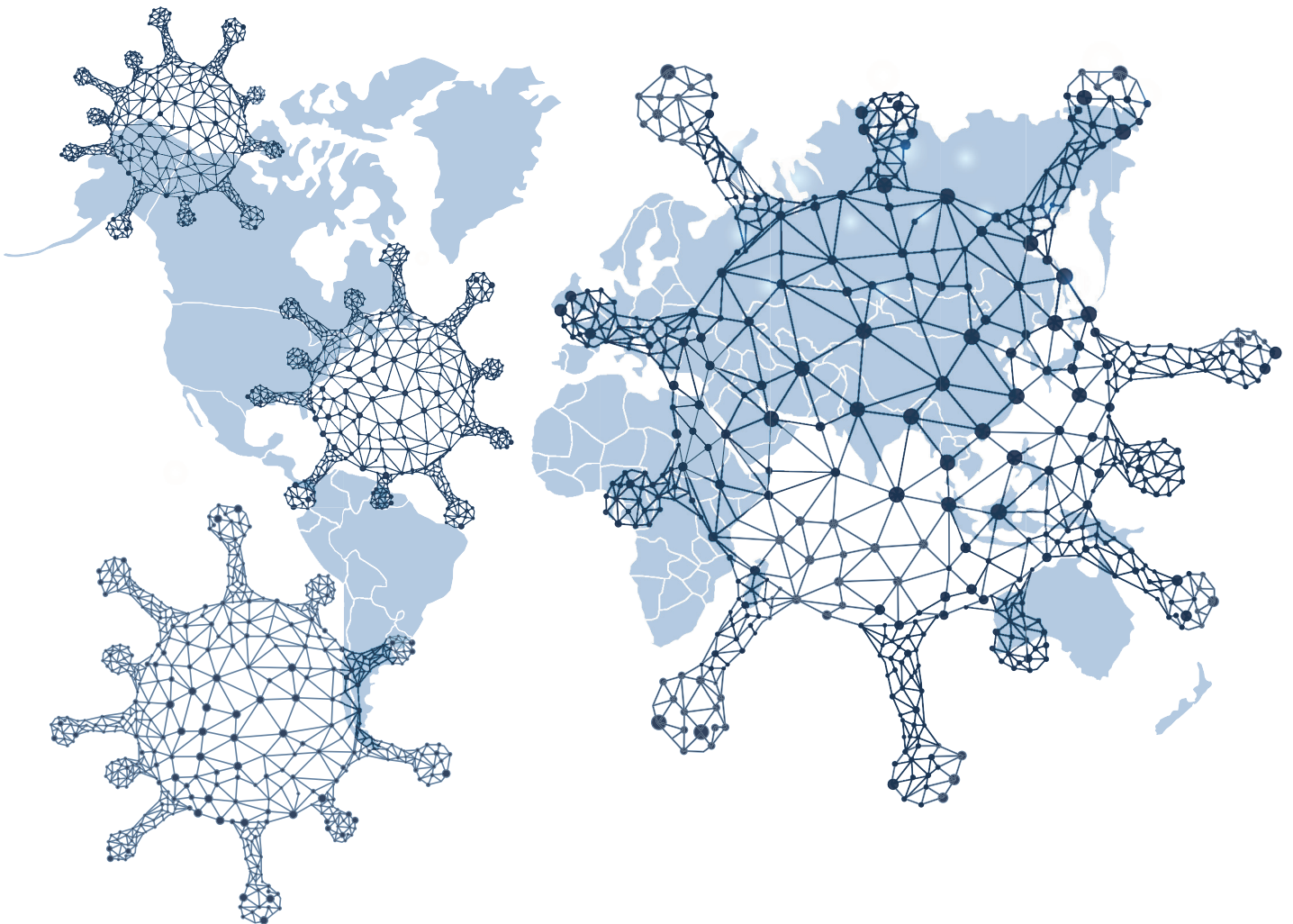




INTERNATIONAL  
AND COMPARATIVE  
LAW RESEARCH CENTER

# COVID-19 AND INTERNATIONAL LAW OVERVIEW OF PUBLICATIONS

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Moscow 2020

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# DESCRIPTION

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This document provides an overview of publications by academics and practitioners, as well as various documents prepared by intergovernmental and non-governmental organizations, on topics related to the spread of COVID-19 and various aspects of international law, including State responsibility, international human rights law, international humanitarian law, international investment law, international trade law, maritime law, and the law of the sea as of April 28, 2020.

This overview is not purported to be complete due to ongoing release of new materials; there are plans to update it as new publications appear. The overview does not constitute an analytical material and is to be used only for informational purposes.

The classification used to place the issues considered in the overview under one or another “branch” is rather illustrative: it is mostly done so for the reader’s convenience. It is evident that the analysis of specific issues, such as, for instance, State responsibility, requires researchers and practitioners to interpret and apply provisions from various “branches” of international law systematically.

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# INTRODUCTION

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1. On March 11, 2020, the World Health Organization (hereinafter, “**WHO**”) announced that the COVID-19 epidemic had reached the level of a pandemic.<sup>1</sup> The effects of the pandemic are transboundary and have already affected the social sphere and various sectors of the economy of many States. In this light, diverse international law issues may arise.
2. In terms of **State responsibility**, the following issues are considered:
  - ***bringing China to international legal responsibility***: possible grounds (**paras. 8-10**); qualification of China’s actions in accordance with Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter, “**Articles on Responsibility**”) (**para. 11**); problems with the establishment of a causation requirement (**para. 12**); jurisdictional problems related to claims against China (**paras. 13-15**); countermeasures against China (**para. 16**);
  - ***assessment of States’ response to the COVID-19 pandemic in the light of the International Health Regulations (2005)*** (hereinafter, “**IHR**”) (**paras. 17-19**);
  - ***evaluation of the COVID-19 pandemic as a circumstance precluding wrongfulness***. Recognizing the COVID-19 pandemic as a force majeure (**para. 21**), state of necessity (**para. 22**), distress (**para. 23**).
3. In the context of **international human rights law**, the following issues are addressed: restrictions imposed by States in connection with the spread of COVID-19, their impact on human rights and freedoms, and standards for the protection of human rights (**paras. 25-27**); protection of human rights in the view of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, “**European Convention**”, “**ECHR**”) and activities of the Council of Europe (**paras. 28-37**).
4. In relation to **international humanitarian law**, such pandemic-related issues as the conditions in which medical personnel and vulnerable social groups are placed, access to water, humanitarian relief, sanctions regimes, and other restrictive measures, etc. (**paras. 38-39**), exercise of public authority by non-State armed groups (**para. 40**), and duties of occupying powers in relation to the fight against COVID-19 (**para. 41**) become most relevant.
5. In the field of **international investment law**, problems related to standards for investor protection (**para. 42**) and exceptions therefrom (**para. 43**) are considered.
6. With regard to **the law of the World Trade Organization** (hereinafter, “**WTO**”), the issues related to restrictions on trade (**paras. 44-45**), protection of intellectual property (**paras. 46-47**), transparency of measures affecting trade (**para. 48**), WHO recommendations and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (**para. 49**), and the prohibition of discriminatory subsidies (**para. 50**) are discussed.

