Vesna B. ĆORIĆ[*]

Institute of Comparative Law,
Belgrade, Serbia

Ana S. KNEŽEVIĆ BOJOVIĆ[**]

Institute of Comparative Law,
Belgrade, Serbia

Aleksandra D. VIŠEKRUNA[***]

Institute of Comparative Law,
Belgrade, Serbia

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NOTIFICATIONS OF DEROGATIONS FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN COVID-19 CONTEXT

- Summary -

Since the start of the COVID-19 pandemic, ten Member States of the Council of Europe have officially derogated from their obligations under the European Convention on Human Rights (ECHR), some of them extending the derogations multiple times. Such widespread recourse to derogations opened the debate on a number of issues, including the question of whether the form and substance of the submitted notifications of derogations were adequate, and of the legal effects in case of their inadequacy. This issue seems particularly pertinent given that the derogation clause under Article 15 of the ECHR which grants states a wide discretion to determine the reasons and the duration of derogations, as well as the aptness of emergency measures, is formulated vaguely. In this paper, the authors

[*] E-mail: v.coric@iup.rs

[**] E-mail: a.bojovic@iup.rs

[***] E-mail: a.visekruna@iup.rs

examine the regime governing notifications of derogations made under Article 15 of the ECHR. Applying the dogmatic, comparative and normative method, the authors first assess the substantive and procedural requirements which notifications of derogations are to include, and then go to critically examine the contribution of ECtHR in clarifying legal effects of the submitted notifications which do not meet the set requirements. Subsequently, the authors will elucidate the scope of the advisory and supervisory powers of Council of Europe Secretary General over assessing such notifications, taking into account the Parliamentary Assembly of the Council of Europe Resolution 2209. Building on the relevant theoretical approaches, case-law and standards developed by the competent CoE bodies, the authors formulate guidance on the path to be taken by the ECtHR and other CoE organs in their future supervision of notification regime in the context of derogation from the ECtHR due to the health emergencies.

Keywords: European Convention on Human Rights, Article 15, derogation, notifications, supervisory powers, Secretary General.

1. INTRODUCTION

The current COVID-19 pandemic has provoked a number of states to limit some of the most important human rights and fundamental freedoms in democratic societies. In response to the wake of COVID-19 pandemic, various Member states of the Council of Europe (CoE) have acted in different ways.[1] Anticipating the upcoming challenges, ten states have officially derogated from their obligations under the European Convention on Human Rights (ECHR) in Europe. More precisely, since the start of the pandemic Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino and Serbia each notified the Secretary General of the CoE (Secretary General) of a derogation specifically with respect to the COVID-19 pandemic.[2] They invoked the public

[1] Ana Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis?", *Iustinianus Primus Law Review*, Vol. 11/2021, Special Issue, p. 1, Available at SSRN: https://ssrn.com/abstract=3938255 or http://dx.doi.org/10.2139/ssrn.3938255.

[2] ECtHR, Press Unit, Factsheet, Derogation in time of emergency, January 2022, p. 2. See Igor Milinković, "Extraordinary Measures in Extraordinary Times: Legal Response to the COVID-19 Crisis

health emergency posed by the pandemic and applied Article 15 of the ECHR related to the "derogation in time of emergency".[3] While some derogations were notified and subsequently withdrawn during 2020, certain countries, such as Latvia and the Republic of Moldova, had reintroduced and then withdrew derogations during 2021, while Georgia has recently notified the Secretary General that it retains the already notified derogation until January 1, 2023.[4]

This is a record number of derogations from the ECHR; what is more, some of them were concurrent and they were all brought about by the same crisis. The high figures show that the impact of COVID-19 pandemic was more widespread compared to the effects of the previous public emergencies, which triggered derogations from the ECHR under its Article 15 in the past. While previous military and public emergencies that were known to the system of human rights protection under the ECHR did not have an immense trans-national effects, the current COVID-19 pandemic and the related health emergency are significantly different, as they seem to affect every European country equally or at least to a comparable degree.[5] Moreover, the effects of the current pandemic on human rights' protection globally show similar tendencies to those present among CoE Member states: 14 Latin American countries derogated from their obligations under the American Convention on Human Rights (ACHR), while 22 states derogated from the respective obligations under the International Covenant on Civil and Political Rights (ICCPR).[6] Out of the latter, 16 of them additionally applied the derogation clause under the ACHR or the ECHR, while six states derogated only from the ICCPR. These are Senegal, Palestine, Kyrgyzstan, Ethiopia, Namibia and Azerbaijan.[7]

in Bosnia and Herzegovina", *Medicine, Law & Society*, 14(2)/2021, p. 443.

[3] Sanja Jovičić, „COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights", *ERA Forum*, No. 21/2021, p. 547, https://doi.org/10.1007/s12027-020-00630-w.

[4] Notification - JJ9303C Tr./005-285 - 3 January 2022 as referred to in: Council of Europe, *Derogations Covid-19, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemi*c (www.coe.int/en/web/conventions/derogations-covid-19, 12.01.2022).

[5] Kanstantsin Dzehtsiarou, "Article 15 derogations: Are they really necessary during the COVID-19 pandemic?", *European Human Rights Law Review*, No. 4/2020, p. 364.

[6] (https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, 12.01.2022).

