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THE AFFAIR OF "STATE OF EMERGENCY" – WAS 70 YEARS OF EUROPEAN CONVENTION ON HUMAN RIGHTS ENOUGH TO PREPARE MEMBER STATES FOR COVID-19 CRISIS?[*]

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Abstract

Seventy years after the adoption of the European Convention on Human Rights (hereinafter: ECHR), its one of a kind, carefully built and long-nurtured system of protection of human rights was unexpectedly and ultimately challenged by the outbreak of the COVID-19 pandemic.

In response to this still ongoing crisis, various Member states have acted in different ways. At least nine of them have formally notified derogations to the ECHR, which naturally inspired academics to open the debate whether that kind of reaction is justifiable.

According to Article 15 of the ECHR, a famous 'derogation clause', Member states are allowed, in exceptional circumstances of war or other public emergency threatening the life of the nation, to derogate from their obligations under the ECHR to the extent strictly required by the exigencies of the situation. While it can be argued that the risks posed to public health by the new virus can amount to an exceptional situation which threatens the life of the nation and requires special measures that may run afoul of the ECHR, it is still questionable whether usual restrictions permitted by the ECHR in regard to e.g. right to liberty and security, right to respect for private and family life, freedom of assembly and association or freedom of movement, have really shown to be inadequate and insufficient. Even more so, considering the fact that states of emergency carry a grave risk of being abused, often for political purposes.

This paper aims to analyse the legal nature, necessary conditions and the scope of Article 15 of the ECHR, from a general as well as COVID-19 pandemic point of view. Special attention will be paid to how Serbia is managing the crisis, especially since the state of emergency was declared even though there was another instrument at hand – statutory law adopted specifically for the purposes of natural disasters such as epidemic diseases.

Keywords: European Convention on Human Rights, European Court of Human Rights, Covid-19, Derogation of Human Rights, Permissible Restrictions of Human Right.

I. INTRODUCTION

When it comes to the need for a derogation clause, no real dilemma arose among the drafters of the European Convention on Human Rights (hereinafter: ECHR).[1] After the atrocities of

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[1] Although it did not appear in the first draft of the Convention, it was quickly drafted and accepted after the first proposals from Irish and United Kingdom delegates, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Council of Europe, 1975, 230

WWII, nobody questioned the possibility of a potential emergency at the ground of European states. The main focus was on establishing clear and apt limitation rules, which will not only serve as the protection of the community during exceptional circumstances and preserve the core rights of individuals, but also enable the international community to identify possible abuses from the states.[2] According to the *travaux préparatoires*, something of a puzzle did appear in regard to the question of whether a precise definition of rights and limitations was more suitable for the particular treaty or if that should have been a broader, general limitation clause.[3] After the exchange of views, proposals and experts reports, Article 15, the so-called 'derogation clause' assumed its final form, largely relying on the wording of draft Article 4 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR). It was commonly accepted that in its absence, *i.e.* without the prescribed procedure, states could and would derogate from the Convention during the emergencies, but with no supervision and with a greater risk of breaches.[4] On the other hand, due to Article 15, states are allowed to suspend certain rights in times of emergency as a means of seeking to promptly return to a situation of normalcy and thus restore the full measure of adherence to the Convention.[5]

If we once again turn back to the negotiations which preceded the final version of Article 15, it is quite interesting to quote the United Kingdom's delegate, who accentuated that 'it is defined in every declaration of human rights that in times of emergency the safety of the community is of first concern'.[6] Although this statement holds true as the basic idea of derogating human rights during the states of emergency, it is about to become even more meaningful in the year of 2020. Precisely 70 years after the adoption of the ECHR, European states, together with the rest of the world, are facing the challenge that the drafters of the ECHR probably could have never foreseen. And the unforeseeability of the outbreak of a deadly virus named COVID-19 is not the only issue at hand. Besides the fact that the world was not ready for a pandemic, even though it presumably never is, the dynamic of its spread and the severity of its consequences are still incomprehensible. It is estimated that from the beginning of the year, more than 45 million people worldwide got infected, while at least 1 million of them died.[7] As for Europe, so far more than 9 million cases have been reported, with a minimum of 200.000 deaths.[8] As devastating as the situation is, especially because the pandemic greeted the states completely unprepared, what is particularly troublesome in regard to the ECHR system amounts to the fact that this pandemic will question the respect of almost every human right guaranteed by the ECHR.

