidden the residents of the specific facilities, among which were listed the houses providing care for elderly people to leave the facilities, with the only exception to those whose health condition, including mental state can seriously deteriorate[324]. On 16 December 2020 the Government significantly eased the measures in the resolution, allowing the walks up to 6 hours and more in certain cases[325]. On 22 December it was further amended by the elimination of the walking time limits, but the requirement to make a test after the walk with a separation of the patient until the test's result has been maintained[326]. Regardless of changes, duration of this highly restricting freedom of movement measures for elderly people living in the care facilities lasted for more than 2 month from October 12 to December 16, with additionally restricted visiting rules[327]. These factors cumulatively with certain personal circumstances can be assessed as too intrusive into the fundamental freedom of movement. The difference in treatment between the general public and elderly people appeared on the ground of age, as they constitute a risk group. Thus, by putting specific restrictions on this group states pursued the aim to protect public health. At the same time, the severity, and length of the aforementioned restrictions adopted in the Czech Republic challenge their proportionality. Two months of complete prohibition to leave, save the possibility to go outside if it's required by health conditions appear to be excessive. Less restrictive measures could have been adopted instead. For example, the possibility to have walks in the facility's territory wearing the protection (masks, respirators, gloves, etc.). Besides, being locked in the building for 2 months can undoubtedly cause the deterioration of

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323 A.L. 111 tal-2020 ATT DWAR IS-SAĦĦA PUBBLIKA (KAP. 465) Ordni tal-2020 dwar il-Protezzjoni ta' Persuni Vulnerabbli, 28 ta' Marzu, https://www.gov.mt/en/Government/DOI/Government%20Gazette/LN/Documents/2020/LN%20111.pdf (Citem from: See «Age discrimination and older persons», *supra* note 316)

324 Vláda České republiky, Usnesení č. 1029 "o zabezpečení a organizaci poskytování sociálních služeb po dobu trvání nouzového stavu - zákaz vycházení pro vybrané druhy sociálních služeb", ze dne 12. října 2020. / The Government of the Czech Republic, Resolution No. 1029 "on the provision and organization of the provision of social services for the duration of an emergency - a curfew for selected types of social services", of 12 October 2020, https://www.vlada.cz/assets/media-centrum/aktualne/7--zakaz-vychazeni-1029.pdf (Cited from: See *"Covid-19 Civic Freedom Tracker,"supra* note 5)

325 Vláda České republiky. Usnesení č. 532/2020 Sb. Usnesení č. 1325 «o změně krizového opatření, https://www.vlada.cz/assets/media-centrum/aktualne/zakaz-navstev-1325.pdf / The Government of the Czech Republic, Resolution No. 532/2020 Coll. Resolution of the Government of the Czech Republic No. 1325 «on the change of the crisis measure»

326 Vláda České republiky. Usnesení č. 578/2020 Sb.Usnesení vlády České republiky č. 1370 «o přijetí krizového opatření», https://www.zakonyprolidi.cz/cs/2020-578/zneni-20201222 /The Government of the Czech Republic. Resolution No. 578/2020 Coll. No. 1370 «on the adoption of a crisis measure»

327 Ministerstvo zdravotnictví. MIMOŘÁDNÉOPATŘENÍ, Palackého náměstí 375/4, 128 01 Praha 2 Praha 2. července 2021Č. j.: MZDR 1595/2021-6/MIN/KAN, https://www.mzcr.cz/wp-content/uploads/2021/07/Zmena-mimoradnych-opatreni-v-nichz-se-stanovi-ockovani-jako-vyjimka-z-nekterych-povinnosti-s-ucinnosti-od-9-7-2021.pdf / The Ministry of Health. EXTRAORDINARY MEASURES, Palackého náměstí 375/4, 128 01 Praha No .: MZDR 1595 / 2021-6 / MIN / CAN, 2 Prague 2 July 2021

mental and physical health. Thus, in comparison to the facilities' inhabitants, who already had the «permission» arising from health condition, those whose health condition «was not requiring» the walks appeared in a position where as a result their health, especially mental state can deteriorate, which makes the measure meaningless and unjustified.

The need of public health protection covers all the population, and the fact that elderly people constitute a risk group should not put them in the worse position comparing to others, especially taking into account that they have already been hit stronger by the virus. Thus, protection of the public by adoption of stricter measures for elderly people should not lead to disregard of their rights. Conversely, putting additional burden on freedom of movement of the specific group states have to evaluate the risks and develop the supportive mechanisms to avoid the destructive effect on this group.

B. *The impact of freedom of movement restrictions on the level of domestic violence during the COVID-19 pandemic*

Restrictions of liberty of movement considerably affected the level of domestic and other forms of violence towards certain groups, inter alia, elderly people[328], women and children[329][330]. The cases of domestic violence during lockdown, quarantine and stay-at-home orders have risen significantly leaving women and girls in the vulnerable position in the closed space[331]. Within the EU states the effort to support women who turned out to be in the disadvantaged position because of the pandemic can be traced. For instance, in Belgium, the part of the European Parliament building in Brussels have been allocated to shelter women[332]. The important solution has been taken in Italy, where by the decisions of prosecutors in cases of family abuse, the one who was responsible had to free the family residence place[333].

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328 C. Williamson, R. Albone, G. Veitch, F. Juergens, F. Galvani, J. Duffield, A. Mihnovits, J. Stovell, B. Sleap, and A. Timlin, "HelpAge International". «Bearing the brunt,The impact of COVID-19 on older people in low- and middle-income countries – insights from 2020», https://www.helpage.org/what-we-do/bearing-the-brunt/.

329 "The Shadow Pandemic: Violence against Women during Covid-19," UN Women, https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19.

330 United Nations, General Assembly. A/HRC/46/19 «Impact of the coronavirus disease (COVID-19) pandemic on the enjoyment of human rights around the world, including good practices and areas of concern», 18 January 2021

331 UN Women. «COVID-19 and Ending Violence Against Women and Girls», UN Women Headquarters, 2021.

332"Infoclip: Covid-19 - EP Kohl Building Used as a Temporary Residence for Women in a Difficult Situation in the Context of the COVID-19: Samu Social Now Fully at Work," Multimedia Centre, https://multimedia.europarl.europa.eu/en/infoclip-ep-kohl-building-used-as-a-temporary-residence-for-women-in-a-difficult-situation-in-the-context-of-the-covid-19-samu-social-now-fully-at-work-in-ep-kohl-building_I190081-V_v.