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<sup>1</sup> WHO Director-General’s opening remarks at the media briefing on COVID-19, 11 March 2020. URL: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

7. In the context of **the law of the sea and maritime law**, the issues related to recommendations of international organizations and other bodies on countering the pandemic in international maritime trade (**paras. 51-54**) and measures taken by States to restrict access to their ports (**para. 55**) are analyzed.

# I. STATE RESPONSIBILITY

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## 1. Bringing China to international legal responsibility

8. A number of publications examine the possibility of bringing China to international legal responsibility in connection with the COVID-19 pandemic.<sup>2</sup>

9. It is noted that an alleged China's violation of Articles 6 and 7 of the IHR, which entrust States with the duty to notify the WHO in a timely manner of all events which may constitute a public health emergency of international concern within its territory and provide to the WHO all relevant public health information, could constitute the ground for bringing claims against China.<sup>3</sup> Besides that, in this context, the reference is made to Article 10 of the IHR that provides for the cooperation between WHO and the State in which the mentioned events might allegedly occur.<sup>4</sup>

10. It is also suggested that the legal framework governing transboundary environmental damage can be utilized to affix the liability of China under international law, since the spread of a contagious infection demonstrates that there was a breach in observing due diligence obligations while undertaking commercial activities in the wet markets.<sup>5</sup>

11. Qualification of China's actions is addressed in the context of Articles on Responsibility.<sup>6</sup>

12. When examining the issue of China's obligation to compensate for the losses incurred by other States, the reference is made to the problems with the establishment of a causal link between the internationally wrongful act and the injury from and ascribable to such act.<sup>7</sup> In this regard, it was indicated that it would be important to analyze various standards for establishing such a link referred to by the International Court of Justice (hereinafter, "ICJ") in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and the *Corfu Channel* cases.<sup>8</sup>

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<sup>2</sup> Similar issue is already under consideration in national courts, see more URL: <https://www.bbc.com/news/business-52364797>.

<sup>3</sup> J. Kraska. China is legally responsible for COVID-19 damage and claims could be in the trillions. URL: <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>; R.R. Bagares. China, international law, and COVID-19. URL: <https://opinion.inquirer.net/128226/china-international-law-and-covid-19>; M. Introvigne. Coronavirus: CCP Beware, the Lawyers Are Coming. URL: <https://bitterwinter.org/coronavirus-ccp-beware-the-lawyers-are-coming/>; D. Fidler. COVID-19 and International Law: Must China Compensate Countries for the Damage? URL: <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/>; R.R. Bagares. China's international responsibility for the COVID-19 pandemic (Part 1). URL: <https://news.abs-cbn.com/spotlight/03/25/20/chinas-international-responsibility-for-the-covid-19-pandemic>.

<sup>4</sup> J. Kraska. Op cit.; R.R. Bagares. China's international responsibility for the COVID-19 pandemic (Part 1).

<sup>5</sup> M. Syali. Affixing China's Liability for COVID-19 Spread. URL: <https://moderndiplomacy.eu/2020/03/31/affixing-chinas-liability-for-covid-19-spread/>.

<sup>6</sup> J. Kraska. Op cit.; L. Bergkamp. State Liability for Failure to Control the COVID-19 Epidemic – International and Netherlands Law. URL: <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/state-liability-for-failure-to-control-the-covid19-epidemic-international-and-netherlands-law/5250CAA5A15C0D9FB9EA490404BA1AE4>.

<sup>7</sup> D. Fidler. Op cit.

<sup>8</sup> R.R. Bagares. China's international responsibility for the COVID-19 pandemic (Part 2). URL: <https://verafiles.org/articles/chinas-international-responsibility-covid-19-pandemic-part-2>; R.R. Bagares. China, international law, and COVID-19.

13. In addition, it is noted that there might be jurisdictional problems related to claims against China.<sup>9</sup>

14. As such, dispute settlement in accordance with the IHR requires recourse to a two-step mechanism implemented in consecutive stages: in the first instance, the States Parties concerned shall seek to settle the dispute through negotiation or any other peaceful means; in the second instance, if the dispute is not settled the States Parties concerned may refer the dispute to the Director-General upon mutual agreement. If the dispute is not resolved that way, then in accordance with Article 56(3) of the IHR it can be settled by arbitration if China does consent to it, which is considered very unlikely.<sup>10</sup>

15. In this regard, attempts are being made to prove that the ICJ has jurisdiction over disputes under Article 75 of WHO Constitution, according to which any question or dispute concerning the interpretation or application of the Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the ICJ. This being said, it is suggested that the conduct of a State that does not comply with the IHR might lead to the breach of the following provisions of the WHO Constitution (and, consequently, to the ICJ having jurisdiction over the corresponding dispute):

- Articles 21 and 22 that grant the World Health Assembly the authority to adopt regulations similar to the International Health Regulations and indicate the process of the regulations coming into force;
- Article 64 that entrusts States with a duty to provide statistical and epidemiological reports in a manner to be determined by the Health Assembly;
- Article 63, whereby a State has an obligation to communicate promptly to the WHO important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned;
- Article 37, whereby a State must refrain from attempts to influence Director-General and the staff of the WHO;
- Article 1 that constitutes the object and purpose of the WHO Constitution, which would be the attainment by all peoples of the highest possible level of health.<sup>11</sup>

16. In light of the problems with the implementation of dispute settlement mechanisms, it is suggested to take countermeasures against China in accordance with the Articles on Responsibility.<sup>12</sup>

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<sup>9</sup> R.R. Bagares. China, international law, and COVID-19; R.R. Bagares. China's international responsibility for the COVID-19 pandemic (Part 2).

