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COVID-19: From Sanitary Emergency to Human Rights Crisis. The Pandemic and the European Convention on Human Rights

COVID-19: dalla emergenza sanitaria alla crisi dei diritti umani. La pandemia e la Convenzione Europea sui Diritti dell'Uomo

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Abstract

This article examines the process of derogation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It focuses on the COVID-19 emergency situation and on the limits posed to fundamental human rights and freedoms by the measures implemented in response to the sanitary crisis in Europe. It is argued that derogation is acceptable if under the close supervision of Council of Europe bodies (CoE). Moreover, any emergency measures which determine the derogation or limitation of human rights and fundamental freedoms should be reasonable and limited in scope and time, and thus should have an exceptional and temporary nature and should be constantly tested against the principles of necessity and proportionality.

L'articolo esamina il processo di deroga della Convenzione Europea dei Diritti dell'Uomo CEDU nel contesto della pandemia causata dal nuovo coronavirus Sars-Cov-2 (COVID-19) in Europa, riflettendo sull'impatto delle misure emergenziali sui diritti umani e le libertà fondamentali. Si argomenta che la deroga per affrontare situazioni di crisi è accettabile sotto l'attenta supervisione del Consiglio d'Europa. L'intento è di evidenziare che le misure emergenziali che determinano una limitazione o deroga dei diritti umani e delle libertà fondamentali debbano essere ragionevoli e limitate sia nel tempo che nell'applicazione, dunque devono essere misure eccezionali e temporanee, costantemente sottoposte alla verifica del rispetto dei criteri della proporzionalità e della necessità.

Keywords

EU Law, European Convention on Human Rights, European Court of Human Rights, COVID-19
Diritto dell'Unione Europea, Convenzione Europea per i Diritti Umani, Corte Europea per i Diritti Umani, COVID-19

Introduction

Never in the history of the Council of Europe (CoE) have there been so many contemporary derogations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It is also the first time after World War II that Europe is facing a common threat and the situation of human rights in the context of the COVID-19 pandemic is worth analysing.

Up to 2020 the Convention has only been derogated by a total of nine member States, for reasons connected with situations of emergency and/or war, as provided under Article 15 ECHR.[1] The first case of derogation of the ECHR, *Greece v. UK* (1958), was dealt with by the European Commission for Human Rights in 1956, and it concerned the situation in Cyprus, which at the time was under British administration (Zagrebelsky, Chenal and Tomasi 2016: 138). Subsequently, the competent body became the European Court of Human Rights and other cases regarded, for instance, the United Kingdom, which applied Article 15 during the Northern Ireland crisis summing a total of 31 derogations from the ECHR between 1957 and 1979, while Ireland presented 4 derogations (Zagato 2006: 150). In the same period, only Turkey derogated the ECHR more than the UK, 32 times, and by 1992, it had already derogated the convention 71 times, mainly due to the Kurdish crisis (Zagato 2006: 150).

The fundamental difference between past derogation and this year's derogations is precisely the type of emergency that triggered them: if in the past the reasons had a political nature, in 2020 the crisis was triggered by the sanitary emergency of the global pandemic SARS-COV-2 determined by the new coronavirus COVID-19, which resulted in the declaration of national states of emergency and ten notifications of derogation of the ECHR between March and April 2020. On 11 March 2020 the World Health Organisation (WHO) had issued a public statement on the state of global pandemic of COVID-19, and soon afterwards several European States declared the national state of emergency caused by the new coronavirus, following up with unilateral notifications of derogation from the ECHR from Latvia, Armenia, Estonia, Georgia, Albania, Moldova, Romania, North Macedonia, Serbia and San Marino. Although the pandemic eventually hit all CoE member States (and not only), the contagion propagated with different timelines and different scales of effect, thus also the measures adopted by each country to deal with the disease were quite different, at least in the initial phases of contagion. What is striking however, is the fact that the European States that were most affected

[1] The complete list of derogations as per Art. 15 ECHR is available online at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO

by the pandemic in terms of positive cases and deaths did not derogate from the ECHR, even though the measures they adopted for the containment of the virus and to limit the contagion, to protect the right to life and the right to health as well as the safety and security of the population, had a direct effect of curtailment of other human rights and fundamental freedoms enshrined in the ECHR – such as the right to respect for private and family life (Art. 8), freedom of expression (Art.10), freedom of assembly and association (Art.11), and others which will be analysed in the present article.

The Derogation of the ECHR and Emergency Measures

By the first week of April 2020 already 9 member States notified their derogation from the Convention for the Protection of Human Rights and Fundamental Freedoms (more commonly referred to as the European Convention on Human Rights, ECHR),[2] determining the decision of the Secretary General (SG) of the Council of Europe (CoE) to assume a more proactive role. For this reason, on 7 April 2020 a toolkit for member States was published online, entitled *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis* with the purpose of providing governments with guidelines "for dealing with the present unprecedented and massive scale sanitary crisis in a way that respects the fundamental values of democracy, rule of law and human rights" (CoE 2020a: 2). Subsequently, on 10 April also San Marino submitted a Note Verbale derogating the Convention due to the COVID-19 sanitary emergency.