333 Ibid. *«COVID-19 and Ending Violence Against Women and Girls».*

Nevertheless, domestic violence has already been a worldwide problem before the pandemic, thus as in case with mental health analysed earlier the states should have demonstrated preparedness, especially introducing the measures which leave people in a closed space for a long time. This is not unexpected outbreak of a novel disease, but already prevailing problem of society. Thus, if during the anti COVID-19 measures increasing tendency in family violence is recorded, including in developed countries[334] it indicates that during the «normal time»[335] the countries failed to regulate this issue in a manner which would have prevented the escalation of the problem in the times of measures limiting free movement. Also, it shows that domestic violence still remains the prevailing societal problem. Consequently, it demands a serious attention when the public health treat will bypass. Otherwise, if not to improve the protective framework against domestic violence during the «normal time» after the pandemic ends, there is a serious risk of the same pattern in domestic violence growth in cases of the next infectious disease outbreaks demanding the restrictions of free movement.

C. *The impact of freedom of movement restrictions on escalation of discriminatory and disproportionate attitude towards certain groups during the COVID-19 pandemic*

During the COVID-19 pandemic many people in one or another way have been more affected by the measures or the manner of their enforcement internationally. The examples of such cases can also be traced within the EU member states in the various forms. The discriminatory division of travel bans at the beginning of the COVID-19 outbreak expressed in prohibition of the entry of nationals only of certain countries does not correspond to the standards of IHRL and IHR[336]. Namely, the cases where the restrictions of entry were based solely on the person's nationality, but not on the existence of symptoms, the disease rates of country of departure, etc. appear to be discriminatory towards people on the ground of their race. Besides, widespread travel bans to and from China were detected at the beginning of the outbreak, while not recommended and justified by the WHO[337]. For example, Italy suspended

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[334] See e.g., Spain faced the 20% more family abuses reports with the beginning of limiting free movement measures. Graham-Harrison E.. Lockdowns around the world bring rise in domestic violence. The Guardian.(2020, March) Retrieved from https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence (Cited from: Usta, J., Murr, H., and El-Jarrah, R. "COVID-19 Lockdown and the Increased Violence Against Women: Understanding Domestic Violence During a Pandemic." *Violence and Gender* (2021).)

[335] Author's note. In the context «normal time» should mean, the time of standard legal order, without the existing threat to protected interests, which not demand the activation of emergency regime.

[336] B. Von Tigerstrom, and K. Wilson, "COVID-19 travel restrictions and the International Health Regulations (2005)." *BMJ Global Health* 5, no. 5 (2020): e002629.

[337] See *"Who Advice for International Travel and Trade in Relation to the Outbreak of Pneumonia Caused by a New Coronavirus in China,", supra* note 251

the flights to and from China already at the end of January[338]. In general, on the first stages of the pandemic travel bans on the ground of nationality of the affected countries had been recorded in 20 countries, and the fact of residency in such countries had been used as a ground for restrictions by 6 countries (e.g. Lithuania)[339]. Targeting only specific countries or its nationals when the spread of the virus had already started and the cases of virus, which were detected in various countries raise a question about reasonableness of such bans[340]. Moreover, in view of the worldwide transmission of the virus that any way occurred, the efficiency of the travel bans is clearly arguable, which strengthening the warning of the WHO that this way of containment is ineffective[341]. Thus, the lack of justification of the effectiveness of travel restrictions and their disproportionate effect on people on the ground of their nationality at the beginning of the outbreak challenges their necessity and non-discriminatory application.

Another worrying trend that also present within the EU members is the manner of the measures' enforcement reflected in the excessive use of force and disproportionate effect on certain groups. For example, disproportionate challenges during the pandemic appeared before the different categories of people in France[342]. Prolonged curfew for such groups as labouring class and ethnic minorities in Nice and increased number of the administrative sanctions towards people of African descent comparing to the rest of the population in the same period of time[343] raise the concern regarding the requirement of non-discriminatory application and enforcement of the restrictions. The difference in treatment within the population recorded in the number of countries seriously undermines the principles of the IHRL and as so the justification of the measures adopted to contain the spread of coronavirus.

The Amnesty International pointed out the disproportionate use of force towards Roma people in Romania in the process of measures enforcement control[344]. The UN Special Rapporteurs raised a concern of general character about the use of lethal force in the process

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338 "Coronavirus: Sospesi Tutti I Collegamenti Aerei Tra Italia e Cina - Courtesy Translation Available," ENAC, January 31, 2020, https://www.enac.gov.it/news/coronavirus-sospesi-tutti-collegamenti-aerei-tra-italia-cina-courtesy-translation-available.

339 Lorenzo Piccoli, Jelena Dzankic, and Didier Ruedin. "Citizenship, Migration and Mobility in a Pandemic (CMMP): A global dataset of COVID-19 restrictions on human movement." *PloS one* 16, no. 3 (2021): e0248066., p. 6

340 See Von Tigerstrom and Wilson, *supra* note 336, p. 2

341 World Health Organization. 2020. «2019 Novel Coronavirus (2019−nCoV): Strategic preparedness and response plan»

342 Amnesty International. «Policing the pandemic human rights violations in the enforcement of COVID-19 measures in Europe», 01/2511/2020. p. 20-21.

343 Ibid.

344 Ibid. p. 25

of measures enforcement control, especially towards the unprivileged groups of society, such as homeless people[345]. Consequently, it is important to notice that in the global pandemic there is no limited list of the EU members or other states which in one or another way excessively interfered with the rights of people enforcing the lockdown measures, these practices traced globally and include different forms[346]. Thus, indicated issues comprise the international concern.

D. *The impact of freedom of movement restrictions on asylum seekers during the COVID-19 pandemic*

The right to seek asylum is a vital right for the people who faced persecution or other serious threat. Being not able to stay in their country of origin people flee to another country to seek the protection. The COVID-19 pandemic significantly complicated the position of the asylum seekers due to the widespread borders closure, lockdowns and travel bans. Thus, the last group considered in the context of the negative consequences provoked by the freedom of movement restrictions within the EU is asylum seekers. The freedom of movement restrictions adopted to deal with the spread of the infectious virus have to be in compliance with the other obligations under the International law[347]. The principle of non-refoulement is an essential part of international legal order. However, the access to the asylum procedure has been notably complicated, or even denied because of the policies of borders closure in the states[348]. According to the United Nations High Commissioner for Refugees (the UN Refugee Agency, or UNHCR) about 100 states did not provide an exemption for asylum seekers from their border policy rules as, for example, Hungary and Cyprus within the EU[349]. Namely, in May by the act of the Hungarian Government people willing to seek asylum in Hungary could receive the access to the territory and asylum procedure, if first they reported about it in the Hungarian Embassy in bordering countries that are not the EU member states[350].

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345 "Covid-19 Security Measures No Excuse for Excessive Use of Force, Say UN Special Rapporteurs," OHCHR,17 April 2020, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25802&LangID=E.

346 Kelly Shea Delvac, "Human Rights Abuses in the Enforcement of COVID-19 Lockdown Measures: A Catalyst for Change." *Indon. J. Int'l & Comp. L.* 8 (2021): 85.

347 Council of Europe.1963. «*Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*», ETS 46, https://www.refworld.org/docid/3ae6b3780.html.

