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HUMAN RIGHTS IN TIMES OF COVID-19:

CAMPING ON SEESAWS WHEN BALANCING A STATE'S HUMAN RIGHTS OBLIGATIONS AGAINST THE ECONOMY AND WELFARE OF ITS PEOPLE

A HUMAN RIGHTS STUDY WITH SPECIAL FOCUS ON HOW THE NPA-REGION IN SWEDEN LIVED UP TO ITS HUMAN RIGHTS COMMITMENTS DURING THE PANDEMIC

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The views expressed within this report are those of the author

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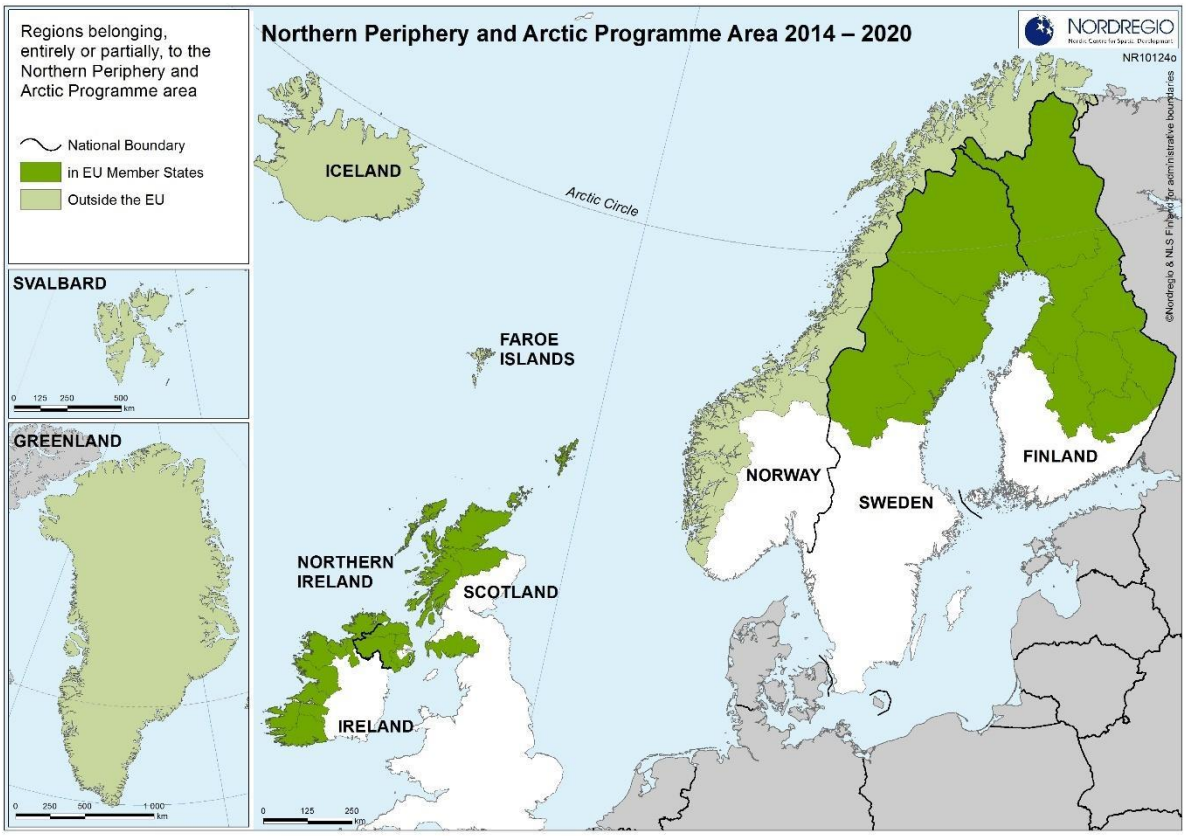

Fig. 1 NPA Programme Area: *In Sweden the NPA area includes Upper and Mid-Norrland*

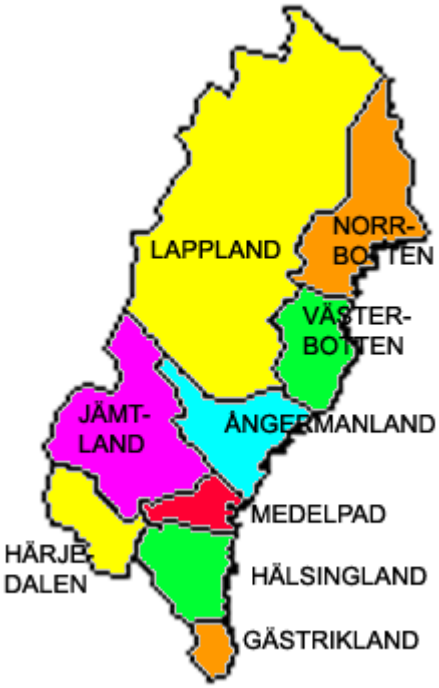

Fig.2. Norrland, that also includes the nether part of Norrland

Introduction

This report highlights the importance of governmental respect for human rights in the fight against a pandemic. Its focus is on the Northern Arctic Region in Sweden and in comparison, when possible, with other parts of the Northern Periphery and Arctic (NPA) area, especially Scandinavia (Norway, Finland and Denmark). Sometimes the study, due to data and historical aspects, must broaden its ambit to cover all the Swedish region of "Norrland" (see Fig. 2), while the NPA-region in Sweden is defined as the four counties Västernorrland, Jämtland, Västerbotten and Norrbotten. However, it should be noted that there are several different definitions of the Arctic region, and that the Swedish Government defines the Arctics in Sweden more narrowly, as above the Polar Circle, whilst the Barents Euro-Arctic Council includes only the two Swedish counties of Norrbotten and Västerbotten in its interregional cooperation.[1]

There has been surprise but also criticism voiced globally of Sweden's strategy during the Covid-19 pandemic, with no mandatory restrictions in place, which led to a high death toll in the pandemic, as much as 20 times more than in the rest of Scandinavia. Did the initial Swedish policy of 'herd-immunity' and inaction violate fundamental human rights such as the right to life and the right to health? Did the Swedish NPA-region suffer from the Swedish strategy in terms of human rights?

But hard lockdowns also come at a price in human rights, and states that introduced them have had to endure criticism from within, claims that rights such as the rights to livelihood, work and freedom of movement and expression are curtailed, sometimes over prolonged periods. For example, Australia's opposite approach to Sweden, with one of the world's most severe Covid-19 responses, met accusations that the restrictions were "alarming regressions toward authoritarian governance".[2]

This report will focus on how a state can camp on seesaws, balancing individual human rights against the economy and the welfare of its people. It will analyse whether states can rely on defences in the law of state responsibility should they fail to comply with international law obligations, and the requirements for derogations to international human rights treaties.[3]

The report starts in Part I with an overview and comparison between how the Spanish flu in 1918-1920 hit the northern part of Sweden ("Norrland") hard, focusing on the NPA-region within Sweden, and compares it with the effects of Covid-19 today on Norrland and the NPA-region.

Part II introduces the concept of human rights and the difference between non-derogable and derogable human rights. Focus will be on human rights at issue in the pandemic. This includes questions about what standards apply when a state wants to suspend or restrict human rights in a state of emergency. It focuses on the Swedish model, as it has been singled out as quite unique, without any hard mandatory lockdown measures. However, this was partly explained by the fact that the Swedish Government did not have any emergency powers inserted in its Constitution or under its regular laws, an anomaly, as compared to all other European Countries, at the time of the outbreak of Covid-19. It was only in January 2021 that the Government first managed to adopt a pandemic law that enabled it to take extraordinary measures paired with sanctions.

In Part III the report analyses how Sweden lived up to relevant human rights norms in its Covid-19 policies. This is done through a case-study approach, with cases and situations from Sweden, sometimes compared with cases and situations from other members in the NPA area, and sometimes from other countries and regions, to illustrate human rights issues in the pandemic.

Part IV examines vaccines and their human rights implications.

Part V evaluates how the economy and human rights can be reconciled through calculations of the worth of a healthy life year (VOSL) and the value of quality of life (QALI).

Part VI contains conclusions drawn from this project. They propose a more federative approach, based on regional self-government and leeway to adopt restrictive and targeted measures against a pandemic based on regional contexts and data. Also, the Swedish Government needs to learn from history to have a ready framework for crisis preparedness in its Constitution and laws, as well as a pandemic plan incorporated in the Swedish Health Agency's work that all other relevant authorities need to share. The Government and authorities need to be able to audit their pandemic responses against human rights, to make sure decisions are not taken that violate Sweden's human rights obligations. This is especially important as Sweden does not have a system of immediate judicial review given to the courts to interpret the Constitution. Neither are class actions allowed, that is for a group of people together to bring litigation in court, such as different categories of victims in a pandemic.

Part I. A Comparison Between the Impacts of the Spanish Flu and Covid-19 on the NPA-Region in Sweden

1. The Spanish Flu in Norrland

By the beginning of the 20th century, Sweden had a population of about 5.8 million. It is estimated that about a third of the population caught the Spanish flu. During the Spanish flu pandemic in Sweden approximately 37,500 people died, with most of the deaths occurring in the age range of 15 to 40. At the time 40% of Sweden's population was aged below 30 years.[4] However, a W-shaped mortality curve showed how the mortality rate hit children, young adults and the elderly. A cause for the deaths at young age is usually explained by prior immunity in the elderly, and lethal secondary bacterial pneumonias often follow dysregulated immune responses to infections with influenza.[5] Research shows that the Spanish flu caused an overreaction in the immune system.[6] However, most deaths were due to bacterial pneumonia that took hold because viral effects destroyed the epithelium in the bronchi and lungs.[7] A relatively large proportion died from direct viral effects in the lungs, which caused pulmonary edema and bleeding in the lung tissue, severe bronchiolitis and alveolitis.[8]

Two groups were identified as especially important for the spread—military troops and school children. In neither case did the government intervene with decisive action, and both schools and military barracks were kept open. The medical health care and social systems in the rural north of Sweden had been marginalised when the 1918 influenza appeared. There was a lack of nursing homes, hospitals, trained medical personnel and equipment.[9] Moreover, there was a lack of money paid by the Government for the sick-pay system.[10] The government was criticised afterwards for its inadequacies in handling the pandemic.[11]

The Spanish flu struck particularly hard in the northern parts of Sweden. Östersund, a city with about 13,000 inhabitants, in the county of Jämtland, earned the nickname "capital of the Spanish flu". The pandemic reached Arjeplog, a municipality in Norrbotten, as late as 1920, with the result that the parish had the overall highest flu mortality in the whole of Sweden, as most of its inhabitants had been on the same market where the flu spread rapidly.[12]

Being part of a small, remote and isolated community presented clear risks in the Arctic during the Spanish flu pandemic.[13] Many Arctic communities experienced underdeveloped medical health care systems and infrastructure, with the example of Östersund that did not have a hospital.[14] Professor Peter Sköld writes:

> "In Alaska, there were communities where the entire population died. The remote location of Arctic communities often means that the successive immunisation that usually takes place in populous towns does not happen. Remote populations are particularly susceptible when the virus reaches them (as they have no prior experience of the disease and no following immunisation). The later waves of a pandemic are often more aggressive."[15]

The causes of the northern region being hard hit can also be found in the fact that a lot of military troops were present in the Arctic region due to World War 1. Moreover, industrialisation had seen workers gather in cities under substandard living conditions and malnutrition due to WW1, in which Sweden did not participate, but which triggered ransoming of food and necessities. In the north, the military lived in close proximity to towns, and there were migrant workers constructing the Swedish railway systems, and people came to work in the forest industry and in mining.

Swedish society was not yet a modern democracy, lacking an equal voting system, as women did not receive the right to vote until 1921 (while men got it in 1909).[16] Due to the low numbers of hospitals, nursing homes and doctors, Norrland was ill prepared, and many cases did not receive proper care. Moreover, vaccinations in the vast Arctic regions took too long and were not sufficient.

The Sami, the indigenous people in the Arctic, with a population of between 20,000 to 50,000, suffered from a higher risk from pandemic influenza. This was due to chronic underlying health conditions, infectious diseases such as tuberculosis, inadequate access to health care, and a lack of basic infrastructure, e.g. they were at this time forced to live in tents.[17] Thus, indigenous peoples of the Arctic have almost always had higher pandemic mortality.[18] "Smallpox, measles, tuberculosis and the 1918 influenza were all more devastating in indigenous communities'', according to Sköld.[19]

Media was scarce in the Arctic region, in an era before radio and TV. The local papers did write about the pandemic, later in the pandemic, but many people were illiterate. But actually, at large, Swedish media did not report much; especially at first reporting was scarce and about a mild influenza hitting Sweden in July 1918. But in August the more violent outbreak prompted more reporting of severe cases and deaths. The fact that no one was prepared for the great mortality also made the people not worry more than in earlier flu epidemics. It seems that both the Government and public opinion agreed that attempting to reduce the spread of influenza at all was almost impossible and unprofitable.[20] So, the lack of response and the acceptance of the deaths are two surprising factors, that also paved the way for the Spanish flu seemingly to be buried in history's junk yard for many Swedes.

2. Covid-19 and Norrland

Today Sweden has a population of 10 million. In March 2020 Covid-19 hit Sweden after many Swedes had been on winter holidays abroad, catching the disease. From 1 March 2020 until 12 April 2021 over 13 500 people died and nearly 1 million have been diagnosed with Covid-19. In January 2020, the Swedish Health Agency's Chief Epidemiologist Anders Tegnell misjudged the potential impact on Sweden of Covid-19 "that this virus didn't pose a 'threat' to Sweden".[21] However, within 9 weeks from the outbreak, if counted from the first emerging cases in early March 2020, the official number of infected people was higher in Sweden than in neighbouring countries. Within 11 weeks, the relative mortality rate in Sweden was globally the highest per population and stayed high.[22] Meanwhile, state epidemiologist Tegnell corrected his "underestimation" of mortality but did not change the Agency's policy of no lockdown, no quarantine, but relied on a voluntary approach through recommendations about social distancing, hygiene and working from home, and very little testing occurred during the Spring 2020.

