

REACTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS CONTRACTING PARTIES TO THE COVID-19 PANDEMIC

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Abstract

The Covid-19 pandemic caused serious human rights limitations in the Member States of the Council of Europe (CoE). Article 15 of the European Convention on Human Rights (ECHR) affords states the possibility of derogating from their obligations to secure certain rights and freedoms. This paper will explore the origin of Article 15 and the circumstances under which the States can derogate from their obligations. Particular focus will be dedicated to explaining the notion - state of emergency - and discussion if the threat posed by Covid 19 can be considered exceptional. Also, the author will analyze the material and procedural requirements of Article 15 and their interpretation given by the ECtHR in its jurisprudence, identifying grounded principles in this area. It will be particularly emphasized that the risk to life and the heavy burden on health services caused by Covid 19 have not been a feature of applications submitted to the Court.

The author will also analyze the attitude of 10 CoE Member States that declared the state of emergency and their compliance with the Convention, especially with the procedural requirement. It will be underlined that all CoE states have adopted very similar measures. Still, the majority of them decided to restrict certain rights and freedoms without declaring a state of emergency. Thus, this situation opens the debate of the necessity of proclamation of the state of emergency, as derogation carries a grave risk of being abused. Therefore, the author argues that more precise guidance on differences between human rights restrictions and limitations is necessary.

Keywords: European Convention on Human Rights. - Derogations. - Covid 19. - Notification. - Material and Procedural Requirements.

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"The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies."

Marija Pejčinović Buri, Council of Europe Secretary-General

I. INTRODUCTION*

Throughout history, infectious diseases have caused many problems among societies, but the Covid-19 pandemic has undoubtedly caused the greatest crisis in modern time. After its outbreak in the People's Republic of China in December 2019, the WHO declared Covid-19 a public health emergency of international concern on 30 January, following the recommendation of the Emergency Committee, and a pandemic on 11 March 2020.¹ It reached almost every country in the world, with a total of 112,513,015 confirmed cases of the coronavirus Covid-19 and a death toll of 2,491,946 deaths.² While world economies are struggling with rising unemployment, the hospitality sector has shut its doors; the global tourism industry is crumbling; another important critical issue is human rights respect due to many government restrictions. Many questions arise from this situation: are there human rights that can be derogated and under what circumstances, what is the level of allowed restrictions, is Covid-19 situation which can cause human rights derogations, and alike.

The European Convention on Human Rights is clear that not all human rights and freedoms enjoy the same level of protection. In other words, there is, although short, a list of rights that are considered absolute.³ Those rights cannot be limited or derogated under any circumstances, including the Covid-19 crisis.⁴ Other, relative rights, can be restricted by balancing their enjoyment against the pursuit of a legitimate aim. They can be exposed to three types of restrictions: derogations, inherent limitations and optional clauses.⁵ This paper will explore the requirements for human rights derogations and attitude of States that declared a state of emergency.

II. TIME OF EMERGENCY?

As it was already said above, the Covid-19 caused a global crisis of no similar range in its recent history. However, the question is whether this crisis can be considered to be a public threat, which

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¹ WHO, COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum, 12 February 2020; WHO, WHO Director-General's opening remarks at the media briefing on COVID -19, 11 March 2020.

²² Worldometer, Countries where COVID-19 had spread, 23 February 2020, available at <https://www.worldometers.info/coronavirus/countries-where-coronavirus-has-spread/> (last accessed 28 February 2021).

³ More on the discussion of absolute and relative rights see Rut Rubio Marin, Rory O'Connell, The European Convention and the Relative Rights of Resident Aliens, *European Law Journal*, Vol. 5, No. 1, March 1999, pp. 4-22.

⁴ The rights which cannot be derogated from are: Art. 2 (the right to life), Art. 3 (the freedom from torture), Art. 4, para. 1 (the prohibition of forced labour), Art. 7 (no punishment without law).

⁵ See more Milan Paunovic, Boris Krivokapic, Ivana Krstic, *Medjunarodna ljudska prava (International Human Rights)*, Faculty of Law, University of Belgrade, Belgrade, 2021, pp. 63-75.

can invoke declaration of emergency and human rights derogations? Article 15 of the ECHR permits states to take measures derogating from its obligations "in time of war or other public emergency threatening the life of the Nation." It aims to afford the governments, in exceptional circumstances, the possibility of derogating, in a temporary, limited, and supervised manner, from their obligation to secure certain rights and freedoms under the ECHR.⁶ In other words, derogations are a "rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties'".⁷ Before 2020, only in few cases, the European Court of Human Rights (ECtHR) has dealt with illnesses, mostly concerning Article 3 of the ECHR and the alleged adequacy of measures to protect prisoners from certain diseases.⁸ Thus, the disease was never recognized as a "public emergency" from Article 15 of the ECHR.