The ECHR itself, like other international and regional conventions and treaties on human rights, provides the possibility of derogation in time of emergency.[3] More precisely, Article 15 of the ECHR sets forth the substantial and procedural conditions for derogation and it is divided in 3 paragraphs: first it sets forth the circumstances and conditions for derogation, fixing certain limits to the application of emergency measures; the second paragraph enshrines the fundamental rights whose derogation is never allowed and the final paragraph regards the procedures required for derogation.

[2] Latvia, Armenia, Estonia, Georgia, Albania, Romania, North Macedonia and Serbia; San Marino's notification is dated 10.04.2020.

[3] Art. 4 of the International Covenant on Civil and Political Rights allows derogation in times of public emergency; the derogation in time of war or public emergency is addressed in Art. 30 of the European Social Charter; Art. 27 of the American Convention on Human Rights provides for the suspension of guarantees through derogation "In time of war, public danger, or other emergency that threatens the independence or security of a State Party". All three international treaties have similar content and maintain the same tripartite structure as Art. 15 ECHR, which will be explained further on.

Circumstances and Conditions for Derogation

The first paragraph of Art. 15 ECHR sets forth that: "In 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." Categorising the pandemic under the umbrella term of emergencies "threatening the life of the nation" might appear quite straightforward at first glance, but the definitional issue is quite tricky from an international law perspective. Such emergencies are comparable to natural disasters, which imply "specific content of obligations inherent in general human rights guarantees as applied in disaster contexts. Such a definition can indeed help identify the situations in which protection may be invoked and clarify who needs protection in such specific circumstances" (Zorzi Giustiniani et al. 2018). Ozturk (2020) applied the UN International Law Commission's Articles on the Protection of Persons in the Event of Disasters to the COVID-19 outbreak and, notwithstanding significant shortcomings in the context of pandemics, arrived to the conclusion that:

> The broad definition, and its interpretation by some actors as including the outbreak of disease, suggests that the outbreak of Covid-19 may be considered as a disaster. The current pandemic consists of a series of calamitous events, resulting in the death and harm of many people and causing great human suffering and distress, thereby resulting in serious disruption of the societies' functioning, with the cancellation of gatherings, closure of non-essential businesses, shift to online education, and curfew measures (Ozturk 2020).

Also, experts like Bartolini (2020) have applied international disaster law categories to the COVID-19, considering it a natural calamity, more precisely a biological hazard. Moreover, according to Greene (2020): "the coronavirus pandemic is possibly the closest we have ever seen of a phenomenon that can *objectively* be categorised as necessitating exceptional measures. The objectivity of a threat, however, needs to be given legal recognition through the declaration of a state of emergency."

The jurisprudence of the European Court and Commission for Human Rights has shed some more light on the definition of "public emergency threatening the life of the nation", for instance in *Lawless v. Ireland* (1961), interpreting it as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". The COVID-19 pandemic had all these characteristics and produced the same disruptive effects. For this and the previously explained reasons, this article contends that the

COVID-19 pandemic is a circumstance which can trigger the application of Art. 15, thus the derogation of the ECHR, and this procedure is deemed advisable in order to allow the supervision of emergency measures by CoE bodies and to prevent them from becoming "the new normal", as it will be discussed further on.

The interpretation of Art.15.1 ECHR conveyed by the Court and Commission through their caselaw adds other distinctive traits to such public emergencies: they should be concrete and imminent or ongoing, requiring exceptional measures to maintain public safety. In this sense the crisis or danger is similar to states of necessity or force majeure, allowing for derogation when "normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate" (the "Greek Case" 1969).

The threat can regard the entire territory of the State or could be specific to a certain region, or portion of territory, but still have disruptive effects on the whole nation, as proved in cases such as *Ireland v. the United Kingdom* (1978) and *Aksoy v. Turkey* (1996). More recently, as of 5 June 2015, the annexation of Crimea by the Russian Federation and the war in Donbass has determined Ukraine to derogate the ECHR (CoE 2015). On 31 January 2017 Ukraine presented the CoE SG with an updated list of localities in the regions of Donetsk and Luhanks of which it declared whether it had lost partial or total control. On 3 December 2019 Ukraine partly withdrew its derogation and – so far – did not present any notification due to the COVID-19 outbreak in 2020.