<sup>10</sup> P. Tzeng. Taking China to the International Court of Justice over COVID-19. URL: <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>; P.A. Villarreal. The (not-so) Hard Side of the IHR: Breaches of Legal Obligations. URL: <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/the-not-so-hard-side-of-the-ih-r-breaches-of-legal-obligations-26-02-2020>.

<sup>11</sup> P. Tzeng. Op cit.

<sup>12</sup> J. Kraska. Op cit.



## 2. Assessment of States' response to the COVID-19 pandemic in the light of the IHR

17. Article 43 of the IHR limits the measures States can implement when addressing public health risks to those based on scientific principles and data, commensurate with the risks involved, and anchored in human rights. The purpose of this provision is to ensure that States do not take needless measures that harm people or disincentivize States from reporting new risks to international public health authorities.

18. It is noted that many measures taken by States in response to the COVID-19 pandemic violate the IHR. The following arguments are given to support this view:

- most travel restrictions are not based on scientific data or WHO guidelines, which violates Article 43(2) of the IHR;
- when imposing travel restrictions, States fail to comply with Article 43(1)(5) which requires the measures to be no more restrictive than reasonably available alternatives;
- certain measures violate the principles envisaged by Article 3 of the IHR by being discriminatory;
- States often fail to comply with the requirements of Articles 43(3) and 43(5) that establish the legal requirement to promptly report the imposed restrictions to the WHO.<sup>13</sup>

19. Herewith, it is indicated that some States, on the contrary, have not acted with due diligence while preparing for and responding to the pandemic and have not always taken the necessary measures and followed WHO's recommendations.<sup>14</sup> Furthermore, the issue of the legal effects of States' deviation from the WHO's recommendations remains open.<sup>15</sup>

## 3. The COVID-19 pandemic as a circumstance precluding wrongfulness

20. It is discussed whether it would be permissible for States, should they fail to perform obligations under international law as a result of their efforts to address the COVID-19 pandemic, to rely on any of the defenses that preclude wrongfulness in accordance with the Articles on Responsibility. It is noted that Articles 23 (force majeure),<sup>16</sup> 24 (distress), and 25 (state of necessity) might be the most relevant in this regard.<sup>17</sup>

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<sup>13</sup> R. Habibi, G.L. Burci. Th.C. Campos, et al., Do not violate the International Health Regulations during the COVID-19 outbreak. URL: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30373-1/fulltext#box1](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30373-1/fulltext#box1); B.M. Meier, R. Habibi, Y.T. Yang. Travel restrictions violate international law. URL: <https://science.sciencemag.org/content/367/6485/1436.2>; G.L. Burci. The Outbreak of COVID-19 Coronavirus: are the International Health Regulations fit for purpose? URL: <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>.

<sup>14</sup> T.S. Dias, A. Coco. Part III: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak. URL: <https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>.

<sup>15</sup> P.A. Villarreal. Can They Really Do That? States' Obligations Under the International Health Regulations in Light of COVID-19 (Part I). URL: <http://opiniojuris.org/wp-content/uploads/B.-Sander-J.-Rudall-eds-COVID-19-and-International-Law-Opinio-Juris-Symposium-copy-1.pdf>; P.A. Villarreal. The (not-so) Hard Side of the IHR: Breaches of Legal Obligations.

<sup>16</sup> F. Paddeu, F. Jephcott. COVID-19 and Defences in the Law of State Responsibility: Part I. URL: <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>.

<sup>17</sup> F. Paddeu, F. Jephcott. COVID-19 and Defences in the Law of State Responsibility: Part II. URL: <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>.

21. It is noted, however, that the criteria for a force majeure are unlikely to be met, whereas State's activities that potentially breach its international obligations are voluntary: a State independently makes a decision to introduce measures to control or mitigate the crisis.<sup>18</sup>

22. Contrary to that, conditions for the state of necessity can be fulfilled, but most likely it will be difficult to prove that the measures taken to contain and mitigate the consequences of the pandemic are the only way to protect an essential interest and that, moreover, they did not contribute to the situation.<sup>19</sup>

23. In this regard, it is suggested that reference to distress is the most promising approach for a State to preclude the wrongfulness of its conduct.<sup>20</sup>

24. However, it is pointed out that the admissibility of reference to any of the specified circumstances will depend on the specific obligations allegedly breached, the specific measures impugned, and the timing of the epidemic.<sup>21</sup>

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<sup>18</sup> F. Paddeu, F. Jephcott. COVID-19 and Defences in the Law of State Responsibility: Part I.

<sup>19</sup> F. Paddeu, F. Jephcott. COVID-19 and Defences in the Law of State Responsibility: Part II.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

## II. INTERNATIONAL HUMAN RIGHTS LAW

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25. In general, it is noted that international human rights law guarantees everyone the right to the highest attainable standard of health and obligates governments to take steps to prevent threats to public health and to provide medical care to those who need it. Herewith, it is believed that the COVID-19 pandemic clearly rises to the level of a public health threat that could justify restrictions on certain rights and freedoms.<sup>22</sup>

26. It is noted that such restrictions should be introduced on the basis of the rule of law, openness, and transparency, they must be absolutely necessary, proportionate, and scientifically substantiated, they cannot be discriminatory or unlimited in time. In addition, the imposition of restrictions should ensure respect for human dignity and human rights.<sup>23</sup>

27. The application of various measures aimed at combating the COVID-19 pandemic should not lead to violations of people's rights to privacy, freedom from discrimination, freedom of information, and freedom of expression.<sup>24</sup> Such rights can be restricted, for instance, the freedom of expression can be limited in terms of dissemination of false information. However, any restrictions should ensure a balance of human rights and public interests: in the context of the COVID-19 pandemic, a State has a negative obligation not to disseminate false information and positive obligation to provide true, accurate and reliable information, whereas such information becomes an important part of the fight against the spread of the virus.<sup>25</sup> At the same time, confronting disinformation about the COVID-19 should not disproportionately restrict the press freedom.<sup>26</sup>

28. In the context of restrictions and protection of human rights during the COVID-19 pandemic, activities within the framework of the Council of Europe should be separately underlined.

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<sup>22</sup> See, e.g., Human Rights Watch. Human Rights Dimensions of COVID-19 Response. URL: <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>; European Union Agency for Fundamental Rights. Coronavirus pandemic in the EU – Fundamental Rights Implications - Bulletin 1. URL: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf).