[7] Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic (Information believed correct as of 3 March 2021), Available at: www.rightofassembly.info/assets/downloads/Derogations_from_the_Right_of_Peaceful_Assembly_(at_11_November_2020)_.pdf; Audrey Lebret, "COVID-19 pandemic and derogation to human rights", *Journal of Law and the Biosciences*, vol. 7, no. 1/2020, p. 3.

Such massive recourse to derogations further inspired academics to open the debate on various issues e.g. whether that kind of reaction is justifiable in the context of health emergencies, such as the COVID-19 pandemic, as well as whether the form and substance of the submitted notifications of derogations is adequate.[8] In this contribution, the authors will not examine the issue of the justifiability of the derogations from the human rights instruments, but rather focus on examining the regime governing notifications of derogations which are made under Article 15 of the ECHR. Derogations notified under other international instruments will not be taken into account. The reasons for these are twofold. Firstly, the derogation clauses which are covered by Article 27 of the ACHR, Article 4 of the ICCPR and Article 15 of the ECHR are based on similar, though not identical, principles.[9] Secondly, the approaches of competent supranational courts and the Human Rights Committee also diverge among themselves when it comes to the applicability of the derogatory regime to human rights in the context of health emergencies. All of this renders an effort to jointly examine the application of notifications of derogations under three distinct international human rights instruments very complicated. This topic seems especially interesting given that the derogation clause under Article 15 of the ECHR which grants states a wide discretion to determine the reasons and the duration of derogations, as well the aptness of emergency measures, is formulated vaguely.[10] In order to, *inter alia*, strengthen and clarify the effects of Article 15(13) dealing with the notifications of derogations, the Parliamentary Assembly of the Council of Europe (hereinafter: PACE) adopted the Resolution 2209 in 2018. Its application was expected to be tested for the first time in the COVID-19 pandemics, which brings additional relevance to topic at hand.

[8] See inter alia, Vassilis P. Tzevelekos, Kanstantsin Dzehtsiarou, "Editorial: Normal as Usual? Human Rights in Times of covid-19", *European Convention on Human Rights Law Review*, Vol. 1, 2/2020, pp. 145-146.

[9] Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics", *Michigan Journal of International Law*, vol. 34, no. 3/2013, p. 508; Ana Rita Gil, "Derogation Clauses of International Human Rights Instruments: protecting rights at the maximum possible extent in times of crisis", *Catolica Law Review*, Vol. V, No. 1/2021, pp. 15-17.

[10] Kushtrim Istrefi, *A new mechanism for supervision of derogations from the European Convention on Human Rights: filling the accountability gap?* (http://blog.ucall.nl/index.php/2019/10/a-new-mechanism-for-supervision-of-derogations-from-the-european-convention-on-human-rights-filling-the-accountability-gap/, 20.12.2021).

The authors will, in this contribution, first assess the substantive and procedural requirements which notifications of derogations shall include, and then go to critically examine the contribution of ECtHR in clarifying legal effects of the submitted notifications which do not meet the set requirements. Subsequently, the authors will try to specify the exact scope of the advisory and supervisory powers of Secretary General over assessing notifications made under Article 15(3) of the ECHR. Building on the relevant theoretical approaches, relevant case-law and standards developed by the competent CoE bodies, the authors will formulate guidance on the path to be taken by the ECtHR and other CoE organs in their future supervision of notification regime in the context of derogation from the ECHR due to the health emergencies.

2. VAGUENESS OF THE REGIME GOVERNING THE NOTIFICATION OF DEROGATIONS UNDER THE ECHR

It was repeatedly stated that the ratio of Article 15(3) of the ECHR 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.[11] It seems that such a purpose cannot be fully accomplished since the said provision does not specify all the relevant aspects governing the form, substance and (legal) effects of the submitted notifications of derogations in a complete and unambiguous manner. Namely, Article 15(3) only requires from a state party to the ECHR to keep the Secretary General fully informed of the derogation measures and the reasons for them, as well as to inform the Secretary General when such measures have ceased to operate, so the provisions of the ECHR are again being fully executed.[12] From the standpoint of legal certainty and transparency, this provision seems vague and incomplete, as it failed to stipulate all the substantive and procedural requirements which notifications of derogations are to include. Moreover, the said provision also does not specify the legal effects in case the submitted notification does not meet the set requirements.[13] Finally, it does not

[11] Ana Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis", *op. cit*., p. 10.

[12] *Ibid*, p. 9.

[13] Natasha Holcroft-Emmess, *Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification*,

set out the exact scope of the powers of Secretary General in terms of assessing notifications made under Article 15(3).

2.1. Form and Substance of the Submitted Notifications of Derogations from the ECHR

Although scholars such as Gross have argued that derogation regimes under the ECHR and other human rights treaties rest on, among others, the component of temporariness, such a procedural requirement does not derive from Article 15 of the ECHR.[14] Moreover, the existing ECtHR case law further shows that, if states derogating from the ECHR limit the duration of the derogation, in the first place in their derogation notices and subsequently extend the derogatory measures in time, Article 15 is silent on any temporal limitation to such extensions.[15] However, there are some exceptions in that regard. The ECtHR stated in its case *A and Others v. United Kingdom* that temporality of an emergency has not been entirely absent from its analysis in the given case. Namely, the ECtHR in that case found that the duration of a conflict may be significant in assessing the proportionality of derogatory measures aimed at addressing such a situation.[16]

It seems that the duration of the state of emergency that was declared by states parties to the ECHR due to the COVID-19 pandemic will not be problematic when it comes to meeting the proportionality criteria. The reported durations vary from about 30 days in the case of Romania, Latvia, Armenia, Albania, and North Macedonia to approximately 50-60 days in the case of Moldova and Estonia and around 90 days in the case of the December 2020 notification of Latvia. A notable exception to setting relatively short limits is Georgia, which has recently extended both its emergency legislation and its

(www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/, 05.12.2021).