In its case-law, the ECtHR gave a guideline on what can be considered as a "public emergency threatening the life of the nation." The Court finds it to be "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".⁹ Therefore, the threat must be exceptional, affect the whole population, and present a threat to the community's organized life. The threat also needs to be actual or imminent, and the crisis or danger must be exceptional.¹⁰ The exceptionality of the danger is required to justify the use of extraordinary measures, as ordinary are totally insufficient. Although the State is in a better position than the international body to decide if such state of emergency exists, as well as the nature and scope of necessary derogations, it does not have "unlimited power of appreciation," and the situation must qualify as such taking into consideration the previous criteria.¹¹ There is no doubt that the Covid-19 epidemic appeared suddenly. It started to spread rapidly, which caused serious consequences on the population's health and imposed a heavy burden on health services. Under the previously mentioned criteria, it can be claimed that at the beginning of the epidemic, the states were allowed to proclaim the state of emergency and to derogate from certain rights. However, the exact answer to this question can be given only after the careful consideration of the nature of the restrictions and their duration.¹²

III. CONDITIONS THAT NEED TO BE RESPECTED

Article 15 of the ECHR prescribes three conditions that states must respect, even in times of emergency.

⁶ Derogation in time of emergency, Factsheet, Press Unit, September 2020, p. 1.

⁷ Emilie M. Hafner-Burton et al. *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, *International Organization*, vol. 65, no. 673, 2011, p. 680.

⁸ Jeremy McBride, COVID-19 and the European Convention on Human Rights, *ECHR Blog*, 27 March 2020.

⁹ *Lawless v. Ireland* (no. 3), App. No. 332/57, Judgment from 1 July 1961, para. 28.

¹⁰ *A and Others v. UK* (GC), App. No. 3455/05, judgment from 19 February 2009, para. 176.

¹¹ *Brannigan and McBride v. UK*, App. Nos. 14553/89 and 14554/89, judgment of 26 May 1993, para. 43.

¹² See also, Jeremy McBride, An analysis of Covid-19 Responses and ECHR requirements, *ECHR Blog*, 27 March 2020. There are authors who also claim that the Court will not have difficulties to find that the Covid-19 pandemic was an actual and imminent public emergency. See. e.g. Sanja Jovicic, COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights, *ERA Forum*, 21, 2020, p. 560.

i. Material condition

Each State has the responsibility to determine if the life of the nation is threatened by a public emergency, "and if so, how far it is necessary to go in attempting to overcome the emergency."¹³ National authorities are in a better position to decide on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it, but the European supervision accompanies the domestic margin of appreciation.¹⁴ However, even in that exceptional situation, States need to follow some general standards to preserve the principle of legality, proportionality, and the rule of law.¹⁵ The first paragraph of Article 15 of the ECHR contains a material provision that qualifies the situation and also prescribes that "measures must be to the extent strictly required by the exigencies of the situation and be in accordance with its other obligations under international law." In other words, the States do not enjoy unlimited power in this regard. There are two requirements from this provision: 1. fulfilment of the principle of proportionality; and 2. respect of other international obligations accepted by states in the international arena. The first requirement means that the Court will take into account the duration, geographical coverage, and material scope of the state of emergency and any measure reported.¹⁶ In other words, in order to assess if Article 15, para. 1 was violated, the ECtHR will take into account the nature of the right limited by derogation, the circumstances which caused its limitation, and the duration of the emergency situation.¹⁷ Therefore, the Court will take into account many different issues, but it will particularly assess if the ordinary laws were sufficient to meet the danger,¹⁸ if the measures were used for the purpose for which they were introduced,¹⁹ if the derogation was limited in scope, and if the need for the derogation was susceptible for review.²⁰

Another aspect of this provision is a systemic approach of the Convention and the requirement that derogation does not violate any other international obligation. However, it is not clear which international obligations will be taken into account in each case, but the purpose of this article is to underline the systemic nature of international law and the need that States respect their international obligations.²¹ The International Covenant on Civil and Political Rights (ICCPR) is more precise and in Article 4 requires that measures are not discriminatory in their nature.²² However, as the principle of non-discrimination is the core principle of the ECHR, it must be underlined that the Court will also evaluate if measures were discriminatory.

¹³ *A. and Others v. UK*, App. No. 3455/05, Judgment from 19 February 2009, para. 173.