The procedural conditions for derogation are quite specific and will be dealt with further on, but the substantial conditions seem difficult to grasp, being quite relative and object of a case by case analysis, therefore hard to define *a priori* (Zagrebelsky, Chenal and Tomasi 2016: 137). Given that extraordinary measures are adopted so as to face a serious national threat, manage the crisis and restore order, safety and security, the European Court of Human Rights (ECtHR) has allowed wide margin of appreciation to national governments as far as the nature of the measures is concerned. However, the case law of the Court has clarified over the years that MS do not have complete discretion and since the emergency measures must only be adopted "to the extent strictly required by the exigencies of the situation" as specified in Art. 15.1 ECHR, they should be reasonable and specific, and their scope must prove perfectly coherent with the type of emergency (*Sakik v. Turkey* 1997, *Branningan and McBride v. UK* 1993, *Mehmet Hassan Altan v. Turkey* 2018). This criterion contained in Art. 15.1 is strictly linked to the principles of necessity and proportionality, against which emergency powers must be constantly tested. They are both connected, on the one hand, to the nature of the exceptional measures and, on the other hand, to their duration in time. The time frame during which the emergency measures should apply is of fundamental importance, it should be strictly limited to the duration of the crisis and should cease to apply

once normality, safety and security are restored. Nevertheless, the jurisprudence of the ECtHR demonstrated that this does not exclude the fact that the measures could be in place for several years if deemed necessary, as demonstrated by cases such as *Ireland v. UK*.

In addition, emergency measures must be consistent with "other obligations under international law". First of all, the peremptory norms of *jus cogens* allow no exception. Secondly, the norms become similar to a "minimum standard" with respect to other provisions contained in different sources of international law, both customary and codified under treaty form (Zagato 2006). Even though a State may notify the derogation from the ECHR and/or other human rights conventions, it must still abide by other general and sectorial instruments of international law, including all other treaties and conventions the State is party to.

Non-Derogable Rights

Art. 15.2 does not allow under any circumstance – not even in case of emergency – the derogation of the rights contained in Art. 2 (Right to life), Art. 3 (Prohibition of torture), Art. 4.1 (Prohibition of slavery and forced labour), and Art. 7 (No punishment without law). These non-derogable rights also represent principles of *jus cogens,* "the peremptory rules of international law", "regarded as uncompromisable moral principles", which should be upheld by all legal systems (Lowe 2011: 59).

The right to life deserves special attention since it is immediately put forth already in the text of article 15.2 itself that: "No derogation from Article 2 [is allowed], except in respect of deaths resulting from lawful acts of war". Thus, in the context of war, there may be circumstances in which the deprivation of life is necessary, but it must always be lawful. In general, the protection of the right must be guaranteed by law. This gives rise to due diligence obligations on behalf of the State, who should also establish "effective institutional safeguards designed to prevent arbitrary deprivations of life" (Human Rights Committee (HRC) 2018). Therefore the right to life is not an absolute right, even though it is considered the "supreme right", "whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights", but it "should not be interpreted narrowly" (HRC 2018). This means that "It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity" (HRC 2018).

In the context of epidemics and pandemics, the right to life and the right to health are two facets of the same coin, considering the mortality caused by the virus, and the

extreme measures put in place by governments aim precisely at protecting them. Thus, they acquire a certain degree of dominance with regard to other rights, whose sacrifice is deemed necessary to protect the health – and life – of the population. The rights which were limited or derogated by CoE member States during the COVID-19 sanitary emergency will be analysed further on.

The protection of the right to life above all other rights is associated also with the abolishment of death penalty, which is of crucial importance for the CoE, thus also a condition *sine qua non* for membership.[4] As a matter of fact, even in situations of crisis, death penalty has been forbidden since the entry into force of two additional protocols to the ECHR: namely Prot. no. 6, which excludes the derogation of death penalty under Art. 3, and Prot. no. 13, also excluding derogation under Art. 2.

In fact, over the years, the adoption of additional protocols to the ECHR has been the preferred mechanism to extend the reach of the Convention, by introducing new binding principles as well as other non-derogable principles within the system of the CoE. Not only the derogation of death penalty was excluded, but also, thanks to Prot. no. 7, the principle *ne bis in idem* – the right not to be prosecuted twice for the same crime, has become imperative and it allows no derogation either, as set forth by Art. 4.3.

Procedure and Form: The Notification of Derogations

Paragraph 3 of Art. 15 of the ECHR establishes the procedure to be followed in order to derogate from the Convention. The notification to the SG shall be presented in written form, it shall be clear, including the emergency measures imposed and the reasons which led to the adoption of such measures. No other precise requirements regarding the form are established, but it should be plain to see which rights and fundamental freedoms shall be affected by the derogation. For instance, not all MS specify exactly which are the ECHR articles concerned by their derogation, but no relevant information should be omitted, especially concerning the temporary nature of the measures. Thus, notifications should possibly specify the duration of the emergency situation and/or the date when the Convention shall acquire once again its full entry into force (*Lawless v. Ireland*).