As one might have guessed, various Contracting States have acted differently in response to the crisis. Some, so far eleven of them, have officially declared a state of emergency and notified the Secretary-General of the Council of Europe of their intention to impose measures derogating from their obligations under the ECHR.[9] On the other hand, the majority of states

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[2] Ronald St. J. Macdonald, 'Derogations under Article 15 of the European Convention on Human Rights (1998) 36 ColumJTransnatlL, 228

[3] See, Joan F. Hartman, 'Derogation from Human Rights Treaties in Public Emergencies' (1981) 22 HarvIntLJ, 4-8

[4] Ronald St. J. Macdonald (n 2), 232

[5] Jean Allain, 'Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law' (2005) 11 Eur. Hum. Rights Law Rev., 481

[6] *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (Council of Europe 1975), 152

[7] https://www.worldometers.info/coronavirus/ (30.10.2020) Of course, it will take years after the world recovers to review those numbers and the accuracy of the count.

[8] https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases (31.10.2020)

[9] Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, San Marino and Azerbaijan, *Factsheet – Derogation in time of emergency* (European Court of Human Rights, Press Unit, September 2020), 2

continued to operate within their regular normative framework and recognized no need for activation of Article 15.
In the following pages it will be examined what are the conditions required by Article 15 of the ECHR and can they be fulfilled by the circumstances of the COVID-19 crisis, at least from those aspects of the crisis that are known at the moment of writing this paper.

II. ARTICLE 15 OF ECHR – AN ACE UP STATE'S SLEEVE

As has already been indicated, in exceptional circumstances and in a limited and supervised manner, Article 15 of ECHR allows Contracting States the possibility of derogating from their obligations under the ECHR, in order to secure certain rights and freedoms.[10] Prior to 2020, eight states have invoked their right to derogate, while only half of them had to justify the imposed measures in the light of Convention requirements before the European Court of Human Rights (hereinafter: ECtHR or the Court).[11] It must be noted that the background of all these cases was connected to challenges of civil wars, coup d'état, riots or terrorism threats and additionally, derogations were predominantly directed towards Articles 5 and 6 of ECHR.[12] With that being said, COVID-19 brought to the table not only a completely new basis for derogations, which is a natural disaster, *i.e.* a pandemic, but also expanded the range of rights which states wanted (or needed) to suspend.

Article 15 reads as follows:

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

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'[13]

Paragraph 1 – Derogating May Not Be the Appropriate Solution

The first paragraph of Article 15 defines the circumstances in which states can validly derogate from their obligations, hence places certain limitations on the measures they may take in this regard.
To begin with, the state must find itself in time of war or other public emergency threatening the life of the nation. For the purpose of this analysis, the notion of war is not quite relevant, since COVID-19 may fall only within the second limb - 'other public emergency'. Long ago, ECtHR clearly stated that the meaning of 'public emergency threatening the life of the nation' refers to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is

[10] *Guide on Article 15 of the European Convention on Human Rights* (European Court of Human Rights 2019), para. 1
[11] Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom, *Factsheet – Derogation in time of emergency* (n 9), 2
[12] Jean Allain (n 5), 480
[13] Article 15 of the European Convention on Human Rights, *Council of Europe*, 4 November 1950, ETS 5

composed'.[14] Of course, 'the organized life of the community' must be understood widely, not only as of the mere 'existence of the state or its people' but also in the sense of the (usual) 'way of life.[15] Needless to say, the COVID-19 crisis has indeed threatened the life of every nation, whether it is understood widely or narrowly. From the point of view of death tolls, almost complete collapse of healthcare systems, its impact on the global economy and, finally, the riots and protests it is constantly triggering, there is no denying that it is a public emergency and it is lapsing the way of life of all mankind.

The second substantial condition set out by the first paragraph of Article 15 requires that the imposed measures must be proportionate to the exigencies of the situation.[16] In determining whether a state has gone beyond what is strictly required, the Court will assess many relevant factors, as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.[17] Accordingly, the Court will consider various matters, such as if ordinary laws would have been sufficient to meet the danger caused by the public emergency[18], were the measures a genuine response to an emergency situation[19] and have they been used for the purpose for which they were granted[20]. Also, it will take into account whether the need for the derogation was kept under a continuous review,[21] were the measures subject to safeguards,[22] the importance of the right at stake and the existence, independence and effectiveness of judicial control over interferences with that right,[23] along with the proportionality of the measures and their unjustifiable discriminatory nature[24]. Needless to say, all of these matters will be under review in each and every case that will be brought before the Court in regard to the COVID-19 crisis and their fulfilment will differ from state to state, hence it is not possible to draw any general conclusions, at least not yet. However, few remarks can be made about examining whether the ordinary laws or actions otherwise compatible with ECHR would have been adequate to meet the emergency, *i.e*. the pandemic.

