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ELECTIONS IN TIMES OF THE COVID-19 PANDEMIC: AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE WITH A SPECIFIC FOCUS ON VULNERABLE GROUPS

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ABSTRACT

When holding elections in times of the COVID-19 pandemic, states face the challenge of balancing diverging human rights obligations. States are obliged to protect the life and health of the individuals under their jurisdictions while, at the same time, they are held to respect the right to political participation and related political freedoms. This is particularly evident in case of vulnerable groups, i.e. COVID-19 risk groups who may suffer from severe health implications when contracting COVID-19. Examining how to reconcile the potentially diverging human rights obligations at stake, this article argues that the tension is not insurmountable. Within the international human rights framework, there is leeway for states to adopt situation-specific solutions. Indeed, as relevant state practice shows, states can adopt risk-mitigating measures and rely on alternative voting methods such as postal voting in order to protect the health of vulnerable groups. In the utmost, they may postpone elections. Yet human rights law puts in place conditions and limits to state action.

KEYWORDS

COVID-19 Pandemic; Elections; Vulnerable Groups; Right to Political Participation; Right to Life; Right to Health; Alternative Voting Methods

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1. INTRODUCTION

The COVID-19 pandemic poses considerable challenges to democracies across the world; this is particularly evident in case of elections. States have opted for different approaches in the face of the pandemic with varying impacts on democracy and the rights of their citizens.¹ Some countries have decided in favour of in-person elections: France held the first round of local elections in March 2020; South Korea held its parliamentary elections in April 2020.² Other countries have relied partly or exclusively on remote voting methods, most commonly postal voting as was the case for the second round of local elections in Bavaria.³ Many elections have been postponed and were held later than originally planned, for example the parliamentary and local elections in Serbia or the second round of local elections in France.⁴

Both, holding and postponing elections, has implications for the human rights of individuals under states' jurisdictions. Particular questions arise in relation to vulnerable groups, *i.e.* COVID-19 risk groups such as persons over 60 years of age and persons with certain health predispositions who face the most serious physical consequences or even death in case of infection.⁵ Due to these dangers, COVID-19 risk groups are confronted with obstacles to their participation in elections, most importantly the reluctance to vote for fear of contracting the virus. In other words, their rights to health and life are at stake as is their equal and effective electoral participation. Indeed, the rapid spread of the pandemic which followed France's first

¹ See Toby S James and Sead Alihodzic, 'When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations' (2020) 19(3) *Election Law Journal* 344.

² Sangmi Cha, 'South Korea: No New Domestic Coronavirus Cases, No Transmission from Election' *Reuters* (Soul, 4 April 2020) <<https://fr.reuters.com/article/healthcareSector/idUKL4N2CI16C>> accessed 11 October 2020.

³ See Jochen Gunter, 'The toll of voting in a pandemic: Municipal elections and the spread of COVID-19 in Bavaria' (2020) Johannes Kepler University of Linz Working Paper No. 2015 <<http://www.econ.jku.at/papers/2020/wp2015.pdf>> accessed 11 October 2020.

⁴ For a global overview of elections held or postponed during the COVID-19 pandemic see International IDEA, 'Global Overview of COVID-19: Impact on Elections' (18 March 2020) <<https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>> accessed 22 June 2020.

⁵ See for details below, Part 2.

round of local elections where voters and poll workers were reportedly infected on election-day⁶ demonstrates the risks arising in connection to the holding of elections, in particular for vulnerable groups.⁷

In seeking to live up to their human rights commitments, states face the following tension. On the one hand, a state has the obligation to protect the rights to health and life of the individuals under its jurisdiction, especially the ones who are most vulnerable to severely suffer from a COVID-19 infection. A state's duty to protect thus implies reducing human-to-human contact in order to limit the spread of the pandemic. In effect, this may call for a postponement of elections or the implementation of mitigating measures such as strict sanitary rules and social distancing on election-day as well as an increased reliance on alternative voting methods such as postal voting. At the same time, postponement, alternative voting methods and risk-mitigating measures may encroach upon the right to political participation as well as upon the related freedoms of expression and assembly that are essential for its practical realisation. The tension manifests itself most strongly with regards to the electoral participation of those groups of election participants such as voters, workers and observers, who are most vulnerable to health risks related to COVID-19.

How can these dimensions be reconciled and how can the tension be alleviated? The perspective of vulnerable persons provides a convenient prism of consideration; in particular in relation to what guidance can be gained from the international, and more precisely the European human rights framework, when it comes to holding elections in times of pandemic. Focus will lie on Europe as the region with, at present, the most illustrative examples. In adopting this perspective, this article will first

⁶ Robin Prudent, 'Les Élections Municipales Auraient Dû Être Annulées': Ils Ont Été Contaminés Au Coronavirus Après Avoir Tenu Des Bureaux De Vote' *France Info* (24 March 2020) <https://www.francetvinfo.fr/sante/maladie/coronavirus/les-elections-municipales-auraient-du-etre-annulees-ils-ont-ete-contamines-au-coronavirus-apres-avoir-tenu-des-bureaux-de-vote_3881061.html> accessed 11 October 2020.

⁷ Gouvernement, 'COVID-19 - France' (26 November 2020) <<https://www.gouvernement.fr/info-coronavirus/carte-et-donnees>> accessed 26 November 2020; Statista 'Distribution Des Personnes Décédées Du Coronavirus (COVID-19) En France Du 1er Mars Au 12 Mai 2020, Selon La Tranche D'âge' (26 November 2020) <<https://fr.statista.com/statistiques/1104103/victimes-coronavirus-age-france/>> accessed 26 November 2020.

address the concept of vulnerability and will deal with the question of vulnerable groups' electoral participation during the COVID-19 pandemic (Part 2). It will then outline the applicable international human rights framework, with regards to the rights to health and life, the right to political participation and related political freedoms as well as the prohibition of discrimination/equality (Part 3). On this basis the article presumes cases where a state decides to hold elections despite the pandemic. Drawing on relevant examples from state practice, Part 4 examines possible mitigating measures to limit the spread of the disease during elections; be it in-person or by alternative voting methods. Against that background, the article adopts a human rights perspective to discuss considerations which may guide states in their decision to hold or rather postpone elections with a specific focus on vulnerable groups (Part 5).

2. THE CONCEPT OF VULNERABILITY AND COVID-19 RISK GROUPS

The current pandemic has exposed certain groups of a state's population to particular health dangers in case of a COVID-19 infection. According to the World Health Organization (WHO), such groups include persons with certain underlying medical conditions and persons over 60 years of age, who face higher risks for severe illness and whose mortality rate is significantly increased as compared to the rest of the population.⁸ For this reason, COVID-19 risk groups are in an especially exposed position during elections when an uncontrolled spread of the virus resulting in higher transmission rates is likely to occur due to gatherings of people in the course of electoral activities.⁹ As COVID-19 risk groups are in a state of specific vulnerability

⁸ Centers for Disease Control and Prevention, 'COVID-19 Hospitalization and Death by Age' (18 August 2020)

<<https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html>> accessed 11 October 2020; World Health Organization, 'Coronavirus Disease 2019 (COVID-19) Situation Report – 51' (March 11, 2020) <<https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf>> accessed 11 October 2020.

⁹ Chad D Cotti and others, 'The relationship between in-person voting, consolidated polling locations, and absentee voting on covid-19: evidence from the Wisconsin primary' (2020) National Bureau of Economic Research Working Paper No. w27187

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603818> accessed 27 November 2020.

during elections, they also find themselves in a greater need for positive measures adopted by states to facilitate their voting. To further explore the issue, one needs to better understand the concept of vulnerability in human rights.

From a human rights perspective, the concept of vulnerable groups is complex and multidimensional.¹⁰ Vulnerability is not clearly conceptualized in the practice of human rights treaty bodies and is, as a concept, used in various disciplines.¹¹ While vulnerability is also a problematic concept and accordingly faces criticisms, for example as producing discourses based on victimisation or as perpetuating stereotypes,¹² it may be usefully drawn upon here since it contributes to highlighting the specifically exposed status of COVID-19 risk groups in the electoral process and related concerns.