Thus, in March and April 2020, Covid-19 was allowed to spread from Stockholm and other big Swedish cities across the country, as the Swedish Chief Epidemiologist said there was no need to take measures to quarantine cities, such as Finland did with Helsinki, or impose any travel restrictions, as the pandemic was anyway spreading across the country.[23] Obviously, the Swedish Health Agency embraced the policy of 'herd immunity', to let the disease spread among the public so that a large number of the population get infected and attain immunity. However, a policy of herd immunity was officially denied at the end of May 2020.[24]

The spread was low in the Arctic regions in early Spring 2020, with 65 cases in Västerbotten as of 1 April, and 47 in Jämtland. Boden, on the other hand, a city in the Arctic, was in the top list of cases per capita in

April. The remote nature of the Arctic would have been easier to shut down, especially when you could bear in mind how hard hit the region was during the Spanish flu. But no quarantine or travel restrictions were imposed. The first virus wave reached the Norrbotten region in early summer 2020, and the region was the most hard-hit in Sweden around midsummer. Early in the pandemic, it appeared that mines were a "hotspot" for the spread of Covid-19.[25]

The second wave came to Sweden in October/November 2020. Statistics on 1 February 2021 show that the Arctic region during winter was again one of the most hard-hit regions in Sweden, after the most densely populated southern part of Sweden, where region Skåne had 380 cases/100,000 population. Norrbotten had 231 cases/100,000 population, Västernorrland 232 and Jämtland 190, compared to 149 in Stockholm and 247 in Gothenburg. However, when it comes to deaths, Jämtland had 6000 cases and 100 deaths, Västerbotten 10,000 cases and 115 deaths, Norrbotten 10,000 cases and 188 deaths, Västernorrland 12,991 cases and 353 deaths. Top positions among cases in cities on the 1st of February were Haparanda, Överkalix and Arjeplog.

Northern Sweden was demonstrating the highest Covid-19 cumulative death rate in the Arctic region as of July 2020 (23.6 per 100,000).[26] The drop in workplace mobility contributed to less cases in the Arctic region from the middle of March with a subsequent stabilisation or rise from mid-April through June, except in northern Sweden that "exhibited lower reductions compared to its neighbours, according to its relaxed policy, which made a sharp rise in infections", according to Pavlov *et al*, who examine Covid-19 infections in the Arctic region.[27] At the beginning of the pandemic all Swedish regions were underequipped, in terms of medicines and health care equipment and did not live up to their responsibilities they have under applicable law, according to the Health and Care Inspectorate, IVO, in a report about Covid-19 and Sweden's deficient Covid-19 response in health care.[28]

In Norrbotten it was the aim early in the pandemic to build herd immunity through the controlled spread of the virus, according to the infection control physician, Anders Nystedt, in charge of the regional outbreak:

> "The goal is now to create a herd immunity in Norrbotten against the new virus, but it will take time and cost. Almost all Norrbotten residents, or at least a large part of Norrbotten residents, will have to go through this infection."[29]

In June 2020 he was surprised only 1.9% of the Norrbotten inhabitants had acquired antibodies against Covid-19 following the outbreak, and said one had to reconsider the theory of herd-immunity.[30] Norrbotten was hit very hard by the virus both in the first and second wave, with several outbreaks in mining cities.[31] In February 2021 Norrbotten stated that the second wave had been even more severe than the first (with people travelling from other parts of Sweden into the region to celebrate Christmas and New Year and partying) leaving many dead.[32] The situation was also grave as the British mutant virus got a hold in a factory in Västerbotten with 100s of cases and at least 1 death, although the Swedish Government had imposed travel restrictions with the UK, Denmark and Norway, due to the new mutant virus and based on the recent Pandemic law, that enabled more forceful action.[33] However, Sweden did not have the capacity to analyse more than 1% of the tests, in comparison to the EU's demand to carry out genetic sequencing on at least 10% of Covid-tests, to seek out the mutant variant. In February 2021, testing showed that 11% of the Covid-19 positive tests were of the British mutant virus strain.[34] The Swedish Government said it asked regions to build such capacity to follow the EU rules and that they would get more funding.[35]

A risk of a third wave of Covid-19 was imminent due to the spread of the British mutant strain in 2021. Sweden prepares for it with the adoption of stricter Covid-19 regulations from the 11 March based on the Pandemic law, that will allow closures of shopping malls and shops, bars cafés and restaurants, gyms, museums, zoos and amusement parks, if needed.[36]

> "There is a significant risk of a third wave of infection," Sweden's Minister for Health and Social Affairs Lena Hallengren told reporters. Amid "a concerning" increase in cases over the past week,

the government is proposing five new measures making it easier to "shut down parts of Swedish society".[37]

At the same time, Swedish Chief Epidemiologist, Tegnell, advised people to continue to travel to the Swedish Alps (Fjällen) during the upcoming winter holidays.[38] Åre county in Jämtland, with Sweden's very popular ski resort, had a peak in cases in February, due to tourists and seasonal workers.

Initially much evidence suggests that the Swedish Health Agency believed in herd immunity, allowing the disease to spread among the public. During spring 2020, the Swedish Chief Epidemiologist, Tegnell, proudly presented this as a "Swedish model" - a completely unique strategy. Herd immunity as the Swedish strategy has been proven by email exchanges from the Swedish Health Agency, cited in a recent book on the pandemic, *The Herd,* and in several media clips from Spring 2020.[39] The Swedish Health Agency did walk back on its initial drive towards herd immunity, in a hearing with the Chief Epidemiologist and the Swedish Prime Minister in a Swedish TV hearing in January 2021, when they stated that it never had been their goal. It was also denied by the Swedish Prime Minister Stefan Löfvén, who stated that Sweden actually did not have a COVID policy at all![40]

The EU had taken the decision that its members should start to vaccinate on 27 December 2020. A problem for Sweden, as in the rest of the EU, was that the share of vaccines from the EU was too little. Also, the state was not really prepared to start during the Christmas holidays. Sweden started with the most vulnerable in nursing homes, as that group was the hardest hit, then people with homecare. However, a confusion prevailed whether health professionals should also be included to manage health care systems, and Stockholm county was criticised for giving the vaccine to young health professionals instead of the elderly in care. The short supply of vaccines distributed to Sweden, in the first quarter of 2021, led to discontent that Sweden had not bought its own vaccines but went through the EU, as well as with the vaccine producers. However, the distribution of vaccines among the regions was even. In the NPA-region of Sweden there were mixed results as to how fast the vaccine was given, with only Norrbotten being above the national average, while Västerbotten and Jämtland were below, and Västernorrland had Sweden's lowest proportion of vaccinated people[41], at the same time as these regions topped outbreaks in Sweden.

Covid-19 has also underscored other existing vulnerabilities of Arctic communities in general, and those of indigenous peoples in particular. To cite from a recent article by Petrov *et al* on the Covid-19 pandemic and Arctic health: "Arctic populations often demonstrate higher rates of hypertension, diabetes, heart disease, tuberculosis, hepatitis and other conditions".[42] Thus it is imperative to alert Arctic communities to both the infectious and lethal nature of Covid-19 and to direct resources to counter the threat that it presents to these communities.

The position of the Arctic also makes adapting to the closure of businesses, premises and schools very challenging. For example, poor internet in many parts of the Arctic has posed difficulties for distance learning during the pandemic. If a pandemic is spreading rapidly through society, like in Sweden and the UK that did not initially contain the virus, even quite isolated areas may finally be affected, such as happened with the Scottish Hebrides in 2021. For 10 months they had been Covid-free, but then in the second wave of the pandemic the virus spread to the Isle of Barra. 16% of the island's 1,000 inhabitants got infected, and the small island hospital was not able to provide Covid-care and intensive care.[43] However, the outbreak in such a small island community was also quickly suppressed, as were most outbreaks across the Outer Hebrides.

A recent article by Pauline Pic notes that the Swedish approach chose herd immunity "[w]ith limited lockdown measures compared to its neighbours, which was a source of worry for Finland and Norway given the unique situation in the North, where traditional Sami territories are spread across national borders."[44] In Northern Scandinavia, health care workers commute between countries on a daily basis, such as between Finland and Sweden. Several health care practitioners practising in Norrbotten live in Finland and commute

from Finland, which is why hard border restrictions and quarantine measures can harm the health care system in Northern Sweden.[45]

The situation for the Sami communities, vulnerable to disease and because of preconditions such as cardiovascular and less access to health care, is also a concern.[46] The crisis has had a strong impact on their traditional livelihoods. The drop in tourism and border restrictions and lockdowns affected the Sami people, who could not travel to important cultural events or the Sami University of Applied Sciences across the region as the Sami are spread out in several different countries.[47]

The economic impact was strongly felt in northern Scandinavia, and the Arctic is especially vulnerable when a recession hits and the important tourism industry collapses. From April to June international tourism dropped in Norway by 95%. In Sweden during the same period it dropped by 66%, and Finland experienced a drop of 61%.[48] Also, culture and entertainment jobs were lost. In Sweden, one of the reasons not to introduce travel restrictions was to let mountain tourism in the Arctic thrive.[49] However, for Easter 2020 every Swede was recommended to cancel ski trips up north and such recommendations have been repeated for Christmas 2020, and for winter holidays and Easter in 2021, although the ski-lifts are open and Norrbotten blamed tourists and travel to the region for its second wave.[50] The mining industry which is important in the Arctic of Sweden, was impacted by lower demand and the Covid-19 outbreaks at mines, with mines often being hotspots for the spread of Covid-19.[51]

Flights were down a record 90%, and the transport sector was also severely affected, which is hard for remote areas.[52] There was an enormous loss in Sweden's border trade which has fallen sharply during the Covid-19 pandemic, according to Statistics Sweden. In total, border trade fell by 52% during the second quarter of 2020, and places like Åre, Storuman, Kiruna and Haparanda and other northern regions were severely affected.[53]

3. Conclusion

A hundred years ago, human rights, as we know them, were not invented and did not exist as part of public international law. International human rights were first drawn up as a human rights catalogue by the UN Universal Declaration of Human Rights in 1948, against the background of the atrocities and suffering committed and endured during World War 2. In 1966 two global human rights treaties were adopted at the UN, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Thus, human rights have been adopted as part of modern international law and also been incorporated into most domestic legal systems. Human rights nowadays form part of Sweden's Constitution. Moreover, the Swedish Government, in Sweden's newly adopted *Strategy for the Arctic*, highlights that the Swedish strategy for the region is established firmly on respect for international law, human rights, and democracy.[54]

Thus, it is somewhat stunning and tragic that a comparison between how the Spanish flu and the Covid-19 pandemics were dealt with by the Swedish authorities reveal a similar pattern, although they are almost exactly 100 years apart.

In both cases the Government and the Swedish Health Agency did little to stop the spread and was later severely criticised for their inaction. In neither case were responses targeted or taken at an early stage, although knowledge in both instances was readily available that each pandemic was highly contagious and would have severe impacts if let loose. In both pandemics the approach was mostly voluntary without hard lockdown and quarantine measures. It was communicated to the public that there was not much to do about the spread but to endure. The same misconceptions were spread in both instances to the public, that this was just another influenza. Main centres for the spread such as schools, works and military barracks did not close, in spite of knowing about the lack of hospitals and health workers, medicine and supplies. Neither was anything done to protect the Sami, and why they were severely affected. Nor were vulnerable parts of the country such as Norrland protected through special measures.

In the Spanish flu the devastating effect of the pandemic on Norrland, because of its vulnerability and poor population, and following the risk of civil unrest after the Russian Revolution in 1917, paved the way for democratic elections which were held for the first time in 1921 with universal and equal suffrage. Thus, social injustices were highlighted by the Spanish flu in Sweden and Norrland. The concept of social justice is not equivalent to human rights, although they are interlinked and overlapping.[55] Neil Hubbard writes: "Social justice means the fair distribution of wealth, power and services and is concerned with equity and fairness. On the dominant philosophical view, while overlapping in cases of constitutionally essential equal civil and political rights, social justice is theorised as requiring significantly greater distributive equality across a range of political and socio-economic institutions than human rights."[56] However, social justice predominantly overlaps with economic social rights and cultural rights, such as the right to subsistence, health, the right to work, and peoples' rights. Thus, when today's handling of the Covid-19 pandemic raises quite similar questions whether Norrland's population was disproportionately affected by Covid-19, this should be dealt with from a human rights perspective.

It is quite surprising that the background knowledge of how Norrland was hardest hit by the Spanish flu did not influence the Government's Covid-19 policies. Even if Sweden has changed a lot in 100 years, becoming a socially secure welfare state ranking among the top in the world,[57] several of the parameters that contributed to the devastating effects on Norrland in the Spanish flu were the same.

1. Norrland is still the home of especially vulnerable populations, also in the case of Covid-19. It is home to an indigenous people, the Sami, who are a vulnerable group as pointed out by the Arctic Council.[58] Compared to 100 years ago, today human rights give the Sami protection as an indigenous people with a right to self-determination.

   "Many parts of the Arctic region have demographic challenges with an ageing population and the out-migration of young people, especially young women", to quote from the Swedish Arctic strategy.[59] The elderly are an especially vulnerable group for Covid-19, and the Swedish Government has received severe criticism from the Swedish Health and Care Inspectorate IVO, that found that the Swedish regions with responsibility for health care breached their responsibility for medical care and treatment in caring for the elderly.[60] Up to 22% did not get a diagnosis by a doctor or nurse, most were denied access to hospitals but only given palliative care without oxygen.[61] The regions of Norrbotten, Västerbotten and Jämtland were strongly criticised "that the elderly have not received care and treatment based on the individual's needs in the event of suspected or established Covid-19. Patients have not received individual assessments that are documented in the patient records, they have only received insufficient palliative care as elderly were not sent to hospitals", and IVO emphasises that this is not compatible with the Patients' Act and the Health Care Act.[62] Severe cases of Covid-19 and deaths are also more prevalent in men, according to statistics and research, where research points to biological differences.[63]

   The NPA-region in Sweden has a predominance of men with about 10% more men in Norrland, often living in single households.[64] Studies from Sweden show that being a single man with a lower income and a lower level of education also gives a greatly increased risk of dying from Covid-19.[65] This, in turn, is consistent with the patterns of mortality in other diseases as well, and is why it should not have come as a surprise to the Swedish Health Agency. Sweden also has the highest degree of single households in the world. However, none of those statistics has been highlighted in the Swedish response to Covid-19.

2. Norrland is still vast with long distances to access hospitals, health care and vaccines. In the pandemic the health care system has been understaffed, finding it harder to recruit, due to its remoteness and due to international border closures. Lack of equipment and medicine is felt more, as it is harder to share, and the IVO highlighted that Norrland lacked sufficient patient transports.[66] The Norrland regions, also had a lower average in vaccination rates than the national average, except in Norrbotten.[67] The Arctic region in Scandinavia is usually a cross-border society, where personnel and goods commute.

Sweden and Finland share history, as they were not separated until 1809, and the Swedish regions (landscapes) of Lappland, Västerbotten and Norrbotten have their parallels in Finnish Lappland and Österbotten. The railway "Malmbanan'' ('ore line') is Sweden's busiest railway and one of its most important for transporting people and goods from Kiruna to Narvik in Norway. Thus, cross-border transport and commuting is still very important in northern Norrland. Its remoteness makes it more dependent on cooperation with its bordering neighbour states.