348 The United Nations High Commissioner for Refugees. «COVID-19 and refugees». The maps, stats and facts on how the pandemic has impeded efforts to protect the displaced and affected their access to basic rights, https://storymaps.arcgis.com/stories/95cc3b65d9264cf3b80fffef0daa0358

349 Ibid.

350 United Nations High Commissioner for Refugees, "UNHCR Concerned by Hungary's Latest Measures Affecting Access to Asylum," UNHCR, 10 March 2021, https://www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html.

Denying the access at borders to those who seek asylum contradicts the international customary law[351], also as the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[352], The 1951 Convention Relating to the Status of Refugees[353], article 3 of the ECHR[354], and the Recast Directive 2013/32/EU[355], as every person expressing the need in international protection is a subject to individual assessment and cannot be rejected on the automatic basis[356]. Moreover, there is a serious threat that the person can again appear in the situation of serious threat, torture or inhuman treatment after he/she had been rejected at the border. The UNHCR highlighted that the practises from the European countries contradict to norms of the aforementioned framework and reiterated that the measures enacted to combat the spread of COVID-19 can be performed without the complication or suspension of the asylum procedures[357].

2.2.2. COVID-19 and the right to freedom of movement at the international level

The legal issues mentioned in the previous section derived from the travel bans, quarantine, stay-at-home and similar orders do not exclusively associate with the EU member states, indeed, they are evident on the global scale. Namely, elderly people are in the risk of being abandoned due to the strict restrictions of liberty of movement[358]. The acts of violence and abuse according to the UN Women constitute a «shadow pandemic»[359]. Canada, the US, Singapore, Argentina, the UK this is a non-exhaustive list of countries where the worrying tendencies in the field of domestic violence towards women and girls were traced during the

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[351] Author's note: The principle of non-refoulement recognised as a part of international customary law. See European Commission. Migration and Home Affairs. «Non-refoulement» https://ec.europa.eu/home-affairs/pages/glossary/non-refoulement_en

[352] UN General Assembly. 1984. «*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*»,United Nations, Treaty Series, vol. 1465, p. 85, https://www.refworld.org/docid/3ae6b3a94.html

[353] UN General Assembly. 1951. «*Convention Relating to the Status of Refugees*», United Nations, Treaty Series, vol. 189, p. 137, https://www.refworld.org/docid/3be01b964.html

[354] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, https://www.refworld.org/docid/3ae6b3b04.html., art. 3

[355] European Union: Council of the European Union, "Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)", 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, https://www.refworld.org/docid/51d29b224.html.

[356] United Nations High Commissioner for Refugees, "UNHCR Warns Asylum under Attack at Europe's Borders, Urges End to Pushbacks and Violence against Refugees," UNHCR, 28 January 2021, https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html.

[357] Ibid.

[358] United Nations. Policy Brief: «The Impact of COVID-19 on older persons», May 2020.

[359] See "The Shadow Pandemic: Violence against Women during Covid-19," *supra* note 329

pandemic[360]. In addition to mentioned consequences from the restrictions, the concern on the international level directly linked with the liberty of movement has appeared in regard to the fulfilment of the right to enter own country protected in article 12(4) of the ICCPR[361].

The notification about the enactment of the emergency regime and restrictions of fundamental rights under article 4(3) of the ICCPR has been given to the UN Secretary-General by 26 states[362]. While the other states were restricting the rights under the limitation clauses. Regardless of the legal grounds, freedom of movement became a subject to the broad scale of restrictions internationally. During March and April 2020 stay-at-home orders and lockdowns have been adopted globally[363]. During April 2020 the vast majority of countries required its inhabitants to stay at places of their residence, where some countries introduced just a few reasons in which it was allowed to leave, for instance, the Russian Federation, Kazakhstan, Argentina, Peru, India[364]. On the moment of the research[365], China, Myanmar, Jamaica and Venezuela still have strict rules regarding the possibility to leave ones residence providing the very limited exceptional reasons[366]. At the same time, some states during the whole period of the pandemic haven't introduced restrictions to leave ones place of residence, or if so on the very limited period, also some states had less restrictive policies on the early stages of the pandemic, but strengthened them recently[367]. One of the states which implemented the stricter measures, while the others were easing or lifting them is the Republic of Trinidad and Tobago. The Republic of Trinidad and Tobago has notified the Secretary-General of the UN about the derogation from certain rights, including liberty of movement affected by curfew only in summer 2021[368] which corresponds to the significant increase of the daily COVID-19 cases starting from that period[369]. This example indicates the

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360 Ibid.

361 UN General Assembly. 1966. "*International Covenant on Civil and Political Rights".* United Nations. Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html., art. 12(4)

362 See *"Derogations Covid-19." supra* note 126

363 Hannah Ritchie, Edouard Mathieu, Lucas Rodés-Guirao, Cameron Appel, Charlie Giattino, Esteban Ortiz-Ospina, Joe Hasell, Bobbie Macdonald, Diana Beltekian and Max Roser - "Coronavirus Pandemic (COVID-19)», COVID-19: Stay-at-Home Restrictions, (2020). *Published online at OurWorldInData.org.,* https://ourworldindata.org/covid-stay-home-restrictions

364 Ibid.

365 Author's note, the latest updates were included from October to December 2021.

366 Ibid. "Coronavirus Pandemic (COVID-19)»

367 Ibid. See e.g. In Tanzania people were recommended to stay at home (12 October, 2021), In Laos the stay-at-home policies were changed from «recommended» to «required» (21 October, 2021), In Turkmenistan people were required to stay at home (4 October, 2021)

368 The Republic of Trinidad and Tobago. Notification C.N.214.2021.TREATIES-IV.4, https://treaties.un.org/doc/Publication/CN/2021/CN.214.2021-Eng.pdf.

369 See «Worldometer», *supra* note 101, See Trinidad and Tobago, https://www.worldometers.info/coronavirus/country/trinidad-and-tobago/

importance of the reasoning of the restrictions, which include the concrete epidemiological circumstances of the separate state.

Taking into account that the outbreak of SARS-CoV-2 started in China, it is logical that it was the first country adopted the restrictions. Moreover, China introduced the most massive quarantine documented to the current date, meanwhile it has been recognised as effective[370], however the level of intrusion in freedom of movement in this case raise a serious concern. In addition, considering the information from the previous parts of the work that the SARS like virus started to circulate in China earlier, than the official reaction was given, the breach of IHR provision requiring to inform the WHO within 24 hours can possibly take place[371]. Also, such a delay in the reaction could have caused the increase in the general spread of the virus. With no regard to the strong response at the beginning of the pandemic, Chinese citizens of different areas and those who plan to visit China face the wide range of restrictions nowadays[372]. For instance, the visa applications have been stopped in proceeding in June 2021, the regime of the «strict border control» remains in force (November 2021), the foreign students were permitted to entry China from August 2021, with the requirement of quarantine[373]. Besides QR codes technology is a widespread tool to trace the travel history in China[374]. Thus, the highly intensive measures introduced at the beginning of the outbreak have not prevented from the new outbreaks inside the country, which questions if their strictness is justified, or it was possible to use the less restrictive measures.

