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Positive obligations to protect life and health according to the ECHR

The limits of the positive obligations and the balancing of rights, focusing on the rights of children during the Covid-19 pandemic.

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Master's thesis in Law, JUR-3901, Spring 2024

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1. Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention of Human Rights (ECHR, the Convention) came into force in 1953.[1] The Convention obliges the High Contracting Parties (States) to respect human rights.[2] The Convention is subject to the "supervisory jurisdiction" of the European Court of Human Rights (ECtHR, the Court).[3]

According to Article 1 of the ECHR, States "shall secure to everyone within their jurisdiction the rights and freedoms", defined in section I of the Convention.

The States have different types of obligations under the Convention, namely negative and positive, procedural and substantive. What then, when a major disruptive event such as the Covid-19 pandemic or a similar health emergency happens? How shall the States make sure that they respect human rights trying to handle the situation?

There are tools for States to be able to handle situations in compliance with their human rights obligations. The protection of the right to life according to the ECHR imposes an obligation on the State not to deprive a person of life, which is a negative obligation. However, a situation like the Covid-19 pandemic, does not involve States taking lives; States are obliged to protect the right to life from outside threats. In other words, States must take active steps to protect the right to life. This is where the positive obligations appear.

Several books and articles have been written about positive obligations in general and in different circumstances.[4] With this thesis I would like to take a closer look at challenges that society and States met during the Covid-19 pandemic, especially regarding the rights and

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04 November 1950, Entry into force 03 September 1953.
[2] Article 1 of the ECHR.
[3] See the preamble of the Convention.
[4] To name a few: Akandji-Kombe, J. (2007*)* Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights, *Council of Europe Publishing,* https://rm.coe.int/168007ff4d; Kilkelly, U. (2010). Protecting children's rights under the ECHR: the role of positive obligations. *Northern Ireland Legal Quarterly*, *61*(3), p. 245–261, https://doi.org/10.53386/nilq.v61i3.453; Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press. https://doi.org/10.1093/oso/9780192888044.001.0001; Voigt, C. (2022). The climate change dimension of human rights: due diligence and states' positive obligations*. Journal of Human Rights and the Environment*, *13*, p. 152–171, https://doi.org/10.4337/jhre.2022.00.05.

interests of children, to analyze if measures imposed during the pandemic complied with human right guarantees under the ECHR, and to consider if the pandemic should, or could, have been handled in a different manner. It is worth noting that there are cases pending before the ECtHR considering human rights during the Covid-19 pandemic,[5] which may provide further interpretations by the ECtHR.

As already mentioned, the apparent risk to the life of individuals within the jurisdiction of the States was one of the major challenges during the pandemic and the reason for States` decision to impose a lockdown which in itself led to other, social and economic, challenges. Among other things, closing schools, kindergarten, businesses, leisure activities, issues revolving around "vaccine" and testing, and social distancing in general.

This thesis focuses on the challenges facing children and their rights during the pandemic. The pandemic affected children in many ways. To illustrate, the closing of the schools and kindergartens affected children's education and social life. Their leisure activities – both physical and intellectual were limited too. Children were not only affected directly by closing schools etc. but also indirectly. When businesses closed, parents lost their jobs, and this might have affected families in a negative way, such as, the family economic is put under pressure, adding stress to the parents, and because of this affecting the children of these families.

In other words, several sides of children's life were affected. This will be elaborated more throughout the thesis.

Children are especially vulnerable,[6] and therefore it is especially important to look at their rights, to make sure that they are seen during pandemics and other emergencies, and that their voices are being heard. At the same time, the right to life and health are fundamental rights for all individuals. How can States make sure that all rights are adequately considered and balanced when taking such important and intrusive measures as those imposed during the Covid-19 pandemic?

I will therefore focus primarily on the States positive obligations under the ECHR that arise in a situation of health emergency similar to the Covid-19 pandemic, and by doing this, my hope

[5] Among others: M.C.K and M.H.K.-B and others v. Germany, app.no 26657/22, January 2023 (Communicated case).
[6] E and others v. the United Kingdom, app.no 33218/96, 26 November 2002, § 88; C.A.S and C.S. v. Romania, app.no 26692/05, 20 March 2012, § 71 and 81; M.H. and others v. Croatia, app.no 15670/18 and 43115/18, 18 November 2021, § 184.

is that future pandemics can be met with a broader knowledge and make it easier for States to act in accordance with human rights.

1.1 Objective and research questions

The Covid-19 pandemic has had a massive impact on the whole world, in many different aspects. One important aspect is human rights. A lot of countries introduced several restrictive laws and measures on individuals within their jurisdiction.[7] The reason for this is that the States have several obligations to protect those within their jurisdiction. This again raises a lot of questions, e.g. how States assessed the proportionality of their actions.

However, it is not always clear how far States` obligations go, and what are their limits?

Therefore, it is important to take a closer look on States` obligations under the ECHR, and also how the handling of the pandemic can be seen in legal terms. Did States act in accordance with the ECHR imposing lockdowns and closing schools? When municipalities themselves could decide to close schools and other activities?

The negative obligations have been more in focus earlier, as the negative obligation clearly follows from the text of the ECHR. As an example, "No one shall be", which can be seen in Articles 2, 3, 4, 5 and 7, gives a clear obligation for the State not to do something. In the last six or seven decades the positive obligations have been developed and applied by the ECtHR in its case law, which I will present through the thesis.

As mentioned above, children are vulnerable,[8] especially in a pandemic situation, or a health emergency. The objective of this thesis is therefore to analyze some of the positive obligations deriving from the ECHR, more specific, the States positive obligations to protect life and health, and their limits, and look closer on how they were, or should be, balanced against the rights of children, according to the ECHR. In other words, what standards apply

[7] European Parliament, Directorate-General for Internal Policies of the Union, Grogan, J. (2022). Impact of COVID-19 measures on democracy and fundamental rights : best practices and lessons learned in the Member States and third countries*, European Parliament*. https://data.europa.eu/doi/10.2861/795862; European Parliament, Directorate-General for Internal Policies of the Union, Marzocchi, O. (2020). The impact of Covid-19 measures on democracy, the rule of law and fundamental rights in the EU*, European Parliament*. https://data.europa.eu/doi/10.2861/517188

[8] E and others v. the United Kingdom, app.no 33218/96 26. November 2002, § 88; C.A.S and C.S v Romania, app.no 26692/05, 20 March 2012, §§ 71 and 81; M.H and others v Croatia, app.no 15670/18 and 43115/18, 18 November 2021, § 184.

when States must balance different conflicting obligations? More specifically, my main question is, during a pandemic, or a similar health emergency, what are the limits of the positive obligation of the State to protect life and health, and how should it be balanced against the rights of children?

1.2 Scope of the thesis

There are many sides to the positive obligations to protect life and health according to the ECHR. To explore and analyze all of them would have a larger scale then possible in the frame of a master`s thesis. Therefore, I will delimit the scope of my thesis to give a more basic overview of the limits of the positive obligations mentioned. I will focus on Article 2, 3 and 8 of the ECHR, which are most relevant for the topic. However, regarding the right to education, which is also relevant for my thesis, Article 2 of Protocol No. 1 of the ECHR will be analyzed as well.

Furthermore, I will look at the positive obligation during a pandemic and use examples from the Covid-19 pandemic.

I will further delimit the scope of my thesis by focusing on the rights of children when considering if States surpassed their margin of appreciation. As I've mentioned above, children are a vulnerable group, and are especially vulnerable in a pandemic.[9] It seems that children were not especially affected by the virus itself,[10] but by the many restrictions made by the States.

The ECHR does not define the term child or children, the ECHR protects "everyone" pursuant to Article 1. However, the term "minor" pursuant to Article 5 has been defined by the ECtHR as someone under the age of 18.[11] This, together with the Courts use of the

[9] UNICEF (2022, September) Covid-19 and children, *UNICEF data hub*, https://data.unicef.org/covid-19-and-children/; also see, Amin U.A. & Parveen, A.P. (2022) Impact of COVID-19 on children. *Middle East Current Psychiatry* 29, 94 https://doi.org/10.1186/s43045-022-00256-3; Hafiz, T.A. & Aljadani, A.H. (2022) The impact of COVID-19 on children and adolescents' mental health, *Saudi Medical Journal*, 43 (11) 1183-1191, https://doi.org/10.15537/smj.2022.43.11.20220481; Lehmann, S., Skogen, J.C., Sandal, G.M. *et al.* (2022) Emerging mental health problems during the COVID-19 pandemic among presumably resilient youth -a 9-month follow-up. *BMC Psychiatry*, 22, 67 https://doi.org/10.1186/s12888-021-03650-z; Mulkey, S.B., Bearer, C.F. & Molloy, E.J. (2023) Indirect effects of the COVID-19 pandemic on children relate to the child's age and experience. *Pediatric Research*, 94, 1586–1587 https://doi-org.mime.uit.no/10.1038/s41390-023-02681-4.
[10] UNICEF (2023, March) Child Mortality and Covid-19 - https://data.unicef.org/topic/child-survival/covid-19/.
[11] Koniarska v. The United Kingdom, app.no 33670/96, 12 October 2000.

Convention on the Rights of the Child (CRC)[12] in cases concerning children, without any distinguishing of age, indicates a compliance with the definition within the CRC. Therefore, children are in this thesis defined in accordance with Article 1 of the CRC as "every human being below the age of eighteen years". However, I will not be separating between the different age-groups within this limit.

Furthermore, the theme of my thesis does not specifically focus on Norway. However, I will use examples of measures introduced during the pandemic from Norway, and how the Norwegian government handled the pandemic. The reason for this delimitation is based on the limitations in writing a master's thesis, and the timeframe set. The content of the thesis will be relevant for other countries as well.

1.3 Methodology

The focus in this thesis is, as mentioned, Article 2, 3 and 8 of the ECHR, and also Article 2 of Protocol No. 1. These articles guarantee the right to life, right to respect for private life, right to education, and possibly a right to health. In contrast to the right to life and right to respect for private life, the right to health is not expressly mentioned in the ECHR. Whether a right to health can be derived from Article 2, 3 and 8 of the ECHR is one of the tasks for this thesis. To interpret these Articles, my main focus will be case law from the ECtHR because the Court is the main interpreter of the ECHR, and its mandate is at its core to interpret and apply the ECHR.[13]

Since the ECHR is a treaty, I will apply the rules of treaty interpretation contained in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (VCLT).[14] Article 31 gives the general rules of interpretation, Article 32 the supplementary rules of interpretation, and Article 33 the rules of interpretating treaties authenticated in two or more languages. Article 31 of the VCLT states that conventions must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[12] Convention on the Rights of the Child, adopted 20 November 1989, entry into force 02 September 1990.
[13] ECHR art 19 and 32.
[14] Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.

It is also important to note that, in accordance with the rule of the treaty interpretation in Article 31 § 3 (c) of the VCLT, the ECtHR considers other conventions and international law when interpreting and applying the ECHR.[15] In the case of Savickis and others v. Latvia, the court writes that the Convention "cannot be interpreted and applied in a vacuum", and that it needs to be "interpreted in accordance with the relevant norms and principles of public international law".[16] This opens the ECHR to be interpreted based on a number of conventions and other international law.

The ECtHR uses the VCLT when interpreting the ECHR. However, the interpretation of the Articles has mostly been done before, therefore the ECtHR often refer to earlier cases to confirm the interpretation of the Articles.

Since the ECtHR is the main interpreter of the ECHR, as mentions above, and that the court "provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention",[17] I find it natural to use the case law myself, when presenting and interpreting the Articles, and during my analysis.

As a sidenote, Nawrot et. al (2023) claims that the ECtHR will have to read certain provisions of the ECHR in a new way, "in order to adapt to the new situation", regarding the right to healthcare during the covid-19 pandemic.[18] This is an interesting approach, which may affect the interpretation of the articles in the future. However, I will first and foremost use the existing case law and apply this in the context of the pandemic.

Furthermore, the ECtHR often refers to European or international consensus and common value when interpreting the ECHR and "the scope of the State's obligations in specific cases".[19] This is an interesting point which will be discussed in the thesis.[20]

My main focus concerning case law is applying the Courts jurisprudence. I will therefore not distinguish between cases from Chamber or Grand Chamber. Furthermore, I will, to a certain

[15] For example, Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021; Kurt v. Austria, app.no 62903/15, 15 June 2021.

[16] Savickis and others v. Latvia, app.no 49270/11, 09 June 2022, § 103.

[17] Opuz v. Turkey, app.no 33401/02, 09 June 2009, § 163.

[18] Nawrot, O., Nawrot, J., & Vachev, V. (2023). The right to healthcare during the covid-19 pandemic under the European Convention on human rights. *The International Journal of Human Rights*, *27*(5), 789–808, p. 790. https://doi-org.mime.uit.no/10.1080/13642987.2022.2027760.

[19] Opuz v. Turkey, app.no 33401/02, 09 June 2009 § 164.

[20] Also see Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 287 ff. regarding consensus.

extent, use newer cases from the last 10-20 years. The reason for this is that they highlight the newest interpretations from the ECtHR, and also because of the limitations of writing a master`s thesis at this scale.

Furthermore, I will be using examples and opinions from theoretical works such as books and articles. With just a few exemptions, all articles referred to in this thesis are published in peer-reviewed journals.

I will also use the reports from the Coronavirus Commission (the Commission), a commission which was "established to conduct a comprehensive review and assessment of the management of the pandemic by the Norwegian authorities",[21] as a basis to gather information about the handling of the pandemic in Norway. This is both time saving, since they already have collected the information, and they also highlight challenges which is interesting to analyze in my thesis. The Commission received its mandate in April 2020, and ended its official investigation on October 31, 2021, nearly two years after the beginning of the pandemic.[22] This gives a broad time perspective.

Furthermore, due to the limited time in hand, I will as aforementioned, when using examples from the handling of the Covid-19 pandemic, mostly refer to Norway's handling of the pandemic, based mainly on the reports from the mentioned Coronavirus Commission.[23]

1.4 Structure

I will start in with a short overview of human rights and covid-19 in which I will show to the measures put in place by States, primarily the Norwegian government, in chapter 2. Then I will in short demonstrate how these measures and the Covid-19 pandemic affected human rights, in section 2.2.

Going forward, to chapter 3, I will give a presentation of positive obligations. In my thesis I will focus on the positive substantive obligation, however, giving an overview of the positive

[21] For its full mandate in English, see: https://www.koronakommisjonen.no/mandate-in-english/

[22] NOU 2022: 5 - Myndighetenes håndtering av koronapandemien – del 2, - Norwegian Official Report (NOU) 2022: 5 The Norwegian Government´s Management of the Coronavirus Pandemic – Part 2, [my translation], (NOU 2022: 5) p. 13-15.

[23] NOU 2021: 6 - Myndighetenes håndtering av koronapandemien - Norwegian Official Report (NOU) 2021: 6 The Norwegian Government´s Management of the Coronavirus Pandemic [my translation] (NOU 2021: 6); NOU 2022: 5 - Myndighetenes håndtering av koronapandemien – del 2, - Norwegian Official Report (NOU) 2022: 5 The Norwegian Government´s Management of the Coronavirus Pandemic – Part 2 [my translation] (NOU 2022: 5).

obligation as a whole is important to better understand the positive substantive obligation and the topic of the thesis.

Thereafter I will give a short analysis of the positive obligation to protect life and health according to ECHR, in chapter 4 and 5. Chapter 4 provides a presentation of the right to life and analyzes the guarantees and limits of the obligation. In chapter 5 I will analyze if there is indeed a right to health guaranteed by the ECHR, or an obligation to protect health. The chapter will furthermore present and analyze the Articles of the ECHR that enshrines obligations relating to health, and the limits. Since the main question is, what are the limits of the positive obligation of the State to protect life and health during a pandemic or similar health emergency, and how it should be balanced against the rights of children, i.e. what standards does apply, these chapters will not provide a full analyzes of the Articles, but a shorter one.

I will in chapter 6 look closer on rights that were limited and may have been violated during the Covid-19 pandemic, mainly the right to respect private life and the right to education. These are important when analyzing and discussing the measures imposed by the governments and how they affected the rights of children. Even though the right to education may be derived from the right to respect for private life, Article 2 of Protocol No. 1 contains the right to education, and therefore will be given a short section of its own, section 6.2.

Chapter 7 can be seen as the main chapter of the thesis, in which I will look closer on children's rights during the pandemic, the challenges that children met, and furthermore the interference by States in those rights, and the lawfulness of the interference on the rights of children.

The thesis will conclude, in chapter 8, in which I will provide some final reflections and remarks.

2. Human rights and Covid-19

The World Health Organization (WHO) declared Covid-19 a pandemic on the 11th of March 2020.[24] On the 12th, Norway closed down, and the Norwegian prime minister, Erna Solberg, declared this to be the "strongest and most invasive measures we have had in Norway, in peacetime".[25] She also declared that the measures would have a great impact on our personal freedom, our everyday life, and how our community and social life functions. It did, and still does for many people all around the world.[26]

Covid-19 has affected a lot of people around the world,[27] and a lot of human rights were set under pressure.

2.1 Measures imposed by the Norwegian Government

A lot of measures were imposed throughout the pandemic. As mentioned earlier, examples will mostly be taken from the Norwegian government's handling of the pandemic. It started with measures imposed between the 12th and 15th of March 2020. It was a substantial list of measures, which contains among others, closing of schools, kindergarten, high schools, universities, and other educational institutions. Closing or prohibition of cultural events, sporting events, and organized sporting activities, both indoor and outdoor. Closing of businesses like pubs, gyms, hairdressers, skincare salons, tattooist, physical therapists and alternative medicine. Prohibition of buffets in restaurants. Closing of swimming pools.

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[24] World Health Organization, *Timeline: WHO`s COVID-19 response*. Event 72. https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline; see also NOU 2021: 6, p. 50 and 128.

[25] NOU 2021: 6, p. 21. [My translation of the prime minister saying "sterkeste og mest inngripende tiltak vi har hatt i fredstid"].

[26] Bartels, M. (2024, February 06). Rampant COVID posing new challenges in the fifth year of the pandemic, *Scientific American*, https://www.scientificamerican.com/article/rampant-covid-poses-new-challenges-in-the-fifth-year-of-the-pandemic/; see also Orban, E., Li, L. Y., Gilbert, M., Napp, A.-K., Kaman, A., Topf, S., Boecker, M., Devine, J., Reiß, F., Wendel, F., Jung-Sievers, C., Ernst, V. S., Franze, M., Möhler, E., Breitinger, E., Bender, S., & Ravens-Sieberer, U. (2024). Mental health and quality of life in children and adolescents during the COVID-19 pandemic: a systematic review of longitudinal studies. *Frontiers in Public Health*, 11, 1275917–1275917. https://doi.org/10.3389/fpubh.2023.1275917.

[27] Bruinen de Bruin, Y., Lequarre, A.-S., McCourt, J., Clevestig, P., Pigazzani, F., Zare Jeddi, M., Colosio, C., & Goulart, M. (2020). Initial impacts of global risk mitigation measures taken during the combatting of the COVID-19 pandemic. *Safety Science*, 128, 104773–104773. https://doi.org/10.1016/j.ssci.2020.104773 ; UNICEF (2022, September) Covid-19 and children, *UNICEF data hub*, https://data.unicef.org/covid-19-and-children/.

Prohibition of foreign travels for health care personnel. Visiting restrictions on health institutions, and quarantine of 14 days after all travels outside of the Nordics.[28]

Implementing these measures was not all unified, there were some differences of opinion. For example, between Norwegian Institute of Public Health (NIPH), and the Norwegian Directorate of Health.[29] It was the Directorate of Health, with their Director of Health, that took the decision of locking down the country.[30] Different measures were then taken on and off during the coming months and years.

An example of another measure that was imposed during the pandemic, was the traffic light model, which were implemented after schools and kindergarten reopened.[31] It imposed on the schools and kindergartens to take different measures or considerations based on different level of restrictions. It was the local or national infection control authorities,[32] that made the decision of what level the measure should be. Green was set at a normal level of organizing the everyday life in schools. Red was more comprehensive and intrusive for the children, and could consist of smaller constant groups, and more distancing between students and teachers, such as half of the children at home, and half at school. Yellow and orange was somewhere in between. The local authorities could decide if there should be a higher level of restrictions then recommended, but never lower. It was never green during 2020.

Measures affecting children will be discuss further, later in the thesis.

It is obvious that the measures imposed by the Norwegian Government had a great impact on the lives of the citizens. The question is, therefore, what human rights were affected by the Covid-19 pandemic?

2.2 Human rights affected by the measures and Covid 19

It was early clear that Covid-19 was a decease that could lead to death. Article 2 of ECHR guarantees the right to life. Every event that poses a threat to life may therefore affect the right to life. In the case of the Covid-19 pandemic, people died all around the world. Mostly

[28] For the full list, see NOU 2021: 6, p. 129.
[29] Ibid., p. 130-131.
[30] Ibid., p. 125.
[31] Ibid., p. 354.
[32] Ibid.

elderly people, but also people with different underlying diseases. It clearly had an impact on the right to life.

Close to the right to life, is health. This right is not specified in the ECHR, but there might be a fine line between these rights.[33] If infected by the virus one might become sick,[34] even though the mortality rate is low. There were a lot of people in need of intensive care, and hospitalization. This raises several questions about the healthcare system. Bad health or bad healthcare can lead to death. A possible right to health or healthcare might be enshrined in the ECHR, in the provisions this thesis focuses on, Articles 2, 3 and 8. However, this will be further discussed and analyzed in chapter 5.

The measures also had an impact on people's private life. The right to respect for private life is protected by Article 8 of the ECHR.

Since the focus of this thesis is children, it is interesting to look at rights that were affected, especially involving children. The children have the right to life and, and possibly health as mentioned above, but they have other rights as well. The right to respect for private life, and the right to education were affected, by children not being able to attend school, sporting events and training, and other leisure activities, and not being able to meet friends as a result on restrictions concerning socializing. Children's right to personal development was therefore affected as well. Both the physical and psychological sphere were affected, and it may have caused mental health issues for a lot of children.[35] Parents losing their jobs, leading to an increase in stress and economic troubles, mental health issues and domestic violence. Being home from school may have caused an increase in violence and abuse, and especially domestic violence, in which the children might have endured abuse both directly and indirectly, witnessing other members of the family being abused or treated violently.[36] And,

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[33] Graver, H.P. (2022). Pandemirestriksjoner og retten til liv*, Lov og Rett*, 2022/6, 349-370 [*translation: Pandemic restrictions and the right to life],* p. 352 and 361, https://doi.org/10.18261/lor.61.6.3.
[34] WHO (2023, August) Coronavirus disease (Covid-19) https://www.who.int/news-room/fact-sheets/detail/coronavirus-disease-(covid-19)
[35] See footnote 9. Also see Fegert, J.M., Ludwig-Walz, H., Witt, A., & Bujard, M. (2023) Children's rights and restrictive measures during the COVID-19 pandemic: implications for politicians, mental health experts and society. *Child Adolescent Psychiatry Mental Health* 17, 75, 1-3, https://doi.org/10.1186/s13034-023-00617-8; and Ludwig-Walz, H., Dannheim, I., Pfadenhauer, L.M. Fagert, J.M., & Bujard, M. (2023). Anxiety increased among children and adolescents during pandemic-related school closures in Europe: a systematic review and meta-analysis. *Child Adolescent Psychiatry Mental Health* 17, 74 https://doi.org/10.1186/s13034-023-00612-z.
[36] Evans, M.L., Lindauer, M., Farrel, M.E. (2020). A Pandemic within a Pandemic — Intimate Partner Violence during Covid-19. *The New England journal of medicine*, p. 2302-2304, https://doi.org/10.1056/NEJMp2024046; Nesset, M.B., Gudde, C.B., Mentzoni, G.E., & Palmstierna, T. (2020). Intimate partner violence during COVID-

fewer to pick up on these issues since schools were closed, or the schools healthcare service was reduced as healthcare workers was away working on other Covid-19 related issues.

The right to education was also directly affected by the lockdown and is a right protected by Article 2 of Protocol No. 1 of the ECHR, and possibly Article 8. When schools closed, even though there was some implementation of digital teaching, many were unable to attend, and it might have been difficult in some families to make use of this type of educating.[37] When the schools finally opened, there was always uncertainty if the schools were going to be closed again or not. Furthermore, there were differences between municipalities, since they often decided the restrictions imposed upon those within their jurisdiction by themselves.[38]

Based on the aforementioned; several human rights were affected during the pandemic and the consequent measures imposed by the government restricting the lives of individuals.

The rights most relevant to this thesis, that appear to have been primarily affected, are the right to life, a possible right to health, the right to respect for private life, and the right to education.

When confronted with a pandemic, and measures must be considered, what obligations does a State have, and which limitations are there to these obligations? What happens when one right is affected negatively by the States attempt to protect another right? If some of them collide, what should the State do? These questions will be analyzed in the following chapters.

As mentioned in the introduction, according to the ECHR States are subject to several types of obligations. Both negative and positive. The focus of this thesis is the positive obligation to protect life and health. Therefore, the positive obligation will get a more substantial presentation, which is crucial for the understanding of the arguments used during the thesis. The negative obligation will get a short presentation for the purpose of context and understanding, and also to understand the concept of obligations better when a positive obligation must be balanced against a negative.