¹⁴ *Brannigan and McBride v. UK*, para. 43.

¹⁵ See European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports on State of Emergency*, Strasbourg, 16 April 2020.

¹⁶ These elements are clearly underlined by the Human Rights Committee. See HRC, General comment no. 29, 31 August 2001, para. 4.

¹⁷ See, e.g. *A. and Others v. the United Kingdom* [GC], para. 173.

¹⁸ *Lawless v. Ireland* (no. 3), 1961, para. 36.

¹⁹ *Ibid*, para. 38.

²⁰ *Ibid*, para. 54.

²¹ More on relationship between the ECHR and other parts of international law see Geir Ulfstein, Morten Ruud & Andreas Føllesdal (2020) *The European Convention on Human Rights and other parts of international law*, *The International Journal of Human Rights*, vol. 24, no. 7, pp. 913-916.

²² However, this provision is also limited as it prescribes that measures cannot be discriminatory "on the ground of race, colour, sex, language, religion or social origin." Articles 2 and 26 of the ICCPR contain an open clause, and there is no foundation in the fact that Article 4 limits the prohibited grounds for discrimination during the state of emergency.

ii. Absolute rights

Article 15, para. 2 of the ECHR prescribes the second condition - certain rights cannot be derogated from under any circumstances, including the state of emergency. The ECHR has a concise list of absolute rights.²³ Compared to the ECHR, it should be underlined that ICCPR has a longer list of non-derogable rights.²⁴ Also, the Human Rights Committee extends this list. For example, in its General Comment no. 29, the HRC found the existence of the category of peremptory norms, which extends beyond the list of non-derogable provisions, as given in article 4, paragraph 2.²⁵ In other words, non-derogable nature also extends to the fundamental principles of a fair trial, including the presumption of innocence (art. 14, para. 2), the prohibition of arbitrary deprivation of liberty (art. 9, para. 1), and the prohibition of collective punishment.²⁶ Furthermore, some aspects of relative rights cannot be subject to lawful derogation.²⁷

Absolute rights will continue to apply in their full scope during the state of emergency, irrespective of any derogation made by a state. However, it is essential to underline that the exceptions, already contained in Articles 2, para. 2 and 7, para. 2 of the ECHR will continue to apply during the state of emergency.²⁸ The Parliamentary Assembly also underlines that besides the list of non-derogable rights, states must refrain from derogations of other rights that "violate international humanitarian law or peremptory norms of international law, or procedural guarantees in such a way as to circumvent the protection of non-derogable rights."²⁹ Fundamental safeguards must also be preserved, such as the rule of law (particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies), due democratic process, political pluralism and the independence of civil society and the media. Nevertheless, although absolute rights cannot be derogated, as well as fundamental safeguards, even contemporary practice shows that states can adopt measures that interfere with non-derogable rights. Illustrative is the case of the state of emergency declared by Turkey in 2016, where the right to life and freedom from torture were *de facto* derogated.³⁰

In addition, the ECtHR was clear that even during the state of emergency, freedom of expression and the political debate must be preserved.³¹ Therefore, it found that Turkey violated the ECHR as the journalist was detained, even after the Constitutional Court required his release. He was

²³ These are the following rights: Art. 2 (the right to life), Art. 3 (freedom from torture), Art. 4, para. 1 (the prohibition of slavery), and Art. 7 (no punishment without law). Also, this list was extended by additional protocols: Protocol No. 6 (the abolition of the death penalty in time of peace and limiting the death penalty in time of war), Protocol No. 7 (the *ne bis in idem* principle) and Protocol No. 13 (the complete abolition of the death penalty).

²⁴ These rights are as follows: Art. 6 (the right to life), Art. 7 (freedom from torture), Art. 8 (prohibition of slavery), Art. 11 (prohibition of imprisonment due to inability to fulfil contractual obligation), Art. 15 (the principle of legality in criminal law), Art. 16 (legal recognition of a person), Art. 18 (the freedom of thought, conscience and religion).

²⁵ HRC, General Comment no. 29, *Article 4: Derogations during a State of Emergency*, 31 August 2001. See also General Comment no. 24, 11 November 1994, para. 10; General comment no. 32, 23 August 2007, para. 6; General comment no. 35, 13 October 2014, paras. 65-67.

²⁶ *Ibid*, para. 11.

²⁷ *Ibid*, para. 13.

²⁸ ECHR, Guide on Article 15 of the European Convention on Human Rights, 31 August 2020, p. 11.

²⁹ Parliamentary Assembly, State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, Resolution 2209 (2018), para. 3.