<sup>23</sup> UN. COVID-19 and Human Rights; We are all in this together. URL: [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf); Statement by the UN High Commissioner for Human Rights. URL: <https://news.un.org/ru/story/2020/03/1373871>; Statement by the Director-General of WHO. URL: <https://news.un.org/ru/story/2020/04/1375922>; The United Nations Department of Global Communications. Protecting human rights amid COVID-19 crisis. URL: <https://www.un.org/en/un-coronavirus-communications-team/protecting-human-rights-amid-covid-19-crisis>; UNAIDS. Rights in the time of COVID-19. Lessons from HIV for an effective, community-led response. URL: [https://www.unaids.org/sites/default/files/media\\_asset/human-rights-and-covid-19\\_ru.pdf](https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_ru.pdf); Human Rights Watch. Op cit.; European Union Agency for Fundamental Rights. Op cit.; S. Zarifi, K. Powers. Human Rights in the Time of COVID-19–Front and Centre. URL: <https://opiniojuris.org/2020/04/06/covid-19-human-rights-in-the-time-of-covid-19-front-and-centre/>; S. Sceats. COVID-19 Brings Human Rights into Focus. URL: <https://www.chathamhouse.org/expert/comment/covid-19-brings-human-rights-focus>.

<sup>24</sup> URL: <https://news.un.org/ru/story/2020/03/1374692>; COVID-19: States should not abuse emergency measures to suppress human rights – UN experts. URL: <https://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=R>.

<sup>25</sup> M. Milanovic. Viral Misinformation and the Freedom of Expression: Part I. URL: <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-i/>; M. Milanovic. Viral Misinformation and the Freedom of Expression: Part II. URL: <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-ii/>; M. Milanovic. Viral Misinformation and the Freedom of Expression: Part III. URL: <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-iii/>.

<sup>26</sup> Statement by the Commissioner for Human Rights. Press freedom must not be undermined by measures to counter disinformation about COVID-19. URL: <https://www.coe.int/ru/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>; Statement by the Council of Europe's Committee of experts on media environment and reform. URL: <https://www.coe.int/en/web/freedom-expression/-/freedom-of-expression-and-information-in-times-of-crisis>.

29. On April 7, 2020, the Secretary General of the Council of Europe issued a toolkit on respecting democracy, rule of law and human rights in the framework of COVID-19 sanitary crisis for the member States of the Council of Europe.<sup>27</sup> The document highlights four key issues:

- derogation from the European Convention in times of emergency in accordance with its Article 15;
- respect for the rule of law and democratic principles in times of emergency;
- fundamental human rights standards;
- protection from crime and the protection of victims of crime.<sup>28</sup>

30. With regard to the *first issue*, the document, in particular, reminds that a number of conditions must be met when derogating from the ECHR provisions, including:

- 1) the introduced measures should not contradict other obligations of a State under international law;
- 2) no derogation is admissible from rights provided for in Articles 2 (the right to life, except in the context of lawful acts of war), 3 (the prohibition of torture), 4 (1) (the prohibition of slavery and servitude), 7 (the rule of “no punishment without law”);
- 3) the Secretary General of the Council of Europe must be fully informed of the measures taken, of the reasons therefore, of the moment these measures have ceased to operate, as well as of resumption of application of ECHR provisions without any derogations.<sup>29</sup>

31. It is noted that any such measure can be assessed for compliance with all the necessary criteria by the European Court of Human Rights (hereinafter, “**ECtHR**”, “**European Court**”).<sup>30</sup>

32. In addition, the document states that:

“A derogation under Article 15 is not contingent on the formal adoption of the state of emergency or any similar regime at the national level. At the same time, any derogation must have a clear basis in domestic law in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency. States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness. While derogations have been accepted by the [European] Court to justify some exceptions to the Convention standards, they can never justify any action that goes against the paramount Convention requirements of lawfulness and proportionality.”

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<sup>27</sup> URL: <https://www.coe.int/ru/web/porta/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>.

<sup>28</sup> Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states. Information Documents, SG/Inf(2020)11. 7 April 2020.

<sup>29</sup> It is suggested that in accordance with the Resolution 2209 (2018) of the Parliamentary Assembly of the Council of Europe (“State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”), the Secretary General of the Council of Europe can supervise derogations from the ECHR. K. Istrefi. Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe. URL: <https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/>.

<sup>30</sup> On the role of European Court in a situation with the COVID-19 pandemic. See, e.g., K. Dzehtsiarou. What Can the European Court of Human Rights Do in the Time of Crisis? URL: [https://strasbourgobservers.com/2020/04/14/what-can-the-european-court-of-human-rights-do-in-the-time-of-crisis/?fbclid=IwAR04\\_DsZz1jJgcFzlleMrIpl8Tb6qTVX-1zqv6yKQQsRlhFC-NDZ0aM1qK8](https://strasbourgobservers.com/2020/04/14/what-can-the-european-court-of-human-rights-do-in-the-time-of-crisis/?fbclid=IwAR04_DsZz1jJgcFzlleMrIpl8Tb6qTVX-1zqv6yKQQsRlhFC-NDZ0aM1qK8).

33. It is noted that in order to ensure transparency, additional oversight and supervision, and, accordingly, to ensure the proper level of protection of human rights during a state of emergency, it is important that a State introduces the regime *de jure* and, when introducing emergency measures restricting rights and freedoms, uses Article 15 of ECHR.<sup>31</sup> At the same time, the analysis of the practice of the European Court and its predecessor – the European Commission on Human Rights – does not allow us to conclude whether notification of the Secretary General of the Council of Europe provided for in Article 15 (3) of the ECHR is a prerequisite for recognizing the legitimacy of the relevant derogations: an opinion is expressed that such notification on derogations from the ECHR in some form is mandatory.<sup>32</sup>

34. As of April 27, 2020, declarations of derogation from certain provisions of the European Convention based on Article 15 of ECHR in connection with the COVID-19 pandemic<sup>33</sup> have been submitted by the Republic of Albania,<sup>34</sup> the Republic of Armenia,<sup>35</sup> the Republic of Estonia,<sup>36</sup> Georgia,<sup>37</sup> the Republic of Latvia,<sup>38</sup> the Republic of Northern Macedonia,<sup>39</sup> the Republic of Moldova,<sup>40</sup> Romania,<sup>41</sup> the Republic of San Marino,<sup>42</sup> the Republic of Serbia.<sup>43</sup>

35. In relation to the **second issue**, it is noted that:

- 1) the rule of law must prevail even in an emergency situation;
- 2) operation of the emergency regime, as well as measures taken should be limited to a certain period;

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<sup>31</sup> A. Greene. States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic. URL: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>; see also, M. Scheinin. COVID-19 Symposium: To Derogate or Not to Derogate? URL: <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>. In contrast to this position, it is noted that the use of Article 15 of ECHR in the context of the COVID-19 pandemic can be of limited use, since unlawful actions by a State will in any case remain as follows: any restrictions on rights in accordance with Article 15 must meet certain criteria, including being legal, proportionate and necessary, see K. Dzehtsiarou. COVID-19 and the European Convention on Human Rights. URL: <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/#more-4563>.