19 lockdown in Norway: the increase of police reports, *BMC Public Health* 21, 2292. https://doi.org/10.1186/s12889-021-12408-x; Norges Insitusjon for Menneskerettighter (2021). Vold og overgrep under pandemien – Norwegian National Human Rights Institution - Violence and abuse during the pandemic [my translation of the publications name], https://www.nhri.no/2021/vold-og-overgrep-under-pandemien/.

[37] NOU 2022: 5, p. 369–370.

[38] NOU 2022: 5, p. 71 ff.

3. Positive obligations

This chapter gives a short overview of the term positive obligations, stemming from the ECHR. As mentioned, other obligations exist under the ECHR, namely negative obligations. They will be mentioned to give a better understanding of the term obligation, and the obligations following ECHR, but not given a lot of space in this chapter. This does not entail that there can be no mentioning of these obligations later in the thesis.

3.1 What is an obligation?

A natural understanding of the word obligation would indicate that there is something you must do or something you must avoid doing. You are committed to something, and therefore something you cannot choose if you would like to oblige with - it is not voluntarily. States` obligations is something they must or must not do.

There are different types of obligations, and the ECtHR has divided them into two main categories, negative and positive obligations.[39] The negative obligation, which shows the States what not to do and when not to interfere. The negative obligations have always been seen as part of the ECHR.[40] That is not the case concerning the positive obligation, which appeared for the first time in the late 1960s,[41] in the so-called Belgian Linguistic Case.[42]

The difference between the negative and positive obligation is highlighted by Stoyanova (2023), who writes that "[h]uman rights law obligations have been generally divided into positive and negative. The Court's reasoning also reflects this distinction. While the first category requires the State to take action, the second requires that the State refrain from action."[43] Akandji-Kombe (2007) wrote similarly, "[w]hat distinguishes positive obligations

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[39] Akandji-Kombe, J. (2007). Positive Obligations under the European Convention on Human Rights; A guide to the implementation of the European Convention on Human Rights, *Council of Europe Publishing,* p. 5, https://rm.coe.int/168007ff4d.
[40] Ibid., p. 5.
[41] Ibid., p. 5.
[42] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, app.no 1474/62 and others, 23 July 1968 – "Belgian linguistic case".
[43] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press, p. 12, https://doi.org/10.1093/oso/9780192888044.001.0001.

from negative obligations is that the former require positive intervention by the state, whereas the latter require it to refrain from interference."[44]

In other words, the positive obligation gives States an obligation to actually do something. They need to act in some form.

The positive obligations have been developed by the ECtHR,[45] and is still in development. It seems that there are no limits of situations where the question of positive obligations cannot arise.[46]

Furthermore, positive obligations, as demonstrated in the following section, are mainly divided into two kinds of obligation, procedural and substantive obligations.

3.2 The difference between procedural and substantive positive obligations

First of all, these obligations do sometimes overlap,[47] however, it is important to separate between the two because it is relevant for the finding of, and determining, the compliance with the Convention in a particular case, as well as the measures required of the State.[48] The State would have a responsibility for the occurrence of the ill-treatment itself if a substantive violation is found, and therefore, the measures required of States "in executing the judgment will be more extensive, taking on a preventive dimension rather than a purely investigatory one".[49] Furthermore, the question of the thesis refers to the handling of human rights and the measures imposed by States before and during the pandemic, which is the timeframe for the substantive obligations, as will be shown in this section. While it is important that States fulfils its obligation in an eventual aftermath of an event, it would be preferred if it could be prevented before or during. And finally, do all Articles contain both a procedural and

[44] Akandji-Kombe, J. (2007). Positive Obligations under the European Convention on Human Rights; A guide to the implementation of the European Convention on Human Rights, *Council of Europe Publishing,* p. 11, https://rm.coe.int/168007ff4d.
[45] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press, p. 1, https://doi.org/10.1093/oso/9780192888044.001.0001.
[46] Ibid., p. 1.
[47] M. and M. v Croatia, app.no 10161/13, 03 December 2015, § 136.
[48] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27*(*4), 660-693, p. 677, https://doi.org/10.1163/15718182-02704003.
[49] Ibid., p. 680.

substantive obligation? The Court does not always distinguish between different types of obligations, something that is critiqued by scholars.

Procedural obligations give States a duty to investigate,[50] or to conduct an "effective official investigation",[51] and to provide an effective and independent judicial system.[52] In other words, this is an obligation put in force after something has happened. However, there are circumstances that gives an obligation to investigate during or before something has happened, especially in cases relating to domestic violence.[53]

The substantive obligations give a "duty to put in a place an effective regulatory framework",[54] effective criminal law provision,[55] and to take preventive operational measures.[56] In other words, an obligation put in force before and during something happens.

Furthermore, Stoyanova (2023) claims in her latest book, that the ECtHR distinguishes between three types of positive obligations.[57] The procedural obligation to "conduct an effective official investigation upon reasonable allegations that harm has materialized". This, she claims, is well established, and is looked at as the procedural limb of ECHR Article 2 and 3. Then there are two substantive positive obligations, first the "obligation to adopt an effective regulatory framework with procedural guarantees so as to prevent harm against the public at large", and then "the obligation to take such protective operational measures as may be triggered when a specific individual is at 'real and immediate' risk of harm".[58]

The difference in timing is also highlighted by O`Mahony (2019), who claims that there are two distinctions, and gives a concise analysis, as he writes the following:

[50] Malik Babayev v. Azerbaijan, app.no 30500/11, 01 June 2017, § 79; Tkheldize v. Georgia, app.no 33056/17, 08 July 2021, § 59.
[51] C.A.S. and C.S. v. Romania, app.no 26692/05, 20 March 2012, § 69.
[52] Hiller v. Austria, app. No 1967/14, 22 November 2016, § 48; Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017 § 214.
[53] Kurt v. Austria, app.no 62903/15, 15 June 2021, § 169.
[54] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 186, see also Fernandes de Oliveira v. Portugal app.no 78103/14, 31 January 2019, § 103.
[55] Opuz v. Turkey, app.no 33401/02 09 June 2009, § 128.
[56] Opuz v. Turkey, app.no 33401/02 09 June 2009, § 128; Fernandes de Oliveira v. Portugal app.no 78103/14, 31 January 2019, § 103.
[57] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press, p. 19-20, https://doi.org/10.1093/oso/9780192888044.001.0001.
[58] Ibid., p. 20.

> The dividing line between substantive and procedural obligations is not always as clear as it might be. On its face, there are two distinctions. One relates to timing: substantive violations arise where the State fails to do something prior to or during the ill-treatment, while procedural violations relate solely to the aftermath of the ill-treatment. The other relates to substance and culpability: a substantive violation involves a finding that the State is partly responsible for the occurrence of the ill-treatment (whether by failing to deter it, mitigate the risk of it or respond to it once occurring), whereas a procedural violation does not hinge on State culpability for the ill-treatment, but arises even where substantive obligations have been discharged and the State is found not to bear any responsibility for the ill-treatment in question. Indeed, a procedural violation can arise even in circumstances where it has not been satisfactorily established that ill-treatment actually occurred.[59]

As stated above, this highlights the need to divide between the two.

Furthermore, it does not have to be a criminal law provision, or remedy, in every case, it may suffice with a remedy in civil court.[60] What is most important, is that the domestic law is effective in practice, and not only exist in theory.[61] However, the Court has also stated that in some exceptional situations, the procedural obligation must include recourse to criminal law. This is for example where the fault attributable to the healthcare providers went beyond a mere error or medical negligence.[62]

The case law from the ECtHR distinguishes on how much they focus on the difference between the two obligations. In some cases, the Court have clearly separated the two obligations, with one part or section for the procedural, and one for the substantive. This can be seen in the case of Lopes de Sausa Fernandes v. Portugal, in which the procedural[63] and the substantive[64] obligation, is assessed clearly separately. As seen on page 46 and 29 of the judgement, each "aspect" has its own section. It was the same in O´Keeffe v. Ireland, and

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[59] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 676, https://doi.org/10.1163/15718182-02704003.
[60] Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06 10 April 2012, § 38; Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 85.
[61] Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06 10 April 2012, § 38.
[62] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 215.
[63] Ibid., § 214.
[64] Ibid., § 186.

others.[65] In other cases, it is not that clear. In the case of Opuz v. Turkey, the ECtHR considers both procedural[66] and substantive[67] obligations, but they never use the distinction. One can still deduce it from their considerations. In M.C. v. Bulgaria, one can deduce that the Court are considering both aspects, but not which led to the violation.[68] However, the case law indicates that the distinctions and separation of issues have become more and more evident in reascent years.

The separation of the obligations seems both possible and does not demand much effort. It is possible because they are clearly distinguishable. Its either a substantive violation, which would indicate a failure to deter or prevent, or respond, or a procedural violation, which would be a failure to investigate, or possibly a failure of both obligations.[69]

This highlights the importance of separating the two positive obligations. Without separation, it will not be possible, or at least much harder, to see the limits of the obligations. This will make it harder for States to follow the rulings of ECtHR, and also for the Court to create clear jurisprudence, which is “crucial to the framing of what is required of the State by way of execution of the judgment”.[70]

3.3 Do all articles have a procedural and substantive positive obligation?

Since this thesis mainly focuses on Article 2, 3 and 8, so will this section.

Article 2 states that “[e]veryone's right to life shall be protected by law.” This wording reflects a positive obligation in itself, and also a substantive obligation, since it gives States an obligation to protect everyone, “by law”. Furthermore, as mentioned in 3.1, both the case of

[65] O`Keffee v. Ireland, app.no 35810/09, 28 January 2014, Section II and III on p. 28 and 41; Kotilainen and others v. Finland. app.no 62439/12, 17 September 2020, p 16 and 24, or §§ 65–98.
[66] Opuz v. Turkey, app.no 33401/02 09 June 2009, § 150.
[67] Ibid., § 128.
[68] M.C. v. Bulgaria, app.no 39272/98, 04 December 2003.
[69] O’Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. International Journal of Children's Rights, 27*(*4), 660-693, p 677, https://doi.org/10.1163/15718182-02704003.
[70] Ibid., p. 691.

Lopes de Sausa Fernandes v. Portugal, and Kotilainen and others v. Finland, are cases where the procedural and substantive sides of Article 2 are analyzed.[71]

Based on the case of X. and others v. Bulgaria, there is no doubt that Article 3 enshrines both procedural and substantive positive obligations, and highlights the difference described in section 3.1. The Court describes this in a good way, as they write the following:

> It emerges from the Court's case-law as set forth in the ensuing paragraphs that the authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and, thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation.[72]

In the case of Söderman v. Sweden, it was highlighted that Article 2, 3 and 8, holds a substantive obligation. The Court accentuated that there is a positive obligation, under Article 2 and 3, and sometimes under Article 8, either alone, or in combination with Article 3, to protect the physical and psychological integrity of a person, and that this "may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals".[73] Furthermore, the Court pointed to rape and sexual abuse of children as serious acts where fundamental values and essential aspects of private life are at stake, and where there is an obligation for the States to make sure that there are efficient criminal-law provisions in place.[74]

Article 8 has no explicit procedural requirements.[75] However, the ECtHR has, when considering the obligation under Article 8 to safeguard the individual's physical integrity, not excluded that the positive obligation may relate to the effectiveness of a criminal

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[71] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017; Kotilainen and others v. Finland, app.no 62439/12, 17 September 2020.
[72] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 178.
[73] Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 80.
[74] Ibid., § 82.
[75] European Court of Human Rights (2022) Guide on Article 8 of the European Convention on Human Rights, *Council of Europe/European Court of Human Rights,* 31 August, p 79, https://www.echr.coe.int/documents/d/echr/guide_art_8_eng.

investigation.[76] This was also stated in M.C v. Bulgaria,[77] in which the Court concludes that it follows from Article 3 and 8 a positive obligation "to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution",[78] which was reiterated in the case of Söderman v. Sweden.[79]

It is important to point out, that the obligation to perform an effective investigation regarding violations of article 3, is not an obligation of result, but of means.[80] This also applies to article 2.[81] The obligation of means implies that a desired result of the investigation is not decisive for the finding of a violation, what is important is the measures imposed by the State.[82]

Based in this, Articles 2, 3 and 8 contains both procedural and substantive positive obligations. However, this thesis focuses on the Sates substantive positive obligations because, in the context of the pandemic examined in this thesis, the most relevant and important is the States obligation to act before and during, rather than after the pandemic, meaning the substantive positive obligation.

3.4 Relevant positive obligations during a pandemic

Based on the aforementioned; the positive obligation to protect the right to life and protection of health is relevant during a pandemic. When it comes to the right to respect for private life and the right to education, both a positive and a negative obligation may be relevant. This will be discussed further as the thesis proceeds.

Sometimes obligations collide. On the one hand, you have a positive obligation to protect life, and on the other you might have an obligation to protect the right to respect for private life, or an obligation to not interfere with the right to respect for private life, which in a certain event may not coincide with the right to life. There might be an obligation of finding a fair balance between the two positive obligation, or there might be correct to consider if there has been an

[76] C.A.S. and C.S. v. Romania, app.no 26692/05, 20 March 2012, § 72.
[77] M.C. v. Bulgaria, app.no 39272/98, 04 December 2003, § 152.
[78] M.C. v. Bulgaria, app.no 39272/98, 04 December 2003, § 153.
[79] Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 83.
[80] C.A.S. and C.S. v. Romania, app.no 26692/05, 20 March 2012, § 70.
[81] Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 159.
[82] Ibid., § 159.

interference, and if so, if this interference has been proportional. Either way, there is a consideration of balance and proportionality.

As mentioned, this thesis will focus on the substantive obligations. This is natural based on the theme of the thesis. To find the limits, the procedural obligation is relevant, and will be looked at, but when the rights should be balances against each other, it should be before and during the pandemic.

In the following it is therefore crucial to analyze the obligations motioned in this section in relations to the rights affected during the Covid-19 pandemic.

4. The positive obligation to protect life

The right to life is one of the most fundamental rights according to the ECtHR, and it also enshrines one of the basic values in our democratic society.[83]

This chapter will present the main article that enshrines the right to life. It will give a short summary of the article, and then a general analyzes of the positive obligations to protect the right to life, and the limits of this positive obligation stated by the ECtHR.

4.1 Article 2

The name of Article 2 of the ECHR is "Right to life", and therefore it can be no doubt of its content. The right to life is found in many other conventions, however, in this thesis the focus will be on the ECHR. The protection of life has also been mentioned regarding Article 8, however, it was stated that the considerations to a very large extend are similar to Article 2,[84] therefore it is relevant to only show the "main" Article on the right to life.

Article 2 states that:

[83] Kurt v. Austria, app.no 62903/15, 15 June 2021, § 157.
[84] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, app.no 53600/20, 09 April 2024, §§ 537 and 544.

1. Everyone`s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    a. in defense of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

4.1.1 The scope and limits of Article 2, and the positive obligation to protect life

The importance of this article has been reiterated many times throughout the ECtHR case law,[85] and it was established with the case of McCann and Others v. The United Kingdom, that Article 2 is "one of the most fundamental provisions in the Convention", and in the manner of interpretation that "its provisions must be strictly construed".[86]

The ECtHR has stated in a number of cases, among others the cases of Osman v. The United Kingdom and Kurt v. Austria, that Article 2 § 1 imposes on the State not only a negative obligation to "refrain from the intentional and unlawful taking of life", but also an obligation to "safeguard the lives of those within its jurisdiction", by taking appropriate steps.[87] This confirms that Article 2 has a positive obligation. However, the interpretation and application of the safeguard must be done in a way which makes it both practical and effective.[88]

In the case of Osman v. The United Kingdom, the ECtHR created the so-called "Osman test".[89] The Court has used this test frequently in their judgements.[90] It has been used for a long period of time, and in Kurt v. Austria, from 2021, it was used again. The case highlights the point of the "Osman test", and why it is still relevant, by pointing to the difficulties of

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[85] E.g. Kotilainen and Others v. Finland, app.no 62439/12, 17. September 2020, § 65; Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 157.
[86] McCann and Others v. The United Kingdom, app. no. 18984/91, 27 September 1995, § 147.
[87] Osman v. The United Kingdom, app.no. 23452/94, 28 October 1998, § 115; Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 157.
[88] Vardosanidze v. Georgia, app.no 43881/10, 07 May 2020, § 52.
[89] Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 158.
[90] See among others, Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06, 10 April 2012, § 36.

policing modern societies, the unpredictability of human conduct, and eventually operational choices concerning priorities and resources.[91] Therefore, the scope of the obligation must be interpreted in a way that "does not impose an impossible or disproportionate burden on the authorities".[92] Here the Court sets a limit for the positive obligation. The Court further limits the obligation by stating that "[n]ot every claimed risk to life […] can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."[93]

Therefore, the "Osman test" requires that it first must be established, for the positive obligations to arise:

> … that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[94]

There is a question however, if there always needs to be an immediate risk. In a partly concurring, partly dissenting opinion, Judge Pinto de Albuquerque, argues that States can be found in violation with human rights also where the individual concerned are not under an immediate risk.[95] In the footnote, he also mentioned that he has pleaded for a review of the "Osman test" in cases concerning domestic violence, "when the generalised nature of this problem is known to the authorities".[96] However, this has, as of now, not been confirmed by a majority of judges in any cases.

The obligation does not limit itself to protect an identified individual or individuals from another individual, in some situations it concerns the protection of that individual from him-/herself.[97]

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[91] Osman v. The United Kingdom, app.no. 23452/94, 28 October 1998, § 116; Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 158.
[92] Kurt v. Austria, app. no. 62903/15, 15 June 2021, § 158.
[93] Ibid., § 158.
[94] Kurt v. Austria, app.no 62903/15, 15 June 2021, § 158.
[95] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, § 63.
[96] Ibid., § 63 footnote 222.
[97] Kotilainen and Others v. Finland, app.no. 62439/12, 17. September 2020, § 69.

Furthermore, similar obligations to protect against a real and immediate risk of criminal acts, may arise towards members of the public “who are not identifiable in advance”.[98] It must be noted that the Court in the case of Kotilainen and Others v. Finland related this first and foremost to the context of prison leave and conditional release of dangerous prisoners. It is therefore a distinction between cases where it is required personal protection of one or more individuals who are identifiable in advance, and cases where there is an obligation to give general protection to society.[99] In the latter context the ECtHR has highlighted the duty of “due diligence” on the States, when dealing with potential dangers stemming from individuals in their charge.[100]

However, the obligation for general protection of society does not only apply in the context of prison leave, or the potential acts of certain individuals, it applies in general terms as well. For example, in the case of Talpis v. Italy, the Court stated that the risk of a real and immediate threat must be assessed and considered in the light of the case, in this case domestic violence, and focus both on the obligation to afforded general protection of society, but also the “recurrence of successive episodes of violence within the family unit”,[101] with a heightened focus on the latter. In this case Article 2 applied even though the applicant survived her injuries.[102]

Even with the heightened focus on the latter, this is a clear indicator that there is an obligation for a general protection, also of non-identifiable individuals, especially in cases concerning domestic violence. This focus has furthered been confirmed and reiterated by the ECtHR in later cases, with the case of Tkhelidze v. Georgia as a good example.[103]

The obligation for general protection of society covers a wide range of sectors, and it does not seem to be an exhaustive list of either sectors or situations where the obligation may not arise. The obligation arises whenever there is an activity where the right to life may be at risk.[104]

The same was also stated in the case of Öneryildiz v. Turkey,[105] a key case concerning dangerous activities, while the Court in the case of Ilbeyi Kemaloglu and Meriye Kemaloglu

[98] Ibid., § 70.
[99] Ibid., § 71.
[100] Ibid.
[101] Talpis v. Italy, app.no 41237/14, 18 September 2017, § 122.
[102] Ibid., § 110.
[103] Tkhelidze v. Georgia, app.no 33056/17, 08 October 2021, § 49.
[104] Vardosanidze v. Georgia, app.no 43881/10, 07 May 2020, § 53.
[105] Öneryildiz v. Turkey, app.no 48939/99, 30 November 2004, § 71.

v. Turkey, provided a non-exhaustive list of different contexts and sectors in which it has been engaged, for example in the healthcare sector, in the context of dangerous activities, safety on ships or budling sites, self-harm, and emergency services.[106]

Therefore, regarding the right to life and its limitations, there are no limits of context or activities that the positive obligation of Article 2 might not be applicable, as long as the right to life may be at stake.

However, not every claimed risk to life gives the authorities a positive obligation to take operational measures, there must be a real and immediate treat or risk to life, which the State knew or ought to have known about. Also, a potential collision with other rights may limit which operational measures that can or should be taken. This will be discussed later in the thesis.

Based on the aforementioned; even though there are limitations, it can be concluded that Article 2 of the ECHR contains, under certain conditions, a positive obligation to provide general protection to society.

There are other provisions or parts, connected to Article 2, that might set a limit to the right of life, two of these provisions will be given a short presentation in the following two sections.

4.1.2 Article 2 § 2

Article 2 § 2 of the ECHR also provides a limit of the right to life, and therefore provides an exception to the right to life given in Article 2 § 1. As mentioned above, Article 2 § 2 states that "[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary", and then precedes to list the three exceptions.

The term "absolutely necessary" gives a clear and quite high standard to in which the exceptions apply. This was also stated in the case of Giuliani and Gaggio v. Italy, in which the Court highlighted a stricter and more compelling test of necessity then normal, and that there must be proportionality between the use of force and the achievement of aims pursuant to

[106] Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06, 10 April 2012, § 34.

Article 2 § 2.[107] Furthermore, while making the assessment regarding this provision, deprivation of life must be assessed with careful scrutiny, especially in cases where lethal force was used deliberately, and that in addition to taking in account the actions of state agents who administered the force, one must take into assessment all surrounding circumstances, such as "planning and control of the actions under examination".[108]

This sets a high standard for when Article 2 § 2 applies.

4.1.3 Derogation

In times of emergency Article 15 of the ECHR allows States a possibility to derogate from its obligations. This might affect the limits of the Articles and rights. Article 15 § 1 states the following:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogation from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

However, Article 2 cannot be derogated from in time of emergency "except in respect of deaths resulting from lawful acts of war" pursuant to Article 15 § 2.

This means that there can be no derogation from Article 2 in times of peace, including during pandemic.[109]

[107] Giuliani and Gaggio v. Italy, app.no 23458/02, 24 March 2011, § 176.
[108] Ibid.
[109] Ibid., § 174.

5. The positive obligation to protect health

A right to health is not expressly mentioned in the ECHR, and it is not as such guaranteed by the Convention.[110] This is also pointed out by Nawrot et. al. (2023), by stating that the right to health is not "real" human rights and belongs to a second generation of human rights.[111]

5.1 Is there a right to health following the ECHR?

At the same time, Nawrot et. al (2023) points out that the ECtHR for a long time has "considered the possibility of protecting the health of individuals on the basis set out in the provisions of the European Convention on Human Rights", and that as a rule this protection can be derived from Articles 2, 3 and 8 of the ECHR.[112]

The ECtHR has on several occasion mentioned health together with the right to life, as its closely connected. In the case of Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, the Court stated the following:

> The State's duty to safeguard the right to life was also considered to extend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident …[113]

Furthermore, a positive obligation to protect health can be derived from the ECHR, especially from Articles 2 and 8.[114] In the case of Vavřička and Others v. Czech Republic, the Court stated that there is a positive obligation for the States, notably under Article 2 and 8, "to take appropriate measures to protect the life and health of those within their jurisdiction".[115]

In a recent case from the ECtHR, the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, the Court highlighted States` obligations to protect, to extend to "adverse effects

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[110] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 165.
[111] Nawrot, O., Nawrot, J., & Vachev, V. (2023). The right to healthcare during the covid-19 pandemic under the European Convention on human rights. *The International Journal of Human Rights*, *27*(5), 789–808. https://doi-org.mime.uit.no/10.1080/13642987.2022.2027760, p. 791.
[112] Ibid.
[113] Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06 10 April 2012, § 34.
[114] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §282.
[115] Ibid.

on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm",[116] while considering Article 8 of the ECHR.

After this, there is an obligation to protect health according to the ECHR. However, if there is a right to health that is guaranteed by the ECHR, like the right to life, is unclear. In the following part of this chapter, the relevant Articles will be analyzed further, together with case law.

5.2 The relevant articles to consider the right to, or protection of, health

Articles 2, 3 and 8 of the ECHR is connected in many ways. In some cases, it might be relevant to look at several Articles separately, depending on the facts and circumstances. In other cases, however, the Court found it unnecessary to consider Article 8 when they found a violation of Article 3.[117] However, if the measures fall short of Article 3, they may still be within the boundaries of Article 8.[118] This might also apply concerning Article 2.[119] The Court has furthermore highlighted the connection between these provisions in the case of Söderman v. Sweden,[120] as mentioned above.

5.2.1 Article 2

It follows from applying the general rule of treaty interpretation of the VCLT and the "ordinary meaning" of the terms in Article 2 that this Article does not expressly guarantee a right to health. However, when interpreting it in "context and in the light of its object and purpose", which is also a part of the general rule of treaty interpretation in Article 31 of the VCLT, there might be an opening for an extended interpretation of the right to life to include the right to health, or obligation to protect health.

There are, as mentioned above, examples where the Court considered the right to life, and at the same time highlighted the importance of health. E.g. in the case of Lopes de Sause

[116] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, app.no 53600/20, 09 April 2024, § 544.
[117] Z and Others v. the United Kingdom, app. no. 29392/95, 10 May 2001, §§ 76–77.
[118] Wainwright v. The United Kingdom, app.no 12350/04, 26 September 2006, § 43.
[119] Öneryildiz v. Turkey, app.no 48939/99, 30 November 2004, § 160; Makaratzis v. Greece, app.no 50385/99, 20 December 2004, § 55.
[120] Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 80.