If we start by analysing what are the rights that were most affected by the imposed measures and which are the articles that the states referred to in their notifications about possible derogations, we will detect that those are: the right to respect for private and family life (Article 8), freedom of assembly and association (Article 11), freedom of movement (Article 2 of Protocol No. 4), protection of property (Article 1 of Protocol No. 1) and right to education (Article 2 of Protocol No. 1). What is common to the vast majority of them is a provision that allows limitations of guaranteed rights and freedoms during ordinary times (*permissible restrictions*).[25] Of course, certain conditions need to be satisfied in order to apply them, hence those permissible restrictions must be in accordance with the law, necessary in a democratic society and proportionate to one of the legitimate aims enumerated in the Convention. One of those legitimate aims which are listed in ECHR is the protection of health. Put differently, ECHR recognises the possibility for a state to limit certain rights in order to protect some collective interests, such as public health.

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[14] *Lawless v Ireland (No 3)* (1961), 1 EHRR 15, para 28

[15] Stefan Kirchner, 'Human Rights Guarantees During States of Emergency: The European Convention on Human Rights' (2010) 3 BJLP, 11

[16] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 Ger. Law J., 1776

[17] *Brannigan and McBride v United Kingdom* (1993), 17 EHRR 539, para 43

[18] *Lawless v Ireland (No 3)* (n 14), para 36; *Ireland v United Kingdom* (1978), 2 EHRR 25, para 212

[19] *Brannigan and McBride v United Kingdom* (n 17), para 51

[20] *Lawless v Ireland (No 3)* (n 14), para 38

[21] *Brannigan and McBride v United Kingdom* (n 17), para 54

[22] *Lawless v Ireland (No 3)* (n 14), para 37; *Brannigan and McBride v United Kingdom* (n 17), paras 61-65; *Aksoy v Turkey* (1966), 23 EHRR 553, paras 79-84

[23] *Aksoy v Turkey* (n 22), para 76; *Brannigan and McBride v United Kingdom* (n 17), para 59

[24] *A and Others v United Kingdom* (2009), para 190

[25] See Article 8, para 2, Article 11, para 2, Article 2 of Protocol No 1, paras 3 and 4.

Truth be told, one may challenge the fact that Article 2 of Protocol No. 1 does not contain any kind of provision referring to permissible restrictions. However, ECtHR solved this dilemma by stating that right to education is 'not absolute but may be subject to limitations; these are permitted by implication since the right of access (to education) by its very nature calls for regulation by the State'.[26]

After having clarified that, it becomes obvious that it will not be an easy task for states to convince the Court that the only way for them to effectively respond to the COVID-19 pandemic was to resort to Article 15 and impose measures that may suspend human rights, without an effort to firstly try out less draconian measures, as are permissible restrictions.

Naturally, it could be argued that states that resorted to Article 15 did not actually derogate from their obligations imposed by ECHR, but simply activated a mechanism that allows them to, if it is shown to be necessary. Unfortunately, the case of Serbia shows otherwise. The first case of infection was officially reported on March 6th 2020,[27] while a nationwide state of emergency was declared already on March 15th 2020.[28] As peculiar as this is, its strangeness becomes even more amplified taking into account that there were other instruments available for fighting the epidemical crisis, particularly *the Law on Protection of the Population from Infectious Diseases*,[29] *the Law on Decreasing the Risk from Catastrophe and Managing Emergency Situations*[30] or *the Law on Emergency Situations*[31]. All of those legal acts recognise the concept of an emergency situation, which is something in between the state of normalcy and the state of emergency. It enables the authorities to use particular measures of restricting human rights with additional force and means to respond to various types of crises, such as epidemic diseases.[32] Therefore, it remains incomprehensible, at least from the perspective of the protection of human rights, how did the authorities decide that this instrument was not sufficient and not proportionate to the COVID-19 crisis, but the state of emergency was.

When it comes to the measures imposed in Serbia, apart from the closing of the borders, the curfew was introduced, while people aged above 65 (70 in rural areas) were not allowed to leave their homes at any time[33]. The curfew of the whole nation started only as a ban on leaving homes during the night but has been extended over time. However, it has never reached the point where people cannot leave their homes at all, except for the elderly. That said, although it can be argued that a regular curfew can be qualified as a restriction of the freedom of movement, it is disputable were people older than 65 deprived of liberty, that is whether their right guaranteed under Article 5 of ECHR was derogated. In order to differentiate if their situation amounts to freedom of movement or the right to liberty, standards laid down by ECtHR must be considered.