[14] Oren Gross, "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies", *Yale Journal of International Law*, No. 23/1998, p. 445 as referred to in Kushtrim Istrefi, Stefan Salomon. "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations", *Austrian Review of International and European Law Online,* 22(1)/2019, p. 8.

[15] Kushtrim Istrefi, Stefan Salomon. "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations", *op. cit*., p. 11.

[16] David Dyzenhaus, "States of Emergency" in collection of papers: *The Oxford Handbook of Comparative Constitutional Law* (eds. Michel Rosenfeld and András Sajó), Oxford University Press, Oxford, 2012, p. 456.

derogations until January 2023, thus having extended the derogation from the initial 30 days to almost three years.[17] It should be recalled that in the aforementioned case *A. and Others v. the United Kingdom* that period amounted to years.[18] Even though in that case the public emergency was not based on infectious diseases but on other grounds, it clearly shows that one to two-month duration cannot be considered unproportionate. Moreover, in the cases of infectious diseases which peak in certain seasons, it is reasonable to expect that a state of public emergency is declared even several times within a year.[19]

The provision of Article 15(3) further missed to stipulate the timeframe for submitting notifications of derogations. The ECtHR made some initial clarifications through its case law, holding that notifications of derogations do not have to be immediate but rather "without delay". The ECtHR added more precision in that regard in *Lawless v. Ireland* when it allowed for a twelve-day interval between the time measures came into force and the subsequent notification to the Secretary General.[20] It remains to be seen whether the meaning of the notion "without delay" will be revised in the context of COVID-19 through the ECtHR's case law. Nevertheless, the approach of determining the procedural requirements of notifications of derogations through evolving caselaw seems inadequate, as it is not conducive of legal certainty. Legal certainty and transparency would be better served if such a procedural requirement was being specified in other acts of the CoE.

Further, the provision of Article 15 (3) does not envisage that a list of particular articles of the ECHR that will be derogated from, should be a mandatory element of every notification of derogation. In that context, some authors, such as Zdravkovic, rightly argue that it remains unclear and contradictory how states can inform about the particular emergency measures, without knowing what substantial articles

[17] Council of Europe, *Derogations Covid-19, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic* (www.coe.int/en/web/conventions/derogations-covid-19, 12.01.2021).

[18] See *A and Others v United Kingdom*, Judgement of the Great Chamber of 19.02.2000, Application no. 3455/05. The same applies for the judgment in the case *Ireland v United Kingdom*, Judgement of 18. January 1978, Application No. 5310/71.

[19] Patricia Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19* (www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/, 14.12.2022).

[20] *Lawless v Ireland* (No 3), Judgement of 01.07.1961, Application No. 332/57, para. 47.

of ECHR they may imperil.[21] Other authors conversely argue that in a situation of great uncertainty states may not immediately know what measures will be relied upon in order to meet an ongoing crisis and are hence unable to promptly specify the list of rights those measures might interfere in the notification of derogation.[22] This approach can be showcased by the recent record of COVID-19 related derogations under the ECHR, where the notifications of seven states parties do encompass a list of particular ECHR's articles that may be derogated from, while the remaining three countries (Romania, Serbia and Armenia) do not contain such a list in their Note verbale.[23] However, this argumentation invoking the uncertainty of crisis situations cannot be accepted as well grounded.

Namely, although it is acceptable that some share of uncertainty is always present in public emergencies, it seems that such a problem can be overcome by continuous review of imposed measures. While the ECHR does not explicitly envisage the possibility of making a continuous review of the imposed measures, that option may be assumed to exist. This is because the ECHR within the same provision obliges states parties to "fully inform" the Secretary General of the CoE of the derogation measures which they have taken and the reasons for them. Harris *et al.* offer a convincing interpretation of the obligation to 'fully inform' by positing that it implies regular updating of the initial notification, as the situation further develops.[24] The approach taken by the ECtHR in the case *Brannigan and McBride v United Kingdom* is in line with the aforementioned interpretation offered by the legal doctrine, as the ECtHR in that judgment stated that the right of derogation including the respective obligation to make notifications of derogations "requires a permanent review of the need for emer-

[21] Ana Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis?", *op. cit.*, p. 10.

[22] David Harris *et al*., *Law of the European Convention on Human Rights,* Oxford University Press, 2018, p. 830.

[23] The notifications of derogations of following states parties to the ECHR encompass a list of particular articles of the ECHR that may be derogated from: Republic of Moldova, San Marino, Albania, Georgia, Estonia, Republic of North Macedonia, Georgia, and Latvia. See Council of Europe, *Derogations Covid-19, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemi*c, www.coe.int/en/web/conventions/derogations-covid-19, 12/01/2021. Interestingly, Romania, Armenia, and Serbia did not mention expressly in their *Note verbale* the articles affected by their derogation. See. Patricia Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19* (www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/, 14.12.2021).