Fernandes v. Portugal, a key case concerning health, although not everyone agreed with the majority in the conclusion,[121] the Court held that:

> … an issue may arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of the health care which they have undertaken to make available to the population generally …[122]

The Court stated that the right to health is not guaranteed under the ECHR, although it is in other international instruments, but highlights that the public-health sphere is one context or activity where the positive obligation to protect life, as mentioned in chapter 4, must apply, if the right to life may be at stake.[123] The Court has applied Article 2 both in cases where an individual has died, and in cases where there is serious risk of ensuing death.[124]

Furthermore, in the context of health care, States have a substantive positive obligation to make regulations compelling both private and public hospitals, to adopt appropriate measures to protect the lives of patients.[125] The Court also stated, in the context of public health policies, that there is a possibility that acts and omissions of the authorities in certain circumstances may engage the responsibility of the States, or Contacting Parties, under the substantive limb of Article 2.[126] This has been highlighted by Nawrot et.al. (2023) as well.[127]

Based on the aforementioned; Article 2 of the ECHR does not guarantee a right to health. However, there is an obligation to protect health, including by guaranteeing access to health care necessary to protect the lives of individuals within States` jurisdiction. The limit of the obligation coincides with that of the right to life mentioned above. The "Osman test" and the same assessments must be applied.

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[121] See the Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque on page 58-110 of the judgement, and also the partly dissenting opinion of Judge Serghides on page 111-114.
[122] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 173.
[123] Ibid., § 165.
[124] Fenech v. Malta, app.no 19090/20, 01 March 2022, § 103; see also Talpis v. Italy, app.no 41237/14, 18 September 2017, § 110.
[125] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 166-167.
[126] Ibid., § 166-167.
[127] Nawrot, O., Nawrot, J., & Vachev, V. (2023). The right to healthcare during the covid-19 pandemic under the European Convention on human rights. *The International Journal of Human Rights*, *27*(5), 789–808, p. 792. https://doi-org.mime.uit.no/10.1080/13642987.2022.2027760

5.2.2 Article 3

Article 3 contains the prohibition of torture, and states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Together with Article 2, Article 3 must be «regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe".[128]

Only by looking at the "ordinary meaning" of Article 3 one can see that this might affect health, and after considering it in "context and in the light of its object and purpose" there should be no doubt that a person inflicted with a violation under Article 3 will have his or her health affected.

To be inflicted with torture, your health will be affected, either physical or psychological, or both. The same applies to inhuman or degrading treatment, or "ill-treatment",[129] to the extent that falls within Article 3. To protect against ill-treatment, States has an obligation to establish a legislative and regulatory framework.[130] In more serious cases, like sexual abuse of children, there must be in place effective criminal-law provisions.[131]

For something to be regarded as "ill-treatment", it usually involves bodily injury or intense physical or mental suffering.[132] Bodily injury and intense physical or mental suffering is quite clearly within the sphere of health.

Health seems to be mentioned by the ECtHR in many cases concerning Article 3, either directly or indirectly. In the case of Pretty v. The United Kingdom, the Court highlighted that Article 3 gives positive obligations trough requirements for the State to protect the health of persons deprived of liberty.[133]

The Court related indirectly to health when talking about naturally occurring illness, both physical or mental, and that the suffering from this may be covered by Article 3.[134] However, this applies in the event "where it is, or risks being, exacerbated by treatment, whether

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[128] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 49.
[129] Ibid., § 52.
[130] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 179.
[131] Ibid., § 179.
[132] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002 § 52.
[133] Ibid., § 51.
[134] Ibid., § 52.

flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible".[135]

There is a duty to protect the health and well-being of children.[136] This especially applies in circumstances where the children are particularly vulnerable. Children are always vulnerable, as already mentioned, however, the Court highlight the aspect where children are particularly vulnerable in the case of X. and Others v. Bulgaria and accentuate explicitly cases where children are under the exclusive control of the authorities.[137]

Based on the aforementioned; there are limits to when Article 3 applies. The limit is stated in the case of Pretty v. The United Kingdom, among others. To fall within the scope of Article 3, the "ill-treatment" must attain a "minimum level of severity" and usually involve "actual bodily injury or intense physical or mental suffering".[138]

Article 3 of the ECHR contains an obligation to protect health, both physical and psychological, or mental. Concerning the limit of the positive obligation of Article 3, one must consider the requirement of the principal following the "minimum level of severity".

5.2.2.1 Minimum level of severity

In every case, to assess if the ill-treatment falls within the scope of Article 3, the ill-treatment has to attain a minimum level of severity. This assessment is "relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim".[139]

This has been reiterated in the case of S.P. and others v. Russia.[140] As mentioned above, for something to be regarded as ill-treatment within the minimum level of severity, it usually involves actual bodily injury or intense physical or mental suffering.[141] However, the Court has not stated that this is an absolute requirement.

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[135] Ibid., § 52.
[136] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 180.
[137] Ibid.
[138] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002 § 52.
[139] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 176; also see Fenech v. Malta, app.no 19090/20, 01 March 2022, §§ 62-64.
[140] S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 90.
[141] Ibid., § 90.

The Court has highlighted that physical and sexual violence constitute forms of ill-treatment falling within the scope of Article 3 of the Convention.[142]

However, ill-treatment under Article 3 does not limit itself to physical ill-treatment, it also covers psychological suffering.[143] The Court has given examples of psychological suffering, highlighting treatments that:

> … humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance […] may be characterised as degrading and also fall within the prohibition of Article 3.[144]

A threat of ill-treatment may be enough for it to fall within the minimum level of severity, as psychological harm may cause damage to human dignity. The reason for this is because a fear of violence may instill its victims and cause mental suffering.[145] This can be seen in the case of Gäfgen v. Germany, in which the suspect, during an interrogation, was threatened with "intolerable pain" if he did not tell interrogators about the location of the girl that was missing.[146]

Concerning ill-treatment and State responsibility. The States has a responsibility in cases that meets the requirements of severity, also in the event that the States does not have any direct involvement in the ill-treatment.[147] This means that States has an obligation to "take measures to ensure that individuals within their jurisdiction are not subjected to torture or to inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".[148] The extent of the obligation depends on the circumstances of each case.[149]

There has been some development on this doctrine in later years. There seems to be a new threshold in some cases where an individual is deprived of his or her liberty or is confronted

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142 Ibid § 91.
143 S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 90.
144 Ibid., § 90; also see Fenech v. Malta, app.no 19090/20, 01 March 2022, §§ 63–64 regarding the same principles.
145 S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 92.
146 Gäfgen v. Germany, app.no. 22978/05, 01 June 2010, § 108.
147 S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 98.
148 Ibid.
149 Ibid.

with law enforcement officers. The Court stated in the case of Bouyid v. Belgium the following:

> … any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question.[150]

In other words, in cases such as this, the assessment should be of necessity, not severity. However, this only seems to apply when considering degrading treatment. For torture and inhuman treatment, the severity test still applies.[151]

A test for the minimum level of severity might be relevant in cases questioning their admissibility, pursuant to Article 35 of the ECHR.[152] However, the interpretation in that case is different, and not relevant for this thesis.

5.2.2.2 Derogation

As mentioned in section 4.1.3, in times of emergency, Article 15 of the ECHR allows States a possibility to derogate from its obligations.

However, as with Article 2, Article 3 cannot be derogated, pursuant to Article 15 § 2, but unlike Article 2, Article 3 has no exceptions.

Therefore, there can be no derogation from Articles 3 in a pandemic situation.

5.2.3 Article 8

Article 8 will be further presented in the next chapter, about "private life". In this section the focus is on the Article's relevance to the sphere of health.

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[150] Bouyid v. Belgium, app.no 23380/09, 28 September 2015, § 101.
[151] European Court of Human Rights - Registry (2024) Key Theme - Article 3 The minimum level of severity test in light of Bouyid v. Belgium, *Council of Europe/European Court of Human Rights*, p. 2, https://ks.echr.coe.int/documents/d/echr-ks/the-minimum-level-of-severity-test-in-light-of-bouyid-v-belgium.
[152] C.P. v. The United Kingdom, app.no 300/11, 06 September 2016, § 42.

Article 8 enshrines the right to respect for private and family life and states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As mentioned in section 5.1 there is a positive obligation following Article 8, to take appropriate measures to protect the health of those within States' jurisdiction.[153]

The ECtHR has stated that a person's physical integrity is part of their "private life", within the meaning of Article 8 of the ECHR, and that this is well established.[154] A person's physical integrity may fall within the sphere of health.

In the case of Vasileva v. Bulgaria, the Court stated that the following is now well established:

> … although the right to health is not as such among the rights guaranteed under the Convention or its Protocols […] the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage …[155]

The first coincide with the obligation following Article 2 mentioned earlier, stated in the case of Lopes de Sausa Fernandes v. Portugal, although it was about the protection of patients' lives,[156] while in Vasileva v. Bulgaria their physical integrity. However, this shows that the

[153] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §282.
[154] Ibid., § 261.
[155] Vasileva v. Bulgaria, app.no 23796/10, 17 March 2016, § 63.
[156] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, §§ 166–167.

obligation for States follows several articles, and also confirms the articles` connection in the sphere of health.

Another important case where an obligation to protect health were discussed, was the case of Vilnes and Others v. Norway, in which there was a violation of Article 8 because of the States` failure to ensure that the applicants received essential information, which would enable them to assess the risks to their health and safety.[157]

As with Article 3, a violation of a person's psychological integrity is protected by Article 8.[158] Psychological integrity and mental health coincide, as mental health is part of a person's psychological integrity. However, the Court also put mental health in connection with "moral integrity", which is a part of private life which will be seen in chapter 6, and concluded that a person's mental health is a crucial part of private life.[159]

In other words, Article 8 covers the sphere of health, and there is a positive obligation to provide proper health care to protect a person's physical and psychological integrity. However, as with the other articles, it is not without its limits. States has a margin of appreciation, as will be analyzed later. The assessment of the margin is part of a bigger consideration following Article 8, however, this too will be elaborated further under chapter 6, as the assessment for the obligation to protect health according to Article 8, will largely be the same as the obligation to protect, or not interfere with, the right to respect for private life.

The analysis of the ECtHR case law indicates that medical negligence is part of the health sphere concerning both Article 2 and 8, and it is therefore a relevant factor to examine further.

5.3 Medical negligence

The Court distinguishes between cases concerning medical negligence and where patients has been deprived of access to life-saving, or immediate, emergency treatment. This is a distinction that is relevant to look at here, and to show how to assess the difference.

[157] Vilnes and Others v. Norway, app.no 52806/09 and 22703/10, 05 December 2013, § 245.
[158] Söderman v. Sweden (GC) no 5786/08, 12. November 2013, § 85.
[159] Bensaid v. The United Kingdom, app.no 44599/98, 06 February 2001, § 47.

One of the latest cases on medical negligence, is the case of Lopes de Sausa Fernandes v. Portugal. In this case, the Court saw an opportunity to "reaffirm and clarify the scope of the substantive positive obligations of States in such cases",[160] referring to violations of Article 2 in the context of health care. First it reiterated the substantive positive obligation following Article 2 of the ECHR, as cited in this thesis` section 4.1.1, before going through case law relating to medical negligence.

By going through cases, the Court found that there was a clear distinction between cases where there had been an "arguable claim of a denial of immediate emergency care", from cases where there were "allegations of mere medical negligence",[161] and stated that the approach taken in the first type of cases cannot be transported to cases concerning the latter.[162]

Regarding medical treatment, in the context of medical negligence, States` substantive positive obligations is limited.[163] It only gives a duty to regulate. In other words, States need to make sure that there is an effective regulatory framework, compelling private or public hospitals to adopt appropriate measures to protect the lives of patients.[164] And also their physical integrity.[165]

Furthermore, there is a positive obligation under Article 8 to:

> … have in place regulations ensuring that medical practitioners consider the foreseeable consequences of planned medical procedures on their patients' physical integrity and inform patients of these beforehand in such a way that they are able to give informed consent …[166]

It seems that, in cases where medical negligence has been established, there are only cases in which the relevant regulatory framework failed to ensure proper protection of the patient's life, that the Court finds a substantive violation of Article 2 of medical negligence.[167]

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[160] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 162.
[161] Ibid., § 182.
[162] Ibid.
[163] Ibid., § 186.
[164] Ibid.
[165] Vasileva v. Bulgaria, app.no 23796/10, 17 March 2016, § 63.
[166] Ibid., § 69.
[167] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 187.

It is important to note the following:

> … where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life …[168]

To determine if there has been a failure by the State, there need to be a concrete assessment of the "alleged deficiencies", not an abstract one.[169] To do so one must determine the relevant law and practice, and whether it violated the Convention, based on how it was applied or affected the applicant.[170] Therefore, a deficient regulatory framework may not be sufficient to raise an issue under Article 2 of the ECHR, it must have "operated to the patient's detriment".[171]

The Court emphasized that the obligation to regulate must be understood in a broader sense. It must ensure the effective functioning of that regulatory framework, and the regulatory duties encompasses "necessary measures to ensure implementation, including supervision and enforcement".[172]

Based on this, the Court, giving a broader understanding of States` obligation to provide a regulatory framework, stated that the substantive limb of Article 2 of the ECHR may be engaged in respect of the acts and omissions of health-care providers, in very exceptional circumstances.[173] In other words, the Court has found that there may be circumstances expanding the obligation of States beyond the mere regulatory one.

The two exceptional circumstances are, firstly "a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency

[168] Ibid.
[169] Ibid., § 188.
[170] Ibid.
[171] Ibid.
[172] Ibid., § 189.
[173] Ibid., § 190.

treatment”,[174] however, where a patient have received deficient, incorrect or delayed treatment, this does not apply.[175]

Secondly:

> … where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients’ lives, including the life of the particular patient concerned, in danger …[176]

It has been acknowledged that it sometimes may be hard to distinguish between these cases, between medical negligence and where there is a denial of access to life-saving emergency treatment. The reason for this seems to have been that there can be combinations of factors that has contribute to a patient’s death.[177] The Court has given four cumulative factors that must be met for the case to fall within the latter category, where there is a denial of access to life-saving emergency treatment.

First:

> …the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person’s life is at risk if that treatment is not given …[178]

Second:

> … the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly …[179]

[174] Ibid., § 191.
[175] Ibid.
[176] Ibid., § 192.
[177] Ibid., § 193.
[178] Ibid., § 194.
[179] Ibid., § 195.

Third, "there must be a link between the dysfunction complained of and the harm which the patient sustained".[180]

And finally, fourth, "the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above".[181]

This gives a clear indication that the limit of the obligation is expanded, as mentioned above, and to determined how to assess the States obligation, if there is a case of mere medical negligence or if there is a denial of access to life-saving emergency treatment, one must use these factors. It must be determined in each individual case.

To summaries, it is worth mentioning that in the sphere of medical negligence, the States does not only have a substantive obligation, but also a procedural one. In the case of Lopes de Sausa Fernandes v. Portugal, the Court did not find a violation of the substantive obligation, since the regulatory framework was sufficient and there was no denial of access to life-saving emergency treatment, but there was a procedural violation.[182]

Also, as mentioned above, in the case of Vasileva v. Bulgaria, it was stated that there is a positive obligation under Article 8 "to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage".[183] Furthermore, the Court highlighted that the obligation demanded that such proceeding must operate effectively in practice, not only in theory, and that it have to be "completed within a reasonable time".[184] This, as mentioned, refers to the procedural obligations, and is therefore not as relevant for this thesis and will not be further elaborated. However, it is relevant to mention, as it gives a broader understanding of the obligation, also in manners relating to medical negligence.

[180] Ibid., § 196.
[181] Ibid.
[182] Ibid., § 205 and §§ 238–239.
[183] Vasileva v. Bulgaria, app.no 23796/10, 17 March 2016, § 63.
[184] Ibid., §§ 64–65.

5.4 A positive obligations to protect health and a right to healthcare

Based on the aforementioned; the ECHR does not guarantee a right to health.[185] However, it does contain positive obligations within the sphere of health and health care. In other words, there is a positive obligation to protect health and the provisions guarantee a right to healthcare, as one can deduct from the case of Lopes de Sausa Fernandes v. Portugal, among others. Therefore, not all aspects of a person's health are protected in every circumstance. Furthermore, it is important to note that both a person's physical and mental health may be protected.

5.4.1 The limit for the States obligation

The limit of the obligations is, as mentioned, first and foremost that States must ensure a regulatory framework, regulating compelling both public and private hospitals to adopt appropriate measures for the protection of the patients' lives, and both their physical and psychological integrity and health. There must be in place adequate provision for securing high professional standards among health professionals and the protection of the lives of patients. Furthermore, to put in place a legislative and regulatory framework, which also needs to include efficient criminal-law provisions regarding more serious cases. The State must take operational measures where there is a risk to the health of individuals, or the public, in certain circumstances. There are four cumulative factors that must be met concerning denial of access to life-saving emergency treatment, for the State to have "exceeded" its limits.

5.4.2 How to assess the limits and when does the obligations apply?

In short, concerning Article 2, the Osman-test will apply, Article 3, the minimum level of severity, and Article 8 follows what will be presented in the following chapter concerning the right to respect for private life.

[185] Vasileva v. Bulgaria, app.no 23796/10, 17 March 2016, § 63; Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 165.

6. Rights limited and possibly violated when protecting life and health during Covid-19.

This chapter provides an overview of rights relevant to this thesis that were limited and may have been violated during the Covid-19 pandemic. They are further relevant when considering the limits of the right life and the obligation to protect health. By States protecting life and health during the Covid-19 pandemic, it may have been a collision, or interference, with other rights. There were several rights affected, however, in this thesis, the focus will be the right to respect for private life, and the right to education, as they seem to be most affected concerning rights of children.

6.1 Obligations to respect private life

Article 8 of the ECHR contains the rules of the right to respect for private life.

The object of Article 8 of the ECHR is primarily to protect individuals against arbitrary interference by States.[186] However, as motioned above, the Article also contain a positive obligation.[187]

Considering the "ordinary meaning" of the term "private life" there is not a lot of information to obtain, other than it might be regarding you personally, and at first glance does not include a public life, which in reality it does.[188] In the "context and in the light of its object and purpose" on can see that the term "private life" may contain more.

Following the case law from the ECtHR, among others the case of Fedotova v. Russia, in which the Court stated that "the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition".[189]

This means that article 8 and the right to respect for private life must be considered in each individual case, as it might be applicable in new settings, and new contexts.

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[186] Söderman v. Sweden, app.no 5786/08, 12. November 2013, § 78.
[187] Ibid.
[188] Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70.
[189] Fedotova and others v. Russia, app. No 40792/10 and others, 17 January 2023, § 141.

The following will highlight several cases where the term “private life” has been more elaborated.

6.1.1 The sphere of private life

As mentioned above, the term “private life” does not lend itself to exhaustive definition. And just by analyzing its “ordinary meaning”, it does not provide a lot of information, besides that there might be a lot involved in an individual’s “private life”. Even though no list seems to be exhaustive, the ECtHR has in its case law provided examples of what might be included in the term, some will be reiterated in the following.

The ECtHR has highlighted the right of personal development as part of “private life”.[190] Within personal development, the Court highlights the development of personality and personal autonomy. This is an important principle when interpreting the guarantees following Article 8.[191] The right to personal development has been highlighted in several cases.[192] The right to self-determination has also been highlighted as part of a person’s personal autonomy.[193] This, and the importance of this principle as an underlying rule of interpretation has been reiterated several times.[194]

The Court has also established, as mentioned earlier, that a person’s physical integrity forms part of their “private life”.[195]

Article 8 additionally provides protection of “moral integrity”,[196] which includes mental health,[197] and sometimes it can embrace multiple aspects of an individual's physical and social identity.[198] However, not every measure that may affect the moral integrity of a person gives

[190] Fedotova and others v. Russia, app. No 40792/10 and others, 17 January 2023, § 141.
[191] Ibid.
[192] To name a few, Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70; Darboe and Camara v. Italy, app.no 5797/17 21 July 2022, § 123.
[193] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61.
[194] E.g. Gough v. The United Kingdom, app.no 49327/11, 28 October 2014, § 183.
[195] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 261.
[196] Wainwright v. The United Kingdom, app.no 12350/04, 26 September 2006, § 43; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42.
[197] Bensaid v. The United Kingdom, app.no 44599/98, 06 February 2001, § 47.
[198] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42.

rise to an interference, it must entail sufficient adverse effects.[199] This will apply to other rights as well.

Furthermore, the Court has highlighted the right to establish and develop relationships with other human beings and the outside world.[200] In this regard, the Court has acknowledged the right for everyone to live privately, however, it is too restrictive to limit "private life" to an "inner circle",[201] and by doing so exclude the outside world.[202]

As mentioned, the Court has established that private life must be understood in a broad sense and therefore includes a right to lead a "private social life".[203] This is a possibility for the individual to develop his or her social identity, and furthermore a "possibility of approaching others in order to establish and develop relationships with them".[204]

The term private life also includes a notion of professional activities, or activities taking place in a public context.[205] The Court sees this as part of developing a person's social identity, and a place for developing relationships with others.[206] Furthermore, the Court noted that "it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world".[207] This applies concerning school and education as well.[208]

The notion of "private life" within the employment-related issues was summarized in a recent case, the case of Mile Novakovic v. Croatia, in which the Court referred to an earlier case confirming that employment-related disputes could fall within the scope of "private life".[209]

Even though there are no exhaustive list of what the term "private life" contains, the ECtHR has set some limits. For example, in the case of Gough v. The United Kingdom, the Court stated that Article 8 cannot protect "every conceivable personal choice in that domain: there

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[199] F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 59.
[200] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42; Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 261; Darboe and Camara v. Italy, app.no 5797/17, 21 July 2022, § 123.
[201] Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70.
[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] Ibid., § 71
[206] Ibid.
[207] Ibid.
[208] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §§ 263 and 306.
[209] Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 43.

must presumably be a *de minimis* level of seriousness as to the choice of desired appearance in question".[210] In this case, there was a man that appeared naked in public, in various places.

In the same case, the Court stated the following:

> … not every activity that a person might seek to engage in with other human beings in order to establish and develop relationships will be protected by Article 8: it will not, for example, protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life [...] However, the fact that behaviour is prohibited by the criminal law is not sufficient to bring it outside the scope of "private life" …[211]

In the Case of Nicolae Virgiliu Tănase v. Romania, the Court emphasis that "not every act or measure of a private individual which adversely affects the physical and psychological integrity of another will interfere with the right to respect for private life guaranteed by Article 8".[212] The Court also called for a test of severity, or a severity threshold, to be necessary if Article 8 should be applicable in such a situation.[213] This seems to coincide with that of an interference by a public authority pursuant to Article 8 § 2 of the ECHR. The Court sat further limitation on the scope of the term private life by claiming that activities which are of an essentially public nature, does not fall within the scope of private life, and finds support for this in the Courts case law.[214]

Based on this, the sphere of private life is a broad term and does not have an exhaustive definition. In other words, it may contain a whole array of aspects and context. It gives the people within the State a wide protection when developing their personal and professional life. A person's development and anatomy are of essence. However, it is not without its limits. There need to be a minimum amount of seriousness in the appearance of choice, and there has to be a conceivable direct link between the action or inaction of a State and a person's private life, and when considering the scope of interpersonal relations there cannot be too broad and indefinite scope.

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[210] Gough v. The United Kingdom, app.no 49327/11, 28 October 2014, § 184.
[211] Ibid., § 183.
[212] Nicolae Virgiliu Tănase v. Romania, app.no 41720/12, 25 June 2019, § 128.
[213] Ibid.
[214] Ibid.

To fully understand the rights and limits of Article 8 and the right to respect for private life, it is relevant to give a broader analyzes on how the obligation should be interpreted and applied. This will highlight some limitations, especially the States margin of appreciation, which will follow in the next section.

6.1.2 How the obligation should be interpreted and applied

As aforementioned, Article 8 has both negative and positive obligations. Still, in protecting these rights, the considerations are largely the same.[215]

The interpretation and how to apply Article 8, is more evidently, following the case law from the ECtHR.

It has been stated by the ECtHR, on several occasions, that the principles of assessing the States positive and negative obligation following Article 8 are similar.[216] In the Case of F.O. v. Croatia, the Court stated the following:

> Whether a case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 or as a matter of "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar.[217]

In several cases the Court explains how to interpret and apply the obligations, highlighting the importance of fair balance, and that it has to be struck between the competing interests of the individual and of the community as a whole.[218] The Court, when considering the positive obligations, highlighted that the aims in Article 8 § 2 are of certain relevance.[219] The Court

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[215] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 65; F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 79.
[216] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 65; F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 79.
[217] F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 79.
[218] Keegan v. Ireland, app.no 16969/90, 26 May 1994, § 49; Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 65; Barbulescu v. Romania app.no 61496/08 05 September 2017, § 112; between child and parents see C. v. Croatia, app.no 80117/17, 08 October 2020, § 72.
[219] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 65; F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 79.

also stated that States enjoys a certain margin of appreciation, in both contexts, determining the steps to ensure compliance with the Convention.[220]

The ECtHR has analyzed and explained the notion of "respect" in the first paragraph of Article 8 in more detail. It is not clear cut. This especially relates to the positive obligations, as it will "vary considerably from case to case".[221] There is a list of factors that is relevant when assessing Article 8 in this regard. The factors relate to the importance of the interest at stake, "fundamental values" and "essential aspects" of private life.[222] Furthermore, it is relevant to consider "the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system".[223]

Other factors that have been highlighted is whether the alleged obligation is narrow and precise or broad and indeterminate, and also the burden of the obligation on the State.[224]

Concerning Article 8 § 2. In the case of Vavřička and Others v. The Czech Republic, the Court stated that for it to be determined whether an interference in the right to respect for private life entails a violation of Article 8 of the Convention, one must examine:

> … whether it was justified under the second paragraph of that Article, that is, whether the interference was "in accordance with the law", pursued one or more of the legitimate aims specified therein, and to that end was "necessary in a democratic society".[225]

To understand this better, it is relevant to examine the Courts statement further.