3. The cold climate has proven better for viruses such as influenza and Covid-19, especially when the virus is already spread.[68] Scientists have discovered how the changing seasons affect not only the physical structures of viruses, but also our body's natural barriers against disease. In the winter the cold, dry air and lack of sunlight negatively affect our ability to stave off respiratory infections like the flu or Covid-19.[69]

4. Mining has been found to be a high-risk environment for infectious diseases like influenza and Covid-19, and most of Sweden's mines are located in its northern region, with large outbreaks in Gällivare, Kiruna and Haparanda, but also in connected industries like Northvolt in Skellefteå. Scarce transport and communication are also still a problem. In the digital age it is even worse, when a large part of Sweden such as the Arctic suffers from less than acceptable access to digital infrastructure.[70] The Government strategy for the Arctic pointed out that: "The Covid-19 pandemic in 2020 has demonstrated the great need for, and a higher demand for, digital health care meetings in these areas".[71]

5. Norrlands economic situation has been stagnant for a long time, according to a recent report from Lars Welin, Centrum for Regional Development at Umeå Universitet, on Norrland's economic development.[72] Sweden's population has grown, but not in Norrland: "The question is of course how Norrland managed to create an economy that has had such a hard time attracting people? In order for a region to be able to increase its innovation capacity, dynamism and growth, it is necessary for markets and services to emerge in agglomerations where the economic environment and thus international competitiveness benefits from a well-educated workforce with high competence."[73]

The comparison thus leads to the conclusion that the responses to both the Spanish flu and Covid-19 showed serious shortcomings in the handling of the situation by the Swedish Government and governmental agencies. During the hundred years that have passed between the pandemics, neither the Government nor the health authority seems to have learned any major lessons, either from the Spanish flu in Sweden or from the outside world's handling of pandemics, such as SARS, MERS or Ebola. This is despite the fact that Sweden has gone from being a poor undemocratic state to becoming a highly developed democratic industrial country. Again, the Arctic region was severely hit by the pandemic, although it was precisely the vulnerability of northern Sweden that materialised during the Spanish flu.

Part II: An Overview of Human Rights and of the Swedish Commitment to Human Rights in Accordance With its National Laws

1. Three Generations of Human Rights

The entry of human rights into modern international law took place in 1948 after the Second World War, through the Universal Declaration of Human Rights (UDHR), which introduced a Bill of Rights, that includes both civil and political rights and economic, social and cultural rights.[74] The UDHR is in the form of a declaration, not a binding treaty, but it is generally accepted today as customary international law, in the form of a catalogue of existing human rights. Since the UDHR a number of global and regional human rights treaties have been adopted.[75]

Subsequently, human rights were divided into different categories, such as first, second and third generation rights. First generation rights comprise civil and political rights, emanating from the 17th and 18th centuries. They build on two central ideas - those of personal liberty, and of protecting the individual against violations by the state. They are often defined as negative rights, meaning the state should not interfere with them. Civil and political rights are set out in detail in the International Covenant on Civil and Political Rights (ICCPR), a global treaty from the UN, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a regional treaty covering Europe. Examples are the right to life, the prohibition of torture, the right to participate in government, freedom of movement, of expression and assembly.

Social, Economic and Cultural rights are called second generation rights. They are based on the ideas of equality and guaranteed access to essential social and economic goods, services, and opportunities. They became increasingly a subject of international recognition with the effects of industrialisation.[76] They are described as positive rights, because of claims that they require positive intervention from governments. The social, economic and cultural rights are outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a global treaty from the UN, and also in the European Social Charter of the Council of Europe, adopted in Europe. Examples are the right to health, to work and livelihood, to education and housing.

There are also third generation rights. These are collective rights, that have been developed subsequently. They include e.g. the right to development, the right to peace, the right to self-determination, the right to a healthy environment. These rights can only be claimed by a group of people, such as communities or states. Thus some criticise these rights as hard to attain and thus pointless.

This division into first, second and third generation rights involves tensions. First generation rights have traditionally been regarded by many – at least in a Western tradition – as the most important human rights, supporting Western style liberal democracy, while economic, social and cultural rights were pushed for by the former socialist states in Eastern Europe during the Cold War. Social, economic and cultural rights had difficulty being accepted on an equal level because positive rights often mean a financial cost. Hence, these rights have been considered to need only gradual fulfilment.

However, this division and grading show a false and outdated view, as the Council of Europe emphasises.[77] Many rights can fall into either category and rights from one category may depend on their realisation on the fulfilment of rights in another.

Collective rights can be argued to establish a framework of protection within which individual rights can then be realised. Today, a holistic view on human rights is called for; see the UN Vienna Declaration and Programme of Action, in which paragraph 5 recognises that:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[78]

But in times of Covid-19 this political and ideological division repeats itself and is mirrored in governmental policies. For example, Australian governmental officials have made libertarian claims that the right to life trumps all other human rights; to quote Victorian Premier Dan Andrews about the curfew in Melbourne: "This is not about human rights. It's about human life".[79] In contrast, the Swedish Socialist Government has defended not imposing lockdown with reference to "saving the economy" as equally important, with hints that the right to life cannot trump the right to work and education.[80] This dilemma has also been present in the debate in Norrland, about balancing the right to life and health against economic loss.[81]

The Swedish Government's argument that human rights are subordinate to the benefit of society is an echo of *Scandinavian Legal Realism*, based on the early 20th century Swedish realist philosophy, known as the "Uppsala School", founded by the Swedish legal philosopher Axel Hägerström (1868-1939), which sought

to purge philosophy of metaphysics.[82] This legal philosophy from the early 20th century, influenced by Karl Marx theories, believes that "there are no rights", being subordinate to the benefit of society.[83] Hägerström's disciple, law professor and MP for the Social Democrats, Wilhelm Lundstedt, went further: "To talk about rights is as meaningless as listening to a parrot", and rejected the value of international law.[84] Thus, the Scandinavian Legal Realism and Uppsala School embraced a philosophy where the economy and economic wellbeing trumped individual rights.[85] The Uppsala School had a strong influence on the Swedish Socialist Party at the time and influenced Swedish legal doctrine and legislative process during the 33 years (1933-1976) that the Swedish Socialist Party (Socialdemokraterna) ruled Sweden and formed what is known as "Folkhemmet" ('The People's Home'), that is, a socialist welfare state.[86] Since 1995, when the European Convention on Human Rights (ECHR) became Swedish law, referred to in the Swedish Constitution (this came after Sweden joined the EU), the imprints of the Uppsala School seemed to gradually vanish. This was because the dualist theory of law that Sweden adheres to (that a treaty needs to be incorporated or transformed into national law to be applicable)[87] could no longer challenge that the ECHR was valid domestic law. Thus, several Swedish Supreme Court cases have affirmed that Sweden nowadays needs to apply a treaty conformity interpretation of its laws and decisions in adherence with the ECHR.[88] However, this turnaround came gradually and first took definite hold in the 2010s.[89] Sweden has 61 times been found guilty of breaches of the ECHR, recently most often stemming from Article 3 (prohibition of torture) violations.[90]

2. Non-Derogable and Derogable Human Rights

Human rights can also be divided into non-derogable and derogable rights. Non-derogable human rights are those core human rights that cannot be limited or revoked, even in times of war or other public emergencies.[91] Derogable rights are those human rights that can be limited according to law, such as in a state of emergency. States cannot derogate from non-derogable rights, among which are the right to life,[92] prohibition of torture and ill treatments,[93] prohibition of slavery,[94] and no punishment without law.[95] Those rights are also considered to be non-derogable in customary international law.

Some rights are non-derogable because they are considered peremptory international legal norms, *jus cogens.* Such norms rank the highest in the hierarchy of norms in international law and can never be derogated from.[96] The prohibition against genocide, torture and slavery, and the basics in the right to life are commonly accepted as peremptory.[97]

States have an obligation to adhere to non-derogable civil and political rights at all times. This report focuses on those non-derogable rights listed in Article 4(2) of the ICCPR that are most important in times of Covid-19: the right to life (Article 6), the right not to be subjected to torture and cruel, inhuman or degrading treatment and the prohibition of medical or scientific experimentation without consent in Article 7, and the principle of legality in criminal law (Article 15).

Although the ICESCR does not contain a list of non-derogable rights, states are bound by a minimum core obligation to ensure the satisfaction of, at the very least, *minimum essential levels of each of the rights* provided in the ICESCR.[98] These are supposed to be obligations of immediate effect, unlike other obligations associated with socio-economic rights, that are not subject to progressive realisation over time.[99] Core obligations are the right to essential primary health care, including essential drugs (GC 3, GC 14),[100] the rights to subsistence (GC 3, GC 12), to water that is sufficient and safe for personal and domestic uses to prevent disease (GC 15), and to housing and sanitation (GC 3, GC4).[101] Furthermore, states must guarantee non-discrimination in the exercise of each of the rights enshrined in the Covenant.[102]

Other human rights, that is most human rights, are derogable in accordance with the most well-known human rights treaties, such as the ICCPR, the European Convention on Human Rights and the American Convention on Human Rights. This means that they are not absolute, so that reasonable limitations on the enjoyment of those rights can be imposed by the state in accordance with its laws under a state of emergency. To cite ICCPR Article 4, para 1:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Examples of derogable rights are the right to assembly, freedom of expression, freedom of movement, right to privacy, right to democracy, minority rights, prohibition of arbitrary deprivation of liberty, prohibition on unacknowledged detention.

On the other hand, the rights in the ICESCR cannot be formally derogated from, as the convention has no derogation clause. However, the requirement of "progressive realisation" at a rate commensurate to the "maximum available resources" of the state, set out in Article 2(1) of the ICESCR makes the ICESCR's rights subject to progressive realisation over time and thus open for *de facto* derogations,[103] except for the minimum core of rights, mentioned above, that the ICESCR guarantees protection at all times.[104] The dual aims of the progressive realisation and non-retrogression obligations are to establish "clear obligations" while also being a "necessary flexibility device".[105] In times of a financial crisis and pandemic, a state might impose limits on e.g. the right to work and education. But where retrogressive measures are taken, the burden of proof is on a state party to demonstrate that a number of human rights requirements be met: it must be temporary, to cover only the period of crisis; be necessary and proportionate, in the sense that the adoption of any other policy, or failure to act, would be more detrimental to economic, social, or cultural rights; and the policy must not be discriminatory and must respect minimum core rights at all times.

But even when a state in a state of emergency legally derogates from derogable human rights or what is not deemed minimum core obligations of economic, social and cultural rights, certain standards apply. In a resolution on Covid-19, the Inter-American Commission warned states on the risk of excessive measures:

> "Even in the most extreme and exceptional cases in which suspension of certain rights may become necessary, international law lays down a series of requirements such as legality, necessity, proportionality and timeliness, which are designed to prevent measures of such a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government".[106]

Coming back to the views in Australia, Victoria State Premier Dan Andrews expressed in his quote that "human life overrides human rights", such a proposition may offer a misunderstanding of the fact that the core value of the right to life is a peremptory norm that can never be curtailed in a state of emergency, in opposition to derogable rights such as the right to movement.

3. Sweden's Human Rights Commitments

Sweden appears well equipped when it comes to human rights as it is a party to core human rights treaties.

Sweden is a party to the seven core international human rights treaties: *the International Covenant on Civil and Political Rights 1966* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination 1965* (CERD), the *Convention on the Elimination of All Forms of Discrimination against Women 1979 (*CEDAW), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT), the *Convention on the Rights of the Child 1989* (CRC) and the *Convention on the Rights of Persons with Disabilities 2006* (CRPD).

Sweden is also party to several facultative protocols to conventions that allows access to an international complaints procedure over human rights violations against the treaty, such as *the First Optional Protocol to*

the International Covenant on Civil and Political Rights, the *Optional Protocol to the Convention on the Elimination on all Forms of Discrimination against Women, the Optional Protocol to the Convention against Torture and Other Cruel* (OPCAT)*, Inhuman or Degrading Treatment or Punishment*, the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

Sweden has also signed the *Universal Declaration of Human Rights* 1948 (UDHR) and Sweden's human rights policy is based on the UDHR.

At the regional level, Sweden is a party to the *European Convention on Human Rights* of 1949, which is incorporated as Swedish law. It is also a party to *the European Social Charter* of 1961 that contains economic, social and cultural rights. The *European Convention on Human Rights* (ECHR) is managed by the Council of Europe and has 47 contracting parties, including all EU-Members. The ECHR is likely the world's most effective human rights convention, as its system guarantees individual right of appeal and it awards damages and rectification, because individuals have direct access to the European Court of Human Rights in Strasbourg whose jurisdiction is mandatory for parties to the ECHR. The EU has also incorporated human rights through the EU Charter of Fundamental Rights by the Lisbon Treaty in 2009, which now has the same status as primary EU law.[107] The duty to interpret national law consistently with the ECHR provisions demands that its members incorporate the ECHR into domestic law.[108] Moreover, Art. 6 § 3 of the Treaty on European Union refers to the ECHR as part of its General Principles of Community Law, and the EU courts regularly refer to the ECHR and the Strasbourg case-law in their judgments.[109]

4. The National Level

In Sweden, human rights are guaranteed by three of its four constitutional laws: the Instrument of Government (Regeringsformen, RF), the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.

The first Chapter in the Instrument of Government (RF) provides that "public power shall be exercised to ensure universal human equality and individual freedom and dignity". The Government shall guarantee the right to work, housing, education and promote social welfare, security and a good living environment.[110] In para 1:2 of the RF, the "Public shall oppose discrimination against persons on grounds of sex, colour, national or ethnic origin, linguistic or religious affiliation, disability, sexual orientation, age or any other circumstances affecting the individual as a person". The second chapter of the Constitution, RF 2:1, sets out Fundamental Human Rights and Freedoms, such as freedom of opinion, physical integrity, prohibition of capital punishment, torture or corporal punishment, freedom of expression, information, assembly, association and of worship, freedom of movement within Sweden and the right to leave the country, so that no citizen may be deported or deprived of his/her citizenship.[111] A right to fair trial is guaranteed to a certain extent, such as the right to a judicial process without unreasonable delay and prohibition on retroactive legislation in criminal law. Discrimination is prohibited on account of sex, unless it is a part of efforts to achieve equality.

It is possible to limit the fundamental freedoms. They may be restricted by laws enacted by Parliament for the sole purpose of "achieving means that are acceptable in a democratic society".[112] Such restrictions shall never be disproportionate to their purpose; they may not be carried so far as to constitute a threat to the free formation of opinion, and they may never be imposed solely on grounds of political, religious, cultural or other such opinions. There is also a "proportionality principle" in the Constitution (RF 2:12). It states that restrictions on freedom of expression, information, assembly or association must never go beyond what is necessary to account for the purpose which gave rise to the restriction.