Besides, the notification shall be "timely", hence deposited with the SG as soon as possible. Nevertheless, the precise time frame considered prompt is not clearly defined neither by the Convention itself nor through ECtHR case law. What is certain is that a

[4] In fact, the abolition of death penalty is the main reason why Belarus is the only State in the European continent who is not a member of the CoE.

period of 12 days between the date of adoption of the measures and the notification of derogation was deemed acceptable by the Court in the famous case *Lawless v Ireland*; whereas the so-called *Greek Case* proved that the notification after three months shall be considered belated.

In addition, MS are encouraged to enclose all the relevant documents with regard to the emergency measures they adopted so as to keep the SG fully-informed. To this end, also presenting updates of the situation is strongly recommended. As a matter of fact, a crucial prerequisite for notification is that it allows international supervision and control over the derogation of the Convention.

Experts and scholars criticised the ECtHR for missing previous opportunities to clarify what exactly are the procedural requirements to notify the derogation of the Convention (Lugarà 2020). Further questions include: can there be derogation without notification? More specifically, which authorities are competent to notify for the derogation to be considered valid? Is a national court of law competent to derogate from the ECHR on behalf of a MS? The former question is not new to scholars, since it had already been sparked by *Cyprus v Turkey* (1976 & 1983). Yet, as Holcoft-Emmess concludes, the case "does not give determinative guidance on the effect of a failure to (adequately) notify a derogation at the international level" (Holcoft-Emmess 2020: 4). She focuses on "the effect of a lack of notification, or of inadequate notification – does it vitiate the State's ability to rely on the derogation provision and avoid a violation of its obligations under the human rights treaty?" (Holcoft-Emmess 2020: 2). Holcoft-Emmess criticises the ECHR organs for recognising this question, but they "consistently avoid conclusively determining whether (adequate) notification at the international level is a condition precedent for a State to be able to rely on the derogation to preclude violation of its Convention obligations" (Holcoft-Emmess 2020: 2).

Valid notifications of derogation form the Convention are usually deposited with the SG by the Ministry of foreign affair or other political representatives of the State. Nevertheless, in the recent case *BP v Surrey County Council & Anor* (2020), as Martin points out, a (national) judge "appeared to find that the UK was derogating from its obligations under Article 5 ECHR, when no notification had been deposited with the Secretary General" (Martin 2020 as paraphrased in Holcroft-Emmess 2020: 1). Moreover, Martin contends that "The concept that a trial judge could publicly bind the UK by virtue of sending his reasons in a private law case in which the government was not represented is nonsensical" (Martin 2020: 2). She then concludes that "it is unlikely that the trial judge's reasons constitute an «official and public notice of derogation». While the judgement is publicly available, it has not been made known to the wider public" (Martin 2020: 3). Yet, in *Lawless v Ireland* the Strasbourg Court had

specified that the ECHR "does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe." But even though the notification of derogation does not need to be made public to be considered valid by the organs of the CoE, doing so without informing the citizens has been harshly criticised and sparked outrage in the recent case of Romania's derogation from the ECHR (Centrule de resurse juridice 2020). Moreover, the non-applicability of Art. 15 in the absence of a formal and public notice of derogation was emphasised by jurisprudence in cases like *Cyprus v. Turkey*, when the Commission underlined the inapplicability of the derogation and therefore the breach of the ECHR rights in question (Art. 5 – Right to liberty and security and Art. 8 – Right to respect for private and family life as well as the violation of Art. 1 – Protection of property of Protocol 1 of the Convention).

The Supervision of Derogations: The Role of the ECtHR and of the Secretary General

Derogations are subject to the scrutiny of the CoE bodies, both during the emergency situation and after the restoration of normalcy (*Aksoy v. Turkey*). The Court takes into consideration the nature of the rights that are limited or derogated, the circumstances that led to their derogation, the duration of the emergency situation and the possible alternative measures adopted by the State to provide guarantees different from the ones provided in the ECHR (Zagrebelsky, Chenal and Tomasi 2016: 138). Since, the evaluation of the threat is based on the facts known at the moment of the derogation – as it was made clear by the ECtHR in the cases such as *A. and others v. UK* – notifications shall contain all pertinent information. Nevertheless, the Court might also take account of further information and/or aspects which might subsequently come to light (*A. and others v. UK*). The ECtHR intervenes *a posteriori,* once it receives an inter-State application or individual complaint. "There is no assessment of the notification's merits until it is challenged in Court by an applicant", as Epure (2020) points out, clarifying: "The Convention assumes that governments' decisions to derogate are in good faith. The Court cannot review measures derogating from Convention rights before their implementation". Apart from this, applications reach the Strasbourg court only when they have exhausted internal remedies and are dealt with based on a priority policy. During the COVID-19 pandemic, the Court – as well as numerous other bodies and institutions – has suspended several of its cases and functions, in order to prioritise the most urgent cases. What is more, already before the COVID-19 crisis, there were approximately 60,000 applications pending in front of the Court (ECtHR 2019).