As stated, the interference needs to be "in accordance with the law". The Court elaborated on what is to be understood as "law" by stating that the term "law" must be understood in its "substantive" sense, not its "formal" one.[226] It includes written law but is not limited to

[220] F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 79.
[221] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 66.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 265.
[226] Ibid., § 269.

primary legislation. It also includes legal acts and instruments of lesser rank. This means competent courts, and its interpretation, is the decider of what ranks as "law" in each case.[227]

A list of "legitimate aims" follows from Article 8 § 2. This is an exhaustive list. However, in each case it needs to be examined if the aim falls within this list as it might not be clear in each case. I.e., in the case of Vavřička and Others v. The Czech Republic the aims corresponded with the aims of the protection of health and the protection of the rights of others.[228] These aims are part of Article 8 § 2. It is also relevant for this thesis to note that the Court stated the following in the same case:

> In view of the above, there is no need to decide whether other aims recognised as legitimate under Article 8 § 2 may be of relevance where a State takes measures to guard against major disruptions to society caused by serious disease, namely the interests of public safety, the economic well-being of the country, or the prevention of disorder …[229]

Furthermore, concerning what is "necessary in a democratic society" and its general principles and margin of appreciation, the Court summarizes the applicable principles, by stating that for an interference to be considered "necessary in a democratic society", the aims must answer a "pressing social need" and, in particular, the justification by the State must be "relevant and sufficient", and the interference must be proportionate to the legitimate aim pursued.[230]

In other words, a test of proportionality must be held. It is of essence that the States actually does this test, if not, they will breach the requirements of Article 8.[231] This will be elaborated more under the section on margin of appreciation.

The Court has also highlighted its subsidiary role of the Convention system,[232] stating the following:

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[227] Ibid., § 269.
[228] Ibid., § 272.
[229] Ibid., § 272.
[230] A.-M.V. v. Finland, app.no 53251/13, 23 March 2017, § 81; Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 273.
[231] M.A. v. Denmark, app.no 6697/18, 09 July 2021, §§ 148–149.
[232] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 273.

> It is primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals' rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests.[233]

Here, the Court is assessing the doctrine mentioned above, the margin of appreciation doctrine.

However, the margin of appreciation is not without its limits, and the assessment by the national authorities is subject to review by the Court. In other words, the Court makes the final evaluation whether an interference in a particular case is "necessary". [234]

The States holds a certain margin of appreciation, however, the margins breadth depends on several factors, which again depends on the particular case.[235]

Based on this, the limits of Article 8 are considered based on the whole provision, and relevant to both the positive and negative obligation. To determine whether States followed the obligations of Article 8, fair balance must have been struck between the competing interests of the individual and of the community as a whole, or between two competing individual rights. There must be a test of proportionality, and the interference must be proportional to the legitimate aim pursued. Concerning the proportionality, and the means used, States has a margin of appreciation, however, this margin has its limits and is also under scrutiny by the ECtHR. It is therefore relevant to analyze the margin of appreciation doctrine.

6.1.2.1 Margin of appreciation

States, or the High Contracting Parties, enjoys a margin of appreciation concerning their primary "responsibility to secure the rights and freedoms" that is defined in the ECHR. This is based on the principle of subsidiarity, which also means that States` responsibility is "subject

[233] Ibid.
[234] Ibid.
[235] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67; Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 273.

to the supervisory jurisdiction" of the ECtHR.[236] The doctrine of the margin of appreciation is developed by the ECtHR, and have been used for a long time.[237] The doctrine has not gone unnoticed and has seen some critique.[238] However, it is still going strong, as its use have not been less in recent times, while the Court stressing its subsidiary role.[239]

The doctrine has even been included in the Convention, trough Protocol No. 15, and entered into force on the 1st of August 2021.[240]

The relevance of the margin of appreciation for this thesis considering positive obligations is first of all, as mentioned, that the margin sets a limit on States` obligations. The margin is something that is considered when assessing the proportionality of measures, and in a situation concerning Article 8 § 2, if an interference is "necessary in a democratic society".[241] Furthermore, it is important to note the following:

> … whenever positive obligations are accepted, clashes of rights may become frequent. The obligations to protect one right may indeed collide with the obligations under another conventional right. States will have to strike, in this respect, a fair balance between the conflicting obligations. This is typically so in cases where, e.g., protection of privacy needs to be balanced against the protection of freedom of expression. States may find themselves in such cases in a very difficult position. Protecting one right may indeed bring about the underprotection of another.[242]

It is recognized by the Court, that the margin of appreciation is a relevant factor when rights collide.[243] However, it seems there is a lack of consistency in the Court`s practice, when applying the doctrine. This lack of consistency seems to stem from the Court`s lack of explanation on why it uses the margin of appreciation in different circumstances, and also the width or breadth of the margin.[244] In some cases, the State`s margin seems to be wide, in

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[236] See the preamble of the Convention.
[237] Lemmens, K. (2018). The Margin of Appreciation in the ECtHR's Case Law: A European Version of the Levels of Scrutiny Doctrine? *The European Journal of Law Reform*, 20(2-3), 78–96. https://doi.org/10.5553/EJLR/138723702018020002005, p. 84.
[238] Ibid., p. 85.
[239] Ibid.
[240] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 150.
[241] Paradiso and Campanelli v. Italy, app.no 25358/12, 24 January 2017, § 181.
[242] Lemmens, K. (2018). The Margin of Appreciation in the ECtHR's Case Law: A European Version of the Levels of Scrutiny Doctrine? *The European Journal of Law Reform*, 20(2-3), 78–96. https://doi.org/10.5553/EJLR/138723702018020002005, p. 90-91.
[243] Ibid., p. 91.
[244] Ibid.

others, it is narrow.[245] It may seem like the Court might lack a systematic approach.[246] It has furthermore been claimed that the Court lack a “specific underlying theory”.[247]

However, the Court seems to have a theory, albeit it might differentiate in when and how to present it. In the case of M.A. v. Denmark, the Court made general remarks on the scope of the margin of appreciation. The Court stated that the margin of appreciation will “vary in the light of the nature of the issues and the seriousness of the interests at stake”.[248]

Even though this case was about the right to family life, the Court highlighted factors that will apply in general when interpreting and applying the States margin of appreciation. This case and others will be used to illustrate where the Court has elaborated on the States margin of appreciation.

First, Article 8 of the ECHR does not guarantee absolute rights.[249] The legitimate aim for a State`s choices need to be considered.

Second, even though the Court has acknowledges that some aspects of legitimate aims has a wide margin, and is usually allowed in similar cases,[250] there are a number of arguments, based on the ECHR, and the case law of the ECtHR, to limit the margin of appreciation.[251] The Court has furthermore stated that “the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions”.[252] This is rather vague, but still an effort to give a consistent theory on the matter. Also, the Court stated later in the same case, that based on the object and purpose of the ECHR, the application of its provisions in a particular case must be “practical and effective, not theoretical and illusory”.[253] This is a principle of effectiveness and is a “general principle of interpretation extending to all the provisions of the Convention and the Protocols thereto”.[254]

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[245] Ibid., p. 92.
[246] Ibid., p. 91.
[247] Ibid., p. 86.
[248] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 140.
[249] Ibid., § 142.
[250] Ibid., § 143.
[251] Ibid., § 144.
[252] Ibid., § 144.
[253] Ibid., § 162.
[254] Ibid., § 161.

Furthermore, the Court mentions another factor that has an impact on the scope of the margin, the mentioned subsidiary role of the Court.[255] Because of this, States, or the Contraction Parties:

> …have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions ...[256]

This indicates that as a starting point, the margin of appreciation is rather wide.

The margin extends both to a decision to intervene in each subject area, and to give detailed rules ones it has decided to intervene. The detailed rules must comply with the ECHR and there must be a "balance between any competing public and private interests".[257]

The Court, as mentioned above, has held that choices made by the State is under its scrutiny. Furthermore, The Court highlights the risk of abuse, if general measures were to be relaxed.[258] And, in the light of a potential general theory, the Court has stated that general measure has been found to be preferred, as it is better for achieving the legitimate aim, than a provision allowing a case-by-case examination. The latter might increase a risk of "significant uncertainty, of litigation, expense and delay, as well as of discrimination and arbitrariness".[259]

As mentioned above, the margin of appreciation is considered when assessing the proportionality and if an interference is "necessary in a democratic society".[260] Therefore, when applying their margin of appreciation, it is important that States actually incorporate a test of proportionality in their legislative processes. The importance can be highlighted by the case of M.A. v. Denmark, in which the Court stated the following:

> It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the

[255] Ibid., § 147.
[256] Ibid.
[257] Ibid., § 148.
[258] Ibid.
[259] Ibid.
[260] Paradiso and Campanelli v. Italy, app.no 25358/12, 24 January 2017, § 181.

> legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices [...] In this connection the Court also notes that the domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, and the interests in issue have not been weighed in the balance, there will be a breach of the requirements of Article 8 of the Convention […] Where, on the other hand, the domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and have adequately weighed up the individual interests against the public interest in a case, the Court would require strong reasons to substitute its own view for that of the domestic courts ...[261]

This highlights in a very good way why States need to show, or highlight, that they considered if, and how, there was a fair balance between competing interests.

As highlighted, there is no absolute clear line concerning the breadth of the margin of appreciation. However, the Court has highlighted some relevant factors in its case law.

Consensus is a relevant factor when deciding the margins breadth. The Court has stated that the existence, or not, of common ground between States, is a relevant factor when determining the scope of the margin of appreciation.[262] This was also highlighted in the case of Vavřička and Others v. The Czech Republic, in which the Court stated that if there is no consensus between States, the margin will be wider, particularly where the case raises sensitive moral or ethical issues.[263] Before this, the same had been stated in the case of Hämäläinen v. Finland.[264]

The Court have provided more specific examples on where the States margin usually is wider. For example, in matters of healthcare policy, because the States are best placed to assess priorities, use of resources and social needs.[265] The Court also stated that when striking a

[261] M.A. v. Denmark, app.no 6697/18, 09 July 2021, §§ 148-149.
[262] Ibid., § 151.
[263] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 273.
[264] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67.
[265] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 274.

balance between competing private and public interests or Convention rights, the margin will usually be wide.[266]

However, the breadth of the margin may vary, and are in some cases narrower.

In the case of Söderman v. Sweden, the Court highlighted that the means to secure compliance with Article 8 of the ECHR, in the "sphere of the relations of individuals between themselves", is in principle a matter that falls within States` margin of appreciation.[267] This applies whether the obligations are positive or negative.[268] However, the States obligation depends on the particular aspect of private life that is in issue, in which "a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed".[269]

This was reiterated in the case of Vavřička and Others v. The Czech Republic.[270] However, the Court in this case also highlighted the individual's effective enjoyment of intimate or key rights, and that the margin will be relatively narrow if the right is crucial in this aspect.[271]

These type of restriction to the States margin of appreciation has been reiterated in several cases.[272]

The margin is also reduced in cases where "a particularly vulnerable group is subjected to differential treatment on grounds that are not specifically linked to relevant individual circumstances".[273]

In the conclusion of the case of Vavřička and Others v. The Czech Republic, the Court saw fit to clarify the following:

> … the issue to be determined is not whether a different, less prescriptive policy might have been adopted […] Rather, it is whether, in striking the particular balance that

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[266] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67; Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 275.
[267] Söderman v. Sweden, app.no 5786/08, 12 November 2018 § 79.
[268] Ibid.
[269] Ibid.
[270] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 273
[271] Ibid., § 273.
[272] E.g. Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67; A.-M.V. v. Finland, app.no 53251/13, 23 March 2017, § 83.
[273] A.-M.V. v. Finland, app.no 53251/13, 23 March 2017, § 83.

they did, the Czech authorities remained within their wide margin of appreciation in this area.[274]

To summarize, the States have a margin of appreciation, which in many cases will be wide, however, not in every case or aspect. Furthermore, it is of vital importance for the State to both do a test of proportionality as described above, and also show that its done, and which considerations they took, considering whether there was a fair balance in the measures taken.

6.1.3 Derogation

In contrast to Article 2 and 3, there may be a derogation from Article 8 in "time of war and other public emergency threatening the life of the nation" pursuant to Article 15. However, the measures imposed by the State can only be to an "extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law". States choosing to derogate from the obligations must keep the Secretary general "fully informed of the measures which it has taken and the reasons" for taking them. This also applies when such measures cease to operate.

There might be a possibility to derogate from Article 8 in a pandemic situation, considering it to be a "public emergency threatening the life of the nation".

Concerning the scope of the derogation, States has a wide margin of appreciation.[275] However, this margin can be scrutinized by the Court as described above, and Article 15 provides restrictions on the scope, as the derogation cannot go beyond the "extent strictly required". By assessing the scope, the Court must look at factors, such as "the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation".[276]

[274] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 310.
[275] Brannigan and McBride v. The United Kingdom, app.no 14553/89, 26 May 1993, § 43.
[276] Ibid.

6.2 Right to education

The right to education is not mentioned specifically in the ECHR itself, however, it is enshrined in Article 2 of Protocol No. 1 to the ECHR. Furthermore, it may be that Article 8 of the ECHR also contains rights in the sphere of education. This will be discussed and analyzed more in the following.

6.2.1 Article 2 of Protocol No. 1

The Protocol and Article states the following:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

It is the first sentence that is relevant for this thesis. The ordinary meaning of this, gives States a negative obligation not to interfere in the right to education, to not deny someone the right to education. However, as with other articles, this is more nuanced.

A key case in this area is the so called Belgian linguistic case mentioned earlier in the thesis.[277] However, there is a newer case, which builds upon the Belgian linguistic case, and will be used to highlight the interpretation of the right to education, the case of Leyla Sahin v. Turkey.[278]

The right to education following Article 2 of Protocol No. 1 applies to all levels of education.[279] Also, all within the State`s jurisdiction should be treated equally regarding their exercise of their right to education.[280] Furthermore, the right is equally guaranteed, without distinction, whether it is State, or independent or private, schools.[281]

The Court also made a point that it is of "crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and

[277] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, app.no 1474/62 and others, 23 July 1968 – or the "Belgian linguistic case".
[278] Leyla Sahin v. Turkey, app.no 44774/98, 10 November 2005.
[279] Ibid., § 134.
[280] Ibid., § 152.
[281] Ibid., § 153.

illusory".[282] The development of the right mainly depends on the needs and resources of the community, and also that its content may vary from one time or place to another, according to economic and social circumstances. Furthermore, it is important to note that the Convention is a living instrument which must be interpreted in the light of present-day conditions.[283]

The importance of the right to education, in a democratic society, was also highlighted by the Court, when stating the following:

> … the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision …[284]

This sets a rather high limit in questions concerning limitation of the right to education.

The right to education can be read as "a right of access to educational institutions existing at a given time".[285] However, this is only part of the right. The right need to be effective, and the pupils must be able to draw a profit from the education, e.g. official recognition of the studies completed.[286]

Even though the limit is high, the right to education is not without limitations. The right of access is regulated by the State, and it will vary in time and place. Factors for the variations may be the needs and resources of the community, and also potential features of different levels of education. In other words, States has a certain margin of appreciation also in the sphere of education. However, the Court has the final decisions of the requirements of the ECHR.[287]

It is essential that the "essences" of the right is not impaired, and that it is not deprived of its effectiveness.[288] The restrictions must be foreseeable for those concerned and pursue a legitimate aim.[289] Article 2 of Protocol No. 1 holds no exhaustive list of "legitimate aims",

[282] Ibid., § 136.
[283] Ibid.
[284] Ibid., § 137.
[285] Ibid., § 152.
[286] Ibid.
[287] Ibid., § 154.
[288] Ibid.
[289] Ibid.

like Article 8 to 11 of the ECHR.[290] However, limitation are only compatible with Article 2 of Protocol No. 1 "if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".[291]

Therefore, the first sentence of the provision must be particularly read in the light of Articles 8, 9 and 10 of the ECHR.[292] The reason for this is, that the provision of the ECHR, and its protocols, must be read as a whole, as restrictions mentioned above must not collide, or conflict, with other rights following the ECHR and its protocols.[293]

The right to education is an essential right, and the standard for limiting this right is high. States holds a margin of appreciation, however, the means of interpreting and applying the right must be the same as described concerning the right to respect for private life, both considering the application of the provision, and the margin of appreciation.

6.2.2 Article 8

As the Article has been presented in a section above, it will not be presented again. However, this section will illustrate and refer to some cases where Article 8 of the ECHR provides its relevance to the field of education.

Article 8 has been mentioned in the ECtHR case law in the field of education, on several occasions. The Court has stated that in certain circumstances, measures taken may affect the right to respect for private life.[294] However, as mentioned, not every measure that may affect the moral integrity of a person gives rise to an interference.[295] The case of F.O. v. Croatia, considers corporal punishment, namely verbal abuse, and it was found that the complained treatment was not sufficient for Article 8 to apply, in regards to the persons physical or moral integrity.[296] The case also highlights "the need for protection of children from any form of violence and abuse", also in the field of education concerning discipline.[297]

[290] Ibid.
[291] Ibid.
[292] Ibid., § 155.
[293] Ibid.
[294] F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 59.
[295] Ibid.
[296] Ibid.
[297] Ibid.

In the same case, the Court highlighted the role of the education authorities, as an important public service.[298] The essential role, or primary duty, of the educational authorities is to protect the health and well-being of pupils, to ensure their safety, and to protect them from all forms of violence while under their supervision.[299] It must be taken particular regards to their vulnerability relating to their young age.[300]

As mentioned in section 6.1.1, in the case of Pretty v. The United Kingdom, the Court stated that "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world".[301] While the phrase "personal development" might include several different forms of development, education is a way of developing oneself intellectually, and therefore personal. Furthermore, there is a "personal development" factor in education following the other rights mentioned. By attending school, you will meet other human beings, and provided a possibility to "establish and develop a relationship" with them, and by doing so, also affecting your own "personal development", and "private social life".

The same was stated in Vavřička and Others v. The Czech Republic, in which the Court highlighted the development of personalities and to acquire important social and learning skills, as important opportunities lost in the regards to an exclusion from school and education.[302]

Article 8 provides protection to individuals while attending school. It does not guarantee a right to education. However, access to education, and part of the skills and development opportunities that education provides, may under certain circumstances fall within the scope of private life, which the States have an obligation to protect.

[298] Ibid., § 82.
[299] Ibid.
[300] Ibid.
[301] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61.
[302] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 306.

7. Children in a pandemic situation

As mentioned in chapter 1 and recognized in the ECtHR case law, children are vulnerable.[303] Normally when considering something to be vulnerable, one might think that it needs special attention, that it needs to be even more protected than other things. A vulnerable person needs to be taken extra care of, contrary to someone less vulnerable, which one might expect to take better care of themselves. Furthermore, protection of children must be said to be a worldwide priority of high moral and ethical proportions. At the same time, and based on several sources,[304] some mentioned earlier, respecting children's rights does not seem to have been a priority during the Covid-19 pandemic. In this connection, the question arises whether restrictions imposed during the pandemic complied with human rights of children.

The United Nations International Children's Emergency Fund (UNICEF) stated that Covid-19 is a universal crisis, and that for some children the effects may be lifelong.[305] UNICEF furthermore states the following:

> Children are not the face of this pandemic. But they risk being among its biggest victims, as children`s lives are nonetheless being changed in profound ways. All children, of all ages, and in all countries, are being affected, in particular by the socio-economic impacts and, in some cases, by mitigation measures that may inadvertently do more harm than good.[306]

To analyze whether States did breach the rights of the children, it first needs to be established which rights children actually have. After this, it is relevant to take a closer look at the interference with children's rights, before eventually analyzing the lawfulness of the interference, and the mitigation measures.

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[303] Z and Others v. the United Kingdom, app. no. 29392/95 10 May 2001, § 73; E and others v. the United Kingdom, app.no 33218/96 26. November 2002, § 88; C.A.S and C.S v Romania, app.no 26692/05, 20 March 2012, § 71 and 81; Ilbeyi Kemaloglu and Meriye Kemaloglu v. Turkey, app.no 19986/06 10 April 2012, § 35; M.H and others v Croatia app.no 15670/18 and 43115/18, 18. November 2021 § 184.
[304] NOU 2021: 6; NOU 2022: 5; Barneombudet (2023), Barneombudets høringssvar - Koronautvalgets rapport – Ombudsperson for Children (2023), Ombudsperson for Childrens response to the consultation response - The Coronavirus Committee's report [my translation of the name of the response/reply], https://www.barneombudet.no/uploads/journal/Barneombudets-horingssvar-Koronautvalgets-rapport-16.-oktober-2023.pdf.
[305] UNICEF (2022) Covid-19 and children, *UNICEF data hub*, hhttps://data.unicef.org/covid-19-and-children/.
[306] Ibid.

7.1. The rights of children according to the ECHR

Children are not specifically motioned in the ECHR.[307] Still, they are protected by the Convention as part of "everyone" pursuant to Article 1. As they are a vulnerable group, there might be an obligation for extra protection. Also, there is a lot of case law mentioning children and their vulnerability. This will be highlighted and analyzed in this chapter.

The importance of the rights of children has as mentioned been highlighted by the ECtHR in its case law. Among others in the case of Vavřička and Others v. The Czech Republic, where the Court considered the interference and proportionality following Article 8 of the ECHR, in which the Court stated the following:

> It is well established in the Court's case-law that in all decisions concerning children their best interests are of paramount importance. This reflects the broad consensus on this matter, expressed notably in Article 3 of the UN Convention on the Rights of the Child …[308]

In the same case, the Court stated that "there is an obligation on States to place the best interests of the child, and also those of children as a group, at the center of all decisions affecting their health and development".[309]

This highlights the importance of the rights of children, and what to consider when interpreting and applying the provisions of the ECHR.

Article 8 of the ECHR is important when considering the right of children and the obligation to provide protection, as it seems to have special relevance in cases involving children.[310]

However, it is not only Article 8 that provides protection of children. It has been claimed that Article 3 of the ECHR is where child protection in the case law of the ECtHR has been primarily grounded.[311] The importance of Article 2 and 8 has also been highlighted in the

[307] Except in protocol 7 Article 5, a provision about equality between spouses. Also "juveniles" in Article 6, and "minor" in Article 5, none directly relevant for this thesis. However, the right to education is directed at children, not mentioning children specifically.
[308] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 287.
[309] Ibid., § 288.
[310] Kilkelly, U. (2010). Protecting children's rights under the ECHR: the role of positive obligations. *Northern Ireland Legal Quarterly,* 61(3), 245–261, p. 245, https://doi.org/10.53386/nilq.v61i3.453
[311] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 662, https://doi.org/10.1163/15718182-02704003.

sphere of child protection, as cases involving loss of life, and sometimes life threatening injury, is dealt with under Article 2.[312] For non-fatal cases, the Court has established a minimum level of severity threshold, mentioned in this thesis` section 5.2.2.1, which is necessary to bring it under Article 3. If it does not fall within the minimum level of severity, as it is a less serious breach of personal integrity, it may be a violation of the right to respect for private life under Article 8.[313]

Children's vulnerability, and States` obligation to protect them against acts of violence within the scope of Article 3 and 8 is highlighted in the case of Söderman v. Sweden, in which the Court stated that measures applied by States:

> … should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity […] Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child ...[314]

Furthermore, Article 2 has also been mentioned concerning the protection of the physical and psychological integrity of an individual.[315] As already mentioned, Articles 2, 3 and 8, are often intertwined. Sometimes the obligation relates to Article 2 or 3, sometimes Article 8, and sometimes a combination of the two latter.[316]

There is a question however, whether the obligation of protection only apply to each individual and identified child, or children as a group.

In the case of O`Keeffe v. Ireland, the Court found a violation based on a general risk to unidentified children.[317] However, this seems to be the only judgement to date with this conclusion, and therefore, the scope of this obligation seems unclear.[318] Still, O'Mahony (2019) point to an important factor, as States cannot ignore foreseeable general risk, it must put in place measures to control against them, as it is with identified individuals.[319] However,

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[312] Ibid., p. 662–663.
[313] Ibid., p. 662–663.
[314] Söderman v. Sweden (GC) app. No 5786/08, 12. November 2018 § 81.
[315] Ibid., § 80.
[316] Ibid.
[317] O`Keeffe v. Ireland, app.no 35810/09, 28 January 2014, §§ 168–169.
[318] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 668, https://doi.org/10.1163/15718182-02704003.
[319] Ibid.

there might be some difficulties to overcome in a potential development of this principle, mainly establishing “a causal link between the State’s failure and the ill-treatment suffered by the victim”.[320] Even though the scope of the obligation is not clear as of now, it indicates that the obligation for States in matters such as this, has been confirmed by the ECtHR. Also, this coincide with comments by the Committee on the Rights of the Children (the Committee),[321] and is reiterated several times throughout its comments.[322] This will be further highlighted in the following section. In other words, there seems to be an obligation to protect children as a group, and therefore also unidentified children. However, in decisions concerning an individual child, the best interest of that child must be assessed individually.[323]

Furthermore, Article 2 of Protocol No 1. provides children with a right to education, as mentioned in the previous chapter.