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[26] *Leyla Sahin v Turkey* App no 44774/98 (ECHR, 10 November 2005), para 154; Although Article 1 of Protocol No 1, para 2 mentions the right of a State to enforce laws it deems necessary to control the use of property in accordance with the general interest, it must be admitted that it is not a usual 'permissible restrictions' clause. However, ECtHR held in many cases that as long as a 'fair balance' test is satisfied, infringements with this right are possible. For instance, it stated that "any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate general interest", *Lekic v Slovenia* App no 36480/07 (ECHR, 11 December 2018), para 105

[27] https://www.reuters.com/article/us-healthcare-coronavirus-serbia-idUSKBN20T152 (accessed: 11 November 2020)

[28] https://exit.al/en/2020/03/16/serbia-declares-state-of-emergency-closes-borders/ (accessed: 11 November 2020)

[29] *Official Gazette of the Republic of Serbia, Nos 15/2016 and 68/2020*

[30] *Official Gazette of the Republic of Serbia, No 87/2018*

[31] *Official Gazette of the Republic of Serbia, Nos 111/2009, 92/2011 and 93/2012*

[32] See also Ivan Cavdarevic, 'Serbia and Covid-19: State of Emergency in a State in Disarray' (*Verfassungsblog*, 12 May 2020)

[33] https://www.reuters.com/article/us-health-coronavirus-serbia-idUSKBN2143XR (accessed: 11 November 2020)

First of all, the purpose of measures is not decisive for the assessment.[34] What is more, even measures intended for the protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.[35] The notion of deprivation of liberty contains not only an objective element of a person's confinement in a particular restricted space for a not negligible length of time but also a subjective element in that the person has not validly consented to the confinement in question.[36] For instance, relevant factors that the Court will examine include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.[37] It goes without saying that the movement of the affected group was monitored by the police officers and sometimes even the army on the streets, that the sanctions for violating the curfew and the total ban of the movement were not only fines but also imprisonment for up to three years and that they had no social contacts, except for the people they lived with or via online networks. Moreover, another important matter to be accounted for is the fact that they were not informed on the duration of this measure. Even though they were allowed to go to the grocery's shops during the night after only a few days from the enforcement of the total ban of movement,[38] the amount of uncertainty that bears an unlimited duration of the measure must be interpreted as a violation of guarantees under Article 5. Finally, the possible discriminatory nature of this measure, that is making a distinction between the particular group and the rest of the population, on the ground of their age, will inevitably be questioned. All the more so, since the Constitutional Court of Bosnia and Herzegovina ruled that age-based lockdowns were discriminatory,[39] while the Constitutional Court of Serbia did not, because the age was not listed as grounds on which discrimination is prohibited in Article 202 of the Constitution.[40]
To leave no stone unturned, Article 5, para 1(e) of ECHR does permit the lawful detention of persons for the prevention of the spreading of infection diseases if that is in accordance with a procedure prescribed by law. However, since this is the first pandemic to be reviewed under ECHR, the Court had had no chance so far to consider whether this exception of Article 5 allows for the deprivation of liberty of healthy people to prevent the spread of infectious diseases. It is important though to note that in determining the lawfulness of detention in relation to infectious diseases, the Court will examine the 'danger of the infectious diseases for public health and safety' as well as 'whether the detention of the person infected is the last resort in order to prevent the spreading of the disease because less severe measures have been found to be insufficient to safeguard the public interest'.[41] The threshold is hence pretty high, so it

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[34] *Rozhkov v Russia (No 2)* App no 38898/04 (ECHR, 31 January 2017) para 74
[35] *Khlaifia and Others v Italy* App no 16483/12 (ECHR, 15 December 2016), para 71
[36] *Storck v Germany* App no 61603/00 (ECHR, 16 June 2005), para 74; *Stanev v Bulgaria* App no 36760/06 (ECHR, 17 January 2012), para 117
[37] *Guzzardi v Italy* App no 7367/76 (ECHR, 6 November 1980), para 95; *Storck v Germany* App no 61603/00 (ECHR, 16 June 2005), para 73
[38] http://rs.n1info.com/English/NEWS/a580591/Elderly-leave-their-homes-after-four-day-ban-due-to-coronavirus-threat.html (accessed: 11 November 2020);
[39] https://www.rferl.org/a/coronavirus-in-court-bosnia-s-age-based-lockdowns-are-ruled-discriminatory/30574453.html (accessed: 11 November 2020)
[40] http://www.bgcentar.org.rs/bgcentar/eng-lat/saopstenja/ (accessed: 11 November 2020) By way of explanation, the Constitutional Court of Republic of Serbia stated that 'the anti-discriminatory regime that applied to derogation measures is the one prescribed under Article 202 para 2 and not under Article 21 of the Constitution'. Truth be told, Article 202 para 2 does not mention age as one of the grounds of discrimination, but the provided list of grounds must always be interpreted as an *exempli causa* list, not an exhaustive one. Not only would that kind of interpretation be in line with the nature and the spirit of the prohibition of discrimination under international and national law, but also is required by way of systematic interpretation of the Constitution, since Article 21, which is a general prohibition of discrimination, states that 'any discrimination, direct or indirect, on any ground, in particular on the grounds of … age … is prohibited'.
[41] *Enhorn v Sweden* App no 56529/00 (ECHR, 25 January 2005), para 4