The duration of judicial procedures, exacerbated by the emergency situation, determines a significant tardiness, which has been often criticised and considered a form of weakening of judicial supervision, especially during a crisis. Istrefi (2020a) has been quite incisive in this regard: "the ECtHR, or for that matter any court, is ill-equipped to address in a systemic manner the effects of emergency measures on the rule of law and democracy." Additionally, as far as the enforcement mechanisms are concerned:

> the Court has no power to penalise non-compliance with its judgements. In the worst-case scenario, a State failing to respect its obligations under the Convention may be suspended from the Council of Europe (Articles 3 and 8 of the Statute of the Council of Europe). Suspension, however, is politically sensitive and may even be counterproductive as it would allow a government to continue its (abusive) policies without any constraints (Isterfi 2020a).

As a consequence, the solution of monitoring and close supervision by the specialised bodies of the CoE during derogations was largely embraced as preferable. In the past, the Venice Commission of the CoE as well as its Human Rights Commissioner have covered this role. Nevertheless, as pointed out by Istrefi: "the loopholes in the supervision of derogations cannot be fully mitigated by occasional engagements of the Venice Commission or the Council of Europe Commissioner for human rights, however proactive or activist" (Isterfi 2020b: 2). Thus, as the need for supervision on derogations became more and more pressing, with Resolution 2209/2018 of the Parliamentary Assembly of the CoE (PACE), the SG was recommended to become more actively involved in the timely supervision of derogations and to provide advice to MS. Based on Art. 52 ECHR, the SG also has the power to open an inquiry, and even though this is a powerful tool in the hands of the SG, only six times has the SG used it for all 47 Member States and three times it regarded one MS (Requena 2016: 6). According to Res. 2209/2018, the SG shall also engage in dialogue with the MS so as to ensure "the compatibility of the state of emergency with the Convention standards, whilst respecting the legal competence of the European Court of Human Rights" (Res. 2209/2018: par. 20.3). Scholars contend that this "enhanced role" of the SG granted by Res. 2209/2018 creates "a new layer of supervision of derogations", but "does not itself guarantee effectiveness. The success of the Secretary General of the CoE will depend as much on the cooperation of States Parties to the ECHR as on the resources needed to discharge the ambitious mandate of an expert and supervisory body on derogation. The future derogation practices will determine whether the Secretary General will become an effective supervisory body or continue to serve as a mailbox where States deposit their declarations on derogations" (Isterfi 2020a).

Unfortunately, also the supervisory mechanisms in place have limited enforcement power in case of abuse. Accountability cannot be guaranteed by the punitive measures in place, given that the *modus operandi* is limited to "naming and shaming", thus stirring compliance through political pressure. As Emmons (2020) argues: "This response might raise alarm bells, but cannot directly halt any ongoing abuse." Moreover, the ultimate punishment is the expulsion from the Convention and thus from the CoE, which is not a real solution when it comes to human rights violations.

States Who Derogated the ECHR Due to the Covid-19 Emergency

In 2020, the derogation notifications to the SG of the CoE were connected to the state of emergency declared by member States, who adopted extraordinary measures for the containment of the COVID-19 contagion, in other words to protect the health of the population. The measures required limited and/or derogated other rights protected by the ECHR, and in this sense the majority of the notifications mostly referred to the right to liberty and security (Articles 5), the right to respect for private and family life (Article 8) and freedom of assembly and association (Article 11), as well as the right to education (Art. 2 of the first Protocol to the ECHR) and the freedom of movement (Art. 2 of Protocol No. 4). The limitation of these rights and freedoms, provided the respect of the principle of proportionality, appears quite necessary and reasonably understandable given the need for social distancing in order to stop the contagion which was increasing exponentially in Europe as of March 2020. Measures such as social distancing and quarantine were backed by scientific evidence, which proved their effectiveness in limiting the virulence of the virus, thus State authorities enforced such measures by instating lockdowns and curfews.

In general terms, the exigencies required by COVID-19 containment measures, like social distancing, created a dichotomy as far as the right to liberty and security (Articles 5 ECHR) is concerned: securing the health through the imposition of lockdowns, curfews and confining European citizens to their homes may appear in contrast with their right to liberty, and even more so with regard to freedom of movement. Albeit home confinement is quite different from arrest and detention, it clearly affects – even if to a lower degree – the individuals' right to enjoy (full) liberty.