As already mentioned, Article 8 of the ECHR seems to have a special relevance to children.[324] This has been highlighted by the ECtHR. In the case of M. and M. v. Croatia, a case concerning childcare, the Court accentuated the close connection between Article 12 of the CRC about the right of the child to be heard, and Article 8 of the ECHR. The Court stated that Article 12 of the CRC applies in all judicial or administrative proceedings affecting children’s rights under Article 8 of the ECHR.[325] It was further highlighted that children capable of forming their own views cannot be considered sufficiently involved in the decision-making process, if an opportunity to be heard and express their views, where not provided.[326]

The Court also highlighted that paragraph 32 of General Comment No. 12, by the Committee on the Rights of the Children,[327] is of essence when interpreting and applying Article 12 of the CRC in these questions.[328] The paragraph states that there is no limitation of relevant proceeding that Article 12 of the CRC does not apply.[329]

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[320] Ibid.
[321] CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, § 6.
[322] Ibid., § 6, §§ 23 and 31.
[323] Ibid., § 24.
[324] Kilkelly, U. (2010). Protecting children’s rights under the ECHR: the role of positive obligations. *Northern Ireland Legal Quarterly*, 61(3), 245–261, p. 245, https://doi.org/10.53386/nilq.v61i3.453
[325] M. and M. v. Croatia, app. No. 10161/13, 03 September 2015, § 181.
[326] Ibid.
[327] CRC/C/GC/12 - Committee on the Rights of the Children - General comment No. 12 (2009) The right of the child to be heard, § 32.
[328] M. and M. v. Croatia, app. No. 10161/13, 03 September 2015, § 181.
[329] CRC/C/GC/12 - Committee on the Rights of the Children - General comment No. 12 (2009) The right of the child to be heard, § 32.

In other words, Article 8 of the ECHR should be interpreted in accordance with Article 12 of the CRC, about the right of the child to be heard, "in any judicial or administrative proceedings" affecting the rights of children under Article 8.

Based on the aforementioned; it is both relevant and important to look at the interpretation of the best interest of the child when considering the rights of children, also in accordance with the ECHR. The best interest of the child is an internationally acknowledge standard that is used by many, also the ECtHR as shown above. However, it might not always be clear what the best interest of the child entail. Therefore, this thesis will as mentioned give a short presentation of this in the following section.

7.1.1 The best interest of the child

As stated in Vavřička and Others v. The Czech Republic, the best interest of the child is expressed notably in CRC Article 3 § 1.[330] The provision states that, "[i]n all actions conserving children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

As mentioned, in M. and M. v. Croatia the Court referred to the general comments of the CRC for the interpretation of Article 12 of CRC. Articles 12 and 3 are closely linked. One cannot consider the best interest of a child if one has not heard the child's opinion. This connection, and their complementary roles, has been highlighted in the general comments to both provisions.[331] The same applies to the CRC as a whole.[332] Therefore, it is natural to look at the general comments of the CRC to understand how to interpret and apply the best interest of the child. This is also done by the ECtHR in the mentioned case of Vavřička and Others v. The Czech Republic, in which the Court showed to General Comment No. 15,[333] about the right of the child to the enjoyment of the highest attainable standard of health, to interpret and

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[330] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, §§ 287–288.
[331] CRC/C/GC/12 - Committee on the Rights of the Children - General comment No. 12 (2009) The right of the child to be heard, § 70–74; CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* § 43–45.
[332] CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, § 32.
[333] CRC/C/GC/15 - Committee on the Rights of the Child - General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*.

decide if the State had considered what is the best interest of the child in the sphere of health.[334] In other words, the ECtHR, uses the CRC and its general comments when interpreting and applying the rights of children, and the best interest of the child.

However, it is not within the scope of this thesis to have a full analysis of the concept, the best interest of the child, and does not have room to reiterate all concerning the General Comments. It is still important to highlight some fundamental comments provided, to give a better understanding of the concept and the scope of the obligation. For the full analysis, see the General Comments No. 14.[335]

The best interest of the child is a threefold concept. It is a substantive right, a fundamental interpretive legal principle, and a rule of procedure.[336] This means, among other things, that the best interest of the child must be assessed and taken as a primary consideration when considering different interest, in order to reach a decision. In other words, it is a guarantee that the right "will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general".[337] Furthermore, the interpretation that most effectively serves the child's best interests should be chosen, if the legal provision is open to more than one interpretations, as the CRC provide the framework for interpretation.[338] Also, when a decision are being made, affecting a child or children, the process must include evaluation of the possible impact, both positive and negative, on the child or children.[339]

Furthermore, and this will be reiterated in its entirety as it coincides with what has been stated in the case of M.A. v. Denmark, regarding the margin of appreciation, reiterated in section 6.1.2.1,[340] and is of specific interest for this thesis:

> … the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what

[334] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 288.
[335] CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*.
[336] Ibid., § 6.
[337] Ibid.
[338] Ibid.
[339] Ibid., § 6.
[340] M.A. v. Denmark, app.no 6697/18, 09 July 2021, §§ 148-149.

criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[341]

Furthermore, it is important to highlight what the committee have said about the interpretation of three terms that follows from Article 3 § 1 of the CRC, starting with "concerning".

The term "concerning" must be understood in a very broad sense.[342] This means that the concept applies in all actions and decisions, that directly or indirectly affect, or has an effect on, children. This includes both measures and decisions. Furthermore, it applies in questions relating to an individual child, children as a group or children in general, and it applies among other things in actions related to health, care or education, as highlighted by the Committee.[343] However, States does not need to have a full and formal process regarding the right of the child in every decision made, the scope depends on the impact on the child or children.[344]

Secondly, it is important to elaborate more on the term "best interest of the child". This has been described to some extent under the threefold concept above, however, it is relevant to highlight more from the general comment. The concept is described as complex and therefore, that its content must be determined on a case-by-case basis. To clarify the concept, one must interpret and implement it in line with the other provisions of the CRC.[345] The concept is furthermore flexible and adaptable. It must be adjusted and defined to the specific situation of the child or children concerned, and on an individual basis. Factors that must be taken into consideration is their personal context, situation, and needs.[346] It is important to note that there are differences in assessing and determining what the best interest of the child are, where there is a decision involving a particular child, and that of a particular group of children, or children in general. The consideration must be made to that of the particular child, that particular group, or children in general. However, the assessment and determination much be done with full respect for the CRC in all cases.[347]

There are many positives with the flexibility of the concept. However, it is not without its downside. It leaves room for manipulation. It has been seen abused by Governments and State

[341] CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, § 6.
[342] Ibid., § 19.
[343] Ibid.
[344] Ibid.
[345] Ibid., § 32.
[346] Ibid.
[347] Ibid.

authorities to justify racist policies.[348] The Committee have provided some examples of manipulation such as "parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant".[349]

Lastly, the term "shall be a primary consideration" is a crucial part of the consideration. For a greater understanding of the term, it is relevant to reiterate a larger outtake from the comment:

> The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken […] The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.[350]

However, the best interest of the child is as mentioned not without limitations. It is important to note that it might conflict with other interests or rights, e.g. the rights of other children, the public, or parents.[351] Resolving these conflicts must be done on a case-by-case basis, finding a suitable compromise by balancing the interests of all parties. The same applies if the rights of other persons conflict with the best interest of the child. Harmonization is the wanted outcome, however, if this is not possible, States must analyze and weigh the rights of all those concerned.[352]Again, the interest of the child has a high priority. It is not "just one of several considerations. Therefore, a larger weight must be attached to what serves the child best".[353]

The Committee has also highlighted several elements that needs to be considered when assessing the best interest of the child. Mainly "The child´s views", "The child´s identity",

[348] Ibid., § 34.
[349] Ibid.
[350] Ibid., §§ 36–37.
[351] Ibid., § 39.
[352] Ibid.
[353] Ibid.

“Preservation of the family environment and maintaining relations”, “Care, protection and safety of the child”, “Situation of vulnerability”, “The child’s right to health”, and “The child’s right to education”.[354]

In other words, the best interest of the child is of vital importance and must as a rule be considered concerning all measures that might affect children in one way or another.

Several measures were imposed during the Covid-19 pandemic concerned children, the more important question is whether the best interest of the child was taken as a primary consideration, and explicitly taken into account.

Based on the aforementioned; children, both individually and as a group, enjoys and is guaranteed the right to life, a right to health care and a general protection of their health, the right to respect for their private life and the right to education. However, in this thesis, the problematic area is first and foremost where States has potentially violated the right to respect for private life and education, in an attempt to protect the right to life and health of others. It is still important to note that States` measures during the Covid-19 pandemic may also have had an impact on the right to life and health of children, in certain area. I.e. concerning mental health, abuse and domestic violence, which may have occurred, there is a risk to life and health, both mental and physical. This is a relevant factor which will be analyzed in this thesis.

7.2 Interference with the children’s rights during the pandemic

In an event such as the Covid-19 pandemic one must consider if the imposed measures caused an actual interference with the rights of children, and if so, if this interference was in accordance with Article 8, and Article 2 of Protocol No. 1, of the ECHR. This follows Article 8 § 2. The model for the procedure is highlighted in the case of Vavřička and Others v. The Czech Republic. To not violate the rights of Article 8, under Article 8 § 2, an “interference” needs to be in “accordance to law” and have a “legitimate aim”. Furthermore, the interference must be “necessary in a democratic society”. Therefore, the interference will be analyzed in

[354] Ibid., §§ 52–79.

this section, before the requirements of "accordance to law", "legitimate aim" and proportionality will be analyzed and discussed in section 7.3.

This approach, mentioned in Vavřička and Others v. The Czech Republic, is first and foremost relevant when considering the negative obligations under Article 8, however, as mentioned in section 6.1, the consideration are largely the same concerning the positive obligation.

As seen in the case of Hämäläinen v. Finland, the Court found it relevant to analyze if the case involved a positive obligation or an interference, i.e. a negative obligation.[355] Concerning the Covid-19 pandemic there might have been both, also in the sphere of protecting children. This thesis analyzes the negative obligation of Article 8, however, concerning protection in the sphere of domestic violence and mental health, there is first and foremost a positive obligation.

A question arises whether there was an interference with the right to respect for private life and education during the Covid-19 pandemic.

There are several aspects of the rights of children that were affected by the lockdown, such as closing of schools, kindergartens, and sporting- and leisure activities. It affected both the children's education and private life. The closing may also have had an impact on domestic violence and mental health, and rights affected by that, however, this will be discussed in separate sections.

To clarify, the schools and kindergartens was never entirely closed. 8,5% of children in kindergarten, and 5,3% of children in schools, were attending either full time or partly during the lockdown in the spring of 2020. The reason behind this was either their parents' critically important occupations, or, the most common reason, the children's vulnerability.[356] It has already been mentioned several times that children are vulnerable as a group, however, the group of children referred to here are especially vulnerable. This was a requirement by the Directorate of Health deciding for the lockdown and closing schools and kindergarten. The differentiation applied to children with special care needs, that was not able to be attended to when schools and kindergartens were closed.[357] This was furthermore to be administered by

[355] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, §§ 62–65.
[356] NOU 2021: 6, p. 363.
[357] NOU 2022: 5, p. 372.

the principals of schools and leaders of the kindergartens, however, it caused different services from municipality to municipality,[358] and the quality of education these children received was inconsistent.[359] Nevertheless, this means that schools and kindergartens at times were closed for most children, and restricted to some degree for all.

It is relevant to look at the specific rights and articles that these measures affected, starting with the right to education and respect for private life.

7.2.1 Education

As stated in section 6.2, there is a right to education. This follows first and foremost from Article 2 of Protocol No. 1 of the ECHR, but also somewhat form Article 8.

Closing of schools and kindergarten directly affects the right to education. However, there is a question concerning to what degree the right was affected, and if there was an interference.

The learning loss of children has been considerable during the Covid-19 pandemic, and periods with home-schooling.[360] The loss seems to have been even greater among children who has parents with low degree of education.[361] The Coronavirus Commission highlighted some examples, such as children which lacked access to digital remedies and places to work relatively undisturbed. In some cases, especially among children with immigration background, the only place children could work undisturbed from home, was the toilet or the balcony. There were also incidents where several siblings had only one computer or tablet, they had to share.[362] This indicates an interference with the rights.

As mentioned in chapter 6, in the case of Vavřička and Others v. The Czech Republic there were no violation of the obligations, however, the Court highlights aspects that falls under the rights of both respect for private life and education.[363] The Court accepted that the children had lost educational opportunity, but still was not deprived all personal and intellectual development, even if it meant considerable effort and expense from their parents.[364]

[358] Ibid., p. 372 ff.
[359] Ibid., p. 374.
[360] NOU 2021: 6, p. 413; NOU 2022: 5, p. 369.
[361] NOU 2022: 5, p. 369.
[362] Ibid., p. 369–370.
[363] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 306.
[364] Ibid., § 307.

Furthermore, the Court highlighted the limited time the children were affected as a relevant factor.[365] However, this relates mostly to proportionality, rather than the interference itself. Still, the timeframe must be part of the consideration about interference as well. Also, the limitation in time was foreseeable in the domestic law.[366]

The timeframe of the exclusion from school was also highlighted in Memlika v. Greece, in which the Court concluded that there was a legitimate aim for an exclusion of children from school. However, there was a delay when setting up a panel which should decide if the children could come back to school, and this was not proportionate with the legitimate aim. The children were prevented from attending school for over three months, and the Court therefore concluded that there had been a violation of the right to education.[367] This is a relevant factor concerning proportionality as well, as it means that children must withstand some time away from education without it being disproportionate to a legitimate aim. Still, this was seen as an interference in the right to education.

The first period of closure of schools and kindergartens during the Covid-19 pandemic was between six and eight weeks.[368] However, the restrictions and uncertainty prevailed for a longer period. Adding up the total time of closure and restrictions is not straight forward, as it varies throughout the country.[369] Nevertheless, there is a substantial time in addition to the initial closing. All I all, this in itself would suggest that there was in interreference with the right to education.

Most children were not deprived completely of an opportunity for education. However, a lot of children was negatively affected by the measures concerning home-schooling, which therefore was not a sufficient or good alternative for it not to be an interference.

Finally, in Vavřička and Others v. The Czech Republic, children were not admitted to school, and that was seen as an interference with the right to respect for private life.[370] This was

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[365] Ibid.
[366] Ibid., § 307 with further reference to § 82.
[367] Memlika v. Greece, app.no 37991/12, 06 October 2015 – [Judgement only available in French - and some non-official languages - I have therefore used the press release in English, ECHR 301 (2015) 06.10.2015].
[368] Folkehelseinstituttet (2021) Folkehelserapportens temautgave 2021. Folkehelsen etter covid-19. Pandemiens konsekvenser for ulike grupper i befolkningen. Rapport 2021. Oslo, *Folkehelseinstituttet.* – The Norwegian Institute of Public Health (2021) The public health report's theme edition 2021. Public health after covid-19. The consequences of the pandemic for different groups in the population. Report 2021. Oslo, *The Norwegian Institute of Public Health.* [my translation of the reports name], p. 18, https://www.fhi.no/ss/korona/koronavirus/folkehelserapporten-temautgave-2021/?term=.
[369] Ibid.
[370] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §§ 263 and 294.

largely the case during the Covid-19 pandemic, children were not able to attend, or the opportunity for education was disturbed with home-schooling and other restrictions of their education. This affected both their education, but also their private life, since they were not able to meet friends and socialize with people in the outside world. The same must be said concerning closing and restrictions of sporting- and leisure activities. It potentially prevented, or reduced, children's personal development and ability to socialize with other children and the outside world. The latter will be discussed in the following section.

There was an interference in the right to education during the Covid-19 pandemic.

7.2.2 Private and social life

As mentioned, measures imposed during the Covid-19 pandemic was invasive and sever, and this affected children in many ways. It is important to analyze some specific rights, protected by Article 8 of the ECHR, concerning respect for their private and social life.

By closing schools and kindergarten, children lost an important platform for personal and social development. The same applies to sporting- and leisure activities.

There are different parts of private life, already mentioned in section 6.1, that could be, and was, affected in such a scenario, like the aspect of "private social life". I.e. children could lose the possibility to establish and develop their social identity, as one has "the right to establish and develop relationships with other human beings and the outside world".[371] In many ways, this also affects children's "personal development".[372] Included in personal development is personality and personal autonomy, which is an important principle in the interpretation of Article 8, and also covers the persons "physical and psychological integrity".[373] Meeting other people, learning things in school, is all part of the personal development and developing a child's personality. Being allowed to do this, playing with the children you want, hanging

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[371] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 261; see also Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42; Darboe and Camara v. Italy, app.no 5797/17 21 July 2022, § 123.
[372] Fedotova and others v. Russia, app. No 40792/10 and others, 17 January 2023, § 141; see also Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42.
[373] Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 80; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42.

out with them, is part of the autonomy that one has as a human being. It also helps them in the future, to lead autonomous lives.

Not every activity is protected under the sphere of "private life".[374] However, during the Covid-19 pandemic, all the aforementioned rights were affected.

As already mentioned, in Vavřička and Others v. The Czech Republic, the Court highlighted that the development of personalities, and to acquire important social skills, are important opportunities lost when excluded from school.[375]

Furthermore, the Court accepted that the children had lost educational opportunity, but highlighted that the possibility of personal, social, and intellectual development, was still there, even if it meant considerable effort and expense from their parents.[376]

During the Covid-19 pandemic, this was even more difficult. Among other things, closing schools and kindergartens was not the only measures taken. Sporting- and leisure activities were closed or restricted, taking away another platform where children might develop their personality, and their social life. This makes is almost impossible to embrace their "private social life" and "the right to establish and develop relationships with other human beings and the outside world".[377] Even though there are other social platforms in modern day society, playing with friends online, or using social media, it cannot be said to be a worthy or full-fledged substitute for most children.

This indicates that there was an interference in the children's rights to respect for private and social life. More specifically the right of personal development and living private social lives.

With all the uncertainty surrounding measures taken on and off, as described above, and not being able to meet other children, this may also have had a substantial effect on other parts of "private life", such as the psychological and moral integrity of the children. These aspects of private life are closely linked to mental health. Therefore, mental health will be discussed further in a separate section.

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[374] Gough v. The United Kingdom, app.no 49327/11, 28 October 2014, § 183.
[375] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 306.
[376] Ibid., § 307.
[377] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 261; see also Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 61; Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 70; Mile Novakovic v. Croatia, app.no 73544/14, 17 December 2020, § 42; Darboe and Camara v. Italy, app.no 5797/17 21 July 2022, § 123.

Furthermore, by closing schools and kindergartens, among other measures mentioned, there was an increased risk of domestic violence. This must be considered under the right to respect for private life, as well as other rights, and will be analyzed in the following.

7.2.3 Domestic violence and children

The pandemic brought many challenges upon States and the people living inside its jurisdiction. One of which was domestic violence. This of course is not an issue that the pandemic created, domestic violence and abuse was present before the Covid-19 pandemic, still, with a lot of hidden figures.[378] However, the pandemic does not seem to have decreased the amount of violence and abuse, merely increased it.[379] By closing schools and kindergartens, children were more at home, and both witnessed and were exposed to violence and abuse. When closing businesses, there was an increased stress upon families, and parents providing for their families, which may have increased the dangers of abuse and violence.[380]

Concerning domestic violence, States have positive obligations following Article 8 of the ECHR, as it may affect both the physical and psychological integrity of individuals, as mentioned in section 6.1. However, it may also concern Articles 2 and 3 of the ECHR.[381] This highlights the seriousness of the issue. The issues surrounding domestic violence analyzed in this thesis was potentially created by an interference of the negative obligation under Article 8 § 2 of the ECHR, concerning the right to respect for private life. It has already been established an interference in such rights, however, it is important to look at other parts of the right to respect for private life and the issue of domestic violence during the Covid-19 pandemic in a larger perspective as well.

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[378] NOU 2021: 6, p. 376.

[379] Nesset, M.B., Gudde, C.B., Mentzoni, G.E. Palmstierna, T. (2020). Intimate partner violence during COVID-19 lockdown in Norway: the increase of police reports. *BMC Public Health* 21, 2292. https://doi.org/10.1186/s12889-021-12408-x; Norges Insitusjon for Menneskerettighter (2021). Vold og overgrep under pandemien – [translation: Norwegian National Human Rights Institution: Violence and abuse during the pandemic], https://www.nhri.no/2021/vold-og-overgrep-under-pandemien/.

[380] Evans, Megan L., Lindauer, Margo, Farrel, Maureen E. (2020*)* A Pandemic within a Pandemic — Intimate Partner Violence during Covid-19. *The New England journal of medicine*, 2302-2304, https://doi.org/10.1056/NEJMp2024046.

[381] Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 161 ff.; see also Söderman v. Sweden, app.no 5786/08, 12 November 2013, §§ 78-85; Talpis v. Italy, app.no 41237/14, 18 September 2017, § 100.

Domestic violence is a serious issue and a general problem. This has also been highlighted in the case law of the ECtHR. In the case of Opuz v. Turkey, the Court stated the following:

> …the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present [or an individual] case. It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly.[382]

Closing of schools and kindergartens did affect the sphere of abuse and violence against children in a negative way and made it harder for the States to protect children against such acts. This, the Commission stated, must have been obvious to the government.[383] The Norwegian Human Rights Institution (NHRI) has highlighted the importance of schools and kindergartens to observe and pick up on children who are being violated, abused, or in any other way experience neglect or violence at home, or by others.[384] They further highlight school nurses and the schools health service as important services that gives the most reports of concern to the child protection agencies.[385] This have been highlighted by Evens et.al. (2020) as well, who also accentuated teachers, child care providers, and clinicians as mandated reporters which during the Covid-19 pandemic had fewer interactions with children and families, and therefore "fewer opportunities to assess, recognize, and report signs of abuse than they did before the pandemic".[386] As already mentioned, in F.O. v. Croatia the Court highlighted the role of the education authorities, as an important public service.[387] The essential role, or primary duty, of the educational authorities is to protect the health and well-being of pupils, to ensure their safety, and to protect them from all forms of violence while

[382] Opuz v. Turkey, app.no 33401/02, 09 June 2009, § 132; see Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 161 concerning the sphere of domestic violence transcending the circumstanced of "an individual" case.
[383] NOU 2021: 6, p. 145.
[384] Norges Insitusjon for Menneskerettigheter (2020). Ivaretakelse av menneskerettighetene ved håndtering av utbruddet av Covid 19. NIM-R-2020-005 – Norwegian National Human Rights Institution – Safeguarding Human Rights when dealing with the outbreak of Covid 19 [my translation of the report´s name], p. 89, https://www.nhri.no/rapport/covid-19/.
[385] Ibid.
[386] Evans, Megan L., Lindauer, Margo, Farrel, Maureen E. (2020) A Pandemic within a Pandemic — Intimate Partner Violence during Covid-19. *The New England journal of medicine*, p. 2302-2304, https://doi.org/10.1056/NEJMp2024046.
[387] F.O. v. Croatia, app.no 29555/13, 22 April 2021, § 82.

under their supervision.[388] It must as mentioned be taken particular regards to their vulnerability relating to their young age.[389]

As mentioned above, some children were able to attend school. This was children in need of special education or that they were vulnerable based on other criteria. However, the criteria to whom this applied to was unclear, and a potential stigma made families not disclose children which may have been qualified.[390] However, even for these children it would be hard to pick up on potential domestic violence, as school nurse was reallocated in many municipalities, from schools to infection tracking and vaccination, against the advice from the Department of Health and others.[391] However, States are responsible for the acts of State agents and is therefore not without fault in this matter either.

Vulnerable children experienced that several services were closed or partially closed during the spring of 2020, and the child protective services experienced a reduction of meetings with children by a third, as late as November 2020.[392]

Some States reported on an increase of up to 60% in the numbers of emergency calls received by women in April of 2020, compared to the year before.[393]

Furthermore, there was an increased demand for telephone- and chat-services regarding neglect, violence, and abuse.[394] And the police reported an increase in reports of sexual offences against children, and abuse in close relations with children under the age of 16.[395]

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[388] Ibid.
[389] Ibid.
[390] NOU 2022: 5, p. 372 ff.
[391] NOU 2022: 5, p. 368; see also Bergsangel, I. (2021). SSB: 3 av 4 kommuner omdisponerte helsesykepleiere i 2020, *sykepleien.no*, 24.03.2021, https://sykepleien.no/2021/03/ssb-3-av-4-kommuner-omdisponerte-helsesykepleiere-i-2020.
[392] NOU 2021:06, p. 421 ff.
[393] FNs regionale informasjonskontor for Vest-Europa (2020) Vold i nære relasjoner har økt med 60 prosent, [translation: Violence in close relationships has increased by 60 per cent.*]*, https://unric.org/no/vold-i-naere-relasjoner-har-okt-med-60-prosent/.
[394] NOU 2021:06, p. 421 ff.; see also FNs regionale informasjonskontor for Vest-Europa (2020) Vold i nære relasjoner har økt med 60 prosent, [translation: Violence in close relationships has increased by 60 per cent.], https://unric.org/no/vold-i-naere-relasjoner-har-okt-med-60-prosent/.
[395] NOU 2021:06 p. 421 ff.