A. Implementation and enforcement of the freedom of movement restrictions, justification: the issues of legality and proportionality

With regard to the legality, same as in the previous section, the problem can be already seen on the phase of the implementation of restrictions. For example, according to the Ukrainian Constitution the restrictions of HRs have to be provided by law, however isolation and quarantine rules were introduced by the Resolution of the Cabinet of Ministers of

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370 D Kang, 'The shunned: People from virus-hit city tracked, quarantined' AP 31 January 2020 <https://apnews.com/7f7336d2ed099936bd59bf8cb7f43756> (Cited from: Conrad Nyamutata, "Do Civil Liberties Really Matter During Pandemics?: Approaches to Coronavirus Disease (covid-19)." *International Human Rights Law Review* 9, no. 1 (2020): 62-98) .

371 World Health Organization. 2005. "*International health regulations"*, third edition. World Health Organization.

372 See *"Covid-19 Civic Freedom Tracker," supra* note 5, section «China movement», the policies in force in November 2021.

373 外交部領事事務局. (10/7更新) 因應「武漢肺炎(COVID-19)」疫情 外籍人士入境管制措施專區, 110-10-07, https://www.boca.gov.tw/cp-56-5078-41ac3-1.html / Bureau of Consular Affairs, Ministry of Foreign Affairs. (Updated on 10/7) Special section on immigration control measures for foreigners in response to the ``Wuhan Pneumonia (COVID-19)" epidemic, 110-10-07.

374 "Coronavirus - China Travel Advice," GOV.UK, https://www.gov.uk/foreign-travel-advice/china/coronavirus.

Ukraine[375], which made it contradictory to the supreme legal act of the country. In particular, because the power to implement the law is given by article 75 of the Constitution of Ukraine only to the Parliament[376]. Currently, under the Constitutional proceeding the norms contradicting the Constitution have already been invalid, thus the Constitutional Court has not provided the evaluation of their legality[377]. Nevertheless, it does not change the fact of the operation of norms violative towards liberty of movement during the validity of the aforementioned provisions. Consequently, taking into account that the first step of the justification of restrictions is disputable in this case there is a place to consider freedom of movement violation. Thus, even the measures are necessary for the purpose of health protection they anyway have to be implemented through the eligible legal acts to be justified.

Assessing if the measures are justified it is also vital to consider the way of their enforcement. During the COVID-19 pandemic the evidence of the abusive practises have been recorded internationally. In Kenya the case has been brought before the Constitutional and HRs division of the High Court, inter alia, regarding the application by the national police of unjustified force when controlling the enforcement of the curfew order established to combat the spread of coronavirus[378]. The conduct of the police in the process of the curfew enforcement did not comply with the standards established in the National Police Service Act (the Act)[379]. Namely, the Act lists the cases when it is allowed to use force, consequently detection by the police of curfew breach does not per se justifies the use of force or firearms.[380] To substantiate the case, among other, the information obtained by the constitutionally empowered HRs observer - the Kenya's National Commission on Human Rights (KNCHR), which joined the case as the interested party with the consent of all the proceeding's parties had been used[381]. The representer of the KNCHR stated that the

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375 Valentyn Zolka, Olha Tsarenko, Iryna Kushnir, Serhii Tsarenko, and Roman Havrik. "The Impact of the Pandemic Covid-19 on the Human Right to Freedom of Movement." *European Journal of Sustainable Development* 10, no. 1 (2021): 376-388. p. 377

376 Верховна Рада України. 1996. «*Конституція України*»./ Verkhovna Rada of Ukraine. 1996. "Constitution of Ukraine ".

377 Constitutional Court of Ukraine. Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Supreme Court on the constitutionality of certain provisions of the Resolution of the Cabinet of Ministers of Ukraine "On quarantine to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2, and stages event" of August 28, 2020, https://zakon.rada.gov.ua/laws/show/v010p710-20#Text

378 Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR, Petition 120 of 2020 (Covid 025), 16th day of April, 2020, http://kenyalaw.org/caselaw/cases/view/193192/.

379 Ibid. para. 78

380 Kenya National Commission on Human Rights (KNCHR). Situational report NO. 1 OF 2020 «Pain and Pandemic : Unmasking the State of Human Rights in Kenya in Containment of the COVID -19 Pandemic», P.O. BOX 74359-00200, Nairobi., p. 25

381 See Law Society of Kenya v Hillary Mutyambai, *supra* note 378, para. 6, 31

substantial number of cases of unreasonable use of force by the police had been recorded by the KNCHR[382]. Among the examples, the episode of a police's brutality towards a person who was on the street during the curfew hours had been provided in the court hearing, received in the assault injuries later caused the decease of a person[383]. It is noteworthy, that the assaulted person was returning from hospital where he transferred an expectant mother which required a medical care[384]. Moreover, it is reported that the family of the deceased was too scared to take him to hospital during the curfew hours so he was slowly dying in pain without the medical assistance[385]. This episode not only shows the unjustified enforcement of the anti-pandemic measures in Kenya, but also discloses the deep prevailing problem of the abuse of powers by the police in Kenya, and by the fear formed within the population testifies that the police's wrongdoings enjoy impunity. The unconstitutionality of unjustified force has been recognised by the High Court, so that the actions of the national police officials were violative towards, inter alia, the right to life, dignity, prohibition of torture, inhuman and degrading treatment[386]. Even the curfew as a measure has not been recognised unconstitutional, its enforcement cannot cause the violation of other HRs[387]. The enforcement of the anti-pandemic measures in Kenya, generally, raise a great concern. According to Amnesty International the cases of enforcement of measures in unequal and/or discriminatory manner were evident in Kenya[388], posing the threat to the right to life and dignity[389]. Namely, the killings committed by the police in the process of the curfew compliance control which took place with the introduction of the curfew order, other acts of violence and abuse of power[390] led to non-compliance of the restrictions enforcement with the other HRs and IHRL standards.