The concept of vulnerability has been explored especially in relation to persons with disabilities;¹³ but also, depending on the context, in relation to minorities, marginalized communities or indigenous peoples, to name a few.¹⁴ Indeed, the notion of vulnerability has a situation-specific dimension; it has been described accordingly as a concept that is 'relational, particular and harm based.'¹⁵

Moreover, certain factors, such as extreme poverty or minority status, may aggravate the status of vulnerability since these factors correlate with other structural disadvantages. In particular, as regards COVID-19, race, ethnicity, homelessness, or place of residence in rural communities are considered risk markers as they increase the probability of underlying health conditions; lower access to health care; and

¹⁰ Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge, 2019).

¹¹ See, for details, Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (3rd. ed. CUP, 2020), pp. 577 *et seq.*

¹² *Ibid.*

¹³ Hasheem Mannan and others, 'Core Concepts of Human Rights and Inclusion of Vulnerable Groups in the United Nations Convention on the Rights of Persons with Disabilities' (2012) 6(3) *Alter* 159.

¹⁴ See generally United Nations, 'Persons With Disabilities And Multiple Discrimination - Rights Of Special Groups' (2020) <<https://www.un.org/esa/socdev/enable/comp501.htm>> accessed 11 October 2020.

¹⁵ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Case Law' (2013) 11 *International Journal of Constitutional Law* 1056.

increased exposure to the virus due to occupation.¹⁶ These additional dimensions tend to exacerbate vulnerability and result in intersectional discrimination on multiple levels.

This leads to the question of how to counterbalance the particularly exposed status of vulnerable groups and ensure the full enjoyment of their human rights in times of COVID-19. To draw on the well-developed concept of discrimination seems particularly convenient.¹⁷ In fact, while not being necessarily identical, vulnerability may be broadly related to discrimination as indication that a person is at risk of suffering multiple other human rights violations.¹⁸ In this regard, the risk factors underlying an infection with COVID-19 have been recognized from an equality/non-discrimination perspective by human rights bodies. Indeed, the General Comment (GC) No 20 of the Committee to the International Covenant on Economic, Social and Cultural Rights (CESCR) on non-discrimination lists age and health pre-disposition as possible “other status” for discrimination.¹⁹ Rather focusing on the consequences of a state of vulnerability, the European Court of Human Rights (ECtHR) has referred to the particular vulnerability of persons as a reason for specific protection, implying

¹⁶ Centers for Disease Control and Prevention, 'People with Certain Medical Conditions' (6 October 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcovid-data%2Finvestigations-discovery%2Fhospitalization-underlying-medical-conditions.html> accessed 11 October 2020.

¹⁷ In the authoritative interpretation of the UN Human Rights Committee (HRC), the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. HRC, 'General Comment No 18: Non-discrimination' (1989) HRI/GEN/1/Rev.9 (Vol. I), paras 6 and 7. Indeed, one may distinguish between direct and indirect discrimination: Direct discrimination is when someone is treated unfairly because of a protected characteristic, such as sex or race. In case of indirect discrimination, rules, regulations or procedures appear to be neutral, but have a disproportionate impact on one group. See Bantekas and Oette (n 11) 78. Especially the latter is at stake in case of COVID-19 risk groups.

¹⁸ See, for details, Bantekas and Oette (n 11) 578.

¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 20: Non-discrimination in economic, social and cultural rights' (2009) E/C.12/GC/20, paras 29 and 33.

additional human rights obligations.²⁰ Thus, a status of vulnerability arguably requires specific action and additional positive measures on the part of a state to ensure an equal and non-discriminatory access to the realization of human rights.

When elections are held in times of the COVID-19 pandemic, the concept of vulnerability unfolds at various levels. First, COVID-19 risk groups as defined above, *i.e.* older persons and persons with underlying health conditions, are exposed to higher health risks which may, in turn, negatively impact on their general willingness to participate in elections.²¹ Also operationally, persons belonging to vulnerable groups may have limited access to in-person voting when they are placed in care houses, hospitals and similar facilities where social contact is restricted during the pandemic to minimise the risk of transmission. Finally, when electoral activities like campaigning and voter education are moved online,²² certain risk groups, such as older voters are in danger of being excluded as they are less likely to have access to the Internet or to be familiar with social media.²³ In sum, COVID-19 risk groups find themselves in a situation of vulnerability during elections. Without adequate measures to facilitate their electoral participation, they are likely to be subjected to indirect discrimination since they cannot exercise their right to political participation on equal footing with the rest of the population.

²⁰ *Yordanova v Bulgaria* App no 25446/06 (ECHR, 24 September 2012). See for details below, Section 3.1.

²¹ For comparison, according to the recent opinion polls in the USA, 64% of those aged 65 and older say they would feel uncomfortable going to a polling place to vote. Pew Research Center, 'Most Americans Say Coronavirus Outbreak Has Impacted Their Lives' (30 March 2020)

<<https://www.pewsocialtrends.org/2020/03/30/most-americans-say-coronavirus-outbreak-has-impacted-their-lives/#more-than-three-quarters-of-americans-say-they-are-not-comfortable-eating-out-in-a-restaurant-given-the-current-situation-with-coronavirus>> accessed 11 October 2020.

²² For example in South Korea.

²³ Statista, 'Distribution of Internet Users Worldwide as of 2019, by Age Group' (3 November 2020) <<https://www.statista.com/statistics/272365/age-distribution-of-internet-users-worldwide/>> accessed 3 November 2020. See also Nir Grinberg and others, 'Fake News on Twitter during the 2016 U.S. Presidential Election' (2019) 363 *Science* 374.

3. AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE ON ELECTIONS IN TIMES OF THE COVID-19 PANDEMIC WITH A SPECIFIC FOCUS ON VULNERABLE GROUPS

International human rights law provides standards (and best practices)²⁴ to define the rights of vulnerable groups during elections in the face of the pandemic. It establishes a framework to guide states' efforts to live up to their duty to protect the rights to health and life while upholding the right to political participation and related political freedoms to the maximum extent.²⁵ In discussing relevant human rights parameters for the conduct of elections in times of the COVID-19 pandemic, we will first examine a state's duty to protect the rights to health and life, the right to political participation and related political freedoms as well as the prohibition of discrimination (3.1). Then, we discuss means to reconcile these different human rights dimensions (3.2). On that basis, we argue that while international human rights standards give some leeway to states for situation-specific solutions, they also set conditions and put limits to state action: this is particularly evident in case of vulnerable groups.

3.1. APPLICABLE HUMAN RIGHTS STANDARDS AT THE UNIVERSAL AND EUROPEAN LEVEL

States' duty to protect the rights to health and life and their obligation not to interfere with the right to political participation and related freedoms may require specific state action with regard to vulnerable groups. In line with the focus on Europe, United Nations and Council of Europe treaties to which European states are parties; *i.e.* most importantly the International Covenant on Economic, Social and Cultural Rights

²⁴ See below (n 26-29) as to the concrete human rights treaties relied upon. While these treaties only apply to states which are parties, arguably, the relevant human rights standards also codify customary international law. The regional focus lies on Europe, see below Section 3.1.

²⁵ See Information Document of the Council of Europe Secretary General, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states' SG/Inf(2020)11 (7 April 2020) <<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>> accessed 22 June 2020.

(ICESCR),²⁶ the International Covenant on Civil and Political Rights (ICCPR)²⁷, the European Convention on Human Rights (ECHR)²⁸ and the (rev) European Social Charter (ESC)²⁹ are of relevance. Firstly, states' duty to protect the right to health may be derived, *inter alia*, from Article 12 ICESCR, as well as from Article 11 (rev) ESC. The obligations following therefrom require states to limit the spread of a pandemic. Article 12(1) ICESCR recognizes everyone's right to "the enjoyment of the highest attainable standard of physical and mental health." States also undertake to take measures for "the ... control of epidemic, endemic ... and other diseases" in accordance with Article 12(2.c) ICESCR.³⁰ Confronted with the disease, a state is thus required to adopt a range of measures including isolations and quarantines of

²⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS. The ICESCR has been ratified by 117 states. UNCTC, Status of Treaties, International Covenant on Economic, Social and Cultural Rights
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 12 October 2020.