³⁰ See Ali Yildiz, Did Turkey's Recent Emergency Decrees Derogate from the Absolute Rights?, *Verfassungsblog*, 28 September 2019, at <https://verfassungsblog.de/did-turkeys-recent-emergency-decrees-derogate-from-the-absolute-rights/> (last accessed 28 February 2021).

³¹ See, e.g. *Mehmet Hasan Altan v. Turkey*, App. No. 23672/2016, 11 January 2018, para. 210. See also Committee of Ministers, Guidelines on protecting freedom of expression and information in times of crisis (2007).

placed in detention after the political talk show in which the political situation in Turkey was discussed. The Government closed the news channel while the special prosecutor initiated charges for terrorism against the journalist for allegedly supporting the 2016 military coup attempt. He was later sentenced to aggravated life imprisonment. The ECtHR found that the state of emergency cannot serve as a pretext for limiting freedom of political debate, as it is the core value of each democratic society.

iii. Procedural requirement

The question is if the State needs to adopt the formal and public act of derogation. ICCPR requires in Article 4 that the threat to the life of the nation is officially proclaimed. Even though this requirement is not stipulated in Article 15 of the ECHR, the European Commission was clear that it could not, in the absence of some formal and public act of derogation, apply Article 15.³² In *Cyprus v. Turkey*, the Commission emphasized that "Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency", or otherwise Article 15 cannot apply.³³ In the absence of a formal derogation, the ECtHR has accepted that the ECHR's provisions can be interpreted against the background of the provisions of international humanitarian law.³⁴ Outside of this situation, the absence of a declaration of a state of emergency will preclude reliance on restrictions that would be acceptable in an emergency.³⁵ The proclamation is also significant as it involves the transfer of additional powers to the executive, to the detriment of the executive and the judiciary.

The third requirement is procedural and prescribes that when a State declares a state of emergency and adopt measures that restrict human rights and freedoms, it is obliged to give full information to the Secretary-General of the CoE of the measures it has taken and the reasons thereof and when measures have ceased to operate. The purpose of this requirement is to inform the Secretary-General that the derogation becomes public and to allow its monitoring. However, according to Resolution (56) 16 of the Committee of Ministers, it is underlined that the Secretary-General is responsible for informing about the notification of the other Contracting States and the ECtHR as soon as possible.³⁶ In the *Greek* case, the European Commission gave certain guidance concerning this obligation. First, the notification does not need to be made before the measure is introduced. Second, this notification must be done without any unavoidable delay, although it can be given with certain delay due to the exceptional circumstances.³⁷ Third, it must have sufficient information to allow States and the Commission to assess the derogation's nature and extent. This obligation stems from the fact that other States have a legal interest in being informed on the undertaken measures. At the same time, the Commission's work can be "impeded if it does not

³² *Cyprus v. Turkey*, European Commission, App. No. 8007/77, Report from 4 October 1983, para. 67.

³³ *Ibid*, para. 526.

³⁴ *Hassan v. UK (GC)*, App. No. 29750/09, Judgment from 16 September 2014, paras. 104-107.

³⁵ *Brogan and Others v. UK*, para. 48.

³⁶ Committee of Ministers, Resolution (56) 16, 26 September 1956. Therefore, it is not true that the purpose of nature differs in ECHR and ICCPR as that only the later has the purpose of informing other States Parties. See Kushtrim Istrefi, To Notify or Not to Notify: Derogations from Human Rights Treaties, *OpinioJuris*, 18 April 2020, at <http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/> (last accessed 28 February 2021).

³⁷ See also *Lawless v. Ireland*, para. 47.

receive timely and definite information convening any measure derogating from its obligations under the Convention which such a State claims to have taken in reliance on Article 15."³⁸

It is interesting to mention that due to the Prime Minister's statement on 23 March 2020 that people should remain at home where possible in the UK, a national judge was determined that Article 5 of the ECHR should be derogated from explaining the nature of the pandemic. In the reasoning, the judge wrote: "I will send notification of my decision."³⁹ However, it is unlikely that the trial judge notification of his reasons constitute an official and public notice of derogation.⁴⁰

Another issue is a lack of complete information on the measure of derogation, lacking detail, and the character of a notice of derogation. In *Lawless*, the European Commission considered that the notification was sufficient to indicate the nature of the measures, "without obliging the state concerned to promulgate the notice of derogation within the framework of its municipal laws."