In contrast to all other European constitutions, neither the Swedish Constitution nor Swedish laws provide for declarations of emergencies in peacetime. This is supposed to be one important rationale behind the policy of voluntary recommendations instead of a mandatory lockdown in Sweden during the Covid-19

pandemic. Any inclusion of emergency provisions was found "unnecessary", in a review by the latest *Crisis Preparedness in the Constitution Review Expert Group* in 2008.[113] Their conclusion was that the Swedish Government could anyway easily convey with short notice, within a couple of hours, and adopt laws quickly in case of an emergency. Apparently such handling was not done by the Government during the Covid-19 crises in 2020. It took the Government 10 months, until the 10 January 2021, to be able to prepare and adopt temporary pandemic legislation, that allows the imposition of mandatory measures with sanctions and penalties.[114] The Pandemic Law was severely criticised by the Swedish Law Commission, as being way too late and unprepared, citing that it was known already in June 2020 that such a law would be needed.[115] The Swedish opposition parties also criticised the Pandemic Law as being way too late and also that it did not include anything about compensation for economic losses.[116]

According to the temporary Covid-19 law, the government and authorities can impose restrictions on both businesses and locations. This may apply, for example, to public gatherings and public events, places for leisure or cultural activities that are open to the public, shopping places, such as shopping malls and shops, public transport and domestic air transport, and places for private gatherings. If necessary, it is possible to ban crowds of a certain size in places where the public has access, and restaurants, cafés and bars (serving places) can be closed, as well as use or provision of places for private gatherings.[117] The police, and also the county administrative boards, exercise supervision over adherence to the law.

Part. III. Did Sweden's Covid-19 Policies Violate Human Rights?

1. The Swedish Strategy

The Swedish "strategy" built on each citizen's own responsibility to follow recommendations from the Swedish Health Agency, that has primary responsibility to fight diseases in the Swedish system according to the Swedish Infection Control Act, para 7.[118] With its more voluntary approach to lockdown measures, Swedes were merely recommended to follow advice from the Swedish Health Agency, such as to work from home if they could, those aged 70+ recommended to socially distance and only do necessary shopping, while schools, restaurants, bars, gyms and shops did not close. Facemasks have never been mandatory or even advised, as the Swedish Health Agency said people might be tempted to leave home sick if they wear a facemask and that it was not statistically proven to affect the spread. As was pointed out above, the recommendatory approach was deemed a consequence of the lack of emergency powers inserted in the Swedish Constitution, which could empower the Government to adopt an emergency law. However, on 10 January 2021 the Swedish Government, without needing any revision of the Constitution, adopted a temporary Pandemic Law, and since then recommendations have often turned into prohibitions paired with sanctions.[119]

2. Herd Immunity

It was speculated that the Swedish Health Agency in the Spring of 2020 applied a strategy of 'herd immunity': the resistance to the spread of an infectious disease within a population based on pre-existing immunity of a high proportion of individuals as a result of previous infection or vaccine.[120] An explanation for herd-immunity is that in states where containment seemed to have failed they could only wait until herd immunity occurred for the disease to wane as no vaccine was considered possible before two years. There would be no difference over time in actual deaths, compared with states with lockdowns that hoped to spread out cases over a longer time, as in the end they would have the same total death rate over time.

As has been shown above, Sweden's Chief Epidemiologist, Anders Tegnell, has been perceived as a proponent of herd immunity, condoning the spread of the Covid-19 virus. In April 2020 he predicted that 40% of the Stockholm population would have acquired protective antibodies by May 2020. But according

to the agency's own antibody study samples collected up until late June, the actual figure for random testing of antibodies was only 11.4% for Stockholm and 7.1% across Sweden.[121]

However, Swedish authorities have denied that herd immunity ever was a policy goal.[122] Herd immunity through exposure goes against directives from the Word Health Organization, and its advice that extensive testing, tracing and quarantine limits the infection:

> "Attempts to reach 'herd immunity' through exposing people to a virus are scientifically problematic and unethical. Letting Covid-19 spread through populations, of any age or health status, will lead to unnecessary, suffering and death. These challenges should preclude any plans that try to increase immunity within a population by allowing people to get infected."[123]

Experiments with herd immunity violate the right to health in the European Social Charter, Article 12, that requires a state to intervene against a pandemic to protect its population.

The Swedish approach overburdened the health system and resulted in a high death toll. 6,000 people lost their lives between 15 March and 15 June 2020, and by 12 April 2021, during the second wave of the pandemic, over 13,500 people had died, making Covid-19 the third major cause of death in Sweden in 2020 and shortening life expectancy. The victims are especially the elderly; persons aged 70+ make up 1.7 million people within Sweden, that is about one fifth of its population. It is estimated that about half of the deaths in Spring 2020 came from nursing homes and those receiving homecare. The Swedish Health and Care Inspectorate, IVO, has severely criticised this and found that the Swedish regions with responsibility for health care breached their responsibility for medical care and treatment in care for the elderly, in violation of existing laws.[124] Up to 22% did not get a diagnosis by a doctor or nurse, most were denied access to hospitals and only given palliative care without oxygen.[125] About one-fifth of the people in nursing homes have not been assessed by doctors at all, according to the IVO report, and only 6 % meet physically with a doctor.[126] Participation of patients and relatives has also been low, and decisions to switch to end-of-life care have not been made in accordance with current regulations, according to IVO.[127] This was something that occurred in all the 21 Swedish regions, and so also in the Norrland regions, as pointed out in the first part of this article. "This is about people - someone's mother, someone's father, someone's loved ones", says IVO's CEO Sofia Wallström.[128] She emphasises that those who live in nursing homes have exactly the same right to receive a medical assessment and care as everyone else.[129]

Vulnerable groups also worry. Approximately 2 million Swedes have a cardiovascular disease and 1.3 million have a lung disease.[130] And it has been found that immigrants have had a much higher incidence of Covid-19 and higher percentage chance of dying from Covid-19.[131]

It could be argued that the relaxed Swedish strategy was negligent and caused unnecessary suffering. It built on misconceptions about the pandemic, it was implemented against WHO recommendations, and the Government did not adopt an emergency law until after the second wave of the pandemic, 10 months into the pandemic.

A concept in torts law and in criminal law to measure negligence is the "*bonus pater familias*", from Roman law (meaning 'good family father'), referring to a standard of care analogous to that of the reasonable man. It can be argued that the Swedish State Epidemiologist Tegnell, together with the Swedish Health Agency, did not act as a *bonus pater familias* in its laissez-faire approach to Covid-19, when they did not estimate the impact of the pandemic on Sweden as a whole and on vulnerable groups in particular. To quote Tegnell: "I am more worried to be hit by a car at a pedestrian crossing, than die of Covid", although only 600 people die in car accidents in Sweden annually, while over 13,000 have died in Sweden during 14 months of Covid-19.

It was irresponsible of the Government not to adopt a pandemic law, blaming the Constitution that it would be impossible, while the Constitution allows for emergency legislation to be adopted by the Parliament that can be conveyed in a couple of hours, as the *Crisis Preparedness in the Constitution Review and International*

Outlook Expert Group report remarked already in 2008.[132] The seriousness of the spread of a serious illness is reflected in Swedish criminal law in the Criminal Code 13:7, where the spread of infection is one of the public safety crimes that can lead to life imprisonment. So when the Government decides not to intervene against the spread of a serious illness, it does also violate national laws.

3. The Right to Life and Health

In Sweden questions of violations of the right to life and health and non-discrimination have been in focus. The right to life is not *per se* incorporated in the Swedish Constitution, which only prohibits the death penalty. But the right to life is a non-derogable right enshrined in the ICCPR, Article 6, to which Sweden is a party, and Sweden has signed the UN's Universal Declaration of Human Rights (UDHR), where the right to life is in Article 4. The European Convention on Human Rights (ECHR) contains the right to life in Article 2. In case-law from the European Court of Human Rights, a positive obligation of member states to act proactively towards health protection can be extracted from Article 5 (1) in the ECHR (liberty and security), as Article 5 (1) (e) authorises "the lawful detention of persons for the prevention of the spreading of infectious diseases [...]".[133] The EU Charter of Fundamental Rights guarantees the right to life in Article 2. The right to life is a customary norm of international law and its core value is considered to be *jus cogens,* that is a peremptory norm of international law that a state can never break. The right to life is a prerequisite for the exercise of other rights. For example, Australian governmental officials have made claims that the right to life trumps all other human rights, according to Victoria's Premier Dan Andrews.[134] Such an opinion that human life is the most essential right finds support in the founding fathers of Liberalism such as Locke and Hobbes, two philosophers that influenced the British and American constitutions, which in turn have influenced the Australian constitution.[135] Philosopher and political theorist John Locke emphasised that our right to preserve ourselves trumps any duties we may have.[136]

However, the right to life is not worth much if a life-threatening pandemic lacking a cure is let loose without protective measures, which is why the right to life is guaranteed by other human rights such as the right to health.

The UN Convention on Economic, Social and Cultural Rights (CESCR 1966) includes the right to health in Article 12 (c and d), which states that everyone has the right to health and that the state must "prevent, treat and combat all *epidemic diseases* and create conditions that *ensure all medical and hospital care* in the event of illness." The European Social Charter contains the right to health in Article 11, which obliges states to prevent the spread of epidemics (Art. 11 (3)). The EU Charter of Fundamental Rights incorporates the right to health care in Article 35. Admittedly, the responsibility for health care is transferred to the member states, but it is emphasised that a high level of health care must be achieved within the EU, for example when the EU Advocate General invoked that the right to health care "cannot… be infringed by Member States on the grounds of financial difficulties or social expenditure."[137]

Even if the right to health is not formally part of the ECHR, as it is an economic and social right in the European Social Charter, the European Court of Human Rights has interpreted the right to health into the right to life in ECHR Article 2. The Court found that the right to life requires that health care be designed so that "patients' lives are protected" with "adequate equipment", that it is "not underfunded" and that a certain group may not receive less or poor access to health care.[138] The European Human Rights Court in Strasbourg ruled in *Brincat and Others v. Malta* to protect Maltese shipyard repair workers. The workers were exposed to asbestos for many years, without adequate protection. The Court found that there was a violation of Article 2 (right to life) in respect of the applicants whose relatives had died. In addition, they found a violation of Article 8 (right to respect for private and family life).[139] The Court found, in light of the seriousness of the threat posed by asbestos, and despite the room for manoeuvre, that Malta had overstepped its "margin of appreciation" left to states to decide how to manage such risks, that the Maltese Government had failed to satisfy their positive obligations under the Convention, to legislate or take other

practical measures to ensure that the applicants were adequately protected and informed of the risk to their health and lives.[140] This case shows that a state's positive obligations include, but are not limited to, adequate legislative and administrative frameworks, practical measures to ensure protection of individuals, and provision of information to individuals to enable them to assess risks to their health and lives. In the context of dangerous and hazardous activities, such as health care workers dealing with Covid-19 cases, or frontline workers, it should be noted that the Court placed special emphasis on regulations and measures designed to protect. individuals from harm.[141]

Sweden's unregulated and voluntary approach to the pandemic led to an overburdened health care system during the Spring of 2020, despite awareness that there was a lack of emergency stocks of medicine and protective equipment, when its reserve stock had been sold after the end of the Cold War.[142] Ignorance about an unknown disease also led to more deaths in overcrowded health care settings. It led to vulnerable groups, such as the elderly, being de-prioritised, because there were not enough medicines, equipment and personnel. Thus, the right to life in the ECHR was violated through defective health care that regularly and frequently directed people with Covid-19 to palliative care or no care, and routinely denied oxygen to the elderly. "Many have died unnecessarily. They must have access to basic medical care to survive: drip, oxygen, clot prevention, antibiotics for the bacterial pneumonia. Often it is not the virus you die of, but a bacterial pneumonia that kills", says Yngve Gustafson, Professor of Geriatrics.[143]

The directive from the National Board of Health and Welfare's on what to give to Covid-19 patients at the end of life was a number of medications, like morphine, midolazam and haldol. According to Pharmaceutical Specialties in Sweden, FASS, these are used for analgesic, antipsychotic and sedative purposes, and should be used with caution in case of impaired respiratory function. According to experts, these medications may worsen the condition of Covid-19 patients - who often already suffer from respiratory failure, says Md. Shahindul Islam, Associate Professor at Karolinska Institutet and Chief Physician at the University Hospital.[144] Swedish law does not allow for euthanasia, and euthanasia would anyway require consent from the patient, which is why assisted euthanisia does not release a physician from medical liability.[145] It is also a serious issue if a governmental agency gives directives that can imply euthanasia for a targeted group of people, such as the elderly aged 80+. It could be argued that it comes close to international crimes, such as crimes against humanity, that entails international criminal responsibility and is a crime incorporated in the Swedish Penal Code.[146]

There have also been several work-related Covid-19 deaths that, it can be argued, occurred in violation of the right to life and health. Especially deaths that occurred in public service such as in health care or public transport might be imputable to the Swedish Government. However, this will be discussed in the section on workers' rights.

4. Prohibition of Torture and Other Forms of Cruel, Degrading and Inhuman Treatment

Another non-derogable right is the prohibition of torture and other forms of cruel, degrading and inhuman treatment, that is set out in CAT, in the ICCPR (Article 3) and in the ECHR (Article 3). Torture is forbidden in the Swedish Constitution (RF 2:5). According to the Council of Europe Article 3 of the ECHR is relevant when seriously ill people do not receive the care and medicines needed for life-threatening diseases in times of Covid-19: Liability also applies to "seriously ill patients, persons with disabilities or the elderly" in accordance with the prohibition of discrimination in Article 14.[147] Also, EU's Fundamental Rights prohibits torture and ill treatments. In *Price v* UK, the European Court of Human Rights criticised the UK for detaining and holding a severely disabled person in unsafe conditions, showing that denial of proper treatment for a condition or disease by the authorities can amount to inhumane treatment under Article 3 in the ECHR.[148] Thus, when the elderly were routinely kept at old age care facilities and denied proper treatment for Covid-19, that can be a violation of Article 3 in the ECHR.[149] As has been pointed out, Sweden has been convicted for violations of Article 3 several times this century.

In prisons, as well as in detention and in old age care facilities, people can be affected by isolation when no visitors are allowed, which can also mean there is no oversight of how the inmates or patients are treated, or how they cope at the facilities. This in turn might open the possibility of cruel and degrading treatment, as well as cruel loneliness.[150] This was highlighted by the OPCAT committee in Australia: "Along with elevated health risks of contracting the diseases, institutional living arrangements also expose people to other forms of harm, including detention of people with disability, and older people through restrictive practices, neglect, violence and abuse, mainly where independent oversight mechanisms are inadequate."[151] The committee emphasises that such treatment can violate a state's international obligations under the ICCPR Article 7, which imposes an affirmative burden on State parties to 'afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7 [torture, or cruel, inhuman or degrading treatment], whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.[152] The report also highlights the commitment states have, under Article 19 of the UN Convention on the Rights of Persons with Disabilities, to take steps to deinstitutionalisation, that there are clear strategies, timelines, and benchmarks in place for assisting people in leaving institutional settings.[153]

5. Workers' Rights

The right to work is set out in ICESCR Article 6. The right to "the enjoyment of just and favourable conditions of work" is spelled out in the Article, which includes in 7b) "Safe and healthy working conditions", and in 7d) "Rest, leisure and reasonable limitation of working hours and periodic holidays with pay".