remains unlikely that the Court will take the stand that it is satisfied with regard to healthy people being deprived of liberty primarily for their own safety from COVID-19 virus.
At last, what is common to both the first and the second requirement of paragraph 1 of Article 15 is a wide margin of appreciation that ECtHR afforded states in its previous case-law. From the famous statement that 'it falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a 'public emergency' and if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it'.[42] Nevertheless, that discretion is not unlimited, but accompanied by European supervision.[43] Put in other words, it does make perfect sense that nobody but the state itself knows better the relevant factors of the imminent danger it is combating, hence is in a better place to decide on matters such as declaring a state of emergency or imposing certain measures as a response to the particular threat. Judges in Strasbourg cannot be in the same position as affected states to weigh those factors when it comes to the situations of terrorism threats, demonstrations or putsches that took place around the Contracting States in the last seven decades. However, the assessment of COVID-19 crisis should be different. This is the first time in history that almost all Contracting States are facing the same threat and that each and every one of us are well aware of its precariousness, spread, effects and consequences. By no means are all states in the same position in connection to the development of their health systems or economic wealth, but the threat is pretty much the same. From the perspective of that fact, it seems that Judge Martens made the point back in 1993 when emphasized that 'there is no justification for leaving states a wide margin of appreciation because the Court, being the 'last-resort protector of the fundamental rights and freedoms guaranteed under the Convention, is called upon to strictly scrutinise every derogation by a High Contracting Party from its obligations'.[44] Therefore, it can be suggested that in the context of COVID-19 pandemic, ECtHR reverse the course of its standings, abridge states of a wide margin of appreciation and heighten the threshold that needs to be reached in order to invoke Article 15.
Last requirement of paragraph 1 to be fulfilled calls for the measures not to be inconsistent with other obligations under international law of the particular state. In the jurisprudence of ECtHR, not many cases provide an answer to what amounts to 'other obligations under international law'. In *Brannigan and McBride v United Kingdom*, ECtHR considered the claim that official proclamation was a requirement for a valid derogation under Article 4 of ICCPR, hence that the absence of such proclamation meant that the United Kingdom's derogation was not consistent with its obligations under international law, but the Court was determined that it was not its role to interpret the meaning of the term 'officially proclaimed' in Article 4 and whether it was satisfied or not.[45] Be that as it may, it is plausible that the same question will be raised once again in regard to the COVID-19 pandemic. So far, many states that notified the Secretary-General of the Council of Europe about their activation of the Article 15 mechanism did not issue the same notification to the Secretary-General of United Nations,[46] which will inevitably cause concerns not only regarding the compliance with the ICCPR but also, as already stated, in the sense of Article 15 (1) of ECHR and their respect to 'other obligations

[42] *Ireland v United Kingdom* (n 18), para 207
[43] *Brannigan and McBride v United Kingdom* (n 17), para 43
[44] Concurring Opinion of Judge Martens, *Brannigan and McBride v United Kingdom* (n 17), para 4
[45] *Brannigan and McBride v United Kingdom* (n 17), paras 67-73; See also Stefan Kirchner (n 15), 13-14
[46] ECHR Contracting States that did inform UN Secretary-General on derogations in accordance with Article 4 ICCPR so far are Armenia, Georgia, Latvia, Romania and Estonia, https://ijrcenter.org/wp-content/uploads/2020/04/ICCPR-Derogations-28.apr_.20.pdf (accessed: 1 October 2020)

under international law'. One other point has been made throughout the doctrine about the possible meaning of 'other obligations under international law' and it is again primarily connected to the ICCPR.[47] Namely, taking into account a difference between the list of non-derogable rights included in ECHR and the one given by ICCPR, it is imaginable that a Contracting State derogates from the right that is not qualified as inviolable by the ECHR but is under the ICCPR and therefore by violating the provisions of ICCPR, it could also fail to satisfy the requirement of Article 15, that is to act in consistence with its 'other obligations under international law'.