More examples establishing the violation of rights of people accused in the curfew breach can be traced in the Philippines, including the facts of degrading for the people's

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382 Ibid. para. 32-34
383 Ibid. para 33
384 Ibid.
385 Ibid.
386 Law Society of Kenya v Hillary Mutyambai,, Inspector General National Policy Service & 4 others. Petition 120 of 2020 (Covid 025), 40 2020, http://kenyalaw.org/caselaw/cases/view/192748/ (Cited from Sekalala, Sharifah, Lisa Forman, Roojin Habibi, and Benjamin Mason Meier. "Health and human rights are inextricably linked in the COVID-19 response." *BMJ Global Health* 5, no. 9 (2020): e003359.)
387 UN General Assembly. 1966. "*International Covenant on Civil and Political Rights"*. United Nations. Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html.
388 Amnesty International. Amnesty International Report 2020/21, «THE STATE OF THE WORLD'S HUMAN RIGHTS», 2021., p.214
389 Sharifah Sekalala, Lisa Forman, Roojin Habibi, and Benjamin Mason Meier. "Health and human rights are inextricably linked in the COVID-19 response." *BMJ Global Health* 5, no. 9 (2020): e003359. p. 2
390 Human Rights Watch. "Kenya: Police Brutality during Curfew," Human Rights Watch, October 28, 2020, https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew.

dignity treatment. Namely, accused in the breach of curfew, people were put in the cages designed for dogs and left outdoors during the day[391]. Apart from the unacceptable treatment, the rationale of the arrests is meaningless, if after people were locked in the small-sized isolators, as it have been reported, for example, in Bacolod city[392]. The Amnesty International raised a concern about possible cases of the cruel, inhuman and degrading treatment derived from the abusive use of power by the police in Luzon[393]. The prohibition of torture, inhuman and degrading treatment or punishment is an absolute right which can neither be limited, nor derogated. The mere aim of all the measures restricting liberty of movement, such as, quarantine, isolation, travel bans, curfew, etc. is the protection of the population from the public health threat imposed by SARS-CoV-2. Thus, if this aim is used to violate the HRs it cannot be in any case recognised as legal.

In addition, the enforcement of the measures can sometimes be just absurd in the core. For example, in Australia people received an administrative punishment for the publishing of the pictures from the old vacations in the period of lockdown[394]. Thus, when these measures which should have been protecting the population, conversely make it the target for the abuse, even if legal and necessary they become HRs violative, which contradicts to the norms of the IHRL. However, not only the problem of excessive use of power can be traced during the enforcement of curfews, isolation, quarantine or lockdown in COVID-19 pandemic, but conversely, negligence and failure to use the discretion given to the authorities by law.

The case *Christiansen v the Director-General of Health*[395] is one of the examples of such negligence and failure to use the discretion. The Ministry of Health responsible for the granting of exceptions from mandatory two weeks isolation of arrivals, three times rejected to issue it to Mr. Christiansen who was the subject to isolation after he came to New Zealand

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391 Human Rights Watch. "Philippines: Curfew Violators Abused," Human Rights Watch, October 28, 2020, https://www.hrw.org/news/2020/03/26/philippines-curfew-violators-abused.

392 Nanette Guadalquiver. The Philippine News Agency. «Over 700 arrested for violating curfew in Bacolod City», https://www.pna.gov.ph/articles/1097514 (Cited from: Human Rights Watch. "Philippines: Curfew Violators Abused," Human Rights Watch, October 28, 2020, https://www.hrw.org/news/2020/03/26/philippines-curfew-violators-abused.)

393 Amnesty International. "Investigate Humiliating Abuse of LGBTI People during Curfew in the Philippines," Amnesty International, August 12, 2021, https://www.amnesty.org/en/latest/news/2020/04/philippines-investigate-humiliating-abuses-curfew/.

394 See «THE STATE OF THE WORLD'S HUMAN RIGHTS», *supra* note 388, p.72

395 The High Court of New Zealand *Christiansen v the Director-General of Health* [2020] NZHC 887 [4 May 2020], https://www.courtsofnz.govt.nz/assets/cases/Christiansen-v-The-Director-General-of-Health-Reasons-NZHC-887.pdf (Cited from: Courts of New Zealand. COVID-19: Related judgments, https://www.courtsofnz.govt.nz/judgments/covid-19-related-judgments/)

from London by plane[396]. The reason Mr. Christiansen had been seeking the exemption was the rapidly deteriorated health condition of his father who had a brain tumour, and the doctor's prognoses of the extremely limited lifetime left for his father[397]. It is important to notice, that not only Mr. Christiansen was seeking the exemption, but he was by all means showing that he will follow any required precautionary measures to reach family's house and return back after his father's decease[398]. According to Judge Walker in the exercise of the respondent's power appeared an «error of law». All three rejections referred to the limited list of grounds posted on the governmental website, thus the authorities did not use the discretion given by the Health Act Order[399]. In addition, the judge emphasised that proportionality is vital in the decisions related to the protected rights of individuals, including freedom of movement even in the exceptional time of the COVID-19 crisis[400]. Finally, the order was granted[401]. After 1.5 days from the moment of permission to suspend the isolation, Mr. Christiansen's father died[402]. This case indicates how huge is the problem of the position of individual in the situation of general alert. Where the tension exists between the rights of the concrete person and the right of public to be protected from the disease spread, the former can find themselves in complete helplessness. The practise of the ECtHR established that for the measures interfering in freedom of movement to be proportional, the personal right and public interest must be weighted[403]. In this case, the personal interest in the right to freedom of movement outweighed the public interest in the protection from the infectious disease, taking into account all the circumstances. The fact that the case appeared showed that when the general restriction exists and must be widely followed, even having the eligible ground for exemption it can be ignored. Neither the enforcement of the disease control measures can be excessive, nor exercised with negligence from the side of responsible authorities, otherwise it undermines the mere nature of these measures as those aimed to protect people. The

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396 The High Court of New Zealand *Christiansen v the Director-General of Health* [2020] NZHC 887 [4 May 2020], https://www.courtsofnz.govt.nz/assets/cases/Christiansen-v-The-Director-General-of-Health-Reasons-NZHC-887.pdf, para 2, 4

397 Ibid. para 3

398 Ibid. para 7

399 Ibid. para 47- 48

400 Ibid. para 67

401 Ibid. para 70

402 Sir David Williams QC: "The High Court Gives Judgment in Ground Breaking Covid-19 Freedom of Movement Case: Bankside Chambers," Bankside Chambers - Home,September 11, 2020, https://www.bankside.co.nz/post/the-high-court-gives-judgment-in-ground-breaking-covid-19-freedom-of-movement-case.

403 European Court of Human Rights. 2021. «*Guide on Article 2 of Protocol no. 4 to the European Convention on Human Rights*», https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c)

proportionality principle must be followed both in the process of establishment of measures limiting rights, and when they are applied[404].

B. The impact of the freedom of movement restrictions on the rights of the migrant workers and asylum seekers

Another example, when general restrictions have negatively affected freedom of movement concerns the right to enter person's own country protected by article 12(4) of the ICCPR, also as by the legislation on the national levels. For instance, the Constitutions of Lithuania, Canada, Poland, Spain and Ukraine protect the right of their citizens to enter[405]. This is the essential right, which is especially important in current epidemiological situation. Being in a foreign country during the pandemic is challenging for many reasons. For example, migrant workers depending on the policies of the country can be left the possibility to continue the work, as so deprived of a source of income and means to pay the rent and other essentials[406]. Thus, finding themselves in such a situation people can logically decide to return to own countries. During the COVID-19 pandemic some people found themselves in the exact situation, when they could not enter the territory of their states. The migrant workers willing to return back to their countries, particularly, to Nepal and Thailand did not receive such an ability due to the governmental restrictions (borders closure)[407]. The huge problem appeared on the border of India and Nepal, where Nepalese citizens were stuck without possibility to enter Nepal, sleeping on the streets and in some cases even not having food[408]. Such restrictions violate the right to enter owns country, and undermine the nature of the legal bond between the state and its inhabitants (not just limited to citizens)[409].