[24] David Harris *et al., Law of the European Convention on Human Rights*, *op. cit.*, pp. 829-830.

gency measures".[25] Although the legal doctrine and the ECtHR's case law share the same view on the meaning of the obligation to "fully inform", we believe that there is further room for the improvement of the phrasing of Article 15(3) in order to make the obligation of submitting periodical reports and notifications unambiguous. When it comes to the application of the requirement of the "permanent review of the need for emergency measures", in the context of COVID-19 pandemic, it is noteworthy that seven states parties to the ECHR that issued a notification of derogation with regard to COVID-19 pandemic submitted some form of intermediate notice, containing information on the evolution of the crisis and possible extension of the state of emergency, while two (Serbia and Estonia) that derogated from the ECHR did not make subsequent reviews. Moldova opted for a second notification of derogation, while Latvia utilized both approaches.[26] While additional in-depth analysis is needed to determine what are the main reasons behind the said practices of Serbia and Estonia, its results could reveal whether the failure of targeted states to meet that requirement of "permanent review of the need for emergency measures" are attributable to the lack of understanding of the formal procedure under Article 15(3) or are motivated by some other reasons.

Finally, the wording of Article 15(3) of the ECHR failed to clarify to which extent the derogatory measures and their underlying reasons have to be specified in the notification. The ECtHR in its judgment *Lawless v Ireland* provided some relevant guidance in this regard, having stated that requirements governing the necessary level of specification of provided information will be met if a letter is submitted along with the attached copies of the legal texts laying down emergency measures, as well as an explanation of their purpose.[27] Against this background, it must be noted that notifications of states parties to the ECHR which made COVID-19 related derogations are mutually rather inconsistent regarding the amount of information they provide on derogation measures, attached documents and, most

[25] *Brannigan and McBride v. United Kingdom*, Judgement of 25 May, 1993, Applications No. 14553/89 and 14554/89*)*, para. 54.

[26] For more details and the precise timelines please consult: Council of Europe, *Derogations Covid-19, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemi*c (www.coe.int/en/web/conventions/derogations-covid-19, 12.01.2022).

[27] *Lawless v Ireland* (No 3), Judgement of 01.07.1961, Application No. 332/57Lawless v Ireland (No 3) (1961), 1 EHRR 15, para. 47.

importantly, about the quality of reasoning for imposing particular emergency measures.[28]

Most initial 2020 notifications refer to the World Health Organization's declaration of March 11, 2020, and briefly declare that the measures are necessary to stop the spread of the virus. While this may be sufficient reason to prove that the derogations from Article 11 of the ECHR and Article 2 of the Protocol No. 4 are instrumental in addressing the health emergency, the reasons for derogation from Articles 5 and 6 of the ECHR or Article 1 of its Protocol, for instance, are not that much straightforward and therefore may prove a significant challenge for the States should they face claims before the ECtHR. In addition, the Serbian notification lacks any annexes that would guide the Secretary General through the specific measures which have been so far adopted during the emergency and the relevant ECHR's provisions. Instead, the Serbian notification refers to the national website of the Government of the Republic of Serbia, where all the legal acts are available only in Serbian.[29] It is interesting to note that the Latvian notification of derogation from December 2020 only refers to the declared state of emergency and the "continuous threat the COVID-19 pandemic poses to public health" invoking the need "to combat the spread of virus […] and decrease the number of persons falling ill".[30]

Those diverging practices show that the unclear wording of Article 15(3), coupled with sparse case law on the issue, does not provide sufficient guidelines for the time being. In that context, Zdravkovic rightly observes that in addition to the undeveloped and deficient case law of ECtHR pertaining to the derogatory regime, one of the main reasons for the vagueness of the notification regime under paragraph 3 of Article 15 of the ECHR is that the ECHR organs have avoided providing clear standings on that in the past.[31]

[28] Patricia Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19* (www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/, 14.12.2021).

[29] Ibid.

[30] On Latvian measures see Anita Rodina, "Protection of fundamental human rights during the Covid-19 pandemic: the case of Latvia", in collection of papers: *International Organizations and States' Response to Covid-19* (eds. Sanja Jelisavac Trošić and Jelica Gordanić), Institute of International Politics and Economics, Belgrade, 2021, p. 366-369.

[31] Ana Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis", *op. cit.*, p. 11.

2.2. Effects of a lack of (adequate) notification of derogation

The ECtHR and the Commission, while it operated, were consistently reluctant to take a view on whether lack of notification or inadequate notifications under Article 15(3) shall produce legal effects to the derogating state concerned. The same applies to other organs of the CoE. While the Commission in its *First Cyprus* case and the *Lawless* case held that it has "reserved its view as to whether failure to comply with requirements of Article 15(3) may 'attract the sanction of nullity or some other sanction'",[32] in its subsequent case *Cyprus v. Turkey* it further stated that it "still does not consider itself called upon generally to determine the question" of whether failure to comply with Art. 15(3) nullifies a derogation.[33] It follows that in the case *Cyprus v. Turkey* the Commission did not ground its opinion on the failure of Turkey to notify the States Parties under Article 15(3).[34] Instead, it found an intelligent argument to avoid it. Rather than denying Turkey the right to invoke Article 15 because of failure to fulfil the international notification requirement from the third paragraph thereof, the Commission denied itself the competence to invoke this article because "some formal and public act of derogation" taken by the responsible authorities at the domestic level were lacking.[35] It was certainly prudent for the ECHR organs to refrain from turning the rule of notification from Article 15(3) into a dead letter in an open and explicit manner. However, the ECHR organs would be much more appreciated if they had taken a clear approach by determining what sanctions, if any, should be applied against states that fail to comply with the notification-related requirements stemming from Article 15(3).