<sup>32</sup> N. Holcroft-Emmess. Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification. URL: <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/>; On derogations from various international human rights instruments, see also K. Istrefi, I. Humburg. To Notify or Not to Notify: Derogations from Human Rights Treaties. URL: [http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29](http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29).

<sup>33</sup> Texts of the relevant declarations are available on the Council of Europe website. URL: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=oC00wpDO](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO). Analysis of some of the provided declarations see, e.g., in P. Zghibarta. The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19. URL: <https://www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/>.

<sup>34</sup> Declaration of derogation from Articles 8 and 11 of the European Convention, Articles 1 and 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention.

<sup>35</sup> General declaration of derogation from the provisions of the European Convention in accordance with Article 15 (without reference to certain articles of the European Convention).

<sup>36</sup> Declaration of derogation from Articles 5, 6, 8 and 11 of the European Convention, Articles 1 and 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention.

<sup>37</sup> Declaration of derogation from Articles 5, 8 and 11 of the European Convention, Articles 1 and 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention. A brief analysis of Georgia's statement is presented in N. Holcroft-Emmess. Coronavirus: States Derogating to Suspend Human Rights Obligations. URL: <http://ohrh.law.ox.ac.uk/coronavirus-states-derogating-to-suspend-human-rights-obligations/>.

<sup>38</sup> Declaration of derogation from Articles 8 and 11 of the European Convention, Article 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention.

<sup>39</sup> Declaration of derogation from Articles 8 and 11 of the European Convention, Article 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention.

<sup>40</sup> Declaration of derogation from Article 11 of the European Convention, Article 2 of the Additional Protocol to the European Convention, as well as Article 2 of the Protocol No. 4 to the European Convention.

<sup>41</sup> General declaration of derogation from the provisions of the European Convention in accordance with Article 15 (without reference to certain articles of the European Convention).

<sup>42</sup> General declaration of derogation from the provisions of the European Convention in accordance with Article 15 (without reference to certain articles of the European Convention).

<sup>43</sup> General declaration of derogation from the provisions of the European Convention in accordance with Article 15 (without reference to certain articles of the European Convention).

3) the principle of necessity, which requires that emergency measures must be capable of achieving their purpose with minimal alteration of normal rules and procedures of democratic decision-making, must be observed;

4) an emergency situation may call for simplification of decision-making procedures and easing of some checks and balances, as well as bypassing the standard division of competences between local, regional, and central authorities. Full rights of local and regional authorities shall be re-established as soon as the situation allows it.

36. The **third set** addresses issues related to standards of restriction and protection of human rights provided for in:

1) Articles 2 (the right to life) and 3 (the prohibition of torture and inhuman or degrading treatment or punishment) of the European Convention, derogation from which is impossible. It is noted that these articles provide for a positive obligation of States to protect people in state care against deadly diseases and the ensuing suffering.<sup>44</sup> In particular, the European Convention requires any member State to ensure an adequate level of medical care for people deprived of their liberty.<sup>45</sup> Beyond people in the States' care, responsibility under Articles 2 and 3 of the European Convention may be invoked in respect of severely ill patients, people with disabilities, or elderly persons.<sup>46</sup> It is indicated that this positive obligation is further confirmed by Article 11 of the European Social Charter (revised). In addition, it is noted that such attention to vulnerable groups would be consistent with the peoples' right to equitable access to health care, as provided for in Article 3 of the Convention for the protection of Human Rights and Dignity of the Human

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<sup>44</sup> For more information on positive obligations of States in the context of the COVID-19 pandemic to protect the right to life provided for in Article 2 of the European Convention, see, e.g., E.S. Bates. Article 2 ECHR's Positive Obligations – How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic? URL: <https://opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/>.

<sup>45</sup> The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment prepared the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, which reminds "the absolute nature of the prohibition of torture and inhuman or degrading treatment" and pointed out that "measures must never result in inhuman or degrading treatment of persons deprived of their liberty". The Statement contains ten principles for the treatment of persons deprived of their liberty, which should be applied by all relevant authorities in charge of persons deprived of their liberty (including police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes, as well as in various newly-established facilities/zones where persons are placed in quarantine). URL: <https://rm.coe.int/16809cfa4d>. See also Statement of the Commissioner for Human Rights. COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe. URL: <https://www.coe.int/ru/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe>; UN High Commissioner for Human Rights. Urgent action needed to prevent COVID-19 "rampaging through places of detention". URL: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>; Inter-Agency Standing Committee. Interim Guidance – COVID-19: Focus on Persons Deprived of their Liberty. URL: <https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf>; T. Cadman. The Impact of Coronavirus (COVID-19) on Prisoners. URL: <https://opiniojuris.org/2020/04/01/covid-19-symposium-the-impact-of-coronavirus-covid-19-on-prisoners/>.