²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. The ICCPR has been ratified by 117 states. UNCTC, Status of Treaties, International Covenant on Civil and Political Rights
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 12 October 2020.

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 1950 as amended, ETS No 177. The Convention has been ratified by 47 states. Council of Europe Treaty Office, 'Chart of signatures and ratifications of Treaty 177 Convention for the Protection of Human Rights and Fundamental Freedoms
<<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures>> accessed 12 October 2020.

²⁹ (Rev) European Social Charter (adopted 3 May 1996, entry into force 1 August 1999) ETS No.163. The ESC has been ratified by 43 states. Council of Europe Treaty Office, 'Chart of signatures and ratifications of Treaty 163 European Social Charter (revised)' (12 October 2020)
<<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures>> accessed 12 October 2020.

³⁰ Ibid, Art. 12.2.c ICESCR. See also GC No 14 of the CESCR which establishes the duty to of states "To take measures to prevent, treat and control epidemic and endemic diseases; ...". Postponing elections could be such measure. CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (2000) E/C.12/2000/4. CESCR Compilation of General Comments and General Recommendations adopted by human rights treaty bodies (2006) UN Doc E/C.12/2000/4.

individuals or even communities to live up to its duty to protect.³¹ Specific measures are required for the protection of vulnerable groups who require special attention in public health strategies.³² The concrete measures depend on the disease at hand and on what is required for its containment.

Similar considerations may be derived from a state's duty to protect the life of individuals under its jurisdiction as incorporated in Article 6 ICCPR and Article 2 ECHR. To draw on the right to life seems particularly plausible in severe cases where the further spread of the pandemic in the general population puts the life of vulnerable persons at higher risk (for example when the capacities of hospitals are exhausted). This also finds support in human rights monitoring institutions' case law. For example, the ECtHR has stated previously that a state may be responsible if it knows about life-threatening risks but fails to take the appropriate measures to prevent them.³³

A particular focus may need to be placed on the protection of the rights to health and life of vulnerable persons in view of their specific vulnerability. For instance, the ECtHR has drawn on the concept of vulnerability in its case law as justification for enhanced state obligations. Most importantly, in *Yordanova v Bulgaria*, the ECtHR referred to the particular vulnerability of the applicant to read additional obligations – i.e. protection against eviction – into the right to private life, Article 8 ECHR.³⁴

³¹ See respectively the possibility envisaged in Art. 18 of the WHO's International Health Regulations: "1. Recommendations issued by WHO to States Parties with respect to persons may include the following advice: ... – implement exit screening and/or restrictions on persons from affected areas." World Health Organization, 'International Health Regulations' (2nd. ed. WHO Press, 2005).

³² See UN (n 30) para 43(f).

³³ In *Budayeva et al v Russia*, the failure of Russian authorities to implement land-use planning and emergency relief policies in the light of the foreseeable risk of a mudslide that led to loss of life was considered a violation of the substantive and procedural aspects of Article 2 ECHR by the ECtHR. Likewise in *Öneryıldız v Turkey*, when the municipal authorities of Istanbul had failed to prevent a looming methane explosion that happened in a rubbish tip or at least warn the inhabitants who were living near the tip about the dangers, the ECtHR held that the Turkish authorities had not taken the necessary preventive measures to protect the inhabitants and found a violation of Art 2 ECHR, the right to life. *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECHR, 20 March 2008). *Öneryıldız v Turkey* App no 48939/99 (ECHR, 30 November 2004).

³⁴ *Yordanova v Bulgaria* App no 25446/06 (ECHR, 24 September 2012).

In the context of COVID-19, states have indeed adopted measures to protect the rights to life and health of the individuals under their jurisdiction. In doing so, many states have taken into account the WHO advice to adopt an integrated approach to tackling the pandemic. This comprises, on the one hand, sanitary and public health measures (face masks, hand hygiene) as well as the enforcement of social distancing.³⁵ States have distributed personal protective equipment (PPE) to prevent disease transmission, enforced lockdowns and imposed home confinement on people suspected or tested positive.³⁶ On the other hand, the WHO advised to implement thorough diagnosis, monitoring and reporting of cases.³⁷ Some states deployed largescale electronic surveillance for contact tracing and introduced mass testing programmes.³⁸ Additional measures have been implemented to protect COVID-19

³⁵ World Health Organization, 'Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)' (16-24 February 2020) 16-24

<<https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>> accessed 21 November 2020. Such measures have been considered as most effective from a scientific viewpoint and have been implemented by numerous countries. The list of countries changes. For constant updates, see the dynamic list in Thomas Hale and others, 'Oxford COVID-19 Government Response Tracker' *Blavatnik School of Government* (2020) <<https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>> accessed 21 June 2020; See respectively Armin von Bogdandy and Pedro Villarreal, 'International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis' (2020) *MPIL* 1, 18-19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650> accessed 21 June 21. See also Solomon S Hsiang and others, 'The Effect of Large-Scale Anti-Contagion Policies on the COVID-19 Pandemic' (2020) 584 *Nature* 1, 1.

³⁶ See Juliana Kaplan and others, 'A third of the global population is on coronavirus lockdown—here's our constantly updated list of countries and restrictions' *Business Insider* (7 August 2020) <<https://www.businessinsider.in/international/news/a-third-of-the-global-population-is-on-coronavirus-lockdown-x2014-hereaposs-our-constantly-updated-list-of-countries-and-restrictions/slidelist/75208623.cms>> accessed 21 November 2020.

³⁷ World Health Organization, 'Responding to Community Spread of COVID-19: Interim Guidance' (7 March 2020) <<https://apps.who.int/iris/handle/10665/331421>> accessed 21 November 2020.

³⁸ World Health Organization, 'Digital tools for COVID-19 contact tracing: annex: contact tracing in the context of COVID-19' (2 June 2020) <<https://apps.who.int/iris/handle/10665/332265>> accessed 21 November 2020. Kareem Fahim and others, 'Cellphone monitoring is spreading with the coronavirus. so is an uneasy tolerance of surveillance' *Washington Post* (2 May 2020)

risk groups, such as self-isolation in their homes or in care houses where non-essential visits were restricted.³⁹ Vulnerable groups were allowed to work from home, provided with PPE free of charge, they were systematically tested and benefited from reserved times in shops when fewer people would be allowed in.⁴⁰

Along similar lines, one may argue that, in view of the foreseeable danger of a COVID-19 infection on election-day, a state may be justified and even required to protect the rights to health and life of people and especially of vulnerable groups either by adopting relevant mitigation measures or by resorting to alternative/remote voting methods. Alternatively, a state may be justified to postpone an election when the introduction of risk-mitigating measures or voting by alternative means are insufficient for protection or unfeasible due to limited time, capacities or resources.⁴¹ Thus, states' measures to protect the rights to health and life may restrict the right to political participation.

The right to political participation requires, in principle, the holding of periodic elections, based on universal, free, secret and equal suffrage (Article 25 ICCPR, Article 3 of Protocol 1 to the ECHR).⁴² As regards vulnerable persons, especially their

<https://www.washingtonpost.com/world/cellphonemonitoring-is-spreading-with-the-coronavirus-so-is-an-uneasytolerance-of-surveillance/2020/05/02/56f14466-7b55-11ea-a311-adb1344719a9_story.html> accessed 21 November 2020.

³⁹ Joanne Brooke and Debra Jackson 'Older people and COVID-19: Isolation, risk and ageism' (2020) 29(13-14) *Journal of clinical nursing* 2044.