The pandemic has highlighted workers' rights, such as the working environment and working conditions and unemployment. For example, over 10,300 health care workers caught Covid-19 in Sweden in Spring 2020, making up to a third of Covid-19 cases that spring. A report from the Health Agency in 2021, about *Prevalence of Covid-19 in different occupational categories,* confirms that personnel in health care were the worst hit occupation, peaking in Spring 2020, with more than double the prevalence compared to other categories, and they also had the second most ICU patients compared to other occupations.[154]

Doctors and nurses have died of Covid-19 related to their work.[155] This was in part due to lack of protective equipment; as noted above Sweden had sold its reserve stock of protective equipment at the end of the Cold War, which was a well-known fact for the Government before the outbreak of the pandemic. In an interview in the *Professional Health Care Magazine*, Johan Styrudd, Chairman of the Medical Association in Stockholm and Chief Physician at Danderyd Hospital stated:

> "Health care was not prepared for a pandemic when the coronavirus entered hospitals and health centres. The lack of protective equipment was acute in the first weeks. The lack of protective equipment was great in the hospitals, and even worse in old age care and health centres. The 21 regions entered the global market for protective equipment. Small Swedish regions, in competition with larger states. It was even more difficult for the municipalities, with responsibility for elderly care. In the first weeks, the directives on what we would use for protection were changed several times, not on scientific evidence, but according to what was available".[156]

There have been several deaths related to the workplace reported in Sweden, and not just among health workers: 7 bus drivers, a teacher, 3 employees at the state owned Samhall factories, as well as 5 health care workers (a home carer in Skellefteå, two employees at Karolinska in Huddinge, an employee at the University Hospital in Uppsala and a doctor in Stockholm). However, to be able to prosecute in accordance with Swedish laws, it must be clear that the person has been infected at work, which is almost impossible when there is a general spread of a pandemic. Also, the employer, or the person who has responsibility for the working environment, must have acted negligently so that the employee became infected. This is about whether there has been an opportunity to protect oneself from infection and what risk assessments employers have had the opportunity to make in the situation at the time. It is hard to make such an

assessment in retrospect, when the onslaught of the pandemic came suddenly, according to Kristina Falk Strand, Chief Prosecutor at the National Unit for Environmental and Work Environment Goals (Rema).[157] Another problem is that few cases were initiated/reported by relatives, safety representatives or workplaces.

As a result, few deaths from Covid-19 have hitherto been investigated as work environment crimes. Until December 2020 there were nine workplace cases reported to REMA and three of these were about people in working life who have died after being infected by Covid-19.[158] All three preliminary investigations into these deaths have now been closed. The first two concerned a bus driver in a mid-Swedish town of Västerås and an interpreter, but it could not be proven that they were infected at work.[159] The death of a 39- year-old nurse working in a Covid-19 department at a university hospital was investigated by prosecutors as a wrongful death suit against the hospital reported by the safety representative at the workplace. She was tested for the virus on April 17 and not long after that she fell ill and then died after four days. In December 2020 the prosecutor dropped the charges, as she found it impossible to prove that the cause of death was Covid-19. The safety representatives claimed that the workplace safety equipment did not live up to the Public Health Agency's requirements and that the employer deviated from the Public Health Agency's recommendations, but this was refuted by the Swedish Work Environment Authority which investigated the incident, but did not found any deficiencies in the hospital's handling of the current death.[160]

Also, work-related infections are more likely to affect low-income workers, and immigrants, who do not have the possibility to work from home: “Highly educated, high-income and white individuals were much more likely to shift to remote work and to maintain employment following the virus outbreak,” to quote from an American study.[161] This can become an issue of discrimination, if those workers do not receive proper protective equipment or working conditions in the pandemic. In Västerbotten, a guestworker was the first death in an outbreak at a factory with 100s of infections with the British strain of the virus in February 2021.[162]

It is possible that some work-related deaths or injuries from Covid-19 will be reviewed by the ECHR in the future.[163]

Facemasks

Sweden is one of very few states where facemasks are not recommended. Several public employees demanded mandatory protective equipment, but their demand was dismissed by the Swedish Health Agency. This was subject to review by administrative courts, but they denied that wearing of protective equipment is mandatory in health care, even though this goes against the advice of the Swedish Work Environment Authority.

The dispute over facemasks at Serafen's care and nursing home in Stockholm received attention. At the beginning of April, the Kommunal union's chief safety representative imposed a safety stop on work close to the patient without a face shield and facemask at the home in case of suspected or confirmed Covid-19. The Swedish Work Environment Authority followed the safety representative’s line and banned work close to patients without face shield and facemasks. This decision was appealed by Stockholm City in April 2020, and was set aside as “unclear” by the Administrative Court of First Instance, although the Court did not undertake a medical assessment of which protective equipment is to be used in certain work steps.[164] The Swedish Work Environment Authority appealed the decision but was denied review by the higher administrative courts.

The National Union of Teachers demanded facemasks should apply in primary school along with recurring risk assessments.[165] The Health Agency has dismissed their claims. In Halmstad the municipality went so far as to ban facemasks in school, especially for teachers, even if they soon withdrew the ban after it was criticised as unlawful. However, freedom of expression allows people to wear facemasks, as part of their

outfit. In the US, for example, it was found that mandatory wearing of facemasks is not such an interference that it would hamper the right of expression or freedom of movement.

The Swedish Health Agency's dismissal of wearing facemasks is based on the Chief Epidemiologist Tegnell's view that "masks are pointless" and that "there exists no proof of their effectiveness", as he wrote to WHO in April 2020 suggesting "advice to wear facemasks will evade the public trust if people would think the virus is airborne", and claimed masks will spread the virus instead of containing it, because people will not stay at home if they can wear facemasks.[166]

However, medical evidence supports facemasks because it reduces the risk of transmitting Covid-19. A study in early August, based on evidence from 200 countries, found that weekly increases in per-capita mortality were four times lower in places where masks were the norm or recommended by the Government, compared with other regions.[167]

To cite an article from experts in respiratory diseases in the *Lancet*:

> "If the entire population wants to make a contribution to reduce transmission, then a few months of universal facemask wearing would achieve a lot, but it will come at a cost. That cost might be lower than not reopening businesses and schools once baseline risk achieves acceptable levels."[168]

The WHO has supported the use of facemasks and many countries have an obligation in their domestic law to follow WHO's recommendations, but not Sweden.[169] For example, the wearing of facemasks was made mandatory in both the USA and Australia but met with some protests that this would be a violation of human rights, such as limiting a person's freedom of expression, or the right to movement. But the Swedish Health Agency has constantly rejected the WHO advice.[170] In January 2021, with the new Pandemic Law, Swedes were recommended to wear a facemask on public transport in the rush hour. However, statistics from Europe show that Swedes are the least likely in Europe to wear facemasks, with only 11 % wearing it frequently and none always, as compared to other countries where between 50 and 96% always wear a facemask.[171]

A US lawsuit filed by four Florida residents against Palm Beach County argued that mask mandates "interfere with … personal liberty and constitutional rights," such as freedom of speech, right to privacy, due process, and the "constitutionally protected right to enjoy and defend life and liberty."[172] The Circuit Court in Palm Beach declined to issue an injunction against the mask mandate citing *Jacobsen v. Massachusetts,* a Supreme Court case where Massachusetts could impose immunisation on its citizens because of public health concerns.[173] The Court thus found that constitutional rights must be interpreted on the clear rational basis of protecting public health: "no constitutional right is infringed by the Mask Ordinance's mandate … and that the requirement to wear such a covering has a clear rational basis based on the protection of public health."[174]

The CESCR contains similar provisions as to the right to life, privacy, liberty, freedom of expression, which is why the European Court of Human Rights can be expected to find that the right to life as well as the protection of public health makes it legal for a state to impose mask-wearing in a public health crises: to protect the life of its citizens, using Article 5(1) and the right to derogate in times of a public health crisis, i.e. derogation in time of emergency in Article 15. So, even if such measures were to be found to be an infringement on a derogable human right, they can be considered necessary and proportionate to the purpose of limiting the spread of the virus.[175]

Social Security

A possible explanation for the Swedish policy of non-mandatory recommendations and not imposing lockdowns is to save the economy, to save jobs and protect mental health, and perhaps also to avoid the need to support and pay affected businesses. Without a lockdown, the Government was not responsible to pay compensation to businesses even if no one wanted to visit a restaurant, or no tourists came to Sweden.

When the Swedish Pandemic Law was to be adopted the opposition parties made an outcry, because it did not mention the right to compensation for affected workers and business owners if their workplaces were shut down. However, the Swedish Government asserted that compensation would be paid. Sweden did introduce sick-leave without a medical certificate for two weeks, and prolonged the time those ill with Covid-19 could get sickness benefits up to one year.

In the ICESCR Article 9 states: "The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance". Thus Sweden, famous for its welfare and social security systems, should have better guaranteed peoples' economic welfare through the possibility of mandatory lockdowns with compensation and by the adoption of an early pandemic law with clear compensation provisions.

6. The Prohibition on Discrimination and Freedom of Movement

Several vulnerable groups were affected by and at risk from Covid-19, foremost the elderly, but also pregnant women, people with disabilities, immigrants and people with underlying health conditions that enhance risk factors for severe Covid-19.

In the Swedish Constitution (RF 1:2) discrimination is prohibited.[176] However, derogations are possible when "the provision, criterion or procedure has a legitimate aim and the means used are appropriate and necessary to achieve the aim". In the ICCPR non-discrimination, together with equality before the law and equal protection of the law without any discrimination, is based explicitly on ethnicity and sex, but the Convention does not spell out disability or age, and discrimination may be possible in a public emergency. The same is true for the ICESCR. But the EU Fundamental Rights state, in Article 25, that the elderly must not be discriminated against and must be treated with dignity, and the same is true for the disabled in Article 26.

The European Court of Human Rights pointed out the "horizontal effect" of the prohibition on discrimination laid down in Article 14, that it should also be interpreted to fall within the wider ambit of the other Convention articles,[177] and is also a positive obligation.[178] This implies that although Article 14 in the ECHR can be derogated from according to Article 15, it might still be applicable in the interpretation of the right to life, as the latter is a non-derogable right. Moreover, derogations should always be proportionate, necessary and have a time limit, which are designed to prevent measures such as a state of emergency from being used illegally or in an abusive or disproportionate way to the intended goal.[179] However, also without the need for any derogation (like in Sweden, where the Swedish Constitution does not contain any emergency powers to impose emergency legislation, which is why the Swedish Government claimed that they could not invoke any state of emergency) human rights are sometimes legally weighted against each other in order to justify proportionate and necessary restrictions.[180]

The Elderly

It can be argued that discrimination based on age occurred when the elderly did not get admitted to hospital, were deprioritised through triage, and were routinely referred to palliative care without oxygen (on the advice of the Swedish Public Health Agency that oxygen not be given to old age care facilities), and so did not receive proper treatment. Thus discrimination was done relating to two non-derogable rights, a violation of the right to life, and also the prohibition against cruel and degrading treatment. These are two non-derogable rights that Sweden is bound to follow by its Constitution because the ECHR is incorporated in it. The provision on non-discrimination in the Swedish Constitution confirms that no one shall be discriminated against based on *age*, *sex, ethnicity or disability*, as does the Swedish Discrimination Act.[181] Moreover, the fact that Sweden could not make a declaration of emergency, makes the prohibition on discrimination of any kind valid under the ECHR. Even when the elderly did not have the same right as

younger people to move freely in society because of recommendations that those aged 70+ should stay at home, it could be argued that they were discriminated against (see further below).

However, discrimination can be deemed ok if restrictive measures are necessary and proportionate to alleviate the health care system, when seen in the wider perspective of public health and when made to ensure the rights of vulnerable groups to the non-derogable rights to life and health and non-cruel treatment. Also, triage might be acceptable and worse care can be possible in times of crises when the health care system is overburdened, if the protection of health falls within the scope of private life in Article 8, and a person accepts it. Important is that the European Court of Human Rights is usually reluctant to interfere in states' management of scarce resources in health care, as the *Pentiacova and others v. Moldova* case shows.[182] In it routine dialysis was denied based on costs, and the Court found that the full range of medical treatment can be denied by a state because of lack of funds: "While it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment."[183] However, the case of routine dialysis differs from the situation where people are treated inhumanely or die because of an overburdened health care system that is due to flawed intervention against a pandemic.

In Sweden the Government limited the number of people meeting officially to 50, but at the same time recommended *all* persons aged 70+ should not leave home or socialise except for grocery shopping or visits to pharmacies, and nursing homes were closed to visitors. This met with outrage from PRO, the retirement organisation in Sweden, because even if the recommendation was voluntary, it could be argued to breach the right to freedom of movement and to non-discrimination in the Swedish Constitution and in the Swedish Discrimination Act, as well as in Protocol 4 to ECHR Article 2 "that provides for a right to freely move within a country once lawfully there and for a right to leave any country". Thus, in October 2020, just at the beginning of the second wave of the pandemic, the 70+ recommendation was changed to such a recommendation for all Swedes, and nursing-homes needed to open to visitors. However, nursing-homes closed on 1 November again.

After the Government's national ban on visiting old people's homes expired, the City of Stockholm decided to introduce a local ban. This was appealed to the Administrative Court in Stockholm that found the municipality's restraining order was a restriction on the individual's right to private and family life in Article 8 of the ECHR. The decision was not based on the Swedish rights catalogue in its Constitution (RF 2:12) and its right of movement, as the Constitution does not contain the right to privacy, but on Article 8 in the ECHR, the right to privacy and family life.[184] The Stockholm city ban was thus not supported by law and the decision must be revoked, because according to the Swedish Constitution, freedoms and rights can only be restricted by law, i.e. by a decision of the Parliament.

A former judge of appeal, Jan Melander, suggested that this could give rise to a tort claim based on Chapter 3, Section 4 of the Swedish Torts Act, as every resident and close relative could be awarded damages by a district court for the violation of the European Convention, based on the decision and its right to family life.[185] However, the outcome could have been different, if Stockholm City had invoked the right to life in the ECHR, Article 3 together with Article 5 (1) on liberty and security, supporting its decision with a positive obligation of the member states to act proactively towards health protection, and if the decision was in line with the requirements of Article 5 of the ECHR, namely to "constitute a proportionate response to the need to prevent the spread of infectious disease". Anyway, Stockholm City decided to implement a new visitor ban the day after the judgement, now in line with the Swedish Health Agency's formal decision to allow local restraining orders in consultation with local and regional actors, called a local ban.