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404 See *«General Comment No. 27: Article 12», supra* note 210

405 See e.g. *Constitution of the Republic of Lithuania*. Adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992. Art.; *The Constitution Acts 1867 to 1982*. The Canadian Charter of Rights and Freedoms. Art. 6(1)*; Constitution of the Republic of Poland*, 2 April 1997. Art. 52, https:// www.refworld.org/docid/3ae6b5574.html; *Constitución Española* [Spain], 27 December 1978. Art. 19.; Верховна Рада України. 1996. «*Конституція України*»./Verkhovna Rada of Ukraine. 1996. "Constitution of Ukraine ".

406 Meenakshi Ganguly. "Nepal Abandons Migrant Workers in Fight against COVID-19," Human Rights Watch, October 19, 2021, https://www.hrw.org/news/2020/03/31/nepal-abandons-migrant-workers-fight-against-covid-19.

407 M. Ganguly, Nepal Abandons migrant workers in fight against COVID-19, 2020., https:// www.hrw.org/news/2020/03/31/ nepal-abandons-migrant-workers-fight-against-covid-19; 15 Quinley C. Thais left stranded overseas SLAM coronavirus policy confusion, 2020, https://www.aljazeera.com/news/ 2020/ 04/thais-left-stranded-overseas-slam-coronavirus-policy-confusion- 200416072630213.html (Cited from: Sharifah Sekalala, Lisa Forman, Roojin Habibi, and Benjamin Mason Meier. "Health and human rights are inextricably linked in the COVID-19 response." *BMJ Global Health* 5, no. 9 (2020): e003359.)

408 Ibid. "Nepal Abandons Migrant Workers in Fight against COVID-19,"

409 UN Human Rights Committee (HRC), *CCPR. 1999. «General Comment No. 27: Article 12» (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, https://www.refworld.org/docid/45139c394.html.

The widespread borders closure and travel bans also significantly affected asylum seekers, namely, their possibility to seek international protection, which led to their bigger vulnerability and escalated already existing practises complicating the achievement of the protection all over the world[410]. Australia generally had and still has one of the strictest rules connected to travel to and from the country during the pandemic, including for own citizens and residents[411]. Non-citizens even being fully vaccinated still have to provide a reason (exemption) or apply for an individual exception to travel to Australia[412], thus, not surprisingly asylum seekers with the reasoning of protection seeking were not included in the exemption reasons lists[413]. The major concern regarding the policies restricting freedom of movement and its effect on asylum seekers during the pandemic can be traced in the US. Namely, the international health catastrophe served as a tool to implement the «anti-asylum seekers campaign»[414], side-effected from the US borders closure under the coverage of the necessary anti-pandemic measure. In addition, by the decision of the United States Centres for Disease Control and Prevention the expulsion of the asylum seekers even without the prior examination has been made permissible[415]. The situation in the US has been already evaluated as dangerous towards the rights of those who seek protection by the UN Refugee Agency[416]. Especially taking into account the experience of other countries which, showed that it is possible to protect public health and address the rights of people in need of international protection, without drastic suspension of the asylum applications examination[417]. Thus, when the countries during the public health threat adopt the measures that significantly affect the particular group it becomes an area of concern, and has to be strongly justified by the

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410 Daniel Ghezelbash, and Nikolas Feith Tan. "The end of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection." *International Journal of Refugee Law* 32, no. 4 (2020): 668-679.

411 See e.g., Australian Government. Department of Health. International travel and COVID-19, last updated 3 November 2021, https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-travel-and-restrictions/international-travel-and-covid-19; Australian Government. Department of Health. Coronavirus (COVID-19) FAQs – international travellers to Australia, last updated 1 November 2021, https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-travel-and-restrictions/international-travel-and-covid-19/coronavirus-covid-19-faqs-international-travellers-to-australia; Australian Government. Department of home Affairs.COVID-19 and the border. Travel restrictions and exemptions, last updated 3 November 2021, https://covid19.homeaffairs.gov.au/travel-restrictions

412 Ibid.

413 Australian Government. Department of home Affairs.COVID-19 and the border. Travel restrictions and exemptions, last updated 3 November 2021, https://covid19.homeaffairs.gov.au/travel-restrictions.

414 Jaya Ramji-Nogales, and Iris Goldner Lang. "Freedom of movement, migration, and borders." *Journal of Human Rights* 19, no. 5 (2020): 593-602. p. 594

415 Hebrew Immigrant Aid Society. Impact of COVID for Refugees and Asylum Seekers, https://www.hias.org/sites/default/files/impact_of_covid_on_refugees_and_asylum_seekers.pdf

416 Matthew Reynolds.«UNHCR concerned over U.S. expulsion flights under COVID-19 asylum restrictions». UNHCR, the UN Refugee Agency, 11 August 2021, https://www.unhcr.org/news/press/2021/8/6113dfc14/unhcr-concerned-expulsion-flights-under-covid-19-asylum-restrictions.html

417 Ibid.

necessity of health protection. At the same time, regardless of necessity, the principle of non-refoulement put additional restriction on decisions connected to the right to seek asylum.

To reiterate, freedom of movement has been largely affected both within the EU, including the internal EU borders closure and internationally. All the rights protected under this freedom, such as right to move and reside freely, the right to leave the country, and right to enter own country have been limited in one or another way. The WHO's recognition of the COVID-19 spread as the PHEIC took place on 30 January 2020[418], and then the pandemic on 11 March 2020[419]. Thus, considering the reaction of qualified experts in this field it is indisputable that the SARS-CoV-2 created the threat to public health or as referring to derogation constituted «public emergency threatening the life of the nation»[420], thereby allowing the restriction of freedom of movement according to IHRL, activation of the emergency legislations and enactment of extraordinary measures. However, the mere existence of the health treat cannot justify restrictions implemented not in compliance with the principles of legality, necessity and proportionality, protracted in time or discriminatory in the nature. Nonetheless, the above mentioned examples showed that measures restricting liberty of movement not always were compatible with IHRL and national supreme laws. The common issue to be traced is disproportionality of measures generally and in the concrete cases.

The separate area of concern is the escalation of the previously-existing legal issues caused by freedom of movement restrictions. The nature and characteristics of the virus, in general, reveals the need of quarantine, isolation and self-isolation, curfew, borders closure and travel bans to protect public health. At the same time, the close connection of freedom of movement with the other rights makes it vital to consider the possible outcomes in broader way and improve the preparedness strategies, including the indicated risk areas. The measure itself can be justified by the aim to protect public health, nevertheless the way it is implemented and/or enforced can negatively impact other rights and disproportionally effect certain groups. While analysing the restrictions of liberty of movement it has been observed, that these legal issues have raised concern, namely:

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418 Global research collaboration for infectious disease preparedness. World Health Organization. COVID-19 Public Health Emergency of International Concern (PHEIC)Global research and innovation forum: towards a research roadmap, 11-12 February, 2020.