The school's health service was meant to be protected from measures, however, the municipalities found this hard to follow,[396] and the health services was under a lot of pressure for the duration of the pandemic.[397]

This might indicate that the regulatory framework made by the government was theoretical and illusory, instead of practical and effective.[398] Which is an important principle in the application of the provisions following the ECHR.

Domestic violence affects several rights guaranteed under Article 8 of the ECHR, like physical and psychological integrity.

There was an interference in the right to respect for private life in the sphere of domestic violence.

Therefore, it seems that the interference in the right to respect for private life and education caused a situation where the positive obligation of Article 8, and potentially Articles 2 and 3 was activated or triggered concerning domestic violence during the Covid-19 pandemic. This will be further analyzed in section 7.3.

Being exposed to domestic violence does not only affects the physical integrity of an individual, but also its psychological integrity and mental health. This, together with the rights discussed in section 7.2.2, highlights the importance of analyzing the sphere of mental health of children during the Covid-19 pandemic in the following section.

7.2.4 Mental health

As mentioned above, mental health is part of a child's psychological and moral integrity, which is rights protected under Article 8 of the ECHR, and also Article 3. Also, mental health may be relevant following Article 2, as will be shown in the following.

[396] NOU 2022: 5, p. 380.
[397] Ibid.
[398] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 161.

Mental health was, and is, severely affected by the Covid-19 pandemic.[399] As with domestic violence, the potential risk of harm to the mental health of children was foreseeable at the time of the lockdown,[400] and especially as time went on, and more and more scientific papers was released, concerning the challenges of children during the pandemic.[401]

The Coronavirus Commission found that the services for mental healthcare for children reported of a calm summer of 2020, even though there had been some increase in severity regarding referrals, and also that of sever eating disorders.[402]

However, this changed during the fall of 2020, and by December 2020, the number of outpatient consultations had increased by 16 % compared to December 2019.[403] The health institutions reported of more referrals and more with severe conditions like depression, anxiety, eating disorder, self-harm, school refusal and even more serious mental health issues. There were furthermore concerns about the municipal health services and their service for children, especially vulnerable children.[404] This was among others based on the quality of referrals, making it harder to follow up on the cases for the specialist services.

The same concerns was still present in October of 2021, as there had been an increase of referrals to mental health services for children in the first half of 2021.[405] The Commission

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[399] Amin U.A. & Parveen, A.P. (2022) Impact of COVID-19 on children. *Middle East Current Psychiatry* 29, 94 https://doi.org/10.1186/s43045-022-00256-3; Fegert, J.M., Ludwig-Walz, H., Witt, A., & Bujard, M. (2023). Children's rights and restrictive measures during the COVID-19 pandemic: implications for politicians, mental health experts and society. *Child Adolescent Psychiatry Mental Health,* 17, 75, https://doi.org/10.1186/s13034-023-00617-8; Hafiz, T.A. & Aljadani, A.H. (2022) The impact of COVID-19 on children and adolescents' mental health, Saudi Medical Journal, 43 (11) 1183-1191, https://doi.org/10.15537/smj.2022.43.11.20220481; Lehmann, S., Skogen, J.C., Sandal, G.M. Haug, E., & Bjørknes, R. (2022). Emerging mental health problems during the COVID-19 pandemic among presumably resilient youth -a 9-month follow-up. *BMC Psychiatry* 22, 67 https://doi.org/10.1186/s12888-021-03650-z; Ludwig-Walz, H., Dannheim, I., Pfadenhauer, L.M. Fagert, J.M., & Bujard, M. (2023). Anxiety increased among children and adolescents during pandemic-related school closures in Europe: a systematic review and meta-analysis. *Child Adolescent Psychiatry Mental Health,* 17, 74, https://doi.org/10.1186/s13034-023-00612-z; Mulkey, S.B., Bearer, C.F. & Molloy, E.J. (2023) Indirect effects of the COVID-19 pandemic on children relate to the child's age and experience. *Pediatric Research,* 94, 1586–1587 https://doi-org.mime.uit.no/10.1038/s41390-023-02681-4; UNICEF (2022, September) Covid-19 and children, *UNICEF data hub*, https://data.unicef.org/covid-19-and-children/.

[400] Fegert, J.M., Ludwig-Walz, H., Witt, A., & Bujard, M. (2023). Children's rights and restrictive measures during the COVID-19 pandemic: implications for politicians, mental health experts and society. *Child Adolescent Psychiatry Mental Health*, 17, 75, https://doi.org/10.1186/s13034-023-00617-8; also see Fegert, J.M., Vitiello, B., Plener, P.L., & Clemens, V. (2020). Challenges and burden of the Coronavirus 2019 (COVID-19) pandemic for child and adolescent mental health: a narrative review to highlight clinical and research needs in the acute phase and the long return to normality. *Child Adolescent Psychiatry Mental Health*, 14, 20. https://doi.org/10.1186/s13034-020-00329-3.

[401] See the two footnotes above.

[402] NOU 2022: 5, p. 380.

[403] Ibid.

[404] Ibid., p. 381.

[405] Ibid.

highlights eating disorders which needed admission to hospitals, and also that of an increased number of children who thought they might have ADHD because they struggled with concentration and restlessness during schoolwork.[406] The municipal health services was still under a lot of pressure, which again led to people receiving treatment later than necessary, or later than they could have been.[407] Furthermore, a study of children between the age of 12 and 16, done between January of 2019 and June of 2021, show a significant increase in both mental health problems and somatic problems during the Covid-19 pandemic.[408] Loneliness at the start of the pandemic was a factor that increased the potential for both mental health problems and somatic problems later in the pandemic.[409]

There was an interference in the right to respect for private life in the sphere of mental health.

The abovementioned also indicates that while trying to protect the life and health of some, the State may have failed in their obligation to protect the life, health, and respect for private life of others. What seems even worse is that it is not only a question of failing to protect, it was the measures imposed by the State, interfering in the right to respect for private life and right to education, that created the risk and threat concerning mental health in the first place, as it was with domestic violence. Therefore, mental health will also be part of the analysis in the following.

As already mentioned, even though there has been an interference of the rights, is does not automatically lead to a violation. Therefore, the lawfulness of the interference is crucial to analyze in the following sections.

7.3 Lawfulness of the interference with children's rights

The rights of children that were affected, in the sphere of this thesis, can all be subsumed under Articles 2, 3 and 8 of the ECHR, and Article 2 of Protocol No. 1 of the ECHR.

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[406] Ibid., p. 382.
[407] Ibid., p. 381-382.
[408] Hafstad, G.S., Sætren, S.S., Wentzel-Larsen, T., & Augusti, E. (2020).
Changes in Adolescent Mental and Somatic Health Complaints Throughout the COVID-19 Pandemic: A Three-Wave Prospective Longitudinal Study, *Journal of Adolescent Health*, Volume 71, Issue 4, 406-413, p. 406, https://doi.org/10.1016/j.jadohealth.2022.05.009.
[409] Ibid.

As already mentioned, when the Covid-19 pandemic hit, States decided, including Norway, to close down several parts of society, in a so-called lockdown. In this section, the lawfulness of these measures will be analyzed.

Concerning the positive and negative obligations of States. Sometimes there might be a collision of rights, meaning that a State has an obligation to protect different rights that may collide in the pursuit of protection. Or, by protecting one right, pursuing a positive obligation to put in place measures, there might be a collision or interference with a negative obligation.

As mentioned in the section above, in an event such as the Covid-19 pandemic, one must consider if the implemented measures interfered and violated the rights of children. The interference is already established. Therefore, in this section, to analyze the lawfulness of the interference, it must be considered if the interference was in "accordance to law" and had a "legitimate aim". Furthermore, the interference must be "necessary in a democratic society", i.e. proportional to the legitimate aim pursued. Therefore, the main part of this section will be an analysis and discussion considering fair balance and proportionality,[410] concerning rights of children and areas affected.

Both the negative and positive obligation of Article 8 will be analyzed, as they are similar. Obligations following Articles 2 and 3, and also that of Article 2 of Protocol No. 1 will be analyzed as well.

7.3.1 Accordance with the law

As seen in the case of Vavřička and Others v. The Czech Republic, the interference must have a basis is domestic law.[411] As mentioned in section 6.1.2, it is not limited to primary legislation. However, in Norway, the interference was mainly based on the Act on Protection against Infectious Diseases - "Smittevernloven",[412] which must be considered primary legislation, "Koronaloven",[413] which was a temporary law in connection to the start of the

[410] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 258 ff.
[411] Ibid., § 266.
[412] My translation of «Lov om vern av smittsomme sykdommer [smittevernloven] - LOV-1994-08-05-55»
[413] Midlertidig lov om forskriftshjemmel for å avhjelpe konsekvenser av utbrudd av Covid-19 mv. (koronaloven) - LOV-2020-03-27-17 – [translation: Temporary Act on regulatory authority to remedy the consequences of outbreaks of Covid-19 etc. (koronaloven)], repealed 27.05.2020.

pandemic, and also the "covid-19 forskriften",[414] a temporary regulation of the society in Norway during Covid-19, both in which build upon "Smittevernloven".

According to § 4-1 (1) of "Smittevernloven", the municipalities of Norway may, where it is necessary to prevent an infectious disease that is dangerous to the public, or to prevent its transmitting, to, among other things, close businesses that brings together several people, like schools, kindergartens, shops, hotels etc. According to § 4-1 (2), the Directorate of Health, in an event of a serious outbreak and where its crucial to quickly put in place measures to prevent its further transmission, can make decisions according to the first paragraph, for the whole country, or part of it. Based on the measures, or interference, discussed in this thesis, they seem to fall within the provisions of "Smittevernloven" and the "covid-19 forskriften".

The interference is within the boundaries of "law", and therefore, in accordance with the law.

7.3.2 Legitimate aim

As stated above, Article 8 § 2 of the ECHR has an exhaustive list of legitimate aims. Article 2 of Protocol No. 1 does not, however, it must be considered in accordance with Article 8 § 2, and therefore, if there is a legitimate aim in accordance with Article 8, it will be a legitimate aim according to Article 2 of Protocol No. 1 as well.

There are several different legitimate aims. Among others, public safety for the protection of health, and to protect the rights of others.

In the case of Vavřička and Others v. The Czech Republic, the Court highlights the aims mentioned above, and stated that there is no need to consider other aims when a State put in place measures to guard against "major disruptions to society caused by serious disease", in the interest of public safety.[415]

Covid-19 must be categorized as a serious disease, at least at the start of the pandemic. Furthermore, there is no doubt that the State put measures in place to protect the life and

[414] Forskrift om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften) – FOR-2020-03-27-470, [translation: Regulations on infection control measures etc. during the corona outbreak (covid-19-regulations)], repealed 20.11.2023.
[415] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 272.

health of people within their jurisdiction, therefore, the public safety, protection of health, and to protect the rights of others.

The measures had a legitimate aim.

7.3.3 Proportionality

Since the requirements above were met, the next step is to consider if the interference was necessary in a democratic society, i.e. that the interference was proportional to the legitimate aim pursued, and if there was a fair balance between the competing interest of the public as a whole and that of the individual, or between individuals.

It follows from the rights under the ECHR and case law presented in this thesis, that there is an inhered obligation for States that all measures must undergo a consideration of fair balance, and a test of proportionality, to coincide with the rules of the ECHR, interpreted and applied by the ECtHR. This applied during the Covid-19 pandemic as well. Even though States may derogate, it does not apply to all provisions of the ECHR, and there must be an actual derogation for Article 15 of the ECHR to apply. During the Covid-19 pandemic, there were only a few States that derogated from the ECHR, Norway was not one of those.[416] Still, the ability to derogate from some provisions, and not from others, can be interpreted as a way of establishing a hierarchy of provisions within the ECHR, and highlights the importance of the provisions. However, this is claimed not to be the case, at least not where there are no States threatening the rights.[417] Still, during the Covid-19 pandemic, there is a case to be made that States actually caused threats to some rights.

Furthermore, it is not sufficient for States to mention that there has been a balancing of rights, or test of proportionality, they need to show that they actually carried it out. They must provide the specific reasons for the measures taken, and how it affects rights, such as the

[416] Council of Europa (2023). Derogations Covid-19, Notification under Article 15 of the Convention in the context of the Covid-19 Pandemic. https://www.coe.int/en/web/conventions/derogations-covid-19

[417] Graver, H.P. (2022). Pandemirestriksjoner og retten til liv, *Lov og Rett*, 2022/6, 349-370 [*translation: Pandemic restrictions and the right to life*], p. 370, https://doi.org/10.18261/lor.61.6.3.

rights of children, in the light of the circumstances of the case.[418] One of the reasons for this, is for the ECtHR to be able "to carry out the European supervision entrusted to it". [419]

A test of proportionality and balancing of rights must be done in all cases where there is a risk of potential conflicting rights. During the covid-19 pandemic, there were several conflicting rights, as mentioned earlier, also concerning the rights of children.

In the case of Vavřička and Others v. The Czech Republic, the Court highlighted that, besides the requirement of proportionality, for the interference to have a legitimate aim concerning it being necessary in a democratic society, it needs to answer pressing social needs, and the reasons put forward by the State must be relevant and sufficient.[420]

Therefore, there is a question whether there was a pressing social need, and if the reasons put forward by the State was relevant and sufficient. Furthermore, if Norway did show to a balancing act, or a test of proportionality, concerning the rights of children, while considering measures. There is also a question whether the government did surpass the limitations protecting life and health, and if they were in violation of the rights of children during the pandemic. These are some of the questions that arises, and that will be part of the analysis in the following.

7.3.3.1 Pressing social need

As found in chapter 4 and 5, there is a positive obligation for States to protect the lives and health of the those within their jurisdiction. There are no restrictions of context, if there is a risk to the right to life,[421] or questions relating to the protection of health. Therefore, Norway, and every other state parties to the ECHR, were obliged to do something concerning the Covid-19 virus, if they knew or ought to have known that there was a real and immediate risk to the life or health of those within their jurisdiction, pursuant to Articles 2 and 3, and also 8 of the ECHR, and the "Osman-test".

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[418] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 149; see also CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, § 6.
[419] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 149.
[420] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 273.
[421] Vardosanidze v. Georgia, app.no 43881/10, 07 May 2020, § 53.

Based on the reports from the Coronavirus Commission, the State knew of a real and immediate risk to life and health at the start of the pandemic.[422] The State therefore had an obligation to put in place operational measures, and an effective regulatory framework protecting the lives and health of those within their jurisdiction.

The pressing social need was also highlighted to the State as parents started taking their children out of schools, and some municipalities already decided to close schools and kindergartens.[423]

This indicated that the interference answered a pressing social need to put in place measures at the start of the pandemic, as States are under a positive obligation to protect the life and health of individuals within their jurisdiction.[424] However, this need seems to have diminished as the pandemic progressed.

7.3.3.2 Relevant and sufficient reasons

The State gave reasons for the interference and measures such as lockdown and closing of schools and kindergartens at several times during the pandemic. One of the reasons was to provide lower mobility as a form of mitigation of potential infections.[425] Furthermore, Norway drew inspiration from Denmark, a comparable nation, which closed schools and kindergartens.[426] And ultimately, a recommendation from the European Centre for Disease Prevention and Control to introduce sever measures.[427] This indicates that there were relevant reasons at the beginning of the pandemic. If they were sufficient is not as clear.

However, the pandemic developed and changed. Therefore, it is relevant to highlight another reason that was used throughout the pandemic.

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[422] NOU 2021: 6, p. 145
[423] Ibid., p. 140.
[424] Case of Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 282.
[425] NOU 2021: 6, pp. 138, 141.
[426] Ibid., p. 140.
[427] Ibid.

The strategy Norway decided to use was a so-called "suppression"-strategy,[428] based on a paper published by researchers from Imperial College in the early stages of the pandemic.[429] It was evident that this strategy would require severe and invasive measures.[430] However, both strategies presented in the paper was a strategy to reduce pressure on the healthcare system. And that was one of the reasons for lockdown and closing of schools and kindergartens, put forward by the State. To not overburden hospitals and the healthcare system.[431] This raises a question of the importance to not overburden the hospitals, and why it even was a possibility or question, and if it could have been avoided.

It was early clear that even western healthcare systems might have troubles handling a wave of Covid-19 infections.[432] However, as seen in the section 5.3, on medical negligence, States has an obligation to make sure that there is an effective regulatory framework, compelling private or public hospitals to adopt appropriate measures to protect the lives and physical integrity of patients.[433]

The state of the intensive care units and capacity is therefore one factor that must be taken into consideration. Norway had too few units, fare less then Sweden and Denmark which are comparable nations,[434] and the capacity was too low. The capacity was one of the lowest in Europe, in relations to number of residents.[435] However, this should come as no surprise for the Norwegian government since the low capacity have been discussed since the flu of 2009.[436]

There had been attempts to assess the need for intensive care capacity, however, there was disagreements between professionals concerning what actually constitutes an intensive care

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[428] Ibid., p. 148-152.
[429] Ferguson, N.M., Laydon, D., Nedjati-Gilani, G., Imai, N., Ainslie, K., Baguelin, M., Bhatia, S., Boonyasiri, A., Cucunubá, Z., Cuomo-Dannenburg, G., Dighe, A., Dorigatti, I., Han, F., Gaythorpe, K., & Green, W. (2020, 16 March), Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand. *Imperial College London*, https://doi.org/10.25561/77482.
[430] NOU 2021: 6, p. 149.
[431] Ibid., p. 140-151.
[432] Ibid., p. 148.
[433] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 186; for "physical integrity" see the Vasileva v. Bulgaria, app.no 23796/10, 17 March 2016, § 63.
[434] NOU 2022: 5, p. 174-178; see also Flaatten, H., Almeland, S. K., & Strand, K. (2020). Helseberedskap mellom to pandemier - alltid beredt? *Tidsskrift for den Norske Lægeforening*, 140(9), [translation: *Health preparedness between two pandemics - always prepared?*], https://doi.org/10.4045/tidsskr.20.0341.
[435] Flaatten, H., Almeland, S. K., & Strand, K. (2020). Helseberedskap mellom to pandemier - alltid beredt? *Tidsskrift for den Norske Lægeforening*, *140*(9), [translation: *Health preparedness between two pandemics - always prepared?*], https://doi.org/10.4045/tidsskr.20.0341.
[436] NOU 2022: 5, p. 127 ff.

unit, therefore, it had not been done.[437] Still, it is evident that it was too few, even before the Covid-19 pandemic.[438]

This, as a reason for closing of schools and kindergarten, seems relevant, both at the beginning of the pandemic and in later stages. However, the sufficiency of the reason put forward by the State to justify the interference based on the severity of the measures, is not evident here either.

As stated, reasons put forward by the government was relevant, as they will reduce the risk of infection. If they were sufficient, is not obvious. In the case of Vavřička and Others v. The Czech Republic when discussing relevant and sufficient reason, the Court mentioned that "when it comes to immunisation, the objective should be that every child is protected against serious diseases",[439] and that this, among other things such as "social solidarity" and indirect protection in the way that children not able to take vaccines is protected trough others taking vaccines, States accomplishes herd immunity. The Court accepted that the health policy of the Czech Republic was based on such considerations and therefore the decisions of the State was consistent with the best interest of the child,[440] as the court found it to be in accordance with the general comments on the children rights to enjoy the highest attainable standard of health.[441] However, in Vavřička and Others v. The Czech Republic, the questions were about children showing solidarity to other children, and therefore within the best interest of children. Is it always in the best interest of children to endure invasive measures in solidarity with other parts of society, like elderly people? There were other children that might be infected and sick by the Covid-19 virus, however, as mentioned above, and furthermore will be highlighted in the following, children as a group were not especially vulnerable to the virus itself.

It follows from the best interest of the child, mentioned in section 7.1.1. that the best interest of the child has some limitations. Solving conflicting rights, where the rights of children and the rights of the public, or other individuals, collide, one must find a suitable compromise by balancing the interest of all parties. The same applies the other way around. If harmonization

[437] NOU 2022: 5, p. 176-177.
[438] Ibid.
[439] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 288.
[440] Ibid.
[441] CRC/C/GC/15 - Committee on the Rights of the Child - General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*.

is impossible, States must analyze and weigh the different rights, and again the interest of the child has a high priority. What serves the child best must have more wight as it is not just one of several considerations.[442] This may have been difficult, at least at the start of the pandemic.

Also, the government seems to have been waiting for vaccines as part of the solution, which affected the measures, however, the vaccines started to arrive at the end of December 2020,[443] and it still took a long time before restrictions were lifted.

Nevertheless, “sufficient” does not provide a very high standard for it to be fulfilled, there are no absolutes. Therefore, it is conceivable that the reasons all in all were relevant and at least to some degree sufficient.

7.3.3.3 Proportionality and the margin of appreciation

As already mentioned, several times, especially in section 6.1.2.1, States has a margin of appreciation concerning measures and means. However, the width and breadth of the margin depends on the case, as the margin of appreciation will “vary in the light of the nature of the issues and the seriousness of the interests at stake”.[444] This, together with the proportionality of the measures, will be analyzed in this section.

Based on the reports from the Commission, there seems to have been a lot of uncertainty, and a lot of different actors involved in discussions, not always in agreement,[445] and in the end, bad planning, and hasted decisions. For example, the Norwegian government knew already in January of 2020 that the Covid-19 virus would most likely come to Norway,[446] and in late February 2020 the Norwegian Directorate for Civil Protection (DSB) offered to make an analysis of social consequences of invasive measures, that could be ready for the 4th of March that year.[447] However, this was not followed up by the State, and it was not until the 10th of

[442] CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, § 39.
[443] NOU 2022: 5, p. 22
[444] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 140.
[445] NOU 2021: 6, p 130.
[446] Ibid., p. 128 and 145.
[447] Ibid., p. 232 ff.

March that DSB got the signal to start the analysis. They then got a very short period of time to do it and could not do it as planned.[448]

The allocation of funds and resources in the healthcare sector is as mentioned within the margin of appreciation of States, and the margin seems to be wide.[449] However, this raises a question whether it justifies a lockdown on a country, closing schools, kindergartens and children's leisure activities, because the government has "under-founded" healthcare over several years, by, among other things, not having a sufficient number of intensive-care units.

It is important to note that the Commission points to limitation in this regard. In the event of a pandemic as serious and with such longevity as the Covid-19 pandemic, an increase in the basic capacity of the intensive care and intermediate departments, cannot be seen as a substitute for infection control measures. However, a larger buffer in the intensive care and intermediate wards, such as the ability to scale up the capacity, will provide more flexibility, and in certain cases a longer acceptable response time before infection control measures must be introduced.[450] These are both important factors assessing the proportionality.

The Commission further believes that the hospitals were not sufficiently prepared for a pandemic, and that the Directorate of Health did not do enough to improve intensive care capacity during the pandemic either. The Commission could not see that the ministry had taken any further steps to improve the intensive care capacity, other than in the assignment document for the regional health undertakings in January 2021.[451]

On a side note, the capacity for intensive care units and bed does not seem to have increased after the report from the Coronavirus Commission either.[452] However, the former Minister of Health and Welfare stated in the article that there is an ongoing process, which takes time. It takes time, which is natural, educating nurses and intensive care nurses, however, it is important to question why it took until 2024 before the health institutions was given an

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[448] Ibid., p. 232 and 145.
[449] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 175; see also Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 274.
[450] NOU 2022: 5, p. 178.
[451] Ibid.
[452] Ferguson, K. (2024, 17 February) Haukeland skulle øke intensivkapasiteten. Slik gikk det ikke: Under koronapandemien var målet å øke antallet intensivsenger i Helse Bergen. I stedet har kapasiteten blitt redusert siden 2021, *BA. [translation: Haukeland was supposed to increase the intensive care capacity. This is not how it went: During the corona pandemic, the goal was to increase the number of intensive care beds in Health Bergen. Instead, capacity has been reduced since 2021]* https://www.ba.no/haukeland-skulle-oke-intensivkapasiteten-slik-gikk-det-ikke/s/5-8-2528635.

assignment to increase the capacity. The report from the Commission was delivered several years ago, and the start of the pandemic was over four years ago. Also, as already mentioned, there were indications long before the pandemic that the intensive care capacity was under threat.

As mentioned, where there is a risk to life, there must be an assessment of operational measures, and therefore a test of proportionality. However, not all risk give rise to a positive obligation from States, and the obligation cannot impose an impossible or disproportionate burden on the State.[453] This means that States does not have an obligation to do all in its power to prevent every potential risk to life. Furthermore, the obligation does not contain any specific measures that must or must not be taken, and therefore do not mention anything about an obligation for a lockdown on society at whatever cost. However, it is does not rule out the possibility either. This highlights the importance of the test of proportionality and fair balance.