In Finland the Parliamentary Ombudsman, who oversees the legality, based on human rights, of actions taken by the authorities, received complaints about a ban on visits to care facilities for the elderly. The complaint also concerned that the elderly could be mistreated by the old age care facility, when their

relatives and friends could not visit and observe them. The Ombudsman found that they were prescribed by law and instructed by the Health Minister, and it was important that nothing that was not prescribed by law was imposed.

Finnish law admits quarantine and isolation in cases of a contagious disease. According to Article 68(1) in the Communicable Diseases Act, quarantine and isolation must be carried out in a way that does not needlessly restrict the person's rights. A person may be locked in, when it is necessary to prevent the spread of a communicable disease that spreads via air or as droplet and via contact transmission and meets the prerequisites for a generally hazardous communicable disease. The decision on locking the door from the outside is made by the physician in charge of communicable diseases in a public service employment relationship either with the municipality or joint municipal authority for a hospital district. A person participating in the care of the patient must monitor the patient so that he or she can be in immediate contact with the patient who needs to be able to contact personnel immediately. The Ombudsman found that compliance with the law requires that a person with dementia also has the actual and effective possibility to contact personnel. If a person is not independently capable of contacting the personnel, the personnel must be continuously present. The deliberation must also take into account the other means of carrying out isolation, and the selected method must be the one that most effectively ensures the dignified treatment of the elderly person.[186] The Ombudsman also noted the duty of notification applying to personnel in social welfare units in order to identify the units' procedures when an employee reports an incident of malpractice observed in the old age care facility.[187]

Immigrants

The statistics show that immigrants had a higher death toll statistically than other Swedes and the incidence of Covid-19 was more prevalent in areas with many immigrant inhabitants.[188] The Covid-19 crisis has also starkly exposed the existing economic vulnerability of temporary migrants in many countries.[189] In Sweden immigrants and refugees were overlooked as a category that could be especially vulnerable.[190] A Swedish article highlighted that:

> "Refugees are already a vulnerable group in society and are in a stressful situation due to their often uncertain legal status in seeking asylum and integration in the new society after migration. Refugees are, in general, at greater risk of poor health outcomes when contracting Covid-19, exacerbated by poor living conditions and difficulties in accessing health care. The longer-term social consequences of the pandemic also disproportionately impact them."[191]

Especially since 2015 Sweden has received a large number of refugees. The Swedish Health Agency found that a fairly strong over-representation of cases and death came from Somalia, Iraq, Syria, ex-Yugoslavia as well as Finland.[192]

When the Health Agency's recommendations were not translated to minority languages and the Government did not adopt special protection measures in immigrant populated areas, this may count as discrimination based on ethnicity.[193] "Access to health information and education for health professionals, decision-makers and the public is crucial for facilitating optimal participation in the health response, the uptake of health measures and well informed decision-making", to cite from the United Nations High Commissioner for Human Rights.[194] The Commissioner emphasises:

> "Relevant information on the Covid-19 pandemic and response should reach all people, without exception. This requires making information available in readily understandable formats and languages, including indigenous languages and those of national or ethnic, religious and linguistic minorities. It also requires adapting information for people with specific needs, including the visually- and hearing-impaired, and reaching those with limited or no ability to read or with no internet access. States should also work to ensure the broadest possible access to internet service by taking steps to bridge digital divides, including the gender digital divide."[195]

The right to information is spelled out in the Swedish Constitution (RF 2:12), as is the right to non-discrimination based on ethnicity in RF 1:2. Discrimination based on ethnicity is also forbidden according to the Swedish Discrimination Act. However, it is not explicit in the Discrimination Act that language is a base for discrimination, which is why the Sami Parliament makes the argument that language should be included as a ground for discrimination in the Swedish Discrimination Act: it would increase coherence with the international conventions that Sweden has signed, such as the ECHR and the ICCPR.[196] However, the Swedish Discrimination Ombudsman says the current Discrimination Act is sufficient as it covers language indirectly by banning ethnic discrimination.[197]

Many immigrants are employed in contact intense jobs that cannot be done from home, such as in public transport, taxi drivers, cleaners, interpreters etc., which were hard hit by the pandemic. Also, the lack of lockdown in Sweden caused the disease to spread, and forced many employers where immigrants work to scale down their workforce, especially within the hotel, restaurant, and travel sectors. The numbers of dismissals increased and is above those in one of Sweden's worst financial crises in living memory that occurred between 1990 and 1994.[198] Refugees and immigrants in Sweden are already facing challenges such as poor health, difficulties with employment, crowded living conditions and difficulties obtaining health care as well as understanding health care information. That is why protective measures targeting them should not have been refused by the Swedish Health Agency, such as quarantine of immigrant populated areas of Stockholm, as the Health Agency was aware of these specific problems.[199] Also, safety measures in public transport and the closing with financial support of cafés and restaurants should have been considered early on in the pandemic.

Women's rights

Pregnant women were found to be a risk group, with about 10 to 15% more at risk for severe Covid-19 infections.[200] This would single them out for special treatment based on gender and women's rights. Also, children's rights might be applicable as Covid-19 could cause premature births. A public health crisis cannot be used as a pretext to legitimise unnecessary derogations to women's rights.[201] Pregnant women in Sweden did not get any special rights to protective measures and equipment, and only payment on sick-leave from the 36th week of pregnancy, although they were recommended by the Health Agency to isolate themselves and be aware of the risk and take precautions. This is especially severe in parts of Sweden with long distances to health and maternity care, as pregnant women often find it hard to breath due to less lung capacity late in the pregnancy.

Another problem was also that partners could not stay at the hospitals after childbirth.[202] More generally, the Covid-19 crisis appears to have increased gender inequalities in both paid and unpaid work in the short-term, when more women than men lost their work, or had to juggle home-schooling children plus work from home at the same time.[203]

However, in a decision, the Swedish Work Environment Authority prohibited that pregnant women had to work with Covid-19 patients in health care. The Health Agency also emphasised the risk for premature births and acute conditions due to Covid-19 in late December 2020, based on "new scientific evidence".[204] However, pregnant women were still advised to work, as long as they did not work with Covid-19 patients.[205] In the ICESCR, Article 3, the equal rights of men and women are set out as relating to all the Covenants provisions while Article 7(i) requires "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men." This shows that pregnant women should be given safe working conditions due to their pregnancy.

Travel Restrictions

When it comes to travel restrictions and quarantine in Sweden, a debate arose about freedom of movement. The Government considered that the freedom of movement made it impossible to restrict any

travel inside or outside of Sweden, because the freedom of movement is included in the Swedish Constitution (RF 2:12). However, the Constitution does leave room for exceptions made by law. The Swedish Communicable Diseases Act does allow for mandatory quarantine in case of a communicable disease (paras 9 and 10), and persons suspected of having a contagious disease can be isolated while a doctor examines them according to para 5:1 and 5:3. The law also gives a right for the Swedish Health Agency to quarantine a special area (see para 10), which "means a ban on those who stay in the area to leave it and a ban on those who are outside the area to visit it". Neither is a person under isolation or quarantine allowed to leave the country.[206] The Communicable Diseases Act can be individually enforced.

Swedish law is not toothless when it comes to the right to life and health. Failure to take effective action against the spread of Covid-19 is a violation of national law. The seriousness of the spread of a serious illness is reflected in Swedish criminal law in the Criminal Code 13:7, where the spread of infection is one of the generally dangerous crimes that can lead to life imprisonment, thus reflecting a human rights perspective. Why the Swedish Health Agency and the regions have not used those opportunities is puzzling, but is likely based on the argument that there was no pandemic law in place to legally restrict human rights inserted in the Constitution and the ECHR. The fault for this was the Governments that could have adopted such a law instantly, as the Swedish *Crisis Preparedness in the Constitution Review and International Outlook Expert Group* found as early as 2008.[207]

The non-imposition of isolation, quarantine and travel restrictions had a severe impact in the beginning of the pandemic, as Sweden did not adequately test nor quarantine Covid-19 cases and did not impose any travel restrictions internally or externally. As the disease first hit Stockholm, more remote and vulnerable parts, such as the NPA-region, could have been spared an early outbreak, which would have bought them more time to prepare. The chaotic situation in health care, without enough protective equipment and hospital beds in the regions, could have been avoided. In the beginning of the pandemic not much was known in Sweden about the best care for the sick nor how the virus spread, and why containment was important to stop the spread and reduce deaths. But protective measures would had been justified based on the vulnerability of the population in the NPA-region, especially because it is made up of vulnerable groups that are at higher risk from Covid-19 (such as an indigenous people, the Sami) and has a high number of elderly and men. Also, long distances to health care and hospitals and the climate as well as the Covid-19 prone mining industry are well known factors that make the region vulnerable to a pandemic.

Actually, a Swedish case from the European Court of Human Rights, the judgement in *Enhorn v. Sweden*, could have been used to argue that any Covid-19 containment measures taken which impact on individual rights as a consequence of quarantine and potential detention are lawful, providing they are not arbitrary and are proportionate as part of a wider non-discriminatory approach.[208] In *Enhorn* the applicant infected with HIV complained that he had been subject to compulsory isolation and involuntary placement in a hospital for seven years based on the Communicable Diseases Act. He had transmitted the virus to another man by sexual activity. The applicant skipped several medical appointments offered by the Swedish Health authorities. The Court had to assess the lawfulness of his detention for the preventing the spread of infectious disease. The Court found a potential violation of the procedures of domestic Swedish law, because of the long detention.

In a second step, the Court considered if the detention was in line with the requirements of Article 5 of the ECHR, namely if the detention did "constitute a proportionate response to the need to prevent the spread of infectious disease". The Court examined if the principle of legal certainty was satisfied under the relevant Swedish legislation, i.e. "reasonable cause" and "manifest risk of the infection being spread" and foreseeability, and found authorities had a wide margin of discretion. However, the substantive requirements of an Article 5(1) ECHR qualification meant that Sweden did not fulfil the requirements of proportionality and non-arbitrariness, as it could have tried less severe measures first. The case implies "…that any Covid-19 measures taken which impact on individual rights as a consequence of quarantine and

even detention are lawful if not arbitrary and proportionate as part of a wider non-discriminatory approach", to quote Bachmann & Sanden.[209]

On the other hand, Norwegian and Finnish travel restrictions against travel to Sweden have impacted the border regions negatively, as shown in Part I of this report. Both health care services and business are severely affected by the restrictions of movement across those borders in the NPA-regions. "Given the effectiveness of community-based public health measures such as social distancing and contact tracing, the necessity of travel bans must be weighed against less restrictive alternatives, increased global divisions, and violated human rights obligations", to cite Meier, Habibi and Yang writing early in the pandemic.[210] However, severe border restrictions can save lives and in the long run also the economy, if the virus is shut out effectively. This can more easily be done in less populated peripheral countries and territories with few borders or islands, such as countries in the Arctic region, which the examples of Norway, Greenland, Finland and Canada show.[211] Denmark also has a global travel ban in place. To the contrary, small islands such as Iceland and Faroe Islands do allow travel for leisure but after testing and quarantine.

One of the hardest travel bans is in Greenland which cut off its traffic with Denmark, after Denmark had a spike in cases over Christmas 2020 and while Greenland had seen only isolated cases of Covid-19. All of them were related to travel to and from Denmark, which has led health authorities to underscore repeatedly that stopping widespread infection in Greenland means preventing the virus from arriving from Denmark.[212] This was to protect the local and indigenous population from Covid-19 because they are more vulnerable and keep us from having to impose lockdowns in Greenland, according to Premier Kim Kielsen. Also, to be able to roll out the vaccine before infections get hold, and with the understanding that Danish hospitals were at full capacity, transfer of patients from Greenland would not perhaps be possible while Greenland itself has only limited hospital capacity.[213]

Norwegian owners of cottages in Sweden sued the Norwegian state to get access to their property in Sweden, because Norway has one of the most tough Covid-19 travel bans in Europe, but also 20 times less deaths from Covid-19 compared to Sweden. In January 2021 the Oslo district court delivered its judgement that the rules on quarantine for the Norwegians who have a cottage in Sweden is an encroachment on their freedom of movement under the European Convention of Human Rights and the right to respect for home and family life. The court however did not give the cottage owners an unconditional or permanent exemption from the entry quarantine, so the plaintiffs' application for an interim injunction was dismissed and the Norwegian state will appeal.[214]

In Finland the Parliamentary Ombudsman has taken the initiative to investigate cases concerning the actions of the police in overseeing the restrictions on freedom of movement, as imposed under the Finnish Emergency Powers Act. The Ombudsman stated that the police had issued several unjustified fines for people who have attempted to cross the Uusimaa province border during the lockdown of the Uusimaa region. Although attempting to cross the regional border without a cogent reason was prohibited, the breach of the restriction was not punishable under the Emergency Powers Act. The police had a policy of giving a fine to a person who had once been turned away at the border and subsequently attempted to cross again. However, according to the Criminal Code of Finland, an attempted criminal offence is only punishable if the attempt has been prescribed as punishable, and the attempted violation of the Emergency Powers Act is not a punishable offence. Even repeated attempts to cross the Uusimaa border in contravention of the Government decree are not, therefore, punishable offences.[215] The Parliamentary Ombudsman considered it justified for prosecutors to thoroughly review all such cases to ensure that a lawful outcome has been (or will be) reached.[216]

Finally, cases cited above under the analysis of potential discrimination against the elderly are also relevant to reflection on travel restrictions, including the Swedish Government limiting the number of people meeting officially to 50, but at the same time recommending *all* persons aged 70+ not to leave their home or socialise while nursing homes were closed to visitors.

7. Indigenous Peoples' Rights

This report has already highlighted the vulnerability of the only indigenous people in Sweden, the Sami, that live in the Arctic region. Historically, as well as today, indigenous peoples have proven more vulnerable to disease.[217] Racial and ethnic minorities have always been the most impacted by pandemics because of disparities in exposure to the virus, disparities in susceptibility to contracting the virus, and disparities in treatment.[218] It has been argued that both native Americans in the US as well as First Nation communities in Canada have faced health disparities directly attributable to underfunding and discrimination in public services, especially on reserves.[219]

The rights of indigenous peoples differ from minority rights, as set out in Article 27 in the ICCPR, because minority rights aim at ensuring a space for pluralism in society, whereas the instruments concerning indigenous peoples' rights are intended to allow for a high degree of autonomous development for indigenous peoples.[220] Important for indigenous peoples is that they are a people with self-determination, the right to self-government and rights over their natural resources.