Paragraph 2 – The Core Human Rights

As already indicated above, all rights of ECHR are divided into derogable and non-derogable. Second paragraph of Article 15 protects certain rights from derogation,[48] meaning that they will continue to apply during every state of emergency, irrespective of any justification or activation of Article 15.[49] Nonetheless, COVID-19 crisis will most certainly challenge the respect of many fundamental, non-derogable rights guaranteed by ECHR. On the face of it, it will probably be examined whether states succeeded in respecting their positive obligations to protect lives of people under their jurisdiction in accordance with Article 2 and to protect them from all forms of prohibited ill-treatment under Article 3. Even more so, the clear separation between positive and negative obligations of states under ECHR is sometimes quite difficult,[50] as can be the case with the 'natural herd immunity' scenario, that may be qualified as an omission of the State that directly led to the deaths of those especially susceptible to the virus, for instance, elderly or people with comorbidities, whose right to life is equally protected under the ECHR. Moreover, lack of adequate and reasonable medical treatment and assistance during the detention has already constituted degrading and inhuman treatment under Article 3,[51] but it is yet to be seen how this standard will evolve in the context of COVID-19 and whether it is going to be broadened outside of the detention cases. Finally, there is no denying that the duty to effectively respond to the threats to life and physical integrity posed by COVID-19 amounts to the positive obligations of states, hence many of what was done and what is going to be done will come under review, not only regarding the measures imposed, but also other matters, such as the accessibility, efficiency and quality of health care systems, or especially whether states intervened to protect vulnerable individuals from all forms of prohibited treatment and human rights infringements. All the more, taking into account that everyone was aware, or should have been aware, that the pandemic caused an increase of, for example, domestic violence.[52] Special attention must be paid to the maltreatment of people deprived of liberty, in detention, prisons or other confined spaces, who were unable to act to protect themselves from COVID-19

[47] See Jean Allain (n 5), 492-498

[48] Article 2 (the right to life) except in respect to deaths resulting from lawful acts of war and exceptions already included in the right itself; Article 3 (the prohibition of torture and other forms of ill-treatment); Article 4 para 1 (the prohibition of slavery and servitude); Article 7 (no punishment without law); Article 4 of Protocol No 7 (*ne bis in idem*) Article 2 of Protocol No 13 (the abolition of death penalty);

[49] *Guide on Article 15 of the European Convention on Human Rights*, para 29

[50] *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECHR, 20 December 2011), para 208

[51] *Mouisel v France* App no 67263/01 (ECHR, 14 November 2002), para 48; *Tekin Yildiz v Turkey* App no 22913/04 (ECHR, 10 November 2005); *Serifis v Greece* App no 27695/03 (ECHR, 2 November 2006); *Holomiov v Republic of Moldova* App no 30649/05 (ECHR, 7 November 2006); *Kucheruk v Ukraine* App no 2570/04 (ECHR, 6 September 2007), para 152; See Spyros Kalogeropoulos, 'Human Rights vs Covid-19' (Institute for Internet and Just Society, 15 May 2020), https://www.internetjustsociety.org/human-rights-vs-covid-19 (accessed: 2 November 2020);

[52] UN Woman, 'COVID-19 and Ending Violence Against Women and Girls', https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006 (accessed: 4 November 2020)

transmission, had no or very limited access to health care, often living in overcrowded collective rooms that make social distancing practically impossible and without access to sanitisers, other hygiene items or even hot water, which are all factors that amplify spreading of infection and increase the risk of COVID-19 mortality.[53] After all, some countries have introduced and imposed prison sentences for non-compliance with the COVID-19 measures[54] by enacting or enforcing various statutes and bylaws and it is yet to be examined whether these legal acts comprised qualitative requirements set out by ECtHR, namely those of accessibility and foreseeability.[55] Therefore, new standards and dimensions of both negative and positive obligations of states will emerge in respect to the non-derogable rights and their interaction with the COVID-19 pandemic.