However, not all notifications mentioned the rights and freedoms the derogation would affect. Perhaps the most questionable of the 2020 notifications was submitted by Serbia, on 6 April 2020, referring to the state of emergency proclaimed on 15 March, but without any information regarding the rights and freedoms which would be affected by the derogation of the ECHR, nor the time frame of reference. Scholars

like Zghibarta (2020) criticise the Serbian notification for its vague language and lack of annexes and details regarding the specific measures adopted. She adds that "While it refers to the website of the Government of the Republic of Serbia, where all the legal acts are published, those have been so far available only in Serbian" (Zghibarta 2020). The lack of an English translation might be problematic as far as international supervision is concerned, as well as time-consuming.

San Marino's Note Verbale of 8 May 2020 notified its derogation of the ECHR without specifying the articles concerned and without attaching any documents nor providing any time frame for the emergency measures. The derogation was withdrawn on 7 July 2020, confirming the termination of the COVID-19 emergency and restoration of the full execution of the Convention as of 30 June 2020.

Neither did Estonia specify in its notification the articles of the ECHR which would be affected by its derogation of 20 March and referring to the state of emergency declared on 12 March 2020. Nevertheless, by providing a link to the orders issued by the Government to prevent the spread of the coronavirus SARS-CoV-2, all measures were made available in English translation with reference to the rights and freedoms affected by them, namely those envisaged in Arts 5, 6, 8, 11 ECHR and Arts 1-2 Prot. 1, Art. 2 Prot. 4. Estonia attached to its Note Verbale *inter alia* the document "Recommendations of the Council for Administration of Courts for organising the administration of justice during emergency situation", which implicitly affects the right to a fair trial (Art. 6 ECHR) and sets forth the use of technology and remote hearings held by technical means of communication. These measures might affect the right to a fair trial and their application must be closely supervised. Estonia withdrew the derogation on 16 May 2020, re-establishing the full execution of the ECHR as of 18 May 2020, upon the end of the emergency situation.

With regard to the right to a fair trial (Art. 6 ECHR), also Georgia included it among those subject to derogation, which in this case were clearly stated: Articles 5, 6, 8, 11 of the Convention, Articles 1 and 2 of Protocol 1 to the Convention, Article 2 of Protocol 4 to the Convention. Georgia provided links to annexes: "Amendments to the Law on Public Health" and "Amendments to the Criminal Procedure Code". The latter adds "Article 332^5. Interim regulations for court hearings until 15 July 2020" concerning remote hearings, as in the case of the Estonian notification. The Georgian derogation was dated 21 March 2020, presented with an initial duration of 30 days, which were subsequently extended. The most recent communication, of 15 July, extends the derogation until 1 January 2021, specifying that "the Government of Georgia has already started gradual lifting of certain restrictions since 27 April 2020" and "The Permanent Representation of Georgia to the Council of Europe shall inform the Secretary General of the Council of Europe when these measures cease to operate."

Not only the right to a fair trial should be guaranteed during emergency situations, but in general the rule of law shall prevail, so as to avoid any abuse of power (CoE2020a). Clapham (2020) underlines that: "even in an emergency situation, the rule of law must prevail. In this regard, any emergency laws should comply with domestic constitutional and international law and standards. Crucially, throughout any derogation, legislature must retain the power to control executive action." Also, the previously mentioned PACE Resolution 2209(2018) provides for:

> Fundamental safeguards of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency. Due democratic process, including separation of powers, as well as political pluralism and the independence of civil society and the media must also continue to be respected and protected.

Last but not least, ECtHR's cases such as *Mehmet Hasan Altan v. Turkey* should remind us of the permanent risk of abuse in case of derogation; then, the Court unequivocally stated that the emergency should never become a pretext for the violation of human rights and the restriction of fundamental freedoms, moreover, even when adopting extraordinary measures, State authorities should uphold the values of democracy and rule of law, pluralism, tolerance and broadmindedness.

Romania presented its notification on 17 March 2020, which did not provide any direct information with regard to the rights and freedoms affected by the derogation, establishing an initial duration of the state of emergency of 30 days. The Romanian authorities declared in their notification to "stand ready to provide any additional information to the Secretary General in relation to the above-mentioned measures taken in the effort to contain the spread of the SARS-COV-2 virus and its effects on the territory of Romania, as well as on any other issues deemed relevant." Also, English translations of the Military Ordinances adopted were provided to the SG, as well as periodic updates on the situation. The rights and freedoms affected by the derogation could thus be inferred from the attached documents, and they referred to Arts 8 (Right to the respect of private and family life) and 11(Freedom of assembly and association) ECHR as well as Arts 1 (Protection of property), 2 (Right to education) Prot. 1 and Art. 2 Prot. 4 (Freedom of movement). The most recent update, of 15 May 2020, notified the extension of the state of emergency, without providing a definite duration of application of the emergency measures in place, nor – once again – a direct reference to the rights and freedoms affected.