⁴⁰ Suerie Moon and others 'Continued Confinement of Those Most Vulnerable to COVID-19' (2020) 30(3) *Kennedy Institute of Ethics Journal*. Indeed, many of the measures have raised concerns regarding their interference with other human rights. Besides implications on the right to political participation and related freedoms examined in this article, other rights are seemingly at stake as well, including the right to personal liberty, the right to private life, the right to manifest one's belief or religion, the right to work and the right to education. With regards to vulnerable groups under strict isolation measures, interferences have been reported with the right to family life and the right to dignity. See Sharifah Sekalala and others 'Health and human rights are inextricably linked in the COVID-19 response' (2020) 5(9) *BMJ Global Health* 1; Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020) 11 *European Journal of Risk Regulation* 317.

⁴¹ See for details below, Parts 4 and 5.

⁴² For relevant case law on the right to political participation as incorporated in Art. 25 ICCPR see for instance Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed., Engel, 2005) pp. 563 *et seq.*; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and*

participation in the electoral process on equal footing with other voters, is at stake in the face of the pandemic, for example, because of their unwillingness to come to the polling station for fear of getting infected. This runs counter to the principles of universal and equal participation, and arguably amounts to indirect discrimination if no appropriate safeguards are taken.⁴³

Moreover, likewise the principle of *free suffrage*, i.e., the freedom of voters to form an opinion and to express it freely at the polls is likely to be affected. This is in case of general restrictions on the rights to freedom of expression and assembly that are common in times of pandemic (Articles 19, 21 ICCPR; Articles 10, 11 ECHR)⁴⁴ or when the election campaign (at least partly) moves to the virtual space where it is less accessible to certain groups of voters such as older persons or poorer segments of society.⁴⁵ *Secret suffrage*, closely related to the freedom of voters to express their opinion at polls, is at a higher risk of being compromised when alternative voting methods are widely used, be it remote methods such as postal voting or voting by mobile ballot box to protect against infection on election-day.⁴⁶ More generally, an increased reliance on these methods provides less security to the integrity of the ballot, since voting outside the controlled environment of the polling station is generally

Political Rights. Cases, Materials and Commentary (3rd ed., OUP, 2013) pp. 738-750; concerning the right to free elections in Art 3 of Prot 1 ECHR and relevant case law see William A Schabas, *The European Convention on Human Rights. A Commentary* (OUP, 2015) pp. 1011 *et seq.*; Christoph Grabenwarter, *The European Convention on Human Rights. Commentary* (Beck-Hart-Nomos, 2014) pp. 399 *et seq.*

⁴³ As regards the requirement of universal suffrage see *X. v. Germany* App no 10565/83 (Commission decision 9 May 1967); *Hirst v. the United Kingdom (no. 2)* App No 74025/01 (ECHR 6 October 2005) paras 59 and 62; *Mathieu-Mohin and Clerfayt v. Belgium* App no 27120/95 (ECHR 2 March 1987) para 5.

⁴⁴ Content wise, the rights are framed similarly in the ICCPR and the ECHR. Art. 19 ICCPR and Art. 10 ECHR provides for the freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds. Art. 21 ICCPR and Art. 11 ECHR recognize the right to peaceful assembly.

⁴⁵ Statista (n 24); Willem Roper, 'Internet Access Low Among Economic Vulnerable' *Statista* (8 September 2020) <<https://www.statista.com/chart/22837/internet-access-among-economic-vulnerable/>> accessed 8 November 2020.

⁴⁶ Venice Commission (VC), 'Code of Good Practice in Electoral Matters' CDL-AD (2002) I.3.2.

more susceptible to fraud than traditional voting.⁴⁷ At the same time, these alternative means of voting are the major instruments to protect vulnerable groups against infection on election-day. Thus, the right to political participation of these voters is likely to be disproportionately affected by an increased reliance on less secure or alternative measures. This raises questions as regards the non-discriminatory participation of vulnerable persons in elections⁴⁸ as incorporated in Articles 2.1 ICCPR, 26 ICCPR and Article 14 ECHR; as well as in Article 1 of Protocol No 12 to the ECHR.⁴⁹ Indeed, the above examples evidence a potential for indirect discrimination suffered by COVID-19 risk groups.

In a nutshell, several human rights obligations are at stake during elections in times of the COVID-19 pandemic, as is especially evident in relation to vulnerable groups. While measures adopted to contain the disease are of particular relevance to protect their life and health, these measures may, at the same time, have disproportionate negative impacts on their participation in the electoral process. To put it more bluntly, vulnerable groups are in the centre of the tension between a state's duty to protect the rights to health and life and its obligation not to interfere with the right to political participation and related freedoms. Yet, international human rights law provides for means of reconciliation. As the following will illustrate, certain restrictions on political rights and freedoms are permissible in times of a pandemic, this is all the more when it comes to vulnerable persons.

⁴⁷ Kare Vollan, 'Voting in Uncontrolled Environment and the Secrecy of the Vote' (2006) Electronic Voting 2006–2nd International Workshop, Co-organized by Council of Europe, ESF TED, IFIP WG 8.6 and E-Voting.

<https://dl.gi.de/bitstream/handle/20.500.12116/29159/GI-Proceedings-86-13.pdf?sequence=1> accessed 12 October 2020.

⁴⁸ See respectively in particular CESCR GC 20 paras 10, 29 and 33. CESCR (n 19).

⁴⁹ Art. 2.1 ICCPR and Art. 14 ECHR require states parties to guarantee the rights recognized in the respective instruments without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Art. 26 ICCPR and Protocol No. 12 to the ECHR provide for more comprehensive obligations: Art. 26 ICCPR generally recognises that all persons are equal before the law and entitled without any discrimination to the equal protection of the law; Art. 1 of Protocol No. 12 to the ECHR contains a general prohibition of discrimination in the enjoyment of any right set forth by law.

3.2. RECONCILIATION OF DIVERGING HUMAN RIGHTS OBLIGATIONS: POLITICAL PARTICIPATION & COVID-19 RISK GROUPS

The most “comprehensive” option to reconcile the seemingly conflicting human rights obligations are derogations in times of emergency. States can derogate – and indeed several states have – from their obligations under civil and political rights treaties in the context of COVID-19.⁵⁰ The conditions set in the respective treaties’ emergency clauses (Article 4 ICCPR, Article 15 ECHR) are similar: “In time of ... public emergency threatening the life of the nation”, states may derogate from their obligations to the extent “strictly required by the exigencies of the situation.”⁵¹ The mentioned substantive requirements generally lend themselves for application during the COVID-19 pandemic. Also, the respective measures, including a postponement of elections, might arguably be required to contain the spread of the virus;⁵² *a fortiori* from the perspective of protecting vulnerable groups. Considering the imminent health emergency caused by the pandemic, a state could thus derogate from the right to political participation, the freedoms of assembly and movement. The protection of

⁵⁰ In Europe, ten states have, so far, informed the CoE Secretary General that they derogated from certain rights under the ECHR (although most have withdrawn the derogation since). 22 states have done so under the ICCPR. As of September 2020, Albania, Armenia, Estonia, Georgia, Latvia, Republic of Moldova, North Macedonia, Romania, San Marino, Serbia. Council of Europe Treaty Office, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms' (22 June 2020) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>> accessed 9 November 2020. As of September 2020, Colombia, Dominican Republic, Kyrgyzstan, Peru, Argentina, Armenia, Chile, Ecuador, El Salvador, Estonia, Ethiopia, Georgia, Guatemala, Latvia, Republic of Moldova, Romania, San Marino, State of Palestine, Thailand, Namibia, Paraguay, Senegal. United Nations Treaty Collection, 'International Covenant on Civil and Political Rights' (June 2020)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 9 November 2020.

⁵¹ See also Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law During States of Emergency - Reflections' CDL-PI (2020)005rev, (2020) para 95. Moreover, a state is obliged to inform the other state parties (ICCPR) or the Secretary General of the Council of Europe (CoE) (ECHR) of the derogation which allows for some international scrutiny of a state’s measures (paragraph 3).