Legal scholars have voiced different views on the matter of whether there should be legal effects in place in case there was a failure to make adequate notifications. In that context, some argue that the formal notification should be a mandatory requirement only

[32] See as referred to in case of *Cyprus v Turkey, Report of the Commission,* p. 161, para. 526. Mentioned in: Anna-Lena Svensson-McCarthy, *The international law of human rights and states of exception: with special reference to the travaux préparatoires and case-law of the international monitoring organs*, Kluwer Law International, The Hague, 1998, p. 320.

[33] Case of *Cyprus v Turkey,* Decision of 26 May 1975, Application Nos. 6780/74 and 6950/75, *Report of the Commission, p. 161,* para. 527.

[34] Anna-Lena Svensson-McCarthy, *op. cit.*, p. 320.

[35] *Ibid*., p. 321.

when the prevalence of a state of emergency is not evident, such as a kind of internal crisis. Yet in the case of a pandemic, such as the COVID-19, a notification should not be a prerequisite of Article 15, as its existence is indisputable.[36] In a similar vein, some authors invoke and try to apply the principle of systemic integration, according to which any "relevant rules of international law applicable in the relations between the parties" shall be taken into account in interpreting the treaty. In furtherance to that, they argue that the jurisprudence of the Human Rights Committee clarifies that a State's failure to make a formal notification pursuant to Article 4(3) ICCPR does not lead to any sanctions for the state concerned. Due to that, they conclude that the lack of adequate notification under Article 15(3) of the ECHR likewise should not produce any legal effects.[37]

Another group of scholars apply a rigid approach, arguing in favor of introducing sanctions in case of inadequate notifications of derogations in the ECHR system. In doing so, they put forward a number of arguments. Firstly, some authors, such as Forowicz, conclude that the ECtHR case law so far has been marked by an uneven and lower level of reception than the ICCPR, regardless of the existing principle of systemic integration. Therefore, there is no reason to stick to the interpretation and implementation of the notification regime under the ICCPR. Also, some scholars, such as Holcroft-Emmess, are not convinced that the aforementioned interpretation of the ICCPR provided by the Human Rights Committee does indeed go against the application of respective sanctions. Secondly, those scholars rightly observe that having notification as a mandatory requirement which conditions the ECHR' State Party ability to derogate promotes legal security and transparency, and adherence to the rule of law when the State is taking measures that would, under normal circumstances, constitute non-permissible restrictions on human rights.[38] Last but

[36] See the view taken by Seniha Birand Cinar as refered to in: Natasha Holcroft-Emmess, *Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification* (www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/, 05.12.2021).

[37] See the view invoked by Bruno Gelinas-Faucher as referred to in: Natasha Holcroft-Emmess, *Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification* (www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/, 05.12.2021). In that context, he cites Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 4(3) of the ICCPR.

[38] See among others: Natasha Holcroft-Emmess, *Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification* (www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/, 05.12.2021).

not least, the existing case-law proves that the ECtHR always has to consider the necessity of the taken derogatory measures. Such a necessity test demands a comprehensive analysis of the justifiability of the individual restrictions in the light of the threats facing the nation. The proper conduct of the necessity test requires the availability of data contained in the notification of derogations.[39]

For all those reasons, the aforementioned view according to which the "visibility" of the COVID-19 pandemics should weaken the notification related obligations of the derogating state parties cannot be accepted. The information included in the notification is useful for the ECtHR when adjudicating, as it is for other CoE organs, even if the emergency itself, such as the one provoked by the COVID-19 pandemic, is apparent to all. Therefore, the ECtHR would be advised to proceed strictly in assessing the notification requirements so as to avoid any potential abuse of emergency powers in massive COVID-19 derogations from the ECHR. It remains to be seen whether in the near future the convincing arguments brought by legal scholars advocating a rigid approach will make any impact on the ECtHR when adjudicating cases where notification under Article 15(3) is missing, or at least does not meet the set requirements while the particular state party took derogatory measures. It should be recalled that the ECtHR, for the time being, did not decide on the merits of any of the cases when it comes to the applications against the states which derogated from Article 15 in the context of the COVID-19 pandemic. Hopefully, the ECtHR will not miss the opportunity to deal with the quality of notifications and legal effects in case of their lack and by doing so adequately address this unprecedented health emergency.

2.3. Scope of the Powers of the Secretary General of the CoE

The insufficiently developed case law of the ECtHR and the Commission dealing with the notification regime apparently did not add clarity to the provision of Article 15(3) of the ECHR. However, it is noteworthy that legal scholars rightly posit that no judicial supervision alone, including that of the ECtHR, due to its inherent

[39] Anna-Lena Svensson-McCarthy, *op. cit.*, p. 324.

limitations, can effectively supervise the derogatory regime.[40] The reasons for this are manyfold.