IV. OPTIONAL CLAUSES

Optional clauses present another way of restricting certain human rights. ECHR allows such restrictions to several provisions: Art. 8 (the private life), Art. 9 (the freedom of religion), Art. 10 (the freedom of expression), Art. 11 (the freedom of assembly and association), Art. 2 of the Protocol no. 4 (the freedom of movement). In order to decide if these rights and freedoms will be restricted, there is no need to qualify the situations as a state of emergency. However, whether the danger requires limitations or derogation depends on the judgment if regular measures will be adequate to deal with the threat. If regular measures are enough, a State will not derogate the rights itself but will limit its scope and application. However, in order to limit the right, the state needs to fulfil the three-fold test: 1. the interference is conducted in accordance with the law; 2. the interference is necessary in a democratic society; and 3. interference further a legitimate aim. protection of health.

Therefore, all restrictions always need to have a legal basis, which presupposes compliance with relevant constitutional and legal guarantees.⁴¹ Furthermore, measures must be strictly required to restore the situation and be followed by safeguards against possible abuse of power. The principle "necessary in a democratic society" was defined by the Court itself: "Whilst the adjective 'necessary'... is not synonymous with "indispensable," neither has it the flexibility of such expressions as "admissible," "ordinary," "useful," "reasonable" or "desirable." Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessary in this context."⁴² Therefore, the Court accepts that state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements and the 'necessity' of a 'restriction' or 'penalty' to meet them. Finally, the protection of health in all provisions mentioned above is allowed as a legitimate aim.

³⁸ *Greece v. the United Kingdom*, European Commission, App. No. 176/56, Report from 26 September 1958, para. 158.

³⁹ BP v. Surrey County Council & Anor, England and Wales Court of Protection Decisions, 25 March 2020, para. 27.

⁴⁰ See Stevie Martin, A Domestic Court's Attempt to Derogate from the ECHR on behalf of the United Kingdom: the implications of Covid-19 on judicial decision-making in the United Kingdom, *EJIL: Talk!*, 9 April 2020, at https://www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom/?utm_source=mailpoet&utm_medium=email&utm_campaign=eji-tal (last accessed 28 February 2021).

⁴¹ See, e.g. *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, Judgment from 20 March 2018.

⁴² *Handyside v. the United Kingdom*, App. No. 5493/72 Judgment from 7 December 1976, para. 48.

V. PRACTICE OF COE MEMBER STATES CONCERNING HUMAN RIGHTS RESTRICTIONS

There is no doubt that the rapid spread of Covid 19 and its consequent risk to life and the heavy burden on health services led all European States to impose many human rights restrictions. However, the same situation and the same risk were recognized in 10 Member States as a state of emergency, while other 37 Member States decided to restrict human rights.

i. How the situation was called and qualified?

Among 10 that declared the state of emergency, the majority called it "state of emergency",⁴³ while Estonia and Latvia called it "emergency situations", Albania "a state of natural disaster", and San Marino "urgent measures".⁴⁴ Whatever the meaning, some states explained that they tried first with ordinary measures. For example, Albania underlined that since the first case of Covid-19 was detected on 9 March, the Minister of Health and Social Protection declared the epidemic and approved some other measures.⁴⁵ However, the increase in the number of infected persons necessitated the adoption of additional measures. Finally, it was a state of natural disaster to ensure the containment of the spread of the Covid-19 virus on the entire territory of Albania. The aim of the decision was explained as to ensure epidemiological safety, restrict the spread of Covid-19 and ensure public health at the national level. Nevertheless, some other States didn't have gradual development of measures before declaring the state of emergency. For example, Estonia explained that after the WHO announced Covid-19 as a pandemic on 11 March, and taking into account the significant danger of its spread, the Government of the Republic of Estonia declared an emergency in the entire territory of the Republic of Estonia three days later.⁴⁶

Armenia gave a very detailed explanation of the state of emergency, basing its rationale on the ECtHR requirements. Therefore, in its Preamble of the Note Verbale, Armenia wrote that the decision to declare the state of emergency was "based on the fact that the epidemic situation created as a result of the spread of the infection in the Republic of Armenia, predominantly, in the city of Vagharshapat of the Republic of Armenia, as an emergency resulting from the epidemic, poses a threat to the life and health of the population and may result in the disruption of the normal living conditions of persons."⁴⁷ It was further stated that the decision was also "based on the principle of priority of securing the life and health of people in such an emergency situation, as well as the necessity to take special sanitary and preventive and quarantine measures for the protection of the population, preservation of the health of the population and improvement of the state of health thereof in the conditions of prevention of the epidemic, epidemic situation, to introduce special conditions and regime for prevention of spread of the infection and elimination thereof, as well as the necessity to organise and implement preventive activities and measures for the protection of the population in a timely, due, efficient and effective manner." It also further underlined that other

⁴³ It was the case with Armenia, Georgia, Moldova, Romania, Serbia and North Macedonia.