<sup>46</sup> In this regard, see, e.g., Recommendation CM/Rec (2014) 2 on the promotion of human rights of older persons. URL: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c649f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c649f); Commissioner for Human Rights. Older persons need more support than ever in the age of the Covid-19 pandemic. URL: [https://www.coe.int/ru/web/commissioner/thematic-work/covid-19/-/asset\\_publisher/5cdZW0AJBMLL/content/older-persons-need-more-support-than-ever-in-the-age-of-the-covid-19-pandemic?inheritRedirect=false&redirect=https%253A%252F%252Fwww.coe.int%252Fen%252Fweb%252Fcommissioner%252Fthematic-work%252F%252F%252Fp\\_id%253D101\\_INSTANCE\\_5cdZW0AJBMLL%2526p\\_p\\_lifecycle%253D0%2526p\\_p\\_state%253Dnormal%2526p\\_p\\_mode%253Dview%2526p\\_p\\_col\\_id%253Dcolumn-1%2526p\\_p\\_col\\_count%253D1](https://www.coe.int/ru/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLL/content/older-persons-need-more-support-than-ever-in-the-age-of-the-covid-19-pandemic?inheritRedirect=false&redirect=https%253A%252F%252Fwww.coe.int%252Fen%252Fweb%252Fcommissioner%252Fthematic-work%252F%252F%252Fp_id%253D101_INSTANCE_5cdZW0AJBMLL%2526p_p_lifecycle%253D0%2526p_p_state%253Dnormal%2526p_p_mode%253Dview%2526p_p_col_id%253Dcolumn-1%2526p_p_col_count%253D1); Commissioner for Human Rights. Older persons need more support than ever in the age of the Covid-19 pandemic. URL: [https://www.coe.int/ru/web/commissioner/thematic-work/covid-19/-/asset\\_publisher/5cdZW0AJBMLL/content/persons-with-disabilities-must-not-be-left-behind-in-the-response-to-the-covid-19-pandemic?inheritRedirect=false&redirect=https%253A%252F%252Fwww.coe.int%252Fen%252Fweb%252Fcommissioner%252Fthematic-work%252F%252F%252Fp\\_id%253D101\\_INSTANCE\\_5cdZW0AJBMLL%2526p\\_p\\_lifecycle%253D0%2526p\\_p\\_state%253Dnormal%2526p\\_p\\_mode%253Dview%2526p\\_p\\_col\\_id%253Dcolumn-1%2526p\\_p\\_col\\_count%253D1](https://www.coe.int/ru/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLL/content/persons-with-disabilities-must-not-be-left-behind-in-the-response-to-the-covid-19-pandemic?inheritRedirect=false&redirect=https%253A%252F%252Fwww.coe.int%252Fen%252Fweb%252Fcommissioner%252Fthematic-work%252F%252F%252Fp_id%253D101_INSTANCE_5cdZW0AJBMLL%2526p_p_lifecycle%253D0%2526p_p_state%253Dnormal%2526p_p_mode%253Dview%2526p_p_col_id%253Dcolumn-1%2526p_p_col_count%253D1).



Being with regard to the Application of Biology and Medicine (the Oviedo Convention).<sup>47</sup> Finally, the document states that under both the European Convention and the European Social Charter, States have a duty to inform the population about the known risks related to the pandemic and about behaviors or measures to avoid spreading the disease;<sup>48</sup>

2) Articles 5 (the right to liberty and security) and 6 (the right to a fair trial);

3) Articles 8 (the right to private life),<sup>49</sup> 9 (freedom of conscience), 10 (freedom of expression),<sup>50</sup> and 11 (freedom of association). Limitation of these rights and freedoms is permissible only if relevant restrictions are clearly established by law, with relevant constitutional guarantees, and proportionate to the aim they pursue;

4) Article 14 of the European Convention (the prohibition of discrimination), Article 1 of the Protocol No. 12 to the European Convention (the general prohibition of discrimination), and Article E of the European Social Charter (the prohibition of discrimination). The measures taken today in the framework of the fight against the spread of the virus are likely to raise questions as to their potential discriminatory consequences. In this regard, it is noted that measures taken by States should not discriminate unjustifiably between different categories of persons.

37. Finally, as part of the **fourth set of issues**, it is noted that the pandemic is followed by many problems. In particular, more and more reports are received showing that the policy of isolation and confinement leads to increased levels of domestic, sexual and gender-based violence; computer fraud and medical products counterfeiting are becoming more frequent.<sup>51</sup> As a result, in this context, there is a heightened need of the protection from crime, as well as the protection of rights of victims of crime.

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<sup>47</sup> For more on the principles of access to care in the context of the Oviedo Convention, see DH-BIO Statement on human rights considerations relevant to the COVID-19 pandemic. URL: <https://rm.coe.int/inf-2020-2-statement-covid19-e/16809e2785>; for more on the right to health in times of the COVID-19 pandemic see T.F. Hodgson, I. Seiderman. COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1). URL: <https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>; T.F. Hodgson, I. Seiderman. COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2). URL: <https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>.

<sup>48</sup> For more on the obligations of States to ensure the right to life and the right to health in times of the COVID-19 pandemic, see, e.g., A. Coco. Part I: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak. URL: <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>.

<sup>49</sup> For more information on personal data protection, see COVID-19 Data Protection. URL: <https://www.coe.int/en/web/data-protection/covid-19-data-protection>.

<sup>50</sup> For standards of protection of the freedom of expression, see Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. URL: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805ae60e](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e).

<sup>51</sup> For more information on mechanisms to combat counterfeiting of medical products and States' respective obligations, see The Committee of the Parties of the MEDICRIME Convention. Advice on the application of the MEDICRIME Convention in the context of COVID-19. URL: <https://rm.coe.int/cop-medicrime-covid-19-e/16809e1e25>.

# III. INTERNATIONAL HUMANITARIAN LAW

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38. In the context of the COVID-19 pandemic, a number of issues of international humanitarian law become more acute. In this regard, territories affected by armed conflicts are particularly vulnerable to the spread of the disease.<sup>52</sup> Thus, special attention shall be paid to the following issues:

- protection of categories of persons who are more exposed to the COVID-19 as a result of war or situations of violence. These include people held in places of detention and camps for displaced persons;<sup>53</sup>
- the need for humanitarian reservations in national laws. Such reservations should allow independent and neutral humanitarian organizations to carry out their activities, regardless of which part of the conflict it relates to;<sup>54</sup>
- protection of the red cross emblem. It is expected that national authorities will adopt appropriate regulations protecting the emblem of the red cross and other symbols;<sup>55</sup>
- the need to fight the spread of the COVID-19 cannot itself constitute grounds to hinder impartial humanitarian organizations from carrying out their exclusively humanitarian activities;<sup>56</sup>
- implementation of control measures in respect of humanitarian activities by the authorities should not lead to unjustified delays in humanitarian operations or the impossibility of their implementation.<sup>57</sup>

39. The International Committee of the Red Cross prepared a document on the COVID-19 and the existing IHL norms that should apply to issues of particular importance during the pandemic, such as medical personnel, facilities and transport, access to water, humanitarian relief, persons specifically at risk, children and education, sanctions regimes and other restrictive measures.<sup>58</sup>

40. The problems with exercising public authority by non-State armed groups in the context of the COVID-19 pandemic deserve special attention. In this regard, the following issues come to the fore:

- the need for interaction and cooperation of non-State armed groups with State authorities, humanitarian organizations, and the WHO;

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<sup>52</sup> C. Droegge. COVID-19 response in conflict zones hinges on respect for international humanitarian law. URL: <https://blogs.icrc.org/law-and-policy/2020/04/16/covid-19-response-respect-international-humanitarian-law/>; IHL Rules on Humanitarian Access and COVID-19. URL: <https://www.icrc.org/en/document/covid-19-how-ihl-provides-crucial-safeguards-during-pandemics>.