First, the ECtHR is not capable to guarantee a timely review of derogation measures in order to provide a prompt response to derogation measures in place. According to the applicable priority policy of 2009 pertaining to the examination of incoming cases, applications relating to derogatory measures do not appear as a separate category that enjoys priority. Since they are not classified as 'urgent cases', it may take years before the ECtHR decides on them. In that context, Dzehtsiarou recently claimed that the effects "of COVID-19 will be seen in 5-6 years when measures taken by the Governments now will be analyzed in judgments of the [ECHR]".[41]

Second, the ECtHR rulings focus on individual complaints and, thus cannot address the magnitude of human rights' concerns related to derogation regimes, instead examining only those directly connected to the facts of the pending case. Furthermore, if there are no admissible complaints before the ECtHR in relation to a particular derogation practice, the ECtHR cannot deliver a judgment on it.[42] It is reasonable to expect that the anticipated high rate of inadmissible applications dealing with COVID-19 related issues will undermine the ECtHR efforts to properly address the matters pertaining to the adequacy of submitted notifications of derogations. As of October 2021, apart from received interim measures, there are over forty applications submitted to the ECtHR in relation to the COVID-19 health crisis. Most applications that have been brought before the ECtHR are yet to be judged. However, it is noteworthy that out of the cases in which a decision has been rendered, ECtHR found the violation of the ECHR rights only in one case, while all other applications were declared inadmissible. Nevertheless, the high rate of applications that were declared inadmissible and the fact that the only rendered ECtHR judgment on COVID-19 was against Malta, which did not derogate from the ECHR, show that it is not overly realistic to expect that a

[40] Kushtrim Istrefi, *Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe* (https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/, 12.12.2021).

[41] Kanstantsin Dzehtsiarou, "Article 15 derogations: Are they really necessary during the COVID-19 pandemic?", *op. cit.*, p. 364. See also Laurence R. Helfer, "Rethinking Derogations from Human Rights Treaties", *American Journal of International Law*, 115(1)/2021, p. 27.

[42] Kushtrim Istrefi, Stefan Salomon, "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations", *op. cit.*, pp. 21-22.

fruitful ECtHR's jurisprudence relevant for the COVID-19- related derogation will be developed.

Consequently, the ECtHR, just like any other court, alone is not ill-equipped to systemically address the problems associated with derogations, including ones related to form, content and effects of their notifications. Due to those inherent limitations, the clear need for other non-judicial supervisory institutions to step in and address this issue, was recognized.

It has been further argued that in the past, occasional proactive engagements of the Venice Commission or the CoE Commissioner for Human Rights were not able to reduce the loopholes in the supervision of derogations, whereas substantial development was achieved by the Resolution 2209 of the PACE, which was adopted in 2018.[43] The Resolution 2209 envisages that the Secretary General should take an essential role in engaging with complex issues of derogations. More specifically, it recommends the Secretary General to take a proactive role and advise and supervise States before and during a derogation.[44]

As regards the proposed advisory role of the Secretary General, there is no clear support in Article 15 of the ECHR to suggest that states are obliged to seek advice prior to derogation. The wording of Article 15 of the ECHR envisages that a State only informs, rather than consults, the Secretary General about a planned derogation. From the standpoint of Article 15, the advisory role of the Secretary General in derogation cases depends solely on the willingness of the States Parties of the ECHR to cooperate.

Nevertheless, the recommended supervisory role of the Secretary General does not seem contentious from a legal standpoint. According to Resolution 2209, the active supervisory role could be

[43] Kushtrim Istrefi, *Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe* (https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/, 12.12.2021).

[44] In particular, the Resolution 2209 recommends that the Secretary General: 20.1. as depository of the Convention, provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope;20.2. open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention; 20.3. on the basis of information provided in response to such an inquiry, engage in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the legal competence of the European Court of Human Rights. See more on this at: Kushtrim Istrefi, Stefan Salomon, "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations", *op. cit*., p. 23.

exercised by way of pressuring states to provide information and detailed reasons for derogations in line with Article 52 of the ECHR and, once such information is provided, by engaging in continuous dialogue with the states concerned about the nature, duration and adequacy of a derogation and notification thereof. The clarification and strengthening of the supervisory powers of the Secretary General with regard to derogatory regime constitutes the key benefit of Resolution 2209. Istrefi argues that through this Resolution, the PACE has turned a 'retired' Article 52 of the ECHR, which was hardly ever used in the past, into an essential tool, through which the Secretary General can supervise each derogation practice.[45] The revival of Article 52 of the ECHR seems critical, since its wording confirms that a state is obliged to provide the information requested by the Secretary General. The additional benefit of putting into the play Article 52 ECHR in derogation context is that it does not limit the scope of inquiries. Consequently, it provides the Secretary General with wide discretionary power to supervise any type of derogation and engage in dialogue with states about any aspect of derogations.[46]

The envisaged active advisory and supervisory role by the Secretary General does of course not set aside or limit the wide discretionary power of states parties to derogate from the ECHR. Nevertheless, it ensures that any problematic features of derogations are monitored instantly through a 'new layer' of international supervision of derogation practices. In order to properly exercise new powers/functions, the Secretary General, however, must develop sufficient expertise and procedures to exercise his function properly and effectively.[47] In order to fully utilize those roles of the Secretary General, the meaning of Resolution 2209 needs to be specified as to make clear whether or not the Secretary General should open an inquiry under Article 52 in relation to every single derogation. Although activating Article 52 of the ECHR could have helped in supervising the massive COVID-19 related derogation, the Secretary General confirmed that they have

[45] Kushtrim Istrefi, *A new mechanism for supervision of derogations from the European Convention on Human Rights: filling the accountability gap?* (http://blog.ucall.nl/index.php/2019/10/a-new-mechanism-for-supervision-of-derogations-from-the-european-convention-on-human-rights-filling-the-accountability-gap/, 20.12.2021).