Considering the documents attached to Romania's derogation, The Presidential Decree No. 212/16.03.2020 on the establishment of the state of emergency in the territory of Romania deserves attention, especially with regard to Article 54 (2) which

states as follows: "In case of dissemination of fake-news in mass-media and online in relation to COVID-19 and to the protection and preventive measures, public institutions and authorities undertake the necessary measures in order to correctly and objectively inform the population in this context". This provision might be double-edged, on the one hand trying to guarantee truthfulness of the information provided to the public; on the other hand, this kind of state intervention clearly affects the freedom of expression (Art. 10 ECHR), of information and of the media. Moreover, when State authorities decide what content the service providers can and cannot publish online, the freedom of expression of citizens and the fact-checking role of journalists is dangerously jeopardised.

Moldova's Note Verbale of 20 March referred to the state of emergency proclaimed three days earlier with an initial duration of 60 days,[5] which would affect the rights and freedoms protected by Art. 11 ECHR, Art. 2 of the first Protocol and Art. 2 of Prot. 4. From the attached Declaration of the State of emergency it can be inferred that Moldova imposed similar restrictions as its neighbour Romania with regard to "coordinating media activities on informing the public about the situation, the liquidation of its consequences and the protection of the population, as well as to introduce special rules for the use of telecommunication means" (McBride 2020).

Similar concerns were raised by Armenia's notification of 19 March 2020,[6] which did not directly express the rights and freedoms restricted by the derogation either, but the last part of the attached Decision of the Government of the Republic of Armenia No 298-N of 16 March 2020 explains the "Prohibitions of Separate Publications, Reports through the Mass Media". Such measures, as McBride (2020) argued are "inconsistent with the public watchdog role of the media that the Court sees essential in a democracy."[7] He also provided examples from the case law of the ECtHR to support his affirmation, including *Fatullayev v. Azerbaijan* (2010), *Magyar Helsinki Bizottsag v. Hungary* (2016), *Radio France and Others v. France* (2004), *Sallusti v. Italy* (2019), *Savva Terentyev v. Russia* (2018) and concluded that: "Although the circulation of rumours and false information can be a nuisance, the suppression of non-official information

[5] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/declarations?p_auth=3p2NAOM3&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=MOL&_coeconventions_WAR_coeconventionsportlet_codeNature=10

[6] In Armenia the state of emergency was proclaimed on 16 March 2020 with the initial duration of 30 days, successively extended until 11 September 2020: https://www.coe.int/en/web/conventions/full-list//conventions/treaty/005/declarations?p_auth=oC00wpDO

[7] For further information on media freedom during the COVID-19 emergency see also: https://ipi.media/covid19-media-freedom-monitoring/

and views runs counter to the democracy that emergency measures should protect and could undermine public confidence in governments" (McBride 2020).

In addition, emergency powers have granted the Armenian authorities easy access to the personal data of individuals and groups of individuals by adopting, as of 31 March 2020, a law which allows the collaboration and data sharing between government authorities, the sanitary system and telephone operating companies in order to trace "contact circles" for the containment of the contagion (HRW 2020). These measures must be balanced with the right to respect for private and family life, a qualified right as put forward already in Art. 8 ECHR. The right to respect for private and family life can be sacrificed in order to protect health and public safety, but any interference by the authorities must respect the principle of legality and rule of law as well as democratic values. Short-term limitations were presented as necessary in order to achieve important health benefits by identifying the people who tested positive for the new coronavirus and tracing their social interaction in order to limit the contagion. However, once easy access to personal data – including special categories of "sensitive" data such as the information regarding a person's health – is granted to the authorities, the risk is that the use of such data be carried out beyond the reasons connected to limiting the contagion and possibly also after the sanitary emergency.

Albania'**s** derogation of the ECHR notified on 31 March and withdrawn on 24 June 2020, also referred – *inter alia* – to limitations of the right to respect for private and family life (Art. 8 ECHR) and emergency measures affecting mass media and publications. The other rights and freedoms mentioned in Albania's Note Verbale were Freedom of assembly and association (Art. 11 ECHR), the protection of property (Art. 1 of the first Protocol to the ECHR), the right to education (Art. 2 of the first Protocol to the ECHR) and the freedom of movement (Art. 2 of Protocol No. 4).

Both Latvia and North Macedonia included the right to respect for private and family life (Art. 8) in their notifications of derogation from the ECHR presented on 15 March and 29 April, respectively. Latvia withdrew its derogation on 9 June, communicating the end of the state of emergency as of 10 June 2020, whereas the North Macedonian withdrawal was dated 29 June and informed the Secretary General that the state of emergency ceased to exist on 24 June 2020.