Graver (2022) discussed this to length and claimed that the State during a pandemic in fact has a positive obligation to put in place operational measures like sufficient information to the population and organization of a healthcare system that cover the needs of the people.[454] Still, he could not find that there was an absolute obligation for an invasive measure such as lockdown.[455] He found that there is doubtful that a State has an obligation for a lockdown.[456] However, he could not find that the measure was out of question, but highlighted the importance of the State to show that the measures taken are necessary and proportional when they interfere with fundamental rights.[457] Furthermore, he stated that the obligation of the States will change throughout the pandemic, as the direct threat to the right to life will diminish. This leaves room for a lot of measures as alternatives for a lockdown and closing of schools, kindergartens, and leisure activities, or restrictions upon them.

The importance of information was highlighted in the case of Vilnes and Others v. Norway, in which there was a violation of Article 8 because of the States` failure to ensure that the applicants received essential information, which would enable them to assess the risks to their

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[453] Kurt v. Austria, app. no. 62903/15, 15 June 2021, § 158.
[454] Graver, H.P. (2022). Pandemirestriksjoner og retten til liv*, Lov og Rett,* 2022/6, 349-370 [translation*: Pandemic restrictions and the right to life*], p. 365, https://doi.org/10.18261/lor.61.6.3.
[455] Ibid., p. 366 and 370.
[456] Ibid., p. 366.
[457] Ibid., p. 366 and 370.

health and safety.[458] During the Covid-19 pandemic, the information provided by the State seems to have been sufficient overall,[459] however, with some weaknesses concerning the timing of information towards national authorities.[460] The information was not good enough to all parts of the society either, among others the immigrant population.[461]

The aforementioned furthermore raises a question whether there was a question of money and economics. Of allocation of funds. And if allocation of funds is a sufficient and proportional reason to impose more invasive measures than potentially needed.

The cost and allocation of funds is important, and as mentioned within the margin of appreciation of States, however, imposing lockdown of a society does come with a financial cost as well.

Each year people die, either of old age, diseases, accidents, or other thing. This, we "accept" to some degree, especially when it affects the elderly, meaning, there is a socio-economic perspective that are being considered every year, when e.g. the government decide the national budget for the coming year, and which sector should get what. Not every medicine is purchased, not every treatment possible given, and so forth. This might be relevant for many reasons. Even though States has a wide margin of appreciation concerning the allocation of resources and public funds, in the sphere of healthcare,[462] the Norwegian government decided not to use money on intensive care units before the pandemic, or during. It decided however that there was a need for a lockdown, and what looks like a zero-tolerance policy on Covid-19 related deaths. No measures seemed too expensive for it not to be implemented.

The cost of the pandemic is not yet clear in terms of economics, or any other category either. However, two researchers considered the cost of a saved life, comparing the measures taken in Norway vs. Sweden.[463] It used the numbers provided by Statistic Norway,[464] stating that Norway in the years 2020-2021 used 270 billion NOK on Covid-19 related measures. It found

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[458] Vilnes and Others v. Norway, app.no 52806/09 and 22703/10, 05 December 2013, § 245.
[459] NOU 2022: 5 p. 12.
[460] Ibid., p. 454.
[461] Ibid.
[462] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, § 175.
[463] Zahl, P.H., Johansen, R., (2023) Hva kostet det å redde et liv under pandemien? *DN* [translation: What did it cost to save a life during the pandemic?], https://www.dn.no/innlegg/pandemi/smittevern/folkehelseinstituttet/hva-kostet-det-a-redde-et-liv-under-pandemien/2-1-1556902.
[464] Statistisk Sentralbyrå, or SSB, in Norwegian.

that 2025 less people had died, at a cost of 133 million pr life.[465] The Ministry of Finance claims that the use was in fact 230 billion NOK.[466] However, there are also many other factors that need to be considered to find the total cost, which will then increase, as the researchers point out in the article. Whichever number used; this ultimately means that the cost of the pandemic is high also in terms of economic. The question therefore arises if this was a better way to spend the money. Rather than to e.g. increase the capacity of intensive care units, and potentially put in place less invasive measures.

It is not within the scope of this thesis to consider what the appropriate price for a life is, this is just used to illustrate the choices made by the Norwegian government compared to other comparable nations.

Additionally, the measures compared to its effectiveness was also questioned by several scientist at the start of the pandemic, stating that the effects of the measures were low, especially compared to the costs.[467]

It is furthermore important to note that Sweden introduced less sever measures that Norway, and focused on a mitigation strategi, or a herd-immunity strategy.[468] For example, they did not close schools and kindergartens. However, the "herd-immunity strategy" may in some cases contradict the standards of the ECHR, as the standard is meant to protect the rights under e.g. Articles 2 and 3, and a "herd-immunity strategy" may in some circumstances increase the suffering of individuals.[469] Herd-immunity was never an explicitly expressed goal

[465] Zahl, P.H., Johansen, R., (2023) Hva kostet det å redde et liv under pandemien? *DN* [translation: What did it cost to save a life during the pandemic?], https://www.dn.no/innlegg/pandemi/smittevern/folkehelseinstituttet/hva-kostet-det-a-redde-et-liv-under-pandemien/2-1-1556902.

[466] Ibid.

[467] Bentzrød, S.B., & Dommerud, T. (2020, 12 April). Åtte forskere: Influensa tar flere liv enn koronaviruset i Norge, Sverige og Danmark, *Aftenposten*. [translation: Eight researchers: Influenza takes more lives than the coronavirus in Norway, Sweden and Denmark], https://www.aftenposten.no/norge/i/rARm9A/aatte-forskere-influensa-tar-flere-liv-enn-koronaviruset-i-norge-sverige-og-danmark.

[468] NOU 2021: 6, p. 156.

[469] Nawrot, O., Nawrot, J., & Vachev, V. (2023). The right to healthcare during the covid-19 pandemic under the European Convention on human rights. *The International Journal of Human Rights*, *27*(5), 789–808, p. 798–799, https://doi-org.mime.uit.no/10.1080/13642987.2022.2027760.

from Sweden, however, their mitigation strategy may cause the same consequence.[470] Still, the mortality in Sweden was not as high as assumed, especially in the longer term.[471]

Graver (2022) furthermore claims that a State would be in breach of their obligation to protect the right to life if they did not increase the capacity of their healthcare system to counter or prevent the risk of not being able to save or protect lives.[472] Issues concerning capacity was mentioned above, still, the hospitals did increase it to some degree, by scaling up their intensive care capacity.[473] However, this was done by pushing planned operations and treatments, where the hospitals found it medically responsible, and closing parts of hospitals. Still, most hospitals lacked the flexibility of changing their priorities in the event of a pandemic.[474]

Even though these measures were considered medically responsible, by pushing planned operations and closing parts of hospitals, the hospitals and the State sent a signal to the general population that the capacity of the hospitals was under threat. This may have caused implications that was not considered or intended, e.g. that individuals not contacting doctors or health care providers when they felt sick, or as fast as they should when feeling symptoms of potential life-threatening conditions.[475] Furthermore, the refusal of medical treatment or assistance, or limitation of medical assistance may in some cases intensify the patient`s suffering, and activate a responsibility following Article 3 of the ECHR, such as the postponement of planed procedures for an extended or indefinite time, disturbing the continuity of therapy, which may in some circumstances cause a "patient's health to deteriorate or evokes […] justified fear".[476] States may also be held responsible pursuant to

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[470] NOU 2021: 6, p. 156.
[471] UiT Norges arktiske universitet (2021) Covid-dødeligheten i Sverige ikke så høy som antatt, *Forskning.no.* [translation: Covid-Mortality in Sweden not as high as assumed], https://www.forskning.no/media-partner-samfunnsmedisin/covid-dodeligheten-i-sverige-ikke-sa-hoy-som-antatt/1946410; the article is based on the paper, Juul, F. E., Jodal, H. C., Barua, I., Refsum, E., Olsvik, Ørjan, Helsingen, L. M., Løberg, M., Bretthauer, M., Kalager, M., & Emilsson, L. (2022). Mortality in Norway and Sweden during the COVID-19 pandemic. *Scandinavian Journal of Public Health*, 50(1), 38–45. https://doi.org/10.1177/14034948211047137
[472] Graver, H.P. (2022). Pandemirestriksjoner og retten til liv, *Lov og Rett*, 2022/6, 349-370 [*translation: Pandemic restrictions and the right to life*] p. 367, https://doi.org/10.18261/lor.61.6.3.
[473] NOU 2022: 5, p. 149 and 175.
[474] Ibid., p. 147.
[475] Fossheim, K., Fjelltveit, I., Braaten, M., Hodne, A.M., Figved, S., & Andersen, H.S.Ø. (2021). Mange går ikke til legen under pandemien – frykter store konsekvenser*, Tv2.* [translation: Many do not go to the doctor during the pandemic – fears major consequences] https://www.tv2.no/nyheter/innenriks/mange-gar-ikke-til-legen-under-pandemien-frykter-store-konsekvenser/13882691/ [this article is behind a paywall but is only used to highlight the statement made].
[476] Nawrot, O., Nawrot, J., & Vachev, V. (2023). The right to healthcare during the covid-19 pandemic under the European Convention on human rights. *The International Journal of Human Rights*, *27*(5), 789–808, p. 795, https://doi-org.mime.uit.no/10.1080/13642987.2022.2027760.

Article 2 of the ECHR if the postponement of treatments causes a life-threatening deterioration in health.[477] Thus, this may indicate that there could be cases where one need to assess if there were cases of medical negligence, and also if there was a denial of access to life-saving emergency treatment, analyzed in section 5.3. This, however, cannot be done within the scope of this thesis, as it must be determined in each individual case.

Some people did however go to doctors, and it seems that the general practitioners may have prevented hospitals collapsing during the pandemic.[478]

The aforementioned indicates that the measures may not have been proportional, even though the allocation of funds may have been within the margin of appreciation of the State.

Because of the uncertainty at the beginning of the pandemic, an even wider margin of appreciation then normal might be applicable. The ability to derogate from certain provisions might also be an indication of that possibility. Furthermore, measures introduced at the beginning of the pandemic seems to have a high consensus among state parties to the ECHR,[479] even though it did not apply to all.

For this thesis, it is relevant to analyze the measures and their proportionality in connection to the rights of children.

7.3.3.3.1 Proportionality and the best interest of the child

The best interest of the child is as mentioned of paramount importance in alle decisions concerning children.[480] Also, the best interest of children must be placed at the center of all

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[477] Ibid., p. 795–796.
[478] Norberg, B. L., Johnsen, T. M., Kristiansen, E., Krogh, F. H., Getz, L. O., & Austad, B. (2024). Primary care gatekeeping during the COVID-19 pandemic: a survey of 1234 Norwegian regular GPs. *BJGP Open*, 8(1), BJGPO.2023.0095. https://doi.org/10.3399/BJGPO.2023.0095; Nilsen, L. (2024). - Fastlegene hindret sykehuskollaps under pandemien*, Den Norske Legeforening*. [translation: *General practitioners prevented the collapse of hospitals during the pandemic]* https://www.legeforeningen.no/om-oss/fond-og-legater/allmennmedisinsk-forskningsfond/forskningsnytt/-fastlegene-hindret-sykehuskollaps-under-pandemien/
[479] European Parliament, Directorate-General for Internal Policies of the Union, Grogan, J. (2022). Impact of COVID-19 measures on democracy and fundamental rights: best practices and lessons learned in the Member States and third countries, *European Parliament*. https://data.europa.eu/doi/10.2861/795862; European Parliament, Directorate-General for Internal Policies of the Union, Marzocchi, O. (2020). The impact of Covid-19 measures on democracy, the rule of law and fundamental rights in the EU, *European Parliament*. https://data.europa.eu/doi/10.2861/517188.
[480] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 287.

decisions affecting their health and development.[481] This follows from both the ECHR and the CRC concerning the best interest of the child, and has been highlighted by the ECtHR on several occasions, as shown in section 7.1, among others Vavřička and Others v. The Czech Republic. This will affect the States` margin of appreciation, and the consideration of fair balance and test of proportionality.

Therefore, it is a question whether the best interest of the child was at the center of the decisions affecting their health and development made during the Covid-19 pandemic.

Research shows that the Covid-19 virus is less dangerous for children then it is for many others.[482] Especially old people and people with underlaying diseases. This might be a relevant factor in the consideration of fair balance and proportionality. However, it must be seen in the light of "social solidarity", a factor considered by the Court as relevant concerning proportionality.[483] The Court highlighted this as already mentioned, in a case about childhood vaccination and if a State could make it mandatory. It was not the only factor considered and was not decisive in the conclusion of the Court. Still, "social solidarity" is a factor suggesting that individuals may have to do things, or have their rights affected or interfered with, for the benefit of others. However, the programs of childhood vaccination are a proven form of mitigation to provide protection against diseases, that has been tested and proven safe, or low risk, over many years, and in many countries. During the Covid-19 pandemic, most measures had not been tried and proven safe.

As mentioned in section 6.1.2.1 on the margin of appreciation, the States margin is wide when balancing between competing private and public interests.[484]

However, the margin may be narrower when the balancing includes rights that are crucial to the individual's effective enjoyment of intimate or key rights.[485] The same applies concerning

[481] Ibid., § 288.
[482] Sinaei, R., Pezeshki, S., Parvaresh, S., & Sinaei , R.(2021). Why COVID-19 is less frequent and severe in children: a narrative review. *World J Pediatrics,* 17, 10–20. https://doi-org.mime.uit.no/10.1007/s12519-020-00392-y; Zimmermann, P., & Curtis, N. (2021). Why is COVID-19 less severe in children? A review of the proposed mechanisms underlying the age-related difference in severity of SARS-CoV-2 infections. *Archives of Disease in Childhood,* 106(5), 429-439. https://doi-org.mime.uit.no/10.1136/archdischild-2020-320338.
[483] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §§ 279 and 306.
[484] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67; Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 275.
[485] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, § 273; also see Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 67; A.-M.V. v. Finland, app.no 53251/13, 23 March 2017, § 83.

important aspects of the individual's existence or identity, or activities that involve the most intimate aspects of private life.[486]

It is therefore relevant to analyze if there were intimate and key rights affected, or that the interference imposed on important aspects of children's existence or identity. This needs to be weight against the public interest, or the interest of the community as a whole. I.e. fair balance must be struck between the competing interests of the individual and of the community as a whole,[487] as the detailed rules given by States must be in compliance with the ECHR and achieve a balance between any competing public and private interests,[488] or those of individuals between themselves.

There is no exhaustive list of intimate and key rights or import aspects of children's existence or identity. However, the ECtHR has given some examples.

In Söderman v. Sweden, a highly intimate aspect of the applicant's life was affected.[489] In this case a 14 year old girl was filmed by her step-father while undressing in a bathroom. It did not involve any abuse, physical violence, or contact, however, it took place at home, where she should feel safe, and by a person she should be expected to trust, and it affected her personal- and physical integrity. Furthermore, as already mentioned, the Court highlighted rape and sexual abuse of children as serious acts where fundamental values and essential aspects of private life are at stake.[490]

In other words, an individual's personal and physical integrity is seen as intimate, i.e. a person's body is part of the most intimate aspect of private life,[491] and an aspect often affected of domestic violence.

In the case of Stubing v. Germany, a person's sexuality was highlighted as a most intimate aspect of private life.[492] In this case however, a case about incestuous relationships between consenting adults, the Court stated that States margin still had to be wide. A person's

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[486] Söderman v. Sweden (GC) app. No 5786/08, 12. November 2018 § 79.
[487] Keegan v. Ireland, app.no 16969/90, 26 May 1994, § 49; Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 65; Barbulescu v. Romania app.no 61496/08 05 September 2017, § 112; between child and parents see C. v. Croatia app.no 80117/17 08 October 2020, § 72.
[488] M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 148.
[489] Söderman v. Sweden, app.no 5786/08, 12 November 2013, § 86.
[490] Ibid., § 82.
[491] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 273, with further references to Solomakhin v. Ukraine, app.no 24429/03, 15 March 2012, § 33; see also Y.F. v. Turkey, app.no 24209/94, 22 July 2003, § 33.
[492] Stubing v. Germany, app.no 43547/08, 12 April 2012, §§ 59 and 61.

sexuality is of course part of their physical integrity, but sexuality is about feelings, and therefore also affects the psychological integrity.

This means that both bodily or physical integrity, and phycological integrity may fall under intimate aspects of a person's private life.

Also, and especially important for this thesis, what must be considered an important or essential aspects of children's life may be different from that of an adult. For a child his or her life may only evolve around school and education, friends, and leisure activities, and therefore, when these aspects are affected by measures, they are imposing upon important aspects of children's existence or identity, and their key rights. This coincide with the interpretation by the ECtHR mentioned earlier,[493] and that of essential aspects of private life, with was highlighted under an analysis of "respect" in the case of Hämäläinen v. Finland.[494] Therefore, closing of schools and kindergartens, potential domestic violence, and issues concerning mental health all affects rights that falls within the sphere of essential and intimate, or key aspects, of a child's life, and suggests a narrower margin.

On a side note, concerning the right of children during the Covid-19 pandemic. There was not only one child, or a few, affected by the measures imposed on them, it was all children. Children as a group. Therefore, one group of society against another; how does this affect the margin of appreciation? Are there first and foremost competing private and public interest, or between the individual and of the community as a whole? What happens when the society divides in two or more larger groups? This is not obvious based on case law from the ECtHR. Is it out of the question to suggest that it will be a narrower margin than if there was a smaller number of individuals affected? As an example, children are not, as a specific group, part of the vulnerable groups mentioned in A.-M.V. v. Finland,[495] however, there is no doubt that children are a vulnerable group. A.-M.V. v. Finland confirms that the margin can, under certain circumstances, be narrowed when a vulnerable group is subjected.

Based on the aforementioned; the width of the margin is not entirely clear concerning measures imposed during the Covid-19 pandemic. Since the States were implementing measures in the protection of the right to life, and protection of health, maybe the two most

[493] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others 08 April 2021, §§ 263 and 306; together with Barbulescu v. Romania, app.no 61496/08, 05 September 2017, § 71.
[494] Hämäläinen v. Finland, app.no 37359/09, 16 July 2014, § 66.
[495] A.-M.V. v. Finland, app.no 53251/13, 23 March 2017, § 83.

fundamental provisions of the ECHR and enshrining core values under the ECHR,[496] it suggests a wider margin. However, considering it is a vulnerable group, and not a few individuals, and seeing that it affects essential aspects of children's lives, it suggests a somewhat narrower margin. This is further emphasizes considering measures not only affected the children's private life and education, but also that their right to life and right to protection of health, in the sphere of domestic violence and mental health, were affected.

Nevertheless, it is important to consider if there was a fair balance and if the measures where proportional to the legitimate aim pursued.

The State needed to assess and make sure that there was a fair balance between the lockdown, closing of school, kindergartens and leisure activities, and the rights of children affected by the measures, and also whether the measures were proportional.

In the handling of the Covid-19 pandemic, there was shortcomings, or deficiencies, by the State, regarding the assessment of proportionality. This was also highlighted in the second report from the Coronavirus Commission.[497]

The Commission found that the government did not consider the rights of children when deciding to close schools in the beginning of the pandemic.[498] No other consequences following the decisions for a lockdown either, it seems.[499] As mentioned earlier, a wider margin may have been acceptable at the start of the pandemic, and therefor to some degree excused a somewhat poor handling of the situation, concerning fair balance and proportionality. Still, as shown in section 7.3.3.3 they could have done more, e.g. DSB could have been involved earlier. However, consideration and involvement of others was still an issue and lacking later in the pandemic as well. As stated above, pursuant to the best interest of the child, the children have among other things a right to be heard, pursuant to the Article 8 of the ECHR and Article 12 of the CRC. They do not need to be heard directly, which would be difficult in several issues during the Covid-19 pandemic, they can be heard trough a representative or appropriate body.[500] However, even as late as January 2021, the State did not involve potential appropriate bodies, concerning measures affecting schools and therefore

[496] Pretty v. The United Kingdom, app.no 2346/02, 29 April 2002, § 49.
[497] NOU 2022: 5, p. 453.
[498] NOU 2021: 6, p. 145.
[499] Ibid.
[500] Article 12 § 2 of the CRC.

children directly, not even the different directorates responsible for children's affairs.[501] It was not until February the same year, after the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) and the Norwegian Directorate for Education and Training (Udir) themselves contacted the Directorate of Health and NIPH, that they were more involved in the decision-making process, concerning austerity measures and reopening.[502]

Also, the same directorates for children affairs were surprised by the measures imposed in January 2021, since they all the way from April 2020, had warned of the use of general measures against children as a means of infection control, such as closing or restriction schools and kindergartens.[503] They meant that such measures would be disproportionate because of the consequences that would follow, keeping the children away from school. They argued that such measures would only be proportionate in areas with a high extent of infections.[504] This suggested that they were not against the first lockdown in March 2020, however, ever since, they have opposed the general measures imposed on children.

The Commission furthermore highlights that schools in periods were closed for practical reasons, e.g. to not ruin the Christmas vacation for teachers and pupils. This confirmed NIPH`s concerns that a fear of infection would affect the decisions on measures, that was not approved by the NIPH or the government.[505] Several municipalities closed schools without confronting NIPH or without it being necessary based on the local situation of contamination/infection.[506] In other words, the municipalities used more invasive measures then seemed necessary at the time being.[507] This may indicated disproportionate measures.

The report shows that schools and kindergartens had restrictions or periods of closure far beyond the first period of the pandemic, as already mentioned. It was a lot of uncertainty connected to everyday school life, from March 2020 to a full reopening in the spring of 2021.[508] The children still had to endure differed measures even as long as the spring of 2022.[509] Furthermore, the report shows that a lot of times, there was not consistency in the

[501] NOU 2022: 5, p. 360.
[502] Ibid.
[503] Ibid., p. 359.
[504] Ibid.
[505] Ibid., p. 361.
[506] Ibid., p. 361.
[507] Ibid., p. 368.
[508] Ibid., p. 367.
[509] Ibid., p. 354.

measures taken. The traffic light model presented earlier in the thesis, and its use, may be part of the blame for the uncertainty and inconsistency.[510]

In a statement in the summer of 2022, a senior physician at NIPH claimed it was a mistake closing schools, and that the NIPH have held onto this view from the beginning. The Directorate of Health did not agree with those views.[511]

The aforementioned may indicate that politicians and decisionmakers did not take their decisions in accordance with advice from health experts. This may also indicate that the State did not have sufficient reasons for the measures taken, and it may affect the proportionality and balance of the measures. The impact of experts in justifying policies and measures taken by the State was highlighted by the Court in Vavřička and Others v. The Czech Republic,[512] as the Czech Constitutional Court made their conclusion based on relevant data from national and international experts. This may affect both the proportionality and the consideration of the best interest of the child.[513]

As seen in section 7.2. the measures clearly affected the lives and private life of children. Some analysis was done in that section beyond the mere interference, however, it is important to analyze the areas concerning proportionality even more.

Compared to the right of life, the right to education might not be the one with the highest influence or stature, however, as stated in the case of Leyla Sahin v. Turkey, education is "indispensable to the furtherance of human rights", [514] which suggest the importance of this right. As seen in section 6.2 and 7.2.1, education additionally provide opportunity for personal development, which is an important right following the right to respect for private life under Article 8 of the ECHR. Also, this must be considered together with other rights following "private social life" as well, since closing of schools and kindergarten did not only affect the opportunity for education. The importance of "private social life" was highlighted in section 7.2.2. The rights of both "personal development" and "private social life" are not only

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[510] Short about the traffic light model in NOU 2022: 5, p. 354.
[511] Ramberg, E., & Sølhusvik, L. (2022). FHI-overlege: – En tabbe å stenge ned skolene, *NRK*. – *[translation: NIPH-senior physician: - A mistake closing schools.],* https://www.nrk.no/norge/preben-aavitsland_-overlege-fhi_-mener-det-var-en-tabbe-a-stenge-skolene-under-pandemien-1.16029396.
[512] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 285.
[513] See this thesis` section 6.1.2.1 and M.A. v. Denmark, app.no 6697/18, 09 July 2021, § 149; CRC/C/GC/14 - Committee on the Rights of the Children - General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, §§ 36 and 37 together with §§ 52–79.
[514] Leyla Sahin v. Turkey, app.no 44774/98, 10 November 2005, § 137.

important for the present, but they are also rights that are important and have an impact for the entirety of children's lives.

Furthermore, the length of the interference was an important part of the discussion in both Vavřička and Others v. The Czech Republic,[515] and Memlika v. Greece.[516] As already mentioned, children must withstand some time away from schools and kindergarten without it being disproportionate. This must also relate to leisure activities. However, there is a limit. One of the things affecting this limit was mentioned in Vavřička and Others v. The Czech Republic, in which the possibility for personal, social, and intellectual development elsewhere was highlighted.[517] However, as mentioned, this was difficult during the Covid-19 pandemic, as many of those opportunities was closed or restricted as well. This may affect the limit that children must be able to withstand being away from school and kindergarten, and leisure activities, while still being proportional. As mentioned, in modern society there are alternatives for social interactions, however, online gaming and social media cannot be seen as sufficient alternatives for most children.

Based on these cases, the limit of withstanding seems to be around three months. However, because on the other restrictions in society, three months may be too much. Nevertheless, as seen in section above, and in section 7.2., children had to withstand periods of closed- or restricted schools, kindergartens, and leisure activities far beyond that. Furthermore, as mentioned in section 7.2, the Court highlighted in Vavřička and Others v. The Czech Republic that the limitation in time was foreseeable in the domestic law,[518] which was a relevant factor. This was not the case during the Covid-19 pandemic. There were a lot of uncertainty, and it was difficult for children to foresee potential changes. Together, this indicates disproportionate measures.