⁵² See Roy M Anderson and others, 'How Will Country-Based Mitigation Measures Influence the Course of the COVID-19 Epidemic?' (2020) 395 *The Lancet* 931. See Solomon S Hsiang and others (n 35).

vulnerable groups provides additional justification, respectively. For example, most derogations of states under the ICCPR were generally either related to the freedoms of movement and assembly (Articles 12, 21 ICCPR) or framed in rather broad terms.⁵³ Such derogations open room for states to counter the COVID-19 pandemic, and thus to protect the health and life of their population, including of vulnerable groups.

At the same time, from an international human rights law perspective, explicit derogations may not be the best option. In reliance on the treaties' emergency clauses (Articles 15 ECHR and 4 ICCPR), states "opt-out" from the respective human rights obligations. This reduces the substantive level of scrutiny which may be applied by international human rights institutions (ECtHR, Human Rights Committee (HRC)) when examining the conformity of states' measures with their human rights obligations.⁵⁴ Possible monitoring by international human rights institutions is thus reduced during the time of derogations which may give rise to undue/excessive restrictions of human rights guarantees at domestic level.

⁵³ Most states have derogated during spring 2020 at the height of the first wave of the pandemic. For example, the derogation was notified by Colombia on 17 March, by Kyrgyzstan on 30 March, by Peru on 20 March, by Argentina on 29 May, by Chile on 25 March, by Ecuador on 24 March, by El Salvador on 14 April, by Estonia on 20 March, in Georgia on 21 March, in Guatemala on 9 March, in Latvia on 16 March, in Republic of Moldova on 4 May, by Romania on 20 March, by San Marino on 23 April, by State of Palestine on 30 March 2020. In a number of states, derogations have been extended or renewed during the autumn 2020. UNTC (n 50).

⁵⁴ Venice Commission, 'Compilation of Venice Commission Opinions and Reports on States of Emergency' CDL-PI(2020)003-e, (2020) 11. See Information Document of the Council of Europe Secretary General (n 25). There are, however, divergent views; some argue that the obligation to notify the state of emergency draws international attention to the measures at stake and increases transparency accordingly. See for example Alan Greene, 'States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic' *Strasbourg Observers* (1 April 2020) <<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>> accessed 21 June 2020. For an overview see Sean Molloy, 'Covid-19 and Derogations Before the European Court of Human Rights' *Verfassungsblog*, (10 April 2020) <<https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/>> accessed 21 June 2020; see also Martin Scheinin, 'COVID-19 Symposium: To Derogate or Not to Derogate?' *Opinio Juris* (6 April 2020) <<https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>> accessed 21 June 2020.

In any event, an explicit derogation is not necessarily needed.⁵⁵ Interferences with the right to political participation and related freedoms are possible also within the framework of the respective rights. States may restrict the rights set forth in the different provisions in pursuance of certain public interests, including the protection of public health. The conditions set forth in the various provisions are similar.⁵⁶ The laws providing for the interference must be sufficiently clear and accessible to those concerned.⁵⁷ The measures⁵⁸ must pursue a legitimate aim (including public health or the protection of the rights of others); and they have to be necessary in a democratic society – *i.e.*, they must be proportional.⁵⁹ Accordingly, interferences may thus be permissible in light of a health emergency. For example, in *Enhorn v. Sweden*, the ECtHR considered restrictions of movement in the context of infectious diseases as justified.⁶⁰ Thus, when acting in line with the above-mentioned conditions, states may justify limitations of political rights and freedoms when adopting measures to contain the pandemic and to protect the health and life of their population, *a fortiori* of the most vulnerable persons in society.

In sum, the position of vulnerable groups illustrates the diverging human rights obligations at stake when it comes to the holding of elections in times of the COVID-19 pandemic. At the same time, the perceived tension between a state's duty

⁵⁵ See Information Document of the Council of Europe Secretary General (n 25). See also Kanstantsin Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights' *Strasbourg Observers* (27 March 2020) <<https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>> accessed 21 June 2020. See for a discussion also Martin Scheinin (n 54).

⁵⁶ Some provisions explicitly refer to these conditions, such as Art. 21 ICCPR or Arts. 10 and 11 para 2 ECHR; others presuppose them implicitly, such as the right to political participation (Art. 25 ICCPR; Art. 3 of Protocol No. 1 to the ECHR).

⁵⁷ See respectively authoritatively, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' Annex, E/CN.4/1984/4 (1984) paras 15-18 (esp. para 17: "Legal rules limiting the exercise of human rights shall be clear and accessible to everyone." See for details Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) pp. 293ff.

⁵⁸ Postponement of elections; restrictions of movement and assembly; mitigation measures on election-day, alternative voting methods.

⁵⁹ For details on the balancing of rights and means, see Olivier De Schutter (n 57) pp. 314ff.

⁶⁰ *Enhorn v Sweden* App no 56529/00 (ECHR, 25 January 2005) paras. 43-45.

to protect the rights to life and health and its duty to respect the right to political participation and related freedoms may converge in case of vulnerable groups. As a bottom line, states' measures to protect the health of vulnerable voters may remove their fears to cast the ballot. Therefore, states may need to adopt specific safeguards to further the equal participation of voters from vulnerable groups in the electoral process. As will be shown next, there are several possibilities.

4. HOLDING ELECTIONS IN TIMES OF THE COVID-19 PANDEMIC: EXAMPLES FROM STATE PRACTICE WITH A SPECIFIC FOCUS ON VULNERABLE GROUPS

When a state decides to hold elections in times of a pandemic, there are different possibilities present concerning how it can continue to comply with its human rights obligations towards vulnerable groups. As illustrated by relevant examples from state practice, a state may apply adequate risk-mitigating measures to in-person voting in polling stations on election-day as well as more generally during the whole electoral process (4.1). It may also rely on alternative voting methods to complement or even replace in-person voting to minimise the risk of human-to-human transmission (4.2).

4.1. RISK-MITIGATION MEASURES: IN-PERSON ELECTIONS

As argued above, international human rights law, in particular states' obligations to protect vulnerable groups, requires special measures to mitigate the risks entailed in electoral activities. More generally, containment measures are of relevance here. Particularly necessary are employing means to prevent overcrowding; the minimization of human-to-human contact; and the provision of PPE such as masks and plastic gloves to voters and poll workers.⁶¹ While such measures are necessary throughout different phases of the electoral process, the most critical phase are the polling procedures on election day.

⁶¹ Centers for Disease Control and Prevention, 'Polling Locations and Voters Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)' (23 November 2020) <<https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>> accessed 23 November 2020.

Indeed, best practice shows that various countries have successfully implemented measures to avoid or reduce crowding on election-day. For example, in the South Korean parliamentary elections, voters were encouraged to make use of in-person early voting options;⁶² when inside polling stations, voters were instructed to keep distance of at least one meter from each other;⁶³ and also special polling stations were established exclusively for home-quarantined and hospitalized infected voters.⁶⁴ The various options proved particularly useful in furthering the relatively safe participation of vulnerable groups who could vote, if they wished so, in-person.⁶⁵ Similar effects of crowding reduction have been achieved by prolonging voting hours during election day, extending voting over several days or by setting up higher numbers of polling stations in larger venues.⁶⁶ Additionally, voting through drive-ins represents another relevant safeguard; it has been used in several elections as a means of voting for infected or vulnerable voters.⁶⁷ The safety of vulnerable groups can further be enhanced by proper implementation of hygienic and sanitary measures.

⁶² Note that reference to the South Korean elections is made, although the country is geographically outside Europe, for its valuable best practice. See for further reference Antonio Spinelli, 'Managing Elections under the COVID-19 Pandemic: The Republic of Korea's Crucial Test' *International IDEA* (April 2020) <<https://www.idea.int/sites/default/files/publications/managing-elections-during-pandemic-republic-korea-crucial-test.pdf>> accessed 21 June 2020.

⁶³ Ibid.

⁶⁴ Do Kyung Ryuk and others, 'Elections During a Pandemic: South Korea Shows How to Safely Hold a National Election During The COVID-19 Crisis' *Wilson Center* (19 May 2020) <<https://www.wilsoncenter.org/blog-post/elections-during-pandemic-south-korea-shows-how-safely-hold-national-election-during>> accessed 11 October 2020.