<sup>53</sup> H. Durham. On the role of IHL in the context of COVID-19 pandemic. URL: <https://www.icrc.org/ru/document/helen-darem-o-rol-i-mgp-v-usloviyah-pandemii-covid-19>.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> IHL Rules on Humanitarian Access and COVID-19. Op cit.

<sup>57</sup> Ibid.

<sup>58</sup> COVID-19 and International Humanitarian Law. URL: <https://www.icrc.org/ru/document/helen-darem-o-rol-i-mgp-v-usloviyah-pandemii-covid-19>.



- assessment of actions of non-State armed groups to combat the COVID-19 for compliance with international human rights law.<sup>59</sup>

41. In addition to that, the duties of occupying powers in relation to the fight against COVID-19 have also been highlighted. A number of international treaties containing IHL and IHRL rules are applicable in such a situation.<sup>60</sup> At the same time, commitments to combat the pandemic shall also be assigned to public authorities of the occupied territories.<sup>61</sup>

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<sup>59</sup> M.D. Kotlik, E. Heffes. COVID-19 in Conflict-Affected Areas – Armed Groups as Part of a Global Solution. URL: <https://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-in-conflict-affected-areas-armed-groups-as-part-of-a-global-solution/>.

<sup>60</sup> M. Longobardo. The Duties of Occupying Powers in Relation to the Fight against Covid-19. URL: <https://www.ejiltalk.org/the-duties-of-occupying-powers-in-relation-to-the-fight-against-covid-19/>; IHL Rules on Humanitarian Access and COVID-19. Op cit.

<sup>61</sup> M. Longobardo. Op cit.

## IV. INTERNATIONAL INVESTMENT LAW

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42. It is assumed that after the end of the pandemic some measures taken by States in response to the COVID-19 might be challenged in investment arbitration (for example, India's actions to restrict the export of pharmaceutical ingredients).<sup>62</sup> Grounds for such challenges can be found in breaches of various obligations, including the breach of the following standards in dealing with investors:

- fair and equitable treatment;
- full protection and security;
- inadmissibility of expropriation without compensation;
- obligations arising out of the so-called umbrella clause;<sup>63</sup>
- national treatment;<sup>64</sup>
- most-favored-nation treatment.<sup>65</sup>

43. In response to that States could seek to invoke various exceptions provisions to justify their actions. Such exceptions may include the introduction of measures under the so-called State's "police powers."<sup>66</sup> Also, assessing the alleged violation of the standard of fair and equitable treatment, the tribunals may proceed from the fact that States have a certain margin of appreciation in determining measures that must be taken in response to the pandemic.<sup>67</sup> In addition, States may refer to exceptions provided for in investment treaties, as well as in the Articles on Responsibility, in particular, Articles 23 (force majeure), 24 (distress), and 25 (state of necessity).<sup>68</sup>

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<sup>62</sup> O. Hailes. Epidemic Sovereignty? Contesting investment treaty claims arising from coronavirus measures. URL: <https://www.ejiltalk.org/epidemic-sovereignty-contesting-investment-treaty-claims-arising-from-coronavirus-measures/>.

<sup>63</sup> Ibid.

<sup>64</sup> L. Bento, J. Chen. Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses. URL: <http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/>.

<sup>65</sup> N.J. Diamond. Pandemics, Emergency Measures, and ISDS. URL: <http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measures-and-isds/>.

<sup>66</sup> N.J. Diamond. Op cit.

<sup>67</sup> O. Hailes. Op cit.

<sup>68</sup> F. Paddeu, K. Parlett. Op cit.

# V. THE LAW OF THE WTO

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## 1. Restrictions on trade in goods

44. Restrictions introduced by a number of States on export of certain categories of medical products and their compliance with the rules on export restrictions under the multilateral framework of the WTO are also being analyzed. It is noted that States may refer to the following provisions of the General Agreement on Tariffs and Trade (GATT) to justify their measures:

- Article XI:2(a) that allows export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- Article XX(b) that authorizes States to take measures otherwise inconsistent with GATT obligations that are aimed at protecting human life or health;
- Article XXI(b)(iii) that allows a State to take any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergencies in international relations.<sup>69</sup>

45. However, due to the fact that trade restrictions can be counterproductive for combating the pandemic, it is proposed to develop the so-called “*inverse-exceptions*” that would allow for immediate trade liberalization due to an overwhelming global concern like the COVID-19 pandemic.<sup>70</sup>

## 2. Intellectual property law

46. There is also a view that the relationship between the legal regulation of the pandemic and international trade law is also relevant in terms of intellectual property protection. The need to strike a balance between the right to access medical treatment and States’ obligations to protect intellectual property in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, “**TRIPS**”) led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health in 2001. This act allows States to resort to the use of compulsory licensing in emergencies or other exceptional circumstances to provide the population with the necessary medical care. It is noted that the COVID-19 pandemic would satisfy the above.<sup>71</sup>

47. In addition to that, it is discussed whether States may rely on Article 73 of the TRIPS to ensure public access to medical treatment. Article 73 of the TRIPS entitles a State to take any

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<sup>69</sup> C. Glöckle. Export restrictions under scrutiny – the legal dimensions of export restrictions on personal protective equipment. URL: <https://www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/>; M. Pinchis-Paulsen. Thinking Creatively and Learning from COVID-19 – How the WTO can Maintain Open Trade on Critical Supplies. URL: <http://opiniojuris.org/wp-content/uploads/B.-Sander-J.-Rudall-eds-COVID-19-and-International-Law-Opinio-Juris-Symposium-copy-1.pdf>.

<sup>70</sup> M. Pinchis-Paulsen. Op cit.