[46] Kushtrim Istrefi, Stefan Salomon, "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations", *op. cit.*, pp. 20-21.

[47] *Ibid.*, p. 21.

not used inquires under Article 52 as part of its supervisory role in relation to current derogations.[48]

Since the COVID-19 related derogations are the first derogations made subsequent to the adoption of Resolution 2209, the active response of the Secretary General to these derogations could have released the full potential of the Resolution 2209. Unfortunately, it seems that this opportunity was completely missed.

Nevertheless, the case of Hungary may serve as an illustration of an isolated positive step taken by Secretary General in the COVID-19 context. Although Hungary cannot be considered as derogating state, since it did not activate Article 15 derogations in the COVID-19 context, Resolution 2209 is also applicable to it, given that its applicability extends to any State Party of the ECHR that considers the possibility of derogating regardless of the fact whether particular derogation was made. Subsequent to credible human rights organizations warning Hungary that it may misuse COVID-19 emergency measures, on March 24, 2020, the Secretary General offered to Hungary all expertise and assistance on how to ensure compatibility of emergency measures with human rights.[49] This response of Secretary General was compatible with the advisory role recommended by Resolution 2209. In furtherance to it, however, on 31 March 2020, Hungary adopted a law on emergency powers, without having consulted with the Secretary General. Therefore, the Secretary General in the case of Hungary missed the opportunity to consider activating its supervisory powers as envisaged by Resolution 2209 in order to effectively supervise the implementation of emergency measures in Hungary. The approach of the Secretary General with regard to COVID-19 related practices will determine whether it will become an effective and important supervisory and advisory mechanism or will continue to serve as a mere "mailbox" as referred by Istrefi where state parties deposit their notifications of derogations.[50] Without strengthening the advisory and

[48] Kushtrim Istrefi, *Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe*, (https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/, 12.12.2021).

[49] *Secretary General of the CoE to Viktor Orban*, *Prime Minister of Hungary*, 24 March 2020, Internet https://rm.coe.int/orban-pm-hungary-24-03-2020/16809d5f04, 12/01/2022.

[50] Kushtrim Istrefi, A *new mechanism for supervision of derogations from the European Convention on Human Rights: filling the accountability gap?* (http://blog.ucall.nl/index.php/2019/10/a-new-mechanism-for-supervision-of-derogations-from-the-european-convention-on-human-rights-filling-the-accountability-gap/, 20.12.2021).

supervisory functions of the Secretary General over states parties making COVID-19 related derogations, the spirit of Resolution 2209 as well as the ratio of Article 15(3) of the ECHR cannot be fulfilled in the near future.

3. CONCLUSION

The record number of simultaneous derogations from the ECHR provoked by the COVID-19 pandemic presented a valuable opportunity to reexamine the vague and incomplete notification regime under Article 15(3) of the ECHR. The envisaged ratio of Article 15(3) of the ECHR to promote transparency and legal certainty by publicly informing other Contracting States, through Secretary General, of the derogatory measures taken cannot be fully accomplished under the existing regime, since the said provision fails to regulate all the aspects governing the form, substance and legal effects of the submitted notifications of derogations in a complete and unambiguous manner.

As for the incompleteness of the substantive and procedural requirements which the notifications of derogations shall include, first of all, Article 15(3) is silent on their various temporal aspects, such as the maximum duration of the derogations, limitation of their potential extensions and the timeframe for submitting notifications of derogations. Moreover, ECHR's Article 15(3) fails to determine the necessary level of specification of information that should be provided in notifications. The existing approach of having the requirements of notifications of derogations determined through evolving case law of the ECtHR seems inadequate, and certainly not conducive of legal certainty. This can be showcased by the recent record of COVID-19 related derogations under the ECHR, where the notifications of states parties to the ECHR are mutually rather inconsistent regarding the aforementioned substantive and procedural requirements of notifications. Those diverging practices show that the unclear wording of Article 15(3), coupled with sparse case law on the issue, does not provide sufficient guidelines for the time being. Legal certainty and transparency would be better served if such requirements were specified either in the ECHR or in other acts of the CoE. This is particularly relevant in the context of the observation made in the 2021 annual report of the Secretary General of the Council of Europe,[51]

[51] State of Democracy, Human Rights and the Rule of Law, A democratic renewal for Europe, p.

which reiterates that "Covid-related restrictions and measures must not only be necessary and proportionate, but also limited in duration. This means that, as the public health crisis eases, they should be lifted in as complete and timely a manner as possible".

When it comes to failure of the provision of Article 15(3) to determine the legal effects of the lack of adequate notifications of derogations, it is noteworthy that the ECtHR and the Commission, while it operated, were consistently reluctant to take a view on whether or not a lack of notification or inadequate notifications under Article 15(3) produce legal effects to the derogating state concerned. It was certainly prudent for the ECHR organs to refrain from turning the rule of notification from Article 15(3) into a dead letter in an open and explicit manner. However, the ECHR organs would be much more appreciated if they had taken a clear approach by determining what sanctions, if any, should be applied against states that fail to comply with the notification-related requirements stemming from Article 15(3).