[515] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 307 with further references.
[516] Memlika v. Greece, app.no 37991/12, 06 October 2015 – [Judgement only available in French - and some non-official languages - I have therefore used the press release in English, ECHR 301 (2015) 06.10.2015].
[517] Vavřička and Others v. The Czech Republic, app.no. 47621/13 and 5 others, 08 April 2021, § 307.
[518] Ibid., § 307 with further reference to § 82.

The quality of life is important, not only life itself.[519] This was highlighted by the Court while considering Article 8. There can be no doubt that being able to attend school, and socializing with people in the outside world, affects the quality of life, especially in children's life.[520]

What may also affect the quality of life and the right to respect for private life, as well as other aspects of a child's life, is domestic violence and children's mental health.[521] This was highlighted in section 7.2., however, this is also important in an analysis of proportionality. As mentioned, the sphere of domestic violence and mental health falls within rights under Articles 2, 3 and 8 of the ECHR, and concerns both positive and negative obligations.

Concerning domestic violence; in the case of Kurt v. Austria, the Court highlighted that children affected by domestic violence are particularly vulnerable and are entitled to State protection, to protect against breaches of personal integrity.[522] It is also important to note that the Court highlighted that "[v]iolence against children belonging to the common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner."[523]

This was a case where a father shot and killed his son at school, before shooting himself, and where the State knew about the history of domestic violence and abuse against the child's mother, the killer's wife, and the threats and violence inflicted upon the children. The Court found no violation of the substantive obligation under Article 2, since there "were no indications of a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk", and that the Court found that the measures taken by the authorities appeared adequate in the situation to contain the risk of violence against the children.[524] The school was not informed of the barring order.

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[519] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, app.no 53600/20, 09 April 2024, § 544.
[520] Barneombudet - Ombudsperson for Children (2021) "Det er forskjell på hva du går glipp av på ett år når du er 16 og når du er 45", *Barneombudet* [translation: *There is a difference betweem what you miss in a year at 16 and when you are 45*], https://www.barneombudet.no/aktuelt/aktuelt/ny-rapport-fra-unge-hva-kostet-koronatiden and https://www.barneombudet.no/uploads/documents/Publikasjoner/Fagrapporter/koronapandemien.pdf.
[521] As an example concerning mental health and quality of life: Orban, E., Li, L. Y., Gilbert, M., Napp, A.-K., Kaman, A., Topf, S., Boecker, M., Devine, J., Reiß, F., Wendel, F., Jung-Sievers, C., Ernst, V. S., Franze, M., Möhler, E., Breitinger, E., Bender, S., & Ravens-Sieberer, U. (2024). Mental health and quality of life in children and adolescents during the COVID-19 pandemic: a systematic review of longitudinal studies. *Frontiers in Public Health*, 11, 1275917–1275917. https://doi.org/10.3389/fpubh.2023.1275917.
[522] Kurt v. Austria, app.no. 62903/15, 15 June 2021, § 163.
[523] Ibid.
[524] Ibid., § 209, §§ 211–212.

The Court also gave a general summary of obligations for the State in the context of domestic violence, stating the following:

> … an immediate response to allegations of domestic violence is required from the authorities […] The authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment […] The reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases […] If the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered. Such measures must be adequate and proportionate to the level of the risk assessed …[525]

Furthermore, the statement highlights the importance of protecting against domestic violence, and the limits of the State as well. However, questions arises whether this obligation applies, or should apply, in general, where there are non-identified individuals that might be in risk of domestic violence. Also, if it only applies where there is an immediate risk to life, or if it is acceptable that only the health of victims of domestic violence is hurt, or the sphere of private life. There is also a question whether potential mental health issues, and the long-term risk to life and health, withstanding domestic violence over a long period of time, may trigger the obligation. There may be an obligation for States to act accordingly, also where there is no immediate risk to life, as will be analyzed in the following.

The obligation to provide general protection to society is highlighted in several cases.[526] The cases also highlight the particular context of domestic violence, as a situation to not only provide general protection, but one must above all take into account "recurrence of successive episodes of violence within a family".[527] This means that the State need to respond in such situations, as stated in the case of Kurt v. Austria. This does not provide indications if there is an obligation to put in place operational measures before a threat is immediate, only that of a

[525] Kurt v. Austria, app.no 62903/15, 15. June 2021, § 190.
[526] Talpis v. Italy, app.no 41237/14, 18 September 2017, § 122; Tkhelidze v. Georgia, app.no 33056/17, 08 October 2021, § 49.
[527] Tkhelidze v. Georgia, app.no 33056/17, 08 October 2021, § 49.

legislative and regulatory framework.[528]. However, in S.P. and Others v. Russia the Court highlights the following:

> … the national authorities have an obligation to take measures to ensure that individuals within their jurisdiction are not subjected to torture or to inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals […] The extent of this obligation of protection depends on the particular circumstances of each case …[529]

O`Mahoney (2019) also claims that the obligation to protect applies concerning ill-treatment under Article 3, and whether there is direct harm to children or indirect harm by witnessing ill-treatment of others.[530]

Stoyanova (2023) claims that general awareness of a general problem is not sufficient for the positive obligation to apply, it needs to be a specific individual at risk.[531]

She also used a case concerning domestic violence as an example when discussing this topic. However, as mentioned in section 7.1.2, there has been claimed that "the mere risk of abuse was enough to engage a positive obligation",[532] showing to the case of O`Keeffe v. Ireland, a case about sexual abuse in a catholic school in Ireland in the 1970, where this can be deduced by the Courts assessment.[533] This refers to a general obligation to put in place protective measures when there is a general risk of harm, as it was with the Covid-19 pandemic itself. O´Mahony (2019) further claims that this is "analogous to case law governing positive obligations arising under Article 2 in respect of activities that pose a risk to life",[534] referring to the case of Öneryildiz v. Turkey.[535] In this case, the Court stated that to put in place a

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[528] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 179.
[529] S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 98.
[530] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 668, https://doi.org/10.1163/15718182-02704003.
[531] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press, p. 30-31. https://doi.org/10.1093/oso/9780192888044.001.0001.
[532] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 667, https://doi.org/10.1163/15718182-02704003.
[533] O`Keeffe v. Ireland, app.no 35810/09, 28 January 2014, § 168-169.
[534] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. *International Journal of Children's Rights,* 27(4), 660-693, p. 667, footnote 11, https://doi.org/10.1163/15718182-02704003.
[535] Öneryildiz v. Turkey, app.no 48939/99, 30 November 2004.

legislative and administrative framework is a general obligation, making it compulsory for States to take practical measures ensuing effective protection of citizen whose lives may be endangered.[536]

Also, as mentioned in section 4.1.1, Judge Pinto de Albuquerque stated in his partly concurring, partly dissenting opinion in the case of Lopes de Sausa Fernandes v. Portugal, that the State in certain circumstances may be found responsible for human rights violations even though the persons not yet faces an imminent risk.[537] If the authorities know or ought to know about a risk and failed to prevent harm.

What is more important for this thesis is that, when writing this he also referred in the footnote,[538] to his concurring opinion in the case of Valiuliené v. Lithuania, in which he suggests a review of the Osman-test in cases concerning domestic violence. He states that when one is at the stage of an "immediate risk" it might already be too late, and it is however a serious risk when it is present. He suggests another wording of the Osman-test relating to domestic violence:

> If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations.[539]

This is also relevant for children as a segment of the population. However, this is off course not the opinion of a majority in a case, and the validity is therefore lower, it still shows that the judges of the ECtHR are not all inn agreement over the interpretation of the rule.

The aforementioned provides no clear indication if the obligation might apply for a group of non-identified individuals, or a group. However, if States` obligations limits itself to only apply when allegations appear, what happens then to all the hidden numbers of domestic violence, as shown in 7.2., and when you close services that normally would pick up on these issues? Are States without obligations? Nevertheless, the obligation cannot be interpreted in a

[536] Ibid., §§ 89–90.
[537] Lopes de Sausa Fernandes v. Portugal, app.no 56080/13, 19 December 2017, partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, § 63.
[538] Ibid., footnote 222.
[539] Valiuliené v. Lithuania, app.no 33234/07, 23 March 2013, The reviewed Osman test concerning domestic violence.

way that there are no obligations for the State to have the potential risk of domestic violence in their assessment of proportionality, or fair balance, while considering measures affecting children. Additionally, before the Covid-19 pandemic and the imposed measures, a lot of children were already in connection with the child protection services, which means that these children at least needed to be considered specifically while assessing measures, as the State must have known about them.

This may have been done to some degree, as the government established a coordination group for vulnerable children in the beginning of April 2020. This group were meant to provide the government with a report every other week, stating how the children were seen and followed up during the pandemic, and also suggest potential follow-up measures.[540] However, the Commission did not find that any of the group's proposed measures have been implemented or rejected. It is also unclear for the Commission how the reports were used in the different levels of the State.[541] Also, the mandate did not initially indicate what constitute a vulnerable child.[542] This must be described as problematic. Still, the mandate was later updated to include what constitute a vulnerable child, among others, children in families with problems of violence and abuse. However, this did not happen until January of 2022,[543] which indicates that domestic violence was not the only problematic area that the group assessed, and also the vagueness of the mandate might be the explanation to why the use of the reports is unclear. It may additionally be a reason to ask questions whether this group actually was established as a genuine effort to protect vulnerable children.

One thing is implementing general operational measures to protect, however, this was somewhat implemented already, by having a fully operational child protective service, school nurses that could pick up on these things, among other services. However, when closing down or restricting their ability to do their job, the State has actually done the opposite of putting in place operational measures, they were cutting back on them, making them less efficient. By

[540] NOU 2022: 5, p. 354-355.
[541] Ibid p. 355.
[542] Barne- og familiedepartementet (2020) Mandat for koordineringsgruppe for tilbudet til sårbare barn og unge under Covid19- pandemien – [translation: Mandate for the coordination group for the service to vulnerable children and young people during the Covid19 pandemic], https://www.regjeringen.no/contentassets/ab5d3d30e305470e8c24cf4b0eb2e86c/mandat-for-koordineringsgruppe-for-tilbudet-til-sarbare-barn-og-unge-under-covid19.pdf.
[543] Barne- og familiedepartementet (2022) Adjusted mandate, https://www.regjeringen.no/contentassets/07a94a46945c43408c50a168e540079d/mandat-for-koordineringsgruppen-for-tjenestetilbudet-til-barn-og-unge-under-covid-19-pandemien.pdf; both can be found at: https://www.regjeringen.no/no/dokumenter/utsatte-barn-og-unges-tjenestetilbud-under-covid-19-pandemien/id2831843/

doing so the State may have disrespected the right to private life of children. Furthermore, this may have increased the risk and threat to life and health of the children as well.

Concerning mental health. There is, as stated, both a negative and positive obligation for the State to protect and respect private life, in which mental health, or psychological and moral integrity is part of. However, mental health issues may also fall under Articles 2 and 3 of the ECHR, which may trigger the States positive obligation to protect life and health.

The seriousness of mental health issues has been highlighted with many articles already. It can also be highlighted by using case law from the ECtHR, with the case of Fernandes de Oliveira v. Portugal,[544] and the case of Boychenko v. Russia,[545] as good examples. The cases are both about mental health and suicide, the first one while in a psychiatric hospital and the other while serving military service.

In the first case, there were no violation of the substantive positive obligation following Article 2, and the obligation to take preventive operational measures, since it was not establish that the State knew or ought to have known at the time of a real and immediate risk to the life of the deceased.[546] The second case, there was a violation of the substantive obligation as the State had not taken appropriate steps to safeguard the life of the serviceman.[547]

The Court, in the latter case, made an important statement regarding the test under Article 2:

> … the test under Article 2 does not require it to be shown that "but for" the failing or omission of the authorities the death would not have occurred. Rather, what is important, and what is sufficient to engage the responsibility of the State under that Article, is that the reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm …[548]

The military did not do enough to be able to assess the mental state of its servicemen and -women. These cases indicate the seriousness of mental health, and that the standard for States to follow, protecting the lives, health, and respect for private life, in regard to mental health,

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544 Fernandes de Oliveira v. Portugal, app.no 78103/14, 31 January 2019, § 115.
545 Boychenko v. Russia, app.no 8663/08, 12 October 2021, § 80.
546 Fernandes de Oliveira v. Portugal, app.no 78103/14, 31 January 2019, § 133.
547 Boychenko v. Russia, app.no 8663/08, 12 October 2021, § 96.
548 Ibid., § 95.

must be high. The States must take reasonable measures that "could have had a real prospect of altering the outcome or mitigating the harm".[549]

The Court has highlighted that when considering knowledge, one cannot base this on hindsight.[550] Did the government know or ought they to know of the risk at the time of lockdown and when deciding to apply restrictive measures?

As already mentioned, Stoyanova (2023) claims that general awareness of a general problem is not sufficient for the positive obligation to apply, and states more specifically that "[p]rotective operational measures are activated when the authorities are aware that *a specific* individual could be at risk."[551]

However, as also mentioned above, States cannot ignore foreseeable general risk. Measures to control against general risk must be implemented the same way as it is with identified individuals.[552] A State cannot be allowed to not make proper assessment and then point to a "fact" that they did not know about the risk. The "ought to have known" indicates that a proper due diligence, or "special diligence" concerning domestic violence cases,[553] needs to be in place before applying invasive measures. This also applies in the case of an interference with a negative obligation.

The potential challenges for children following a lockdown and closing of schools and kindergartens was foreseeable for the State.[554] It especially would be if they had confronted or conferred with the relevant authorities before applying these measures, as they should have. The same applies concerning closing and restrictions of sporting- and other leisure activities. Furthermore, measures imposed by the State seems to challenge both the negative obligation of Article 8, but also the positive of Articles 2, 3 and 8, which highlight the implications of the imposed, and accentuate the seriousness of a proper test of proportionality.

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[549] Ibid.
[550] Vilnes and Others v. Norway, app.no 52806/09 and 22703/10, 05 December 2013, § 222.
[551] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford Academic - Oxford University Press, p. 30-31. https://doi.org/10.1093/oso/9780192888044.001.0001.
[552] O'Mahony, C. (2019). Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations. International Journal of Children's Rights*,* 27*(*4), 660-693, p. 668, https://doi.org/10.1163/15718182-02704003.
[553] Kurt v. Austria, app.no 62903/15, 15 June 2021, § 211.
[554] Fegert, J.M., Ludwig-Walz, H., Witt, A., & Bujard, M. (2023). Children's rights and restrictive measures during the COVID-19 pandemic: implications for politicians, mental health experts and society. *Child Adolescent Psychiatry Mental Health,* 17, 75, https://doi.org/10.1186/s13034-023-00617-8; also see NOU 2021: 6, p. 145.

As highlighted in section 5.2.2.1 about the minimum level of severity, for something to be regarded as ill-treatment and fall within the minimum level of severity, it usually involves actual bodily injury or intense physical or mental suffering.[555] However, the Court has not stated that this is an absolute requirement.

Physical and sexual violence constitute as already mentioned forms of ill-treatment falling within the scope of Article 3 of the Convention.[556] Furthermore, the assessment of the treatment is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the age of the inflicted.[557] Ill-treatment under Article 3 also covers psychological suffering,[558] and the Court gave examples of psychological suffering, treatments that "humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[559]

The measures imposed by the State and endured by children may have caused situations where ill-treatment have occurred, and this may apply. Therefore, there may have been cases concerning specific children during the Covid-19 pandemic, that exceeded the minimum level of severity and therefore falls under Article 3. Article 2 may also be relevant if the ill-treatment put the individual's life at risk, and Article 8 may still be relevant even if the ill-treatment should not be within the minimum level of severity required by Article 3. This applies both in the sphere of domestic violence and mental health.

The right to life is as seen essential and is aa fundamental right under the ECHR. The same applies to health, and a right to healthcare and protection of health. This gives States an obligation to protect these rights by putting in place operational measures where they are at risk or threatened, and as a basis, a wide margin of appreciation concerning the means applied during the Covid-19 pandemic, as it also involves the healthcare sector. As seen above, there are several right affected for children that may have narrowed this margin. Furthermore, and as already mentioned, the measures imposed by the State did not only interference with the right to respect for private life, and the right to education. The measures imposed may have

[555] S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023 § 90.
[556] Ibid., § 91.
[557] X and Others v. Bulgaria, app.no 22457/16, 02 February 2021, § 176; also see Fenech v. Malta, app.no 19090/20, 01 March 2022, §§ 62-64.
[558] S.P. and Others v. Russia, app.no 36463/11 and 10 others, 02 May 2023, § 90.
[559] Ibid., § 90; also see Fenech v. Malta, app.no 19090/20, 01 March 2022, §§ 63 and 64 concerning the same principles.

the blame for the increase of domestic violence and issues concerning the mental health of children, that surged during the pandemic, at least part of it. A substantive positive obligation to put in place operational measure to protect the life and health of the children in those situations therefore might have arisen and been triggered. However, it is highly unclear if the State obliged with these obligations. The State may claim that they did not know, or ought to have known of this risk, however, as highlighted above, these issues seem to have been foreseeable.

Concerning the States inhered obligation to assess the proportionality of their measures; the Norwegian Ombudsperson for children commented on the second report from the Commission, and stated in a letter sent in October 2023, that throughout the pandemic it had noticed the absence of a sufficient assessments of proportionality, and consideration of the best interests of the child. [560] In their opinion, this have had a significant impact on children, as they had also pointed out in hearings to the Coronavirus Commission earlier. They had noticed that too intrusive measures had been implemented towards children, that there had been a lack of compensatory measures, and that the measures had lasted too long. [561] Furthermore, the seriousness of this was highlighted, and it was also stated that they miss a greater focus on whether proportionality assessments were carried out, in which different considerations and rights were balanced against each other. For example, the consideration of protecting life and health through infection control measures against the right to education, health care and protection against violence and abuse on the other hand.[562]

Also, the Ombudsperson stated that they had noticed that the professional foundation, that the Norwegian Directorate of Health sent to the Ministry of Health and Care during the pandemic, lacked concrete proportionality assessments related to which measures were recommended. However, they did note that the consequences for children were described and specified, still, they point to a lack of a better assessment of which considerations should weigh more heavily, as a proportionality assessment requires.[563]

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[560] Barneombudet - Ombudsperson for Children (2023), Barneombudets høringssvar - Koronautvalgets rapport – [translation: Ombudsperson for Children’s response to the consultation response - The Corona Committee's report], https://www.barneombudet.no/uploads/journal/Barneombudets-horingssvar-Koronautvalgets-rapport-16.-oktober-2023.pdf.
[561] Ibid.
[562] Ibid.
[563] Ibid.

Furthermore, two law professors stated in an interview, that the lack of publicity on the test of proportionality made by the Norwegian government, made it impossible to see if the measures taken were in fact legal.[564] A similar statement was made, to the same publication, by the director of the Norwegian Human Rights Institution.[565]

The assessment seems to have not been done to a satisfactory manner under the ECHR, interpreted and applied by the ECtHR, at least as the pandemic went on. Also, the best interest of the child is just part of the consideration that States must do and is not absolute decisive for det result, meaning, the result might have been the same even if the test of proportionality had been done in a satisfactory way. However, the best interest of the child does not seem to have been at the center of all decisions concerning their health or development, and their best interest does not seem to have been considered with paramount importance.

It might be claimed that the uncertainty in the beginning of the pandemic, and therefore some hasted decisions by the government may be excusable. This was at least found by the Coronavirus Commission.[566] However, that may always be the case concerning pandemics or health emergencies. Therefore, it cannot be a general exemption or excuse by States for not dealing with the emergency in a proper manner and in accordance with human rights. There is an obligation to consider the fair balance of measures, and of proportionality. There is an obligation to put the best interest of the child in center of all decisions concerning their health and development. This does not seem to have been done. If States are allowed to not explicitly show that these issues were taken into consideration and weight in the decisions, it will be much harder to assess if States obliges to their obligations, and if they were responsible for the ill-treatment, which affects measures required by States, as highlighted in section 3.2 of the thesis. This especially applies during a pandemic or health emergency, considering their substantive positive obligations.

[564] Hagstad, K. (2021, 20 December). Spinnvilt at vi ikke får innsyn i myndighetenes forholdsmessighetsvurderinger av koronatiltakene, *Advokatbladet* [translation: Crazy that we do not get access to the authorities`s proportionality assessments of the coronameasures], https://www.advokatbladet.no/korona/spinnvilt-at-vi-ikke-far-innsyn-i-myndighetenes-forholdsmessighetsvurderinger-av-koronatiltakene/171842.
[565] Hegstad, K. (2022, 07 January). Norges institusjon for menneskerettigheter krever offentliggjøring av regjeringens begrunnelser for koronatiltak, *Advokatbladet* [translation: Norwegian Human Rights Institution demands publication of the government's reason for coronameasures], https://www.advokatbladet.no/korona-menneskerettigheter/norges-institusjon-for-menneskerettigheter-krever-offentliggjoring-av-regjeringens-begrunnelser-for-koronatiltak/172766.
[566] NOU 2021: 6, p. 125.

8. Final reflections and remarks

The Covid-19 pandemic was a new type of threat to society, making it more difficult for States to fulfill their obligations. However, as seen, States might have made it harder for themselves in some cases, Norway included. Still, there were obligations of both positive and negative nature that needed to be handled on top of all existing obligations, which increased the pressure on States.

Several questions were asked throughout this thesis that did not have a clear answer. Still, it is important to ask those questions as well, to continue developing and improving the rules of law. However, there was multiple factors highlighted throughout this thesis, pointing in the direction of the measures being disproportionate to the legitimate aim pursued, and not achieving a fair balance with the right of children. An expressly conclusion in such direction is not easy to make concerning the general measures imposed by the State. This might be different however, assessing a specific case.

The complexity of the issue as well, and seen as the Covid-19 pandemic was a rather new threat to society, at least at that scale, makes it even more difficult to expressly conclude if the States surpassed its limits, or if the measures were proportionate or not.

However, the thesis gave answers to the main question; what standards does apply when States must balance different conflicting obligations, more specifically, during a pandemic, or a similar health emergency, what are the limits of the positive obligation of the State to protect life and health, and how should it be balanced against the rights of children.

It is relevant to finish the thesis with a view on the future, and what it holds for children's rights in pandemic related issues. Even though one cannot expressly conclude if there have been a violation of rights, or that the State surpassed the limits of their obligations, I find, de lege ferenda, that there are many indications in the direction of the State failing children as a group, that the measures were too invasive and lasted too long. The negative effects were clearly seen during the pandemic, and some negative long-term effects are also seen. More will likely be seen in the future. Additionally, the consideration of proportionality and fair balance while assessing measures seems to not have been done in a satisfactory and acceptable way, maybe not even legal at times. This needs to improve in the future, in pandemics and health emergencies, but also concerning other potential issues.

The ECtHR might provide further clarification on these issues in the future, among other in the pending case of M.C.K and M.H.K.-B and others v. Germany, as mentioned at the beginning of the thesis, concerning the right to education. The question of the case is "Covid-19 related restrictions on and prohibition of in-class school lessons", or "*school closures*", both under Article 2 of Protocol No. 1, and under Article 8, respect for private life. The Court highlights that the applicant "complain that the *school closures* negatively affected their personal and social development as well as their mental health and respectively reduced their knowledge with effects on their future careers and income".[567] If the Court finds the case admissible, it will hopefully provide a better understanding of the rights analyzed in this thesis, based on the interpretation from the ECtHR.

Also, it is worth mentioned the case of Communauté genevoise d'action syndicale (CGAS) v. Switzerland, about the Covid-19 pandemic and measures imposed, in which the Chamber came to a violation of rights under Article 11 of the ECHR, with a majority of 4 vs. 3 judges.[568] The Grand Chamber, however, did not discuss the case itself, it concluded that the applicants had not exhausted national remedies, and labeled the case inadmissible.[569] This was unfortunate as this case from the Grand Chamber would have provided more clarity on the balancing of rights during the Covid-19 pandemic.

There are other cases concerning the Covid-19 pandemic that has concluded about measures, some were referred to in this thesis, however, they mostly concern detention and imprisonment, and are not directly related to the theme of the thesis.[570]

A lot of human rights were affected and put under pressure during the Covid-19 pandemic. It seems that the pandemic will have an effect on society for a long time still. However, States now have an increasingly amount of information to provide knowledge for the future, making it easier to fulfill their positive substantive obligation, provided a better assessment of proportionality, and the best interest of the children at center, as a primary consideration.

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[567] M.C.K and M.H.K.-B and others v. Germany, app.no 26657/22, January 2023 (Communicated case). https://hudoc.echr.coe.int/eng?i=002-13975

[568] Communauté genevoise d'action syndicale (CGAS) v. Switzerland, app.no 21881/20, 15 March 2022; also see Information Note on the Court's case-law 260, March 2022, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* – 21881/20 Judgment 15.3.2022 [Section III]. https://hudoc.echr.coe.int/fre?i=002-13596

[569] Communauté genevoise d'action syndicale (CGAS) v. Switzerland, app.no 21881/20, 27 November 2023, legal summary. https://hudoc.echr.coe.int/fre?i=002-14249.

[570] European Court of Human Rights – Press Unit. (2024). *Factsheet – Covid-19 health crisis.* ECtHR https://www.echr.coe.int/documents/d/echr/FS_Covid_ENG.

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