The requirement of constantly testing emergency measures against the principles of necessity and proportionality, and ensuring that they are only temporarily applied require special attention during the current COVID-19 emergency, while other safeguards against potential abuse of power should be guaranteed, as it was made clear by the case law of the ECtHR (*Ireland v. the United Kingdom*, paragraphs 216-219; *Lawless v. Ireland* (no. 3), par. 37*; Brannigan and McBride v. the United Kingdom*, paragraphs 61-65; *Aksoy v. Turkey*, paragraphs 79-84.9). Supervision by CoE bodies is

necessary not only for the member States who notified their derogation pursuant to Art. 15, but on all member States, especially in cases such as the COVID-19 pandemic, which affects them all.

States Who Did Not Derogate the ECHR Due to the Covid-19 Emergency

Interestingly, the most affected European States by the pandemic, Italy, Spain, the UK and Russia, did not notify any derogation form the ECHR due to the COVID-19 emergency;[8] not even Poland and Orban's Hungary, notwithstanding the recent authoritarian drifts (Tacconi 2020a). Nonetheless, the emergency measures and their effects on the CoE member States who did not derogate the Convention are quite similar if not the same as for the ten countries who submitted their notification to the SG. The scope of the present article does not encompass the analysis of all emergency measures adopted by CoE member States, but several examples of *de facto* derogations of human rights and fundamental freedoms protected by the ECHR are instrumental for the demonstration of the author's initial hypothesis.

First and foremost, the Hungarian example: the instrument chosen by the Prime Minister Viktor Orban to deal with the sanitary emergency was government by decree, which granted him vast powers and the possibility to rule indefinitely, and as of 31 March 2020 without the control of the parliament. This measure was harshly criticised as "abnormal" (Casolari 2020), "draconian" (Bruszt 2020), "the *coup de grâce* for the rule of law, the crossing point to dictatorship" (Tacconi 2020a). The only counter balance to the otherwise unlimited powers acquired by the Prime Minister has been the Constitutional Court, which according to the Hungarian opposition and NGOs has become almost irrelevant. Experts like Tacconi (2020b) underline how the separation of powers has been weakened in the last 15 years and Hungarian magistrates are now "organic" to Fidesz's power. For this reason, he contends that not even when the Hungarian Parliament reacquired its functions on 20 June 2020, were Orban's powers significantly limited.

Among the emergency measures enacted in Hungary, the drastic limitation on freedom of expression and information and the repercussions on the media have been troubling. As a matter of fact, they include a new law on fake news regarding the coronavirus pandemic which provides for up to five years of imprisonment. Moreover,

[8] The most affected Europen States are considered in terms of total number of coronavirus COVID-19 cases as reported by the WHO; reports available online: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/?gclid=CjwKCAjwqML6BRAHEiwAdquMnUlM9iuVq2IBd9L3E20xufxHS67bIfXpyR1XnhYooFE-k77TVJx7pxoCV8MQAvD_BwE

Orban has encouraged the rise of a new elite of oligarchs repaying their political support by granting them control over TV and radio stations as well as newspapers (Tacconi 2020b). Apart from this, another decree forbids sex change, underlining the conservative position of the country and its distance from liberal values, in line with its drift away from EU values (Casolari 2020) and alignment with China for economic reasons linked to the Belt and Road Initiative (Tacconi 2020b).

The reaction of the European institutions to the measures adopted by Hungary ranged from the Commission's vigilance (Von der Leyen 2020) to the Parliament's concern with regard to using the pretext of the pandemic to "manipulate our freedom", while limiting the freedom of the press and endangering democracy (Sassoli 2020). Moreover, President Sassoli declared that the EU Parliament required the Commission to verify the compliance of the Hungarian Law n.12 of 30 March 2020 with Art.2 TEU. The CoE SG Marija Pejčinović Burić expressed her willingness to stand by Hungary during the difficult times of the pandemic, underling the importance of balancing emergency measures with the rule of law, democratic values fundamental human rights and freedoms; though her concern for the severe measures imposed could be read between the lines of her letter of 24 March 2020 to the Prime Minister Orban. This proves once again the more proactive role recently assumed by the SG and hints to a monitoring mechanism of the CoE over its member states, especially during emergency situations, and even in absence of a formal notification of derogation from the ECHR.

In general, the lockdown imposed in almost all European States presented the challenge of enforcement and the mechanisms adopted by State authorities included mass surveillance and individual geo-localisation, directly affecting the right to liberty and security, freedom of movement, and the respect of private and family life. It could not have been more difficult to strike a balance between the protection of the aforementioned rights and fundamental freedoms with the emergency measures imposed. Nonetheless, in order to find an equilibrium, these extraordinary measures must respect the criteria and principles analysed in section 2 of the present article.

Italy and other ECHR member States have been working on a mobile application meant to trace social contacts through the use of geo-localising and Bluetooth information sharing systems, meant to map and contain the contagion. Italy's app *Immuni* has encountered resistance and criticism from the general public, although its creators insist it respects the General Data Protection Regulation (GDPR)[9] and the Italian Data Protection Authority provided a positive evaluation of its impact on the protection and limited use of special