The Sami today often have preconditions, such as cardiovascular disease and moreover they have less access to health care.[221] As cited earlier in this report (Part I, Section 2), the Covid-19 crisis has had a strong impact on their traditional livelihoods. The drop in tourism and border restrictions and lockdowns affected the Sami people who could not travel to important cultural events or the Sami University of Applied Sciences across the region as the Sami are spread out in several different countries.[222] Also, residents of the Far North asked that authorities allow nomadic reindeer herders to move between settlements in Norway, Sweden and Finland as it is almost impossible for reindeer herders and nomads to self-isolate because their work is related to grazing and ensuring the safety of the reindeer population.[223]

The Sami did not receive any special treatment, except for reindeer herding being allowed across Swedish-Norwegian borders, but no measures were introduced to protect them in Sweden. The question arises if indigenous peoples located in a state that has adopted minimal protections to curb the pandemic may enact stronger protections for their own citizens and territories, based on the right to self-determination of peoples set out in the UN Charter para 1(2), and restated for indigenous peoples in several instruments that have become international customary law, such as the ILO Convention on Indigenous and Tribal Peoples, 1989, and the United Nations Declaration on the Rights of Indigenous Peoples, 2007.[224] Article 3 in the UN Declaration provides: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The concrete meaning is specified in Article 4: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous status." It appears that indigenous populations should be able to adopt stricter measures in their community than the rest of the state, based on indigenous peoples' rights to self-determination (see relevant cases infra). [225]

In Sweden the Sami people did have a different perspective on border closure. "From a Sami perspective, we could keep the national borders in the North open and draw the line at the Arctic circle instead, to keep natural movement for reindeer and people, and keep the Sami economy going", says Christina Henriksen, President of the Sami Council in an interview.[226] In the cases of Norway and Sweden, the national authorities rapidly came up with an exception for reindeer husbandry and allowed these herders to cross the border without quarantining afterwards, but border restrictions with Finland have impacted reindeer husbandry. The border measures the nation states have introduced have serious consequences for the fundamental and human rights of the Sami, especially the freedom of assembly and movement, and children's rights, as the areas traditionally inhabited by the Sami are divided into four different nation states: Finland, Sweden, Norway and Russia. Many Sami families reside across nation state borders and they go to work across borders.[227] This violates Article 36 in the UN Declaration on the Rights of Indigenous Peoples, when nation

states have not, in consultation and cooperation with the Sami, taken effective measures to ensure the implementation of the right to maintain spiritual, cultural, political, economic and social ties during the Covid-19 pandemic.[228]

In Greenland (as discussed in the previous section on travel restrictions) a travel ban was imposed on travel from abroad, to protect the indigenous population from Covid-19 and reduce the need to impose lockdowns in Greenland and to be able to roll out vaccinations before infections got hold.

Henriksen states that "The Sami people have equal access to the same health services as society at large. In some cases, they face the same challenges such as too long distances to hospitals, unacceptable emergency preparedness, few respirators and so on."[229] Additional challenges for the Sami people are the long-recognised lack of culturally-appropriate health services and lack of Sami speaking nurses and doctors, and also that many elderly live in the Sami territories.[230] A lot of the Sami businesses are small or micro-businesses, often in combination with several other activities, and they did not get support from the Swedish Government, as happened in Norway through their national budget. Only in February 2021 did the Sami receive 4 million Swedish kronor to support their cultural activities, which were severely hampered by Covid-19 restrictions and no international tourism.[231]

Tribal nations across the world have been disproportionately impacted by the pandemic.[232] Often indigenous peoples were being excluded from Covid-19 data and government public health responses, for example in the USA.[233] An example where indigenous peoples right to self-determination has been infringed is in South Dakota. The Governor of South Dakota adopted a laissez faire response to Covid-19, so the state was in the top third of states in terms of per capita Covid-19 infections. The stance was apparently adopted out of concern for businesses. In late April 2020 the Governor abruptly removed restrictions so that almost everyone should return to normal, while recommending that limited, voluntary measures such as social distancing and good hygiene be adhered to, quite similar to the Swedish approach.[234]

The power of states to impose measures to stop the spread of Covid-19 has been upheld by the US Supreme Court in a 2020 decision.[235] In Sioux territories in South Dakota the indigenous people chose to adopt their own more stringent measures, such as checkpoints, roadblocks and contact tracing, based on a comprehensive Covid-19 response plan to monitor the entry of individuals on to their Reservation, but the Governor intervened and tried to force them to remove these laws, threatening to pull essential Covid-19 relief aid and end law enforcement contracts, and asking President Trump for federal intervention. This led the tribe to sue Trump in Cheyenne River Sioux Tribe v. Donald J. Trump,[236] where the Cheyenne River Sioux Tribe filed the complaint for "injunctive and declaratory relief against the Defendants Donald J. Trump, President of the United States and members of his administration, for threatening to take unlawful actions to shut down the Tribe's Health Safety Checkpoints, including its threats of reassumption of control of the Tribe's law enforcement program, in the midst of an unprecedented national Covid-19 public health crisis."[237]

In North America, the NGO Cultural Survival has documented and mapped 27 human rights violations against indigenous peoples. In the Western USA, both the Navajo Nation and Confederated Tribes of Warm Springs in Oregon had already faced long-term water crises, a critical issue during a pandemic in which hand-washing is one of the few effective defences. Indigenous immigrants in California allege discrimination by state and federal agencies, citing language barriers and their exclusion from access to health care. In Canada indigenous peoples are threatened by the mining industry, which is prone to spread Covid-19.[238]

Sweden has so far not ratified the ILO Convention on Indigenous and Tribal Peoples, 1989, which has faced criticism since the Convention is legally binding and is an important legal instrument in the fight for the defence of land and natural resources. Neither has Sweden signed the UN Declaration on the Rights of Indigenous Peoples of 2007.[239] But since these documents are considered to be customary international law, Sweden ought to let the Sami population decide on stricter measures and quarantine of their territories, if they want. Another important point is that funding for the Sami should be raised due to Covid-

19, as their economy is especially vulnerable to Covid-19. While the Sami did receive 4 million Swedish kronor in support of their cultural activities later in February 2021, funding should also go to better their access to health care and Covid-19 screening.[240] Also the Sami are afraid that the Government will sponsor new opportunities for mining and other business after Covid-19 that might encroach on indigenous land rights.

8. The Right to Education

Sweden also justified its policy with the right to education, as its Constitution safeguards entitlement to free basic education in the public school system (RF 2:21).[241] Thus Sweden kept schools for children aged 7 to 15 and pre-schools open, although at first all universities and the last three years of high school went on-line during the Spring semester in 2020.

In late August 2020 all schools and universities opened again for on-site learning, which most likely paved the way for the second wave of the virus in October 2020. At Umeå University, in region Västerbotten, students were tested in September 2020, and very few tested positive, which was taken as proof by the Swedish Health Agency, in charge of the evaluation, that the spread of the virus was low both at universities and in Sweden: "[t]he low prevalence of Covid-19 in the group is consistent with other observations that the spread of infection in the country remains low. It is valuable for Umeå University and other universities in Sweden to know that the spread of infection at Umeå University did not increase at the start of the semester".[242]

Article 13 in the CESCR spells out that the right to education, to "free, universal and compulsory primary education" be "generally available and accessible". Hence, the Swedish negative stance on on-line learning can find support also in the *Report on the impact of the COVID-19 crisis on the right to education* by the Special Rapporteur on the right to education which "stresses that the deployment of online distance learning ..., should only be seen as a temporary solution aimed at addressing a crisis. The digitalisation of education should never replace on-site schooling with teachers […] the deleterious effect screens have on children and youth, including their right to health and education."[243]

Due to the high spread of the virus in the second wave of the pandemic, Sweden again closed its high schools before Christmas until the 24 January 2021. After that date and until 1 April, a decision by the Swedish Health Agency recommended that in high schools the proportion of distance teaching should be between 20 to 80%, but each region could decide if on-line should continue and to what extent, in accordance with statistics on the local transmission of the virus.[244] The recommendation was based on "the principle of attendance in class, a method that is best suited for students in general."[245] The primary schools were to be open, but middle schools had the right to go on-line, based on the individual schools' decisions that were to be taken on advice from the regional authorities. The temporary school ordinance that was introduced in the spring of 2020 regulates that a principal may in certain cases take measures if a school is wholly or partly temporarily closed. The right to measures may be used if necessary to ensure that pupils in the pre-school class, compulsory school, compulsory special school, special school, Sami school, upper secondary school and upper secondary special school have their right to education.[246]

But many, both Swedish researchers and school children as well as several teacher unions, opposed the decision to let schools be open based on the theory that children do not spread the virus according to the Health Agency. As set out above in the analysis of use of facemasks (*see supra* on workers' rights), the National Union of Teachers demanded facemasks should apply in primary school along with recurring risk assessments.[247] In the Swedish Newspaper, *Dagens Nyheter*, 30 researchers wrote, "Opening the schools in January is taking very big risks", while they refuted as outdated internationally the theory that children do not pass on the virus.[248] Students in Västerbotten started a campaign to close schools, after a large scale outbreak of the British mutant virus in Västerbotten that made it one of the most affected areas in Sweden

in the winter of 2021.[249] Teachers and their union were very upset, since it was found that middle school teachers had a high incidence of Covid-19, and at least one case of the death of a teacher that occurred in Norrland had been reported as a work environment injury, although it could not be proven.[250] Also, in Sweden parents are among Europe's oldest.[251] But the Chief Epidemiologist Tegnell dismissed the criticism based on the Health Agency's Report, according to which school staff generally do not have a higher risk of infection than people in other occupational groups who have contact with many people, such as the service professions.[252] The National Union of Teachers demanded safer working conditions and that protective equipment such as facemasks should be worn by students and staff, but this was not allowed by the Swedish authorities, and some county's tried to forbid facemasks in school.[253]

The majority of complaints due to Covid-19 received by the Parliamentary Ombudsman in Finland concerned children, schools and education.[254] The Parliamentary Ombudsman has handled complaints about the grounds for admission to universities, arrangements for remote studying, school meals, learning support and arrangements for matriculation examinations.[255] The report found many complaints about on-line exams, and about accessibility to the right to free school lunch. Research shows that children's mental health deteriorates in lockdowns with on-line teaching and stay at home orders; to cite from a study by Rubén López-Bueno: "many children, particularly those from lower socio-economic backgrounds, might have been temporarily deprived of institutional educational environments, social contact with peers and, possibly, adequate cognitive, affective and physical stimuli for their age.[256] School closures that last too long can curtail children's rights, such as the right to education, and children may become confined in homes that are overcrowded or do not meet adequate standards of living. Domestic violence often increases in lockdowns.[257]

Part IV. Vaccines

Health is a human right, and Covid-19 vaccines are inherent in that right: affordable, non-discriminatory access to the vaccine is a human right. This is emphasised by the Office of the United Nations High Commissioner for Human Rights (OHCHR) that acknowledges that the right to vaccines against Covid-19 is inherent in the right to health, but also in the right to development[258], and the right "to enjoy the benefits of scientific progress and its applications" (Article 15 in the CESCR), citing the Committee on Economic Social and Cultural Rights and its commentary on Article 15**:**

> "The availability of vaccines, medicines, health technologies and health therapies are an essential dimension of the right to health, the right to development and the right to enjoy the benefits of scientific progress and its applications. Everyone is entitled, on an equal footing with others, to enjoy access to all the best available applications of scientific progress necessary to enjoy the highest attainable standard of health."[259]

The OHCHR underscores that vaccines should be treated as "global public goods and that technology and information be shared, so that an inclusive global vaccination campaign is rolled out": "[V]accines should be treated as global public goods, rather than as marketplace commodities available only to those countries and people who can afford to pay the asking price". The OHCHR also refers to "technology transfer and the sharing of information and data … to ensure a successful and inclusive global vaccination campaign." [260]

There are estimates that 90% of the population in 67 countries will not be able receive a Covid-19 vaccine in 2021. "Unfair distribution of vaccines across countries, or hoarding of vaccines, disregards international legal norms and undermines the achievement of the Sustainable Development Goals", to cite OHCHR again.[261] Wealthy countries, e.g. Australia, have been buying over 300 million doses for its population of 26 million, but will provide only Australian $80 million to the COVAX Facility Advance Market Commitment to improve access to safe, effective and affordable Covid-19 vaccines for 92 development countries in the

region and around the world, together with 80 other countries and urges more wealthy states to participate.[262] The ICESCR requires states to achieve the progressive realisation of the rights protected by the Covenant according to Article 2(1), including the right to health, both individually and through international assistance and cooperation.[263] Hence there is a responsibility for wealthy states to provide assistance, especially economic, scientific and technical, to developing countries for immunisation against major infectious diseases and for the prevention, treatment and control of epidemic and endemic diseases.[264] *The 2030 Agenda* also commits, in Goal no. 10, to reducing inequality within and among countries, and makes solidarity, cooperation and partnership among states and all stakeholders vital to achieving the Sustainable Development Goals. The right to development (Goal 17) is equally important.[265]

Access to the vaccine is a critical issue as prioritisation of groups for access to the vaccine. The OHCHR underscores: "The determination of early vaccine recipients should not, for instance, exclude anyone explicitly or implicitly on the basis of older age, disability, race, gender, migration status or other discriminatory criteria, and should be conducted through a fair, transparent, inclusive and accountable process."[266] It is important that institutional settings such as care homes, psychiatric institutions, homes for people with disabilities, homeless shelters, immigration detention centres and prisons are included without discrimination in vaccine distribution policies.[267]

States have a duty to prevent unreasonably high costs for access to essential medicines and vaccines, so the vaccine should not be expensive.[268] Thus, even if private companies are not bound directly by human rights, every state has a duty to enact laws that are consistent with human rights and prevent an unreasonably high cost, and prevent private clinics offering the vaccine to the wealthy instead of prioritised groups. In most of the world this has been interpreted that the vaccine should be free of charge, but this did not affect the price paid by states to buy the vaccine from pharmaceutical companies.

However, states have also sponsored the development of the Covid-19 vaccine, by funding pharmaceutical companies' Covid-vaccine development in exchange for rapid access to their products (e.g. the USA funding Pfizer's and the UK Astra-Zeneca's). This has led those states to get earlier access to the vaccine and has given them precedence over other states, which has led to friction in the international community.

For example, early in the vaccination roll-out, there were not enough doses left for the EU, when the UK and the USA claimed most of the available Pfizer and AstraZeneca vaccine doses. In the case of AstraZeneca, the EU thought about suing the company for breach of contract when it claimed that, due to its Belgian production plant, it could only deliver half of the doses (35 million instead of 80 million) bought by the EU during the first quarter of 2021. The EU first tried to force the company to redistribute vaccine doses from the UK. However, a clear-cut violation by AstraZeneca of its obligations (e.g., by prioritising its supply obligations to the United Kingdom over its obligations to the European Union) would be required.[269] The UK is neither willing to let go of any of its contractual vaccine doses, as it underscored that it has its own contract with AstraZeneca. So, whether AstraZeneca's problems at the Belgian production plant would violate its best reasonable efforts to manufacture and deliver obligations is a question of fact. The European Commission then needs to prove that AstraZeneca did not use its best reasonable efforts to manufacture and supply the amounts of doses stipulated for distribution within the European Union.[270] So if human rights are considered, an agreement should be reached amicably between the EU, and AstraZeneca, on the number of vaccine doses, based on the above principles of global distribution. Under international law, the UK does not seem to have to give up its doses, as the country is Europe's most affected by Covid-19 and is neither obliged under contract law, being a third party, to give up vaccine doses to the EU. The same problems arose when the USA preferred to use syringes and other supplies needed for the manufacturing of the AstraZeneca vaccine in its Indian plant, hampering supply of the vaccine in India and Europe.