⁴⁴ Information is taken from the notifications under Article 15 ECHR of the Covid-19 pandemic, at <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> (last accessed 28 February 2021).

⁴⁵ Note Verbale of Albania, Strasbourg, 1 April 2020.

⁴⁶ Note Verbale of Estonia, Strasbourg, 20 March 2020.

⁴⁷ Note Verbale of Armenia, Strasbourg, 20 March 2020.

circumstances were taken into account, "including the entry of potentially infected persons from the countries with high rates of infected population into the Republic of Armenia, free movement of persons within the territory of the Republic of Armenia, participation in public events, failure to undergo relevant preventive measures, and in case of existence of symptoms - failure to undergo a medical examination."

However, Serbia did not explain why it qualified the situation as a state of emergency.

ii. Date of notification

States also had a very different approach in submitting information to the Secretary-General on the declaration of a state of emergency and derogation of certain rights. While the majority of states informed the Secretary-General on the same day as the state of emergency was declared or within three days,⁴⁸ some states informed it in a range of 4 to 8 days.⁴⁹ However, three states notified the Secretary-General with significant delay: North Macedonia (14 days),⁵⁰ Serbia (21 days)⁵¹ and San Marino (36 days).⁵²

It is also noticeable that following the WHO's announcements, particularly of 30 January that Covid-19 was declared an international public health emergency, and that of 11 March 2020, in which it was declared a pandemic, 10 CoE Member States declared state of emergency at an early stage of pandemic, from 5 to 23 March 2020. In other words, they all fulfilled the requirement that the declaration of a state of emergency is a legitimate legal method only if it responds quickly to threats caused by particular circumstances.⁵³

Emergency situation was in force differently, from 6 May to 16 September. Therefore it lasted as such: Albania: 24 March – 23 June; Armenia: 20 March – 16 September; Estonia: 12 March – 18 May; Georgia: 21 March – 15 July; Latvia: 12 March– 10 June; North Macedonia: 18 March– 24 June; Moldova: 17 March– 15 May; Romania: 16 March - 14 May; San Marino: 5 March - 30 June; and Serbia: 15 March - 6 May. Therefore, it was the shortest in force in Serbia (for 52 days) and the longest in Armenia (for 180 days). After the state of emergency was lifted, states replaced it with less restrictive legal regimes and measures, which is also welcomed by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.⁵⁴ However, in most States, the number of infected persons was less during the state of emergency than afterwards, which can open the question of necessity to proclaim the state of emergency, which can normalize lower standards and imposes populations to greater interference with their rights. Also, from the

⁴⁸ See Armenia, Georgia, Moldova and Romania. Armenia declared a state of emergency on 16 March and notified the Secretary-General on 19 March. Georgia declared a state of emergency on 21 March and informed the Secretary-General on 23 March 2020. Moldova declared a state of emergency on 17 March and informed the Secretary-General on 20 March 2020. Romania declared a state of emergency on 16 March and informed the Secretary-General on 17 March 2020.

⁴⁹ See Albania, Estonia and Latvia. Albania declared a state of emergency on 24 March and informed the Secretary-General on 31 March 2020. Estonia declared a state of emergency on 12 March and informed the Secretary-General on 20 March 2020. Latvia declared a state of emergency on 12 March and informed the Secretary-General on 16 March 2020.

⁵⁰ North Macedonia declared a state of emergency on 18 March and informed the Secretary-General on 2 April 2020.

⁵¹ Serbia declared a state of emergency on 15 March and informed the Secretary-General on 6 April 2020.

⁵² San Marino declared a state of emergency on 5 March and informed the Secretary-General on 10 April 2020.

⁵³ Parliamentary Assembly, Protection of human rights in emergency situations, Resolution 1659 (2009), para. 3.

⁵⁴ See Committee on Legal Affairs and Human Rights, The impact of the Covid-19 pandemic on human rights and the rule of law, para. 5, available at <http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2020/20200702-CovidImpact-EN.pdf> (last accessed 28 February 2021).

state perspective, it is essential to understand that the ECtHR, in reviewing adopted measures, will take into account the passage of time, and its assessment of the exigencies of the situation will be stricter.⁵⁵