⁶⁵ See for further reference Eun Young Kim and others, 'COVID-19 Public Health Measures During National Assembly Elections of the Republic of Korea' (2020) 11(4) *Osong Public Health Res Perspect* 158.

⁶⁶ International IDEA (n 4) Featured cases Malaysia. See also Willow Fiddler, 'Voting in a Time of Pandemic: Why Shoal Lake 39 Felt Pressed to Hold an Election' *APTN National News* (27 March 2020) <<https://www.aptnnews.ca/national-news/voting-in-a-time-of-pandemic-why-shoal-lake-39-felt-pressed-to-hold-an-election/>> accessed 21 June 2020.

⁶⁷ For example, this method was used in the Czech Republic to allow voters to cast the ballot from their cars. See Yelena Dzhanova, 'States Are Taking Precautions to Keep Coronavirus from Disrupting Fall Elections' *CNBC* (10 May 2020) <<https://www.cnn.com/2020/05/10/coronavirus-states-take-precautions-to-prevent-disrupted-elections.html>> accessed 21 June 2020.

Voters may also be temperature-checked to prevent potentially infected voters from entering the polling station.⁶⁸

Similar measures for the protection of voters who belong to vulnerable groups can be applied during other stages of the electoral process to ensure, as far as possible, their non-discriminatory and equal participation. For instance, specific safeguards may be required for in-person voter registration especially in countries where active voter registration is in place or where voters' physical presence is necessary for certain registration acts.⁶⁹ Other measures can be taken for election campaigns. Relevant country examples provide positive guidance. In France, only campaign rallies with no more than one thousand persons attending were allowed.⁷⁰ In South Korea, a large part of in-person campaigning was suspended and moved online⁷¹ as well as to more conventional channels of reaching out to voters, such as sending printed campaign materials to households by post or conveying campaign messages on Television.⁷² Such diverse coverage of the campaign also by traditional media (TV, radio, press, printed materials) seems particularly important so that voters from vulnerable groups who have less access to social media (for example older voters) are not discriminated in accessing information.

As shown above, applicable international human rights law requires specific state measures to protect vulnerable groups against infection, while ensuring their equal participation in elections. This is one way of striking the balance between states' obligations to protect the rights to life and health, and at the same time, uphold the

⁶⁸ Antonio Spinelli (n 62) 3.

⁶⁹ Ashley Quarcoo, 'Can Elections Be Credible During a Pandemic?' *Carnegie Endowment for International Peace* (29 July 2020) <<https://carnegieendowment.org/2020/07/29/can-elections-be-credible-during-pandemic-pub-82380>> accessed 11 October 2020.

⁷⁰ The Economist, 'France Suspends Local Elections Because of Covid-19' (Paris, 19 March 2020) <<https://www.economist.com/europe/2020/03/19/france-suspends-local-elections-because-of-covid-19>> accessed 21 June 2020.

⁷¹ Note that South Korea has very high rates of internet usage across all age groups with the exception of the population of over 70 years. Statista, 'Internet usage rate in South Korea from 2013 to 2019, by age group' (19 June 2020) <<https://www.statista.com/statistics/226740/age-composition-of-internet-users-in-south-korea/>> accessed 9 November 2020. In terms of accessibility of online campaigning for older persons, South Korea may thus be considered an exception.

⁷² Antonio Spinelli (n 62) 4.

right to political participation. Moreover, the implementation of risk-mitigating measures on election day and information campaigns aimed at awareness raising among electoral participants contribute to trust-building and create a safe space during elections that bolsters the electoral turnout of vulnerable voter groups.⁷³

An obvious advantage of this approach is that maintaining the possibility to vote in-person preserves relatively best the electoral principles of universal, equal, free and secret suffrage. The overall integrity of elections is better guaranteed as voting takes place in the controlled environment of a polling station. At the same time, these measures only mitigate but do not eliminate health risks related to electoral activities during a pandemic. Mitigating measures may not always be sufficient to guarantee safety. Obstacles to the non-discriminatory political participation of vulnerable groups therefore persist. This warrants turning to complimentary forms of facilitating political participation, through alternative voting methods.

4.2. ALTERNATIVE VOTING METHODS

Alternative voting methods present an additional, and arguably necessary option to further the non-discriminatory participation of vulnerable groups in elections. Although alternative voting methods may present challenges to electoral integrity and secret suffrage and are thus generally to be applied with caution,⁷⁴ the current COVID-19 crisis has (re-)opened the debate as to their potential to complement (or even replace) traditional in-person voting in order to avoid human-to-human contact amongst voters and poll workers on election day, while maintaining voter turnout.⁷⁵

⁷³ For instance, printed election materials were sent by post to all households. Ingrid Bicu, 'Communication guidelines for EMBs during COVID-19 crisis' *International IDEA* (May 2020) <<https://www.idea.int/news-media/news/communication-guidelines-embs-during-covid-19-crisis>> accessed 9 November 2020.

⁷⁴ See above, Section 3.1 and below for details. See also OSCE/ODIHR, 'Alternative voting methods and arrangements: Benefits, Risks and Practical Considerations in Light of International Standards and Good Practice, Including in the Context of the Covid-19 Pandemic' (2020) <<https://www.osce.org/files/f/documents/2/a/466794.pdf>> accessed 9 November 2020.

⁷⁵ Ibid. Anika Eleni Heinmaa, 'Special Voting Arrangements (SVAs) in Europe: In-Country Postal, Early, Mobile and Proxy Arrangements in Individual Countries' *International IDEA* (October 2020)

Alternative voting methods include sending the ballot by post; casting the vote online through a computer or mobile phone application; voting by proxy; or by mobile ballot box. Since these methods allow voters to cast their ballots either remotely or by involving other persons, a growing number of states have provided for alternative/remote voting in the context of COVID-19 or are considering doing so in the upcoming elections in 2020 or 2021.⁷⁶

The concrete options are as follows. Postal voting is one of the most discussed means to replace or complement in-person voting during the pandemic. Its use has been explored already in application to vulnerable groups, such as persons with disabilities, including older voters with impaired mobility, voters in hospitals and others.⁷⁷ In some states, such as in Poland, postal voting has been used during the pandemic for these groups of voters⁷⁸ as well as for the general population as an option of voting after certain conditions were met as was the case in Bavaria.⁷⁹ A possible drawback, however, is the practical feasibility of conducting the postal vote which is heavily dependent on the capacities of the national postal service.⁸⁰

<<https://www.idea.int/news-media/news/special-voting-arrangements-svas-europe-country-postal-early-mobile-and-proxy>> accessed 9 November 2020.

⁷⁶ For an overview of states' practices and their compatibility with international standards see Venice Commission, 'Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe' CDL-AD(2004)012, (2004); See also Venice Commission, 'Report on Out-of-Country Voting' CDL-AD(2011)022, (2011); See also Matt Qvortrup, 'First Past the Postman: Voting by Mail in Comparative Perspective' (2005) 76 *The Political Quarterly* 414.

⁷⁷ See for example Daniel P Tokaji and Ruth Colker, 'Absentee Voting by People with Disabilities: Promoting Access and Integrity' (2020) 38(4) *McGeorge Law Review* 1015. See also Catherine White and Zoe Wyrko, 'Enabling Voting for Inpatients at Geriatric Rehabilitation Hospitals' (2011) 41 *GM Journal* 338.

⁷⁸ *The Wire*, 'Elections During COVID-19: Elderly, People With Disabilities Can Use Postal Ballot' (New Delhi, 22 August 2020) <<https://thewire.in/government/elections-during-covid-19-elderly-people-with-disabilities-can-use-postal-ballot>> accessed 12 October 2020.

⁷⁹ Postal voting was successfully used in the federal state of Bavaria in Germany as well as in South Korea. Euronews, 'Germany: Bavaria's Municipal Elections Go Ahead despite Coronavirus Concerns' (15 March 2020) <<https://www.euronews.com/2020/03/15/germany-bavaria-s-municipal-elections-go-ahead-despite-coronavirus-concerns>> accessed 21 June 2020.