There has been discussion if European states could introduce compulsory vaccination. This could eventually be a breach of human rights, violating Article 3 on cruel and degrading treatment in the ECHR, the right to privacy (Article 8) and to freedom of conscience (Article 9). A case is pending at the Strasbourg Court, the

Pavel VAVŘIČKA et autres c. République tchèque case, whether the obligation to vaccinate and the sanctions taken against the parents (notably denying access to school) respect freedom of conscience and family freedoms (Articles 8 and 9 of the Convention and Article 2 of Protocol No.1 to the Convention).[271] Several European states have compulsory vaccination, while the majority do not. Above, in the section on worker's rights, we cited a United States Supreme Court case (*Jacobsen v. Massachusetts, 1905*) in which the Court upheld the authority of states to enforce compulsory vaccination laws.[272]

Swedes are protected against forced physical intervention by the public in the Constitution (RF 2:6). As a general rule, everyone is protected from such physical intervention, but exceptions may be made for the benefit of public health, if it is considered proportionate and appropriate, as prescribed in Chapter 2, Section 20 of the Constitution. However, hitherto, introducing a vaccination requirement has not been done in Sweden. So some health care workers have explained that they will not take the Covid-19 vaccine. This made the conservative, opposition party, "Moderaterna" demand that health care workers who do not want to be vaccinated against Covid-19 must be relocated so as not to work with at risk groups.[273] However, the proposal was dropped after criticism it violated the Constitution and current legislation.

Inside states the domestic distribution of vaccines must live up to the conditions of even and fair distribution of vaccines based on transparent criteria for the selection of prioritised groups. Some issues arose during winter 2021 because of the shortage of supply of vaccines in the EU, as Sweden had not bought vaccines separately, but relied on the EU allocation of doses. The region of Stockholm complained they did not receive a fair allocation of vaccines as compared to other regions, so they could not fulfil the goal of all grown-ups being vaccinated on the 1 July. The Swedish Health Agency retorted that region Stockholm had received less doses according to its population, but the same as other regions according to the prioritised group of seniors in old age care and in home care services. In Sweden an outcry arose that managers in health care and old age care managed to skip the line for themselves and their families. This seems illegal, also from a human rights perspective. States like the Emirates have been denied the possibility of selling vaccines to tourists, based on the rights to life, to health and to international cooperation and assistance in the ICESCR.

In the NPA-region vaccination rates were slow in the beginning. It should also be highlighted that in the NPA-region of Sweden other vulnerable groups could have come into focus for priority vaccines, such as indigenous populations, or very remote communities. However, such considerations were not made. On the other hand, the Swedish regions could choose to prioritise health care personnel before the oldest, which could benefit the NPA-region, because border closures and remoteness have made lack of health care personnel apparent and especially acute in the far north.

Part V. Saving the Economy

However, the overarching argument for the sacrifices of individual illness and even death from Covid-19 comes from "saving the economy". This report has already pointed out that the Scandinavian Legal Realism and Uppsala School embraced a philosophy where the economy and economic wellbeing trumped individual rights.[274] Several governments, like Sweden and also the UK, the USA and Brazil, avoided or delayed adopting large scale public health and social measures to prevent economic downturns, while some companies chose to remain open to avoid massive losses, with the overriding argument of saving the economy.[275] Sweden as an export dependent economy, with a high fatality rate, but no mandatory lockdowns in 2020, did not do better than its neighbours. Its policy did not in fact avoid huge economic losses and unemployment.[276] Sweden did not do better than its neighbours with hard lockdowns, due to its high fatality rate and the second wave that made the economy dive, adjusting numbers to a -3% GDP growth over 2020, and unemployment at 8.5%, rising to 9-10% in Spring 2021. For example, Australia, which imposed severe lockdown measures from mid-March 2020, could then open up domestically as a basically

Covid-free society in late October 2020, so that it was able to come out of its recession quicker than expected, in part because the lockdown made people accumulate savings and then spend it at home.[277]

Researchers from the US found that containment measures, such as masks and social distancing, and also a vaccine, would help the US economy, and compared it to China that made a 2.3% gain in its GDP in 2020 because of its restrictive measures against Covid-19 that prevented an economic crises by limiting the no spread of the virus.[278] On the other hand, countries like Italy, Spain and France that did lockdown also made huge economic losses, and still had a high death toll. A study of 42 states by König and Winkler of the their economies during Covid-19, the relationship between lockdowns, fatality rates and economic activity, concludes:

> "[t]hat tighter government measures have a negative impact on economic activity but by keeping fatality rates low they … support economic activity. Thus, from an economic perspective, lockdowns might represent a second-best policy approach as they limit the economic damage associated with high fatality rates […] results also support those voices arguing that tight lockdowns – despite their negative effect on growth – might still serve as a useful economic policy instrument if they succeed in reducing health risks as economic activity is severely hampered by high fatality rates."[279]

Calculations have been adopted about how much a human life is worth.[280] The value of a life year (VOLY) is used as a measure of each healthy individual's value, in economic calculations, based on death, illness and injury as welfare-setbacks, and typically includes a quantitative "risk assessment, where measures to reduce physical harm are under consideration".[281] The value of a healthy life year can be estimated by a mathematical formula.[282] Most official values of a statistical life (VOSL) are based on an average value for death of a healthy person at age about 40 years. The European Union recommends a VOSL in the range of €0.9-3.5 million with a best estimate around €1.4 million, while the USA estimates VOSL to be $6.1 million. The EU also argues that VOSL is likely to decline with age and proposes that for elderly persons a VOSL of around €1.0 million be adopted.[283] A cancer premium may be added to allow for pain and suffering before death.[284] On the other hand, the EU recommends that all members adopt a common VOSL irrespective of income differences. The Australian government values a VOLY at $213,000 a year. A bit under $600 a day. In France an economic study was presented that concluded that until September 2020 the average discounted economic value per human life lost due to Covid-19 of $339,381 is 8-fold France's gross domestic product per person.[285]

Psychological costs, such as anxiety, depression, stress and their impact on wellbeing could also be measured as an additional cost. Measuring anxiety can be done on a "QALY" scale, and then converting from QALYs to dollars. QALYs, or quality-adjusted life years, are a widely used welfare scale in health economics. The scale ranges from zero (for death) to one (for a perfect health state).[286] An example from the US is a case where the FDA used QALY to measure if better rubber gloves would be cost effective for health care workers handling blood tests, due to HIV concerns: "[Persons] who experience high levels of uncertainty due to the possibility of contracting serious, threatening diseases experience heightened levels of stress and anxiety until the results show negative."[287] It is calculated at an assumed monetary value of $125,000 and a discount rate of 3% , i.e. each year of life at a QALY value of 1.[288] Covid-19 research in the USA suggested "QALY benefits from mortality averted by continued social distancing and limited reopening relative to a policy of full reopening exceed projected GDP costs if an effective vaccine or therapeutic can be developed within 11.1 months from late May 2020."[289] Studies show that health care workers experienced post-traumatic stress disorder (PTSD) symptoms during Covid-19,[290] and in Sweden many health care workers quit their job But other considerations affecting human well-being, such as reduced quality of life caused by prolonged social distancing, educational regression associated with prolonged school closures, restrictions, unemployment and bankruptcy have to be weighed in also.

In addition, health care costs, vaccines and other governmental spending and loans as a result of responding to the pandemic are inherent costs.[291] Moreover, the Government's responsibility is connected to policies done before the outbreak, to cite Quintana & Uriburu:

> "Death and economic losses are not simply inevitable consequences of the virus, to quote from an article in AJIL: 'Frail health systems are a result of decades of defunding and policies of austerity .... This acknowledgement is a precondition for a revision of the structures of the global political economy, which are expressed in law. The containment of the virus was, in fact, difficult to attain from the outset, against the background of an "international economic life" organised around open markets, freedom of navigation, migrant workers, and global value chains.'"[292]

The ICESCR Covenant contains so-called positive rights, where the state must meet people's needs in various respects, which often means a financial cost. Therefore, with an outdated view, these rights were only gradually considered to be fulfilled, based on Article 2 in the ICESCR, that states:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means …"

Today most states, and especially industrialised states such as in Europe, are considered able to afford the full realisation of the ICESCR rights. In the 21st century developed states must take their full responsibility to provide citizens with economic, social and cultural rights, even if expensive. In addition, states must help developing countries to achieve these rights if they do not have the means, as the ICESCR requires developing states to achieve the progressive realisation of the rights protected by the Covenant, also through international assistance and cooperation.[293] For ICESCR an individual complaints system was introduced in 2013 in the same way as for ICCPR, so that individuals can report violations of the Convention; see Article 2:

> "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party."[294]

But even in a global market and as part of the European Union, the Swedish Government had its own responsibility, to look back at its own experiences from the Spanish flu, to impose quarantine and travel restrictions on parts of the country that obviously were more vulnerable, such as Norrland. Practice from Australia, New Zealand, but also in Norway, Finland, and Iceland show how severe restrictions in remote countries and regions can save lives and in the long run also the economy, if the virus is shut out effectively.

Citizens should be able to expect hospitalisation with adequate standards, affordable medicine, and vaccination against Covid-19, based on the right to health. The right to health thus demands adequate spending on health care. In a pandemic the population has the right to treatment and not be deprioritised or triaged based on economic shortcomings.

PART VI. Conclusions

A key miscalculation was that all of Sweden had to be treated the same, without any considerations for variations in vulnerability due to location, businesses and population composition. The Arctic region could have avoided being so hard hit if targeted measures had been applied to them out of regional considerations. The NPA-region should have been treated as a whole, together with the NPA-regions in the bordering Scandinavian states Norway and Finland, so that a coherent area-specific approach could be applied. This was one of the flaws in the Swedish Covid-19 policy, but neither of the other Scandinavian

countries, Norway and Finland, considered a joint policy. It is obvious that collaboration basically failed in setting common policies. This is something for the NPA to consider in the future, to adopt recommendations for an NPA-sensitive pandemic response, valid for the specific features and characteristics of the region. This would adapt to the theory that international law is turning towards more regional solutions, in what is called the fragmentation of international law, due to the regionalisation of international law because of a rise in the number of regional fora engaged in the formulation of international regulations; and the emancipation of individuals from states.[295] Aligned with this is he specialisation of international regulations, where states in a federation, but also cities, territories and counties, should be able to become parties to international legal commitments.[296]

Due to its different Covid-19 -policy, Sweden got a lot of attention, and it was speculated whether its voluntary recommendations could endanger people's lives and violate human rights, such as the right to life and health. On the other hand, most countries with lockdowns have had other human rights issues, concerning derogable rights, following hard lockdowns with curfews, where the right to movement, right to assembly, freedom of expression, education and rule of law have been highlighted. Sweden evaded much of this discourse, due to its voluntary recommendations. However, from the adoption of a Pandemic Law on 10 January 2021, Sweden started on a more mandatory course, with mandatory measures targeting education, public transport, public gatherings, restaurants, malls and the serving of alcohol, as well as enforcing restrictions on working at home.

An overriding argument for the Swedish voluntary Covid-19 policy was to save the economy – the thesis that sometimes it is unavoidable in a pandemic to sacrifice a few for the benefit of the population at large. But an important lesson is that there is not necessarily an opposition between human rights and saving the economy. Figures calculated in the value of a statistical life year (VOSLY) and the value of a quality of life year (QUALY) show that respect for basic human rights and the avoidance of human suffering is also an economic benefit.

This report has tried to pinpoint which areas have come into scrutiny from a human rights perspective and what violations could come into question within the Swedish strategy. It has singled out non-derogable rights, such as the right to life and health, and not to be cruel and degradingly treated, as well as indigenous rights in the form of self-determination. It has also found that derogable human rights, such as non-discrimination, workers' rights and freedom of movement could have been violated in Sweden. A problem was that the Swedish approach was not sensitive to regional variations, even if in 2021 the Pandemic Law opened greater possibilities for a more regional approach. However, it will be for the Swedish Courts and the European Court of Human Rights, as well as maybe EU courts, to evaluate if human rights violations have occurred.

It is surprising that Scandinavian Legal Realism and the Uppsala School still had influence over the Swedish Covid-19 policy, embracing a philosophy where the economy and economic wellbeing trumped individual rights.[297] However, the non-regional, state central approach was in fact a replica from the days of the Spanish flu, when the then conservative government did not intervene forcefully with mandatory measures against the Spanish flu. Both laissez-faire approaches raised significant concern and resulted in a high death rate. But maybe this is the 'Swedish Model', to endure and get through, without too many disruptions of daily life, a policy based on a collective society, where everyone is treated equally and where people are used to follow recommendations as if they were law. However, today in a global world and a diverse multicultural society such a policy is not really up-to-date in a state with 10 million people. What is needed is a more regional approach, based on regional self-government and leeway to adopt restrictive and targeted measures against a pandemic based on regional settings and data, that would be preferable to today's uniform state-centred response.

The Government had needed to learn from history, looking back at earlier responses to pandemics, domestically and abroad. It needs to have a ready set framework for crisis preparedness in its Constitution

and laws. It needs a specialised pandemic plan made by the Agency for Civil Protection and Emergency Planning (MSB) and incorporated in the Swedish Health Agency's work and that all other relevant authorities need to share in and update constantly. Scenarios and models should be frequently reviewed and sent out to the different regions for future planning and preparedness.

Most importantly, the Government and authorities very much need to be able to audit their pandemic response against a human rights policy, to make sure decisions are not taken that violate Sweden's human rights obligations. A Code of Ethics could also be adopted in decision making at national and regional levels. Such review and auditing processes are readily available in other settings, such as the maritime industry. For example, the United Kingdom Accreditation Service (UKAS) has human rights as a standard that the bodies that run an ISO certification system need to audit in their check of compliance of private maritime security companies. These standards point to key relevant human rights declarations and treaties, such as the International Bill of Rights, The ILO Declaration on the Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights.[298] Human rights policies and review need to be incorporated in the Swedish authorities' procedures. This is especially important as Sweden does not have a system of immediate judicial review given to the courts to interpret the Constitution. Nor does Swedish Process Laws permit class actions, which would allow a group of people together to bring a litigation, such as different categories of victims in a pandemic.

ENDNOTES

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