The view invoked in legal doctrine according to which the "visibility" of the COVID-19 pandemics should weaken the notification- related obligations of the derogating state parties cannot be accepted. The information included in the notification is rather useful for the ECtHR when adjudicating, as it is for other CoE organs, even if the emergency itself, such as the one provoked by the COVID-19 pandemic, is apparent to all. Therefore, the ECtHR would be advised to proceed strictly in assessing the notification requirements so as to avoid any potential abuse of emergency powers in massive COVID-19 derogations from the ECHR. However, it remains to be seen whether in the near future the convincing arguments brought by legal scholars advocating a rigid approach will make any impact on the ECtHR when adjudicating cases where adequate notification under Article 15(3) is missing, while the particular state party took derogatory measures. It should be recalled that the ECtHR, for the time being, did not decide on the merits of any of the cases when it comes to the applications against the states which derogated from Article 15 in the context of the COVID-19 pandemic. Hopefully, the ECtHR will not miss the opportunity to deal with the quality of notifications, and legal effects in case of their lack and by doing so adequately address this unprec-

8 (https://rm.coe.int/annual-report-sg-2021/1680a264a2, 21.12.2021).

edented health emergency. This would be particularly relevant in the context of repeated extension of derogations, especially those covering substantial periods of time.

Nevertheless, it is reasonable to expect that the anticipated high rate of inadmissible applications dealing with COVID-19 related issues will undermine the ECtHR's efforts to properly address the matters pertaining to the adequacy of submitted notifications of derogations. As of October 2021, apart from received interim measures, there are over forty applications submitted to the ECtHR in relation to the COVID-19 health crisis. The high rate of applications that were declared inadmissible and the fact that the only rendered ECtHR judgment on COVID-19 was against Malta, which did not derogate from the ECHR, show that it is not overly realistic to expect that a fruitful ECtHR's jurisprudence relevant for the COVID-19- related derogation will be developed.

Due to the inherent limitations of the judicial organs such as the ECtHR to systematically address the problems associated with notifications of derogations, the clear need for other non-judicial supervisory institutions to step in and address this issue is apparent. In that regard, much has been expected from the Resolution 2209 of the PACE of 2018 as it clarifies and strengthens the advisory and supervisory powers of the Secretary General with regard to notification regime under Article 15(3) of the ECHR. Given that the COVID-19 related derogations are the first derogations made subsequent to the adoption of this resolution, the active response of the Secretary General to these derogations could have released the full potential of the Resolution 2209. Unfortunately, it seems that this opportunity so far has been completely missed. Since the COVID-19 pandemic is still ongoing, there are certain prospects that the ECtHR as well as the Secretary General, in case of new derogations, will activate their inherent powers in order to effectively supervise states parties with regard to their notification practices. Again, these reinforced roles seem to be needed in the overall social context in the European Continent or rather, what is, according to the annual report of the Secretary General, a democracy in distress, resulting in a call for the national authorities to recommit to the ECHR and respect and execute ECtHR decisions. Without strengthening the roles of the Secretary General and the ECtHR over states parties making COVID-19 related dero-

gations, the spirit and the ratio of Article 15(3) of the ECHR cannot be fulfilled in the near future.

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Весна Б. Ћорић, Ана С. Кнежевић Бојовић,
Александра Д. Вишекруна

ОБАВЕШТЕЊА О ОДСТУПАЊУ ОД ЕВРОПСКЕ КОНВЕНЦИЈЕ О ЉУДСКИМ ПРАВИМА У КОНТЕКСТУ ПАНДЕМИЈЕ КОВИДА 19

- Резиме -

Од почетка пандемије Ковида 19, десет држава чланица Савета Европе званично је одступило од својих обавеза по Европској конвенцији о заштити људских права и основних слобода (ЕКЉП), при чему су неке од њих ова одступања продужавала више пута. Овако значајан број држава које су се определиле да искористе могућност одступања од ЕКЉП отворио је простор за дебате о многим питањима, укључујући и то да ли су форма и садржина обавештења о одступањима биле адекватне, те о правним последицама пропуста, у случају да нису. Ово питање чини се нарочито значајним ако се има у виду да одредба члана 15 ЕКЉП која се односи на одступања, а којом се дају широка овлашћења државама чланицама приликом опредељивања разлога за одступања и трајање одступања, није довољно прецизно формулисана. Отуда, у овом раду ауторке испитују правни режим који се односи на обавештења о одступањима у складу са чланом 15 ЕКЉП. Користећи се нормативним, догматским и упоредноправним методом, ауторке прво анализирају материјалне и процесне аспекте обавештења о одступању, а потом критички преиспитују допринос Европског суда за људска права у прецизирању правних последица пропуштања да се наведени материјални и процесни захтеви испуне. Потом, ауторке указују на саветодавну и надзорну улогу Генералног секретара Савета Европе у односу на дата обавештења, са нарочитим освртом на Резолуцију 2209 Парламентарне Скупштине Савета Европе из 2018. године. Узимајући као полазну основу релевантна правнотеоријска становишта, те праксу и стандарде развијене под окриљем Савета Европе, ауторке формулишу смернице о приступу који треба да користе како Европски суд за људска права, тако и друга тела Савета Европе у контексту одступања од ЕКЉП у ванредним околностима у вези са јавним здрављем.

Кључне речи: Европска конвенција о људским правима, члан 15, одступања, обавештење, надзорна овлашћења, Генерални секретар Савета Европе.

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