It is also interesting to follow the situation concerning the timeline for the notification on withdrawal. Serbia recorded the most extended period in this respect. Therefore, while the state of emergency was declared on 6 May, the notification on withdrawal was sent on 13 October, or after 160 days. There is no clear answer if a state which experiences delays in notification of withdrawal of undertaken measures will experience any sanction. Still, it is clear that a state has that obligation and that delays without reason can be taken into account when deciding concrete cases before the ECtHR. This obligation is stated in the Parliamentary Resolution 2209: "The State must, without any unavoidable delay, inform the Secretary-General of the Council of Europe of the measures taken and the reasons for them, and of the date when such measures have ceased to operate and the Convention is again fully applied."⁵⁶

iii. Permanent review of measures adopted

The ECtHR has found that Article 15, para. 3 implies a requirement of permanent review of the need for emergency measures.⁵⁷ This aspect is crucial as all restrictive measures must be under review in light of the evolution of the pandemic to ensure that only those restrictions that are still necessary and proportionate remain in force. The approach of ten CoE states that introduced the state of emergency was different in this respect. While Albania had only one review, Georgia and San Marino had two reviews, Latvia 3 reviews, followed by North Macedonia (4 reviews), Armenia (5 reviews), and Romania (7 reviews). For example, in its first review, the Romanian government emphasized the following: "It should be noted that the measures taken by the Romanian authorities are permanently adjusted to cover all potential situations and to clarify their concrete application and are founded on the factual evaluation of the situation made by the National Commission for Special Emergency Situations. The *gradual nature of the measures* as well as their constant adjustment reflect the concern of the Romanian authorities to abide by the principles of necessity and proportionality and, thus, to strictly apply only those measures required at a certain moment by the circumstance of the situation, in the general effort to contain the spread of SARS-COV-2 virus and its effects on the territory of Romania"⁵⁸ (emphasize added). Another approach taken by North Macedonia was to declare the state of emergency for a short period and to extend it, while necessary.⁵⁹ Nevertheless, Estonia, Moldova and Serbia didn't have any review during the state of emergency. The Serbian Government only stated that undertaken measures "have been constantly under review taking into account the epidemiological situation, recommendations of the World Health Organization and experiences in fighting this contagious disease."⁶⁰ This approach must be criticized.

The Court consistently reserved its view on whether lack of or inadequate notification may attract the sanction. This issue was addressed in *Aksoy v. Turkey*, where the Court underlined that it is within its competence "to examine this issue of its own motion ... and in particular whether the

⁵⁵ *Bas v. Turkey*, App. No. 66448/17, Judgment from 3 March 2020, para. 224.

⁵⁶ Parliamentary Resolution 2209 (2018), para. 5.

⁵⁷ *Brannigan and McBride v. UK*, para. 53-54.

⁵⁸ Notification of communication, Romania, Strasbourg, 3 April 2020.

⁵⁹ Notification of communication, North Macedonia, Strasbourg, 30 April 2020.

⁶⁰ Note Verbale, Serbia, Strasbourg, 7 April 2020, p. 2.

Turkish notice of derogation contained sufficient information about the measure in question."⁶¹ Furthermore, in *Mehmet Hasan Altan v. Turkey*, the ECtHR found that the Secretary-General must be "fully informed of the measures taken by way of derogation from the Convention and the reasons for them."⁶²

iv. Measures adopted and rights restricted

There were many different measures imposed during the state of emergency, such as restriction of movement/quarantine/ban for travel, restriction on property rights/businesses, restrictive regimes in closed institutions (e.g., penitentiary institutions, social care institutions, asylum and migration centres), closing of educational institutions, closing of gastronomy and entertainment industry, the prohibition of assembly and association, public gatherings/events, restrictions on transport, restrictions to the right to health, restrictions on private life, restrictions on the fair trial rights, especially in the form of closing courts and/or organizing online trials, restrictions on the right to information, restrictions to freedom of religion, etc. The list of rights and freedoms which were limited during the state of emergency is pretty extensive and requires careful consideration. However, States often imposed broadly similar measures to limit the spread of Covid-19, while the majority of them did not declare a state of emergency.

States, which declared a state of emergency, again, had different approaches to the list of rights derogated during this time. Thus, Armenia is the only country with detailed measures mentioned in the Note Verbale. They were split to the: restrictions on the right of persons to free movement and movement of vehicles, and inspections thereof; restrictions on the rights to property of persons; restrictions in separate institutions; restrictions and prohibitions on assemblies and public events; restrictions on transporting goods from Armenia; restrictions on separate types of economic activities and provisions of services, activities of educational institutions; and prohibition of separate publications, reports through the mass media.⁶³

Other countries included in the Note list of limited rights and freedoms, including measures introduced. Serbia is the only country that did not mention either rights and freedoms limited to the exigency of the situation and measures implemented. It only stated the following: "The measures implemented by the Republic of Serbia have derogated from certain obligations provided for in the ECHR to the extent strictly required by the exigencies of the epidemiological situation and medical necessity."⁶⁴ This approach must be criticized as the one who violates requirements from Article 15 of the ECHR. Inadequate information goes against transparency and adherence to the rule of law when the State imposes measure that in a normal situation would constitute impermissible restrictions on human rights.⁶⁵

⁶¹ *Aksoy v. Turkey*, App. No. 21987/93, Judgment from 18 December 1996, para. 86.