⁸⁰ See Eric Lichtblau, 'Exclusive: As States Prepared Mail-in Ballots, Postal Service Failed to Update at Least 1.8 Million Addresses' *The Time* (Washington, 28 September 2020)

Another, perhaps less relevant and operationalizable option, is reliance on electronic (internet) voting. Unlike traditional paper-based methods, this method takes place by means of casting and counting votes electronically, using information and communication technologies. Internet voting has regained prominence in debates during the current pandemic, as a possible way of protecting vulnerable voters by enabling them to vote remotely through electronic means from the safety of their homes.⁸¹ However, contrary to postal voting, no country has yet employed internet voting in response to the pandemic, neither for the general population nor as a means to facilitate voting by vulnerable groups. In fact, only a handful of countries worldwide rely on internet voting regularly.⁸² Due to the high levels of planning, preparation and testing needed, it is highly unlikely that countries which do not already have systems in place would be able to introduce electronic voting, as a response to the pandemic, even for limited groups of voters.⁸³

Proxy voting is a form of voting whereby a registered voter may delegate his or her voting power to a representative, to enable a vote in absence. Proxy voting can, under certain conditions,⁸⁴ offer a further option for vulnerable groups to participate in an election without being required to visit a polling station. For instance, proxy voting is in use in France and was expanded during the pandemic. While voters normally have to apply for permission in-person, due to the COVID-19 crisis, certain

<<https://time.com/5893881/exclusive-as-states-prepared-mail-in-ballots-postal-service-failed-to-update-at-least-1-8-million-addresses/>> accessed 12 October 2020.

⁸¹ The Economist, 'Why Voting Online Is Not the Way to Hold an Election in a Pandemic' (28 April 2020) <<https://www.economist.com/international/2020/04/27/why-voting-online-is-not-the-way-to-hold-an-election-in-a-pandemic>> accessed 12 October 2020.

⁸² For example, in Estonia, some cantons in Switzerland; conversely, other countries, such as Norway have tested this method but later stepped back to traditional voting.

⁸³ Meredith Applegate and others, 'Considerations on Internet Voting: An Overview for Electoral Decision-Makers' *IFES* (April 2020)

<https://www.ifes.org/sites/default/files/considerations_on_internet_voting_an_overview_for_electoral_decision-makers.pdf> accessed 12 October 2020.

⁸⁴ Strict rules should apply to prevent electoral fraud. See Venice Commission (n 46) I.3.2.v.

groups of vulnerable voters were allowed to request having the necessary documentation delivered to their homes in advance.⁸⁵

Finally, voting by mobile ballot implies bringing the ballot box by poll workers to the place where a voter lives. This method is normally used to allow those voters to cast their ballot who cannot come to the polling station due to their impaired mobility.⁸⁶ Mobile voting is thus a valuable means to further the participation of vulnerable groups in times of a pandemic. In fact, in the context of COVID-19, the use of mobile ballot boxes has been expanded, for example in Serbia, to a wider group of voters, such as voters infected with COVID-19 or from vulnerable groups.⁸⁷ In any case, high standards of protection must be applied when poll workers deliver the mobile ballot box to the voter as this method entails human-to-human contacts which should otherwise be avoided.

In total, alternative voting methods broaden the range of options at the disposal of states when holding elections in times of a pandemic. These methods may enhance the equal and universal participation of vulnerable groups and reduce their vulnerability in line with applicable international human rights standards, as voting takes place in the safety of their homes. However, these methods may present challenges with regards to the effective realisation of the right to vote, as they may negatively affect the electoral integrity of ballots. This is due to the perceived implications for voter secrecy when voting is conducted outside the controlled environment of polling stations.

From an international human rights perspective and relevant electoral standards, the arguments in favour and against the various methods differ slightly in

⁸⁵ The exception was granted to persons in quarantine or confined due to illness, to those who could not move due to a disease or disability, and to persons living in retirement facilities; IFES, 'Elections Held and Mitigating Measures Taken During COVID-19' (27 May 2020)

<https://www.ifes.org/sites/default/files/elections_held_and_mitigating_measures_taken_during_covid-19.pdf> accessed 21 June 2020.

⁸⁶ Virginia Atkinson and Rebecca Aaberg, 'How to Ensure People with Disabilities Are Included in Political Life During COVID-19' *IFES* (14 July 2020) <<https://www.ifes.org/news/how-ensure-people-disabilities-are-included-political-life-during-covid-19>> accessed 12 October 2020.

⁸⁷ Virginia Atkinson and others, 'Inclusion and Meaningful Political Participation' *IFES* (2020) 18 <https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_inclusion_and_meaningful_political_participation_july_2020.pdf> accessed 12 October 2020.

relation to vulnerable groups. For example, postal voting has the advantage to be relatively uncomplicated and easily accessible to voters from distinct backgrounds (old, young, with disabilities, urban, rural) who can freely express their opinion at polls by this method. It seems thus particularly convenient from the perspective of universal and equal suffrage.⁸⁸ On the contrary, internet voting may pose obstacles for some vulnerable groups, such as older voters, due to the on average lower degrees of technological savviness in this social group and thus raises questions in terms of their effective political participation.⁸⁹ For both, postal as well as internet voting, the principles of free and secret suffrage may be a concern⁹⁰ since both voting methods take place outside of the controlled environment of a polling station and thus open room to various types of voter coercion, such as family voting, vote-buying and accompanying threats.⁹¹

From the perspective of voting secrecy, also proxy voting is problematic. It potentially runs counter to the principle of one person one vote (equal suffrage),⁹² consequently, its use needs to be carefully circumscribed. Voting by mobile ballot box, conversely, provides somewhat higher standards for secrecy of the vote than other alternative voting methods under the condition that the poll workers delivering the mobile ballot boxes are impartial.⁹³ It is also relatively easily accessible for all voters without distinction.⁹⁴ At the same time, voting by mobile ballot box may be difficult

⁸⁸ Jessica A Fay, 'Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters' (2005) 13 *The Elder Law Journal* 453.

⁸⁹ Margareth Applegate and others, 'Considerations on Internet Voting: An Overview for Electoral Decision-Makers' *IFES* (April 2020), 2
<https://www.ifes.org/sites/default/files/considerations_on_internet_voting_an_overview_for_electoral_decision-makers.pdf> accessed 12 October 2020.

⁹⁰ Robert Krimmer and Melanie Volkamer, 'Secrecy Forever? Analysis of Anonymity in Internet-Based Voting Protocols' (2006) First International Conference on Availability, Reliability and Security (ARES'06) <<https://ieeexplore.ieee.org/abstract/document/1625329>> accessed 12 October 2020.

⁹¹ Kare Vollan (n 47).

⁹² John C Fortier and Norman J Ornstein, 'The Absentee Ballot and the Secret Ballot: Challenges for Election Reform' (2003) 36 *University of Michigan Journal of Law Reform* 483.

⁹³ OSCE/ODIHR, 'Election Observation Handbook Sixth edition' (2010) 75-77
<<https://www.osce.org/files/f/documents/5/e/68439.pdf>> accessed 12 October 2020.

⁹⁴ Still, mobile voting may be human resource intensive: burden lies on the side of election administration to provide enough staff for this purpose.

from an organisational point of view and entails higher health risks than other methods. Careful balancing therefore needs to be applied when considering alternative voting methods overall. Whilst they provide a somewhat useful tool by facilitating the universal and equal participation of vulnerable groups in elections, they also raise the chances of the integrity of the ballot being compromised.⁹⁵

In sum, different considerations are at stake. While risk-mitigating measures implemented during in-person voting on election day provide to some extent adequate safeguards to uphold electoral integrity, the truth remains that this will only be to an extent, such measures may not always be sufficient to protect the health of vulnerable groups. At the same time, alternative voting methods appear as a somewhat limited means for states to secure the political participation of vulnerable groups during electoral processes. They are suitable to complement rather than to replace traditional voting in the current pandemic.⁹⁶ Yet, when all options are together insufficient, the last resort is postponing elections. When deciding on how, when and whether to undertake elections, a situation-specific decision is called for; in such instance states may draw on different parameters.