Paragraph 3 – Undetermined Procedure

At last paragraph 3 obliges Contracting States to keep the Secretary-General of the Council of Europe fully informed of the derogating measures, reasons for them and also when such measures have ceased to operate so the provisions of the Convention are again being fully executed. It is of paramount importance since, in the absence of an official and public notice of derogation, Article 15 should not be applied to the imposed measures.[56] Thus, it is to yet be shown whether there are states that enacted emergency laws without lodging a formal notification in accordance with Article 15 (3), that is to say, states that have *de facto* derogated from their obligations arising from ECHR and what are the ramifications going to look like.
As for those states that have complied with this requirement, many possible shortcomings may be identified in the following period. Obviously, paragraph 3 of Article 15 does not specify all aspects of the request it imposes. For instance, there is no deadline defined by ECHR, yet the Court held that the notification does not have to be immediate, but rather 'without delay', so in *Lawless v Ireland* it allowed for a twelve-day interval between the measures entered into force and the subsequent notification to the Secretary-General.[57] It can be expected that the meaning of 'without delay' will be challenged once again in the context of COVID-19 pandemic.
Moreover, there is another important question in respect of elements that need to be incorporated in the notification. According to ECtHR, the requirement will be met by writing a letter and attaching copies of the legal texts laying down emergency measures, with an explanation of their purpose.[58] When it comes to the COVID-19 related derogations, notifications of the states differ significantly in the amount of information they provide, documents that are attached, if there are even any, and probably most importantly, in the existence of an explanation and reasoning for imposing particular emergency measures together with the quality and detailedness of that explanation.[59] It will be up to the ECtHR to rule on the matter of whether those notifications lack the necessary degree of specification in naming and explaining the measures that had been taken under the derogation and should the answer be positive, to decide on the consequences.

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[53] See https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch_2_PlacesofDetention.pdf (accessed: 2 November 2020)
[54] Jamie Prentis, 'Coronavirus: Serbia jails man for three years for breaking quarantine' (The National News, 29 March 2020) https://www.thenationalnews.com/world/europe/coronavirus-serbia-jails-man-for-three-years-for-breaking-quarantine-1.998156 (accessed: 8 November 2020)
[55] *Del Rio Prada v Spain* (ECHR 2012), 58 EHRR 37, para 91
[56] *Greece v United Kingdom* App no 299/57 (European Commission of Human Rights, 8 July 1959)
[57] *Lawless v Ireland (No 3)* (n 14), para 47
[58] Ibid.
[59] Compare for instance notifications of Serbia and Estonia, https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354 (accessed: 4 November 2020)

In the same manner, the wording of the paragraph at hand does not mention anything about periodical reports and notifications, but the ECtHR did say that 'it requires a permanent review of the need for emergency measures'[60]. To be completely fair, even without this clear instruction from the Court, the obligation to 'fully inform' can be interpreted in a way that it implies regular updating of the initial notification, as the situation further develops, which will, after all, demonstrate that the state is acting in a good faith and endeavours to actually respect the proportionality requirement.[61] Against this background, it must be noted that the majority of states that issued a notification in regard to COVID-19 crisis also submitted some kind of intermediate notice that contains information on the evolution of the crisis and possible extension of state of emergency.[62] Therefore, it can be concluded that parties of the Convention understand not only the formal procedure arising from paragraph 3 of Article 15 but also its purpose and intrinsic nature, hence without arguing the substantial aspects of those notifications, the distinction between those respecting the explained requirement and others that skipped it will have to be accounted when reviewing the Contracting State's approach towards COVID-19 crisis.

Finally, between various notification issued in regard to COVID-19 another difference can be detected. Some of them encompass a list of particular articles of the ECHR that may be derogated from,[63] although it must be admitted that there is no explicit demand to identify them.[64] Besides, it has been argued that in a situation of great uncertainty states may not immediately know what measures will be relied upon in order to meet an unfolding and dynamic crisis situation.[65] Even if that can be accurate in the light of war or terrorism emergencies, it is rebuttable in the case of a pandemic. Since the pandemic had started in China, at the end of 2019, Contracting States did have some time to prepare, organize and come up with a more or less comprehensive plan for managing the virus once it enters their territory. Of course, it is completely acceptable that a fair share of uncertainty was and still is present, yet that could also be overcome by continuous review of imposed measures. In other words, there is not much to be reproached to the scenario where a state notifies Secretary General of its plan for confronting the threat, particular measures it plans to enforce and list of rights those measures may intervene with, and then once again issue a notification about the need for new measures that have arisen, in the same manner, states are obliged to notify it when the need for any kind of derogating measures cease to exist. Additionally, if we take a look into the *ratio* of paragraph 3, its purpose is to promote transparency by publicly informing the other Contracting States, through Secretary-General, of measures that would, under regular circumstances, constitute a violation of ECHR.[66] From this perspective, it remains unclear and almost contradictory how state can inform about the particular emergency measures, without knowing what are the substantial articles of ECHR they may imperil. Consequently, naming particular articles of ECHR that may be derogated should be a necessary element of every notification.

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[60] *Brannigan and McBride v United Kingdom* (n 17), para 54

[61] David Harris, Michael O'Boyle, *et al*, *Law of the European Convention on Human Rights* (OUP 2018), 829-830

[62] It is registered that Romania made 7 reviews, Armenia 5 reviews, North Macedonia 4 reviews, Latvia 3 reviews, Georgia and San Marino 2 reviews, Albania 1 review, while Azerbaijan, Estonia, Moldova and Serbia had no reviews, https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354 (accessed: 4 November 2020)

[63] Albania, Estonia, Georgia, Latvia, Republic of North Macedonia and Republic of Moldova, ibid.