419 "Who Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020," World Health Organization (World Health Organization), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

420 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, https://www.refworld.org/docid/3ae6b3aa0.html

1. Certain groups of the population were more burdened by the movement restrictions, or were affected more than others as a consequence. The groups discussed are elderly people, women, kids, and asylum seekers;

2. The level of domestic violence increased in the EU and internationally during the pandemic in the result of constant interaction of people in the closed spaces for a long time;

3. The discriminatory and disproportionate attitude towards, inter alia, elderly people, marginalised, underprivileged and vulnerable groups, ethnic minorities, migrant workers.

All these legal issues in conjunction with the strategy towards harmonisation of quarantine and isolation standards as widely used measures should become a priority after the end of the pandemic on the international level. Also, in particular on the EU level even with centralised communications and recommendations the reaction of states varied significantly. That is, first of all, connected with the better understanding of the concrete national circumstances, nonetheless, the reported cases of the HRs infringement in the concrete member states must become a basis for more substantial cooperation in times of public health threat to improve the general HRs protective strategy during the emergencies.

CONCLUSIONS AND RECOMMENDATIONS

1. The states' specific obligation to protect public health in the COVID-19 pandemic derives from the provisions of the IHR - the specialised framework established by the WHO for the coordinated international response, as well as, from article 12 of the ICESCR and national legislation as essential parts of the HRs protection concept. The strong correlation legally established between the measures of prevention, control and containment of the spread of diseases and the HRs protection in that process. Thus, every anti COVID-19 measure must comply with the standards of the IHRL, otherwise it cannot be recognised as justified.

2. Under the provisions of the ICCPR and ECHR, public health threat serves as the ground to limit or derogate from certain HRs. The COVID-19 outbreak, which firstly became PHEIC, and then was recognised the pandemic by the WHO satisfied the criteria of posing the serious threat to public health, and achieved the level of emergency threatening the life of the nation. Considering that the SARS-CoV-2 cumulatively affected 222 countries and territories, led to unprecedented international mortality rate the need in measures restricting certain HRs, including the right to freedom of movement became evident to protect public health.

3. Consequently, states had formal preconditions to invoke both limitation and derogation procedures. The EU member states, which used the derogation clause established in Art. 15 of the ECHR have followed the formal requirements of notification about the derogation, measures restricting HRs and their purposes to the Secretary-General of the CoE. At the same the IHRL standards, which establish that measures have to be legal, necessary, proportional, temporary and reviewable have not been always followed regardless of the limitation or derogation clause usage. Inter alia, the work indicated the cases where the measures were adopted and enforced with the breach of the legally established procedures, the cases of prolonged application of excessively restrictive measures, the lack of proper medical/ scientific justification of their necessity, unclear definitions of what constitutes the violation of anti-pandemic measure, and disproportionate sanctions.

4. Comparison of the SARS 2003 epidemic and the COVID-19 pandemic indicated the excessive intrusion in HRs in both cases, inter alia, in the right to freedom of movement. However, while in the SARS 2003 epidemic highly intensive restrictions were mainly present in China, during the COVID-19 pandemic the infringement of HRs caused by the anti-pandemic measures is traced globally. The revised in the aftermath of the SARS 2003 epidemic International Health Regulations established a clear connection between HRs and

response to the spread of diseases, by that obliging states to prioritise HRs when adopting the policies. Besides, states must report the cases of unusual epidemiological activity to the WHO within 24 hours. However, notable delay in notification took place in both cases. Moreover, the attempts to suppress the fact of disease outbreak took place, which violates both, the norms of the IHR and the right to information.

5. The right to mental health as an integral part of the right to health has been notably disadvantaged in the course of the anti-pandemic measures. Protection of public health in the COVID-19 pandemic, in general, have been performed through the prevention of the threat to physical condition of people. However, article 12 of the ICESCR is not limited to the physical component of health and establishes the same obligations towards mental health. The analysis has been focused on the obligation to fulfil the right to mental health, and indicated the absence of measures aimed to protect mental health, or their insufficiency reflected, inter alia, in their untimely implementation.

6. All the elements of the proper mental condition defined by the WHO were affected by the ani-pandemic measures. Especially, by the restrictions of HRs which tightly connected to the right to health per se, inter alia, the right to freedom of movement, the right to work, and the right to education. In particular, the consequences of the restrictions reflected in the lack of socialisation, increase of unemployment rate and financial instability, the overload caused by the childcare (disproportionally affected women due to the «traditional roles division»), provoked a massive distress, fear, anxiety, post-traumatic stress disorder, depression, etc. These consequences, first of all, indicated the risk areas, which should be considered to improve the response strategies. Besides, they showed unpreparedness and failure to prevent and/or respond to the massive mental health deterioration, considering that the protection of mental health has already posed an international concern and should have been prioritise before the COVID-19 pandemic.

7. On the basis of steps taken in Canada, the general recommendation on improvement of preparedness and response strategies in health crises can be formulated:

a. The statistical researches of the tendencies of mental health within the population are essential to indicate the risk factors, which demand regulation;

b. The ad hoc creation of the centres of mental support on the period of highly restrictive measures, which affects the «normal life» of the population;

c. Creation of a consolidated «resource hubs», which provide the necessary information in regard to factors affecting mental health during the emergencies, how to cope with them, and which services are available for the support;

d. Development of reform initiatives in the field of mental health protection based on the data collected during the statistical researches.

These comprise the comprehensive steps which effectively contribute to the obligation to fulfil the right to mental health. However, the first important step, that should be taken for the protection of the right to mental health is the increase of the funding and gradual inclusion of this right in the countries' day-to-day agendas to make the population acknowledged about a real meaning, importance and the methods of the right to mental health protection.

8. The protection of mental health of the HCWs demands a separate scrutiny in response to diseases' outbreaks strategies. Particularly, the strong correlation between the right to mental health and the right to just and favourable conditions of work (healthy and safe working environment) make states, which failed to supply, control or assist in the provision of the PPE during the COVID-19 pandemic responsible for violation of both rights. The large-scales shortage of the PPE within the HCWs in the pandemic caused the wide range of mental disorders experienced by the medical personnel during the COVID-19 pandemic, because the lack of protection caused the fear of getting sick and infect their families. The fact that the HCWs constitutes a high-risk group of being affected by the mental disorders in the time of the diseases' outbreaks was established way earlier than the COVID-19 outbreak happened. Thus, inability of states to control and support the supplement of the PPE in conjunctions with absence of specialised mental health assistance, workload in some cases without the just payment, while the resources from COVID-19 funds had been used for non-medical purposes seriously affected the right to mental health of HCWs.