⁶² *Mehmet Hasan Altan v. Turkey*, para. 89.

⁶³ See Annex to Decision of the Government of the Republic of Armenia No. 298-N, 16 March 2020, Measures applied during the state of emergency declared in the Republic of Armenia on 16 March 2020, temporary restrictions on rights and freedoms, and measures ensuring the legal regime of the state of emergency.

⁶⁴ Note Verbale, Serbia, Strasbourg, 7 April 2020, p. 2.

⁶⁵ Natasha Holcroft-Emmess, Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification, *EJIL: Talk!*, 10 April 2020, at <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/> (last accessed 28 February 2021).

VI. CONCLUSION

All Member States of the CoE have been forced to take exceptional measures to deal with the extraordinary threat posed by the Covid-19 pandemic. Many issues arose from this situation, which requires careful monitoring of compliance of different measures with CoE standards. Although there is solid guidance on Article 15 of the ECHR, and a State has a margin of appreciation to decide to declare a state of emergency, the domestic margin of appreciation is accompanied by the ECtHR supervision. This is very important as only 10 out of 47 the CoE Member States declared a state of emergency, but measures undertaken in all of them were similar in their nature and scope. This issue would open discussion if it was necessary to declare the state of emergency at all? Many rights and freedoms of the ECHR allow for limitations to accommodate the need to balance individual against public interests, including the protection of public health and safety. The difference would be that state of emergency allows a more rapid, flexible, and effective response, but it also limits the application of regular checks and balances, why it should be only a last resort. In other circumstances, the margin of appreciation of a State will be wider than in a situation when all Member States were facing the same threat, and it is much easier to make a comparison in their attitude and measures imposed. It also requires that the Court, in its jurisprudence dealing with Covid-19 cases, makes the firmer difference between human rights derogations and their limitations. Another imposed question for discussion is if the failure to rely on Article 15 exceptions the state risks normalizing exceptional powers.

If a state of emergency is declared, there is a requirement to send a formal submission of notices of derogations to the Secretary-General.⁶⁶ The ECtHR will examine the Note Verbale in order to assess if it contains sufficient information on the measures being taken and the circumstances considered to justify the existence of an emergency to satisfy the requirements of Article 15, para. 3.⁶⁷ Moreover, the Committee on Legal Affairs and Human Rights is clear that the notification to the Secretary-General needs to include full details of the declaration of the state of emergency, the derogating measures, the duration of the derogation (or its extension), and the Convention rights affected.⁶⁸ However, States that declared the state of emergency in their notification to the Secretary-General had a very different approach. It must be discussed which of these approaches should be followed in the future. It will be interesting to see how the ECtHR will look at delays in procedural obligations and its lack of clarity on imposed measures and restricted rights. These questions left for the Court are at the same time challenges for States. Therefore, they will need to understand the difference between human rights derogations and limitations. Also, States will need to understand that draconian measures taken in response to a crisis are no less dangerous simply because they are not expressly labelled as emergency powers, or are taken under the assumption that they are compatible with the standard requirements of human rights law.

Finally, while assessing alleged human rights violations, it will be interesting to read for what concrete measures States didn't properly apply the proportionality principle, non-discrimination principle, and basic values of the ECHR. This last aspect was already emphasized by the president of the Court, Mr. Robert Spano, at the annual Court's press conference in Strasbourg, who underlined that the pandemic has already raised a number of important human rights issues, including the proportionality of measures taken by CoE Member States, and who emphasized that

⁶⁶ *Ireland v. UK*, App. No. 5310/71, Judgment from 18 January 1978, paras. 223-224.

⁶⁷ *Aksoy v. Turkey*, para. 86.

⁶⁸ Committee on Legal Affairs and Human Rights, para. 12.5.

"democracy, the independence of the judiciary and the rule of law is increasingly being called into question at both the European and global levels."⁶⁹

⁶⁹ Newsroom, ECHR President: Polarisation and COVID-19 threaten difficult times ahead, Strasbourg, 28 January 2021, at <https://www.coe.int/en/web/portal/-/echr-president-polarisation-and-covid-19-threaten-difficult-times-ahead> (last accessed 28 February 2021).