[64] David Harris, Michael O'Boyle, *et al* (n 61), 829

[65] Ibid, 830

[66] *Greece v United Kingdom* (n 56), para 158; See Natasha Holcroft-Emmess, 'Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification' (*EJIL: Talk*, 10 April 2020); See Ali Yildiz, 'Human Rights in a State of Emergency' (*IACL-AIDC Blog*, 26 March 2020)

As shown, many aspects of this paragraph have so far been blurred and vague. The underlying reason can be the rareness of ECtHR judgments dealing with this matter together with the fact that from the beginning, ECHR organs have avoided providing clear standings. An example can be the Commission stating that it is 'still not called upon generally to determine the question of whether failure to comply with Article 15(3) nullifies a derogation'.[67] Due to this kind of approach, we are here, 70 years after the adoption of ECHR, amidst the worldwide pandemic, arguing and debating about the elements of one of the most important Articles for the overall protection of human rights and freedoms.

To conclude with, it is high time all of these quandaries were faced with. Hopefully, COVID-19 crisis will pressure the ECtHR to address the effect of the failure to satisfy Article 15 (3) on the state's ability to derogate, to elucidate the mandatory elements of the notifications and maybe even develop a periodical review mechanism, that can even involve a monitory role of the Committee of Ministers,[68] hence bring us clarification of this long avoided and unresolved issue.

III. CONCLUSION

The underlying idea of derogation is not rocket science – it allows states a certain amount of flexibility to respond to emerging threats and to take the edge off the situation that has led to state of emergency, even though by imposing certain measures in that regard it suspends its obligations under ECHR. Yet, through the lens of COVID-19 crisis, this legal concept will be examined in its full controversy. Some authors suggested that in the case of a pandemic, invoking Article 15 is not particularly useful, since it sends an unnecessary message to people that states will start suspending their human rights.[69] Others took the view that declaring a state of emergency under Article 15 of ECHR and expressly acknowledging the unpalatable and temporary nature of these measures is the best practice, since it ensures that other states and international human rights organisations can monitor and even police how powers are being implemented.[70] But, to say that is to admit that in ordinary circumstances there is a permanent lack of transparency, oversight and supervision, which is simply unacceptable from the perspective of human rights protection. Furthermore, there is no denying that emergency powers carry a grave risk of being abused, often for political purposes such as controlling public opinion, censuring free media, curtailing dissent, dissolving Parliament, postponing elections or cementing the powers of dictatorships.[71]

Bearing that fact in mind, it is rather odd that states responded quite differently to the same threat that befell them. Eleven of them decided to derogate under Article 15, while the majority remained in the framework of permissible restrictions. As previously noted, since derogating measures must be proportionate to the threat which they are addressing, there are not many arguments in favour of derogation of Convention rights without an effort to firstly use permissible restrictions. If and only if those restrictions are shown to be insufficient and the need for derogating becomes obvious, Article 15 may be utilized in combating the pandemic, but it must always be used as a last resort. From the point of view of those states that relied on

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[67] *Cyprus v Turkey* App Nos 6780/74, 6950/75 (European Commission of Human Rights, 10 July 1976), paras 526-527

[68] David Harris, Michael O'Boyle, *et al* (n 61), 832

[69] Kanstantsin Dzehtsiarou, 'Covid-19 and the European Convention on Human Rights' (*Strasbourg Observers*, 27 March 2020)

[70] Alan Greene, 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic' (*Strasbourg Observers*, 1 April 2020)

[71] See also Martin Scheinin, 'Covid-19 Symposium: To Derogate or Not to Derogate?' (*Opinio Juris*, 6 April 2020)

it as soon as the virus knocked on their doors, it will be quite challenging for them to convince the Court that imposing measures that suspend human rights was really strictly required by the crisis.

Borrowing the words from judge Macdonald, an emergency or crisis situation challenging Contracting States presents a test for the whole Convention system, because if the system only functions when times are good, but fails to respond to a real emergency, then its authority and legitimacy are undermined.[72] COVID-19 pandemic will most certainly cause a review of the whole system of ECHR that has been carefully developed during the last 70 years, as well as a verification of the commitment of Contracting States to the protection of human rights. For now, one thing is certain. It is eagerly awaited to hear what approach will the Court take towards issues presented in this paper and many other aspects of this still ongoing pandemic.

[72] Ronald St. J. Macdonald (n 2), 998, 225