<sup>71</sup> A. Bogdandy, P.A. Villarreal. Op cit.; H.G. Ruse-Khan. Access to Covid-19 Treatment and International Intellectual Property Protection—Part I: Patent protection, voluntary access and compulsory licensing. URL: <https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-i-patent-protection-voluntary-access-and-compulsory-licensing/>.

action which it considers necessary for the protection of its essential security interests taken in time of war or other emergencies in international relations.<sup>72</sup>

### 3. Transparency

48. It is noted that in the context of the COVID-19 pandemic, transparent, efficient information-sharing is crucial to effectively fight the COVID-19. Thus, WTO members are required to formally notify the WTO Secretariat of any measures affecting trade, including new rules and procedures affecting export and import, imposed export restrictions, tariffs and taxes, as well as new customs regulations and transportation rules. This information should be publicly available, including to all WTO members and other concerned parties.<sup>73</sup>

### 4. Other matters

49. It is pointed out that the WHO's recommendations that can be adopted in accordance with Article 18(2) of the IHR, calling for the introduction of restrictive trade measures, could theoretically lead to a conflict with the WTO rules, in particular the WTO Agreement on Application of Sanitary and Phytosanitary Measures. However, as of March 26, 2020, the WHO has not recommended any trade restrictions to combat the pandemic.<sup>74</sup>

50. In addition, subsidies issued to companies by States to support their economy, the rules for the provision of which are enshrined in the WTO Agreement on Subsidies and Countervailing Measures, may become another problem. Such subsidies will be prohibited if they are contingent upon the use of domestic over imported goods or export performance. In addition, such measures to support the economy should be non-discriminatory, as follows from the obligations of States under the WTO framework.<sup>75</sup>

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<sup>72</sup> H.G. Ruse-Khan. Access to Covid-19 Treatment and International Intellectual Property Protection – Part II: National security exceptions and test data protection. URL: <https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-ii-national-security-exceptions-and-test-data-protection/>.

<sup>73</sup> WTO. Transparency – Why It Matters at Times of Crisis. URL: [https://www.wto.org/english/tratop\\_e/covid19\\_e/transparency\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf).

<sup>74</sup> A. Bogdandy, P.A. Villarreal. International Law on Pandemic Response: A Fist Stocktaking in Light of the Coronavirus Crisis. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561650](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650).

<sup>75</sup> For more details with examples of separate US support measures see text and comments thereto: S. Charnovitz. New US Domestic Content Requirement for COVID-19 State Aids. URL: <https://ielp.worldtradelaw.net/2020/04/new-us-domestic-content-requirement-for-state-aids.html>. With respect to the applicable law, see Article 3.1 of the Agreement on WTO Subsidies and Countervailing Measures, Article III: 4 of GATT, Article 2 of the Agreement on investment measures related to trade.

## VI. LAW OF THE SEA, MARITIME LAW, AND RELATED MATTERS

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51. In the situation of the COVID-19 pandemic, it is especially important to facilitate the cross-border movement of not only relief goods, but goods in general, to help minimize the overall impact of the COVID-19 pandemic on economies and societies.

52. In this regard, customs administrations and port State authorities, together with all concerned agencies, are strongly urged to establish a coordinated and proactive approach to ensure the integrity and continued facilitation of the global supply chain so that the flow of goods by sea is not unnecessarily disrupted.<sup>76</sup>

53. The WHO and the International Maritime Organization (hereinafter, “**IMO**”) have adopted a joint statement, indicating, inter alia, that measures taken by States in response to the pandemic should be introduced in such a way as to minimize interference with international trade.<sup>77</sup> The European Commission has also adopted the Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships.<sup>78</sup> They are aimed at promoting the continuity of maritime transportation while ensuring adequate response to humanitarian and sanitary crises.

54. In addition, the IMO has issued a series of circular letters addressing global issues pertaining to seafarers and shipping in the context of the COVID-19 outbreak.<sup>79</sup> They call for cooperation at the international level in order to guarantee the rights of everyone in the current crisis.

55. Restrictive measures taken by a number of States, ranging from indiscriminate prohibitions on access to ports to measures discriminating between ships on account of their nationality or based on objective considerations, are analyzed for compliance with international law on access to ports. The following aspects are noted in this context:

- in the view of Articles 28(1), 28(2), 43(1), 43(2), and 43(3) of the IHR, States are endowed with limited powers with respect to providing access to their ports even during the pandemic;
- in accordance with Article 24(2)(b) of the United Nations Convention on the Law of the Sea, Article 4.7 of the Annex to the Convention on Facilitation of International Maritime Traffic, and Article 42 of the IHR, States are not entitled to discriminate between ships which fly the flag of the port State and other ships, or between seafarers according to their nationality;

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<sup>76</sup> Joint WCO-IMO statement on the integrity of the global supply chain during the COVID-19 pandemic. URL: [http://www.wcoomd.org/en/media/newsroom/2020/april/joint-wco\\_imo-statement-on-the-integrity-of-the-global-supply-chain.aspx](http://www.wcoomd.org/en/media/newsroom/2020/april/joint-wco_imo-statement-on-the-integrity-of-the-global-supply-chain.aspx).

<sup>77</sup> WHO and IMO. A Joint Statement on the Response to the COVID-19 Outbreak. URL: [http://www.imo.org/en/MediaCentre/HotTopics/Documents/Joint%20Statement\\_COVID-19.pdf](http://www.imo.org/en/MediaCentre/HotTopics/Documents/Joint%20Statement_COVID-19.pdf).

<sup>78</sup> Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships. URL: <https://ec.europa.eu/transport/sites/transport/files/legislation/c20203100.pdf>.

<sup>79</sup> URL: <http://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx>.

- according to Articles 2.17-2.24 of the Annex to the Convention on Facilitation of International Maritime Traffic and Article 28(6) of the IHR, States must allow disembarkation in the event of a medical emergency on board (however, some States have stated with regard to the pandemic that their ports lack the necessary requirements to be classified a “place of safety”. Therefore, such States cannot fulfill their obligations provided for in paras 3.1.6, 3.1.9 and 4.8.5 of the International Convention on Maritime Search and Rescue, which require States to provide a safe place for rescued persons after disembarkation<sup>80</sup>);
- in the view of Rule 2.5 of the Maritime Labor Convention, shipowners are obliged to cover the expenses associated with the right of seafarers to repatriation or a safe stay in the country of disembarkation. However, the fulfillment of this obligation is only possible if the flag State and the port State ensure proper cooperation.<sup>81</sup>

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<sup>80</sup> A.M. Pelliconi. Covid-19: Italy is not a “place of safety” anymore. Is the decision to close Italian ports compliant with human rights obligations? URL: <https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/>.

<sup>81</sup> A. Miron. Port Denials and Restrictions in Times of Pandemic: Did International Law Lose its North Star? URL: <https://www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/>; A. Miron. Port Denials: What are States’ International Obligations? URL: <https://www.maritime-executive.com/editorials/port-denials-what-are-states-international-obligations>.