9. To recapitulate, the right to mental health is a part of the right to health, and has the same level of protection as physical health. However, the significant deterioration of mental health during the COVID-19 response highlighted states' unpreparedness and the insufficiency or absence of preventive and protective strategies and regulations in this field. Thus, it led to inability to properly fulfil the right to mental health. In addition to the recommendations in regard to Canadian experience, the clearer separation of the right to mental health from the right to health, as of one which predominantly associated with the right to physical health, can significantly contribute to its better protection. The necessity in the clear focus on existence of the right to mental health is essential considering both the

worrying tendencies associated with mental health internationally and the notable change in the approach towards its importance.

10. The analysis of restrictions of freedom of movement revealed the following issues:

a. The issues in regard to quality of law have been indicated. Namely, the lack of the clear explanation of what constituted the violation of quarantine rules did not satisfy foreseeability criteria, thus prevented the restriction to be legal. Moreover, the lack of clarity led to abuse of power in the measures enforcement. Consequently, the legal procedures of measures implementation and enforcement if not followed properly make the restrictions of free movement not justifiable.

b. While the WHO recommended not to implement measures notably affecting traffic, as they useful only to obtain additional time for the activation of the response strategies on the early stages, states started to actively adopt travel bans. Protection of traffic and trade from unnecessary interference, and implementation of measures in HRs-centric manner constitute the obligation under the IHR, which however, has not been properly followed during the COVID-19 pandemic. Thus, it undermines the role of the IHR and the WHO, respectively. The improvement can be reached by the inclusion in the IHR of concrete permissible limits of the restrictions of the most affected HRs (incl. freedom of movement) because the mere proclamation of HRs as a principle of response turned to be insufficient.

11. The national cases analysed in the work indicated the disproportionally of measures, inter alia, the high fines for the breach of quarantine in Romania, or refuse in exemption from the quarantine for the person who had a valid reason for it in New Zealand, prohibition of entry for own citizens in Nepal and Thailand.

12. Specific areas of concern which derives from restrictions of freedom of movement were determined. Namely: 1) disproportionate effect on elderly people, which in the concrete cases can lead to discrimination; 2) the increase in the level of domestic violence during quarantines and lockdown, which testifies the absence of the proper regulation of this issue in the «normal times»; 3) discriminatory and disproportionate attitude towards certain groups, such as discriminatory application of sanctions towards people of African descent, stricter curfew rules for the ethnic minorities, disproportionate use of force towards Roma people in the process of measures enforcement; 4) the increased risks for the asylum seekers expressed in the denial to access the asylum procedure and the authorisation of expulsion. Thus, developing the preparedness and response strategies states should consider these issues to prevent the same outcomes in the future health emergencies.

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ABSTRACT

Nahorna L. COVID-19 restrictions and impact on human rights / Master thesis in International Law. Supervisor – Prof. dr. Lyra Jakulevičienė – Vilnius: Mykolas Romeris University, Mykolas Romeris Law School, Institute of International and European Union Law, 2021.

The COVID-19 pandemic created an international threat to public health. States to fully realise the protective mechanisms, limited the implementation of certain HRs. The research is dedicated to the analysis of the impact of the anti-pandemic measures adopted in different states on HRs. Mainly, on the right to mental health protected under the right to health, and the right to freedom of movement. In addition, the legal issues caused by the restrictions of free movement, as one of the most restricted right during the pandemic, have been examined.

The methods used allowed to assess the impact of the restrictions on the right to mental health, and the right to freedom of movement, indicate the common problems in the responses to COVID-19 and to the previous diseases' outbreaks, and estimate if the cases of unjustified restrictions' implementation or enforcement can be traced during the COVID-19 pandemic. The work discloses the areas of a specific concern which need more precise regulation in general, as well as during the health emergencies, and suggests, inter alia, the ways of improvement of the preparedness and response strategies.

Keywords: *the Covid-19 pandemic, restrictions, the right to mental health, freedom of movement, public health.*

SUMMARY

COVID-19 RESTRICTIONS AND IMPACT ON HUMAN RIGHTS

Liliia Nahorna

The master thesis is dedicated to analysis of the impact of measures implemented to curb the spread of coronavirus nationally and internationally on HRs. In particular, the right to mental health, as an integrative part of the right to health, and the right to freedom of movement. Besides, this work aims to indicate the areas of concern caused by the restrictions of freedom of movement. For these purposes it reveals the concept of HRs protection, discloses the legal grounds to limit or derogate certain HRs on the example of the COVID-19 pandemic, and compare the responses to the previous public health emergencies with response to the COVID-19 pandemic. Namely, the aforementioned parts are useful to evaluate if the anti-pandemic measures restricting HRs were justifiable, indicate the areas of specific concern and discuss the possible ways of international and national legislation improvement.

To summarise, the main question of the research which the author tries to answer is what effect the anti-pandemic measures have on certain HRs protected by the IHRL, and if in states' response HRs remained the forefront priority, or states started to neglect HRs and introduce the policies which negatively affect them.

Thus, the first chapter indicates necessity of the HRs limitation in particular cases, discloses the concept of HRs protection and obligation of states to protect public health. Also, it provides an overview of the previous public health emergencies and their effect on protected rights, and analyses the grounds to limit or derogate certain HRs stipulated in the ICCPR and the ECHR on the example of the COVID-19 pandemic. This contributes to indication of the states' response actions which contradict to the standards of the IHRL.

The second chapter is fully devoted to comparison of the SARS 2003 epidemic with the COVID-19 pandemic and the measures taken to curb theirs spread. The comparison indicated the common problems which appeared in both cases. Besides it helped to identify the possible ways of improvement of the specific emergency framework - International Health Regulations developed by the WHO, for the future health emergencies.

The third chapter estimates the impact of restrictions on the concrete HRs, evaluating, inter alia, the legality, necessity, proportionality of certain measures, as well as providing the concrete examples of case-law. Besides, it discovers the areas of specific concern which must

be considered in the process of creation of the public health emergency response strategies and preparedness plans. Namely, the disproportionate or discriminatory effect of measures on certain groups, such as elderly people, women, asylum seekers, ethnic minorities, etc.

The results of the research indicate the weakness of the preparedness and response plans to the public health emergencies internationally. The examples of actions taken by the states during the COVID-19 pandemic which doesn't go in compliance with the standards established by the IHRL treaties and the IHR were established. Both the right to mental health and the right to freedom of movement have been negatively affected. Namely, the right to mental health has not been fulfilled in the proper manner, which indicates the lack of its sufficient regulation in the «normal time». The restrictions imposed on liberty of movement in some cases were implemented or enforced in unjustifiable manner, making them violative towards the protected right. Moreover, the restrictions of free movement caused a chain of legal issues which demands scrutiny in general, and to improve the response plans for the future public health emergencies.