5. HOLDING OR POSTPONING ELECTIONS IN TIMES OF A PANDEMIC?

Among the parameters states may draw upon in their decision on whether to hold or postpone elections in times of a pandemic, perhaps the most important is the probability of holding elections in line with international standards for free and fair elections.⁹⁷ A state will have to consider whether and to what extent the principles of universal, free, equal and secret suffrage can be upheld notwithstanding the measures adopted to contain the virus and decide what restrictions can ultimately be accepted as a possible trade-off. Arguably, the equal and non-discriminatory participation of vulnerable groups is one of the major considerations. Is the state able to make

⁹⁵ As regards the standards, see Venice Commission (n 46) I.3.2; as well as other provisions of the VC Code.

⁹⁶ It was held that, in light of international best practice, in-person voting should always be possible and available to voters when they preferred. Venice Commission (n 46) II.2.b.

⁹⁷ See Venice Commission (n 51) para 96. In these circumstances, the fairness of the elections might be doubtful. Venice Commission (n 46) I.3.1.

arrangements to protect these groups against infection, such as through secure mobile-voting; proxy-voting or by making them vote in separate polling stations?⁹⁸ Does reliance on alternative voting methods such as postal or proxy voting disproportionately affect the right to secret suffrage of voters from vulnerable groups? Similar considerations apply to other stages of the electoral process, for example with regards to the access of vulnerable voters to voter registration and to the election campaign. Ultimately, an assessment will need to be made as to what extent the participation of vulnerable groups in elections can be ensured and, more generally, whether the integrity of the electoral process can be upheld in times of a pandemic, in that elections are, as far as possible, conducted in accordance with international standards.⁹⁹

Another key parameter is the spread and the intensity of the virus, based on which a state's capacity to protect vulnerable groups is highly contingent. At a certain degree of intensity, the health of the population, *a fortiori* of vulnerable persons, may be at such a high risk that it cannot be properly ensured. Relevant criteria, for consideration here, include the curve of infections in the country, the reproduction factor (R below or over 1), the number of hospitalised persons, as well as of persons in intensive care, and hospital capacities. On the basis of these data, state authorities will have to assess in consultation with national health experts to what extent the holding of elections may contribute to the further spread of the virus, with disproportionate detrimental impacts on vulnerable groups.¹⁰⁰

Further considerations concern whether it is financially and logistically feasible for states to live up to their various international human rights obligations (i.e., right to life and health vs. right to political participation) from an operational perspective.¹⁰¹ Clearly, it is neither cheap to hold elections in times of a pandemic, nor is it easy to implement in practice. The criteria under consideration should include a state's

⁹⁸ A state should indeed generally assess whether elections in times of a pandemic disproportionately exclude certain groups of voters. See for further reference Venice Commission (n 51) para 112.

⁹⁹ Ibid.

¹⁰⁰ Arnon Afek and others, 'Upholding democracy in a global pandemic: the Israeli elections experience' (2020) 27(7) *Journal of Travel Medicine* 1; See also Chad D Cotti and others (n 9) and Eun Young Kim and others (n 65).

¹⁰¹ Venice Commission (n 51) para 114.

budget and its operational capacity to put in place risk-mitigating measures such as additional polling stations; distributing disinfectants; or providing large quantities of personal protective equipment. Likewise, the provision of alternative voting methods for widespread use, for example by vulnerable groups, requires additional funding, manpower and logistics, especially in states where these methods are new or used to be in place only for a very limited number of voters.¹⁰² For example, it is essential that the postal service is reliable when postal voting options are made available. Underfunding, poor logistics and lacking human resources can result in risking people's health or compromising the integrity of the electoral process.

More generally, the voter turnout factor plays a role in deciding whether to hold or postpone elections. While a low turnout may generally put into question the legitimacy of the results and thus negatively affects the election, this also applies when certain groups of voters, such as older persons, are disproportionately excluded. It is doubtful that legitimate elections can be held when turnout is low and/or when a significant part of voters is excluded from the polls.¹⁰³ However, experiences differ across states. In France, for example, the organization of the first round of local elections by in-person voting amidst the pandemic resulted in a record-low turnout.¹⁰⁴ On the contrary, in South Korea and Bavaria, increased reliance on remote voting led to higher turnouts.¹⁰⁵

Finally, albeit not directly related to vulnerable groups, another factor is the stability of the electoral framework.¹⁰⁶ It is of relevance whether the domestic legal or constitutional framework provides a basis to postpone elections or to introduce alternative voting methods. Where legal amendments are necessary, and the more difficult they are made, the more complex it will be to alter the rules of the electoral

¹⁰² OSCE/ODIHR (n 74) 11-44.

¹⁰³ In the worst case, the fear of vulnerable voters to go to the polls can be instrumentalized to deliberately lower their turnout for political gains.

¹⁰⁴ The Economist (n 70).

¹⁰⁵ Deutsche Welle, 'Coronavirus Affects Election Turnout in France, Bavaria' (15 March 2020) <<https://www.dw.com/en/coronavirus-affects-election-turnout-in-france-bavaria/a-52787502>>

accessed June 21, 2020.

¹⁰⁶ See Venice Commission (n 46) II.2.b.

process, for instance by postponing elections¹⁰⁷ even if one accepts a more flexible approach to the required stability of the election law in times of a pandemic.¹⁰⁸ Additional obligations apply when amendments are necessary: utmost transparency towards all electoral stakeholders (parties, candidates, voters, observers) will be required and procedural safeguards (involvement of the parliament; not only of the executive branch in case of changes in the law) must be maintained.¹⁰⁹ All these factors together should be considered by states when opting either in favour of holding or postponing elections. A context-specific decision, with due regard to domestic conditions, is thus necessary.

6. CONCLUDING REMARKS

The current public health crisis induced by the COVID-19 pandemic has shown that states are confronted with the uneasy situation of balancing diverging human rights obligations when holding elections. The apparent tension between states' duty to protect the rights to life and health and their obligation to respect the right to political participation through free and fair periodic elections shows especially when it comes to vulnerable groups. While from an international human rights law and best practice perspective, in particular risk-mitigation measures and alternative voting methods provide means to foster the electoral participation of these groups in times of a pandemic, they may still fall short of meeting a state's international human rights obligations.

¹⁰⁷ Indeed, good electoral practice requires that the electoral law should generally not be changed/alterd less than a year before the election, except in technical matters. Venice Commission (n 46) II.2.b.

¹⁰⁸ As affirmed by the Venice Commission, it may not be possible to follow all principles governing elections during a pandemic as in normal times. Venice Commission (n 51) paras 98 and 110. As to the stability of the electoral framework, Venice Commission (n 46) II.2.b.

¹⁰⁹ See also Venice Commission (n 51) para 118. The consequences of a lack of transparency were shown by the negative example of the Polish Presidential elections which were originally scheduled for beginning of May, should have been conducted entirely by remote/postal-voting to finally be postponed only a few days before the envisaged election day. EPDE, 'Timeline of the Election Chaos' (14 May 2020) <<https://www.epde.org/en/news/details/timeline-of-the-election-chaos.html>> accessed 21 June 2020.

Ultimately states may face the difficult choice to hold or postpone elections; context-specific decisions are called for. International human rights law gives leeway to states to decide in accordance with domestic conditions which option is best for a particular situation. At the same time, international human rights law provides guidance and sets limits to state action, especially with regards to the participation of voters from vulnerable groups. In any case, one thing is certain: pandemics such as the current COVID-19 crisis are extraordinary times. Not all electoral standards can be upheld.¹¹⁰ Still, abidance to a minimum core of international human rights and electoral standards seems necessary at any time for elections to be meaningful, and to safeguard the trust of the public. The participation of vulnerable groups in the electoral process is not the least important of these.

¹¹⁰ See Venice Commission (n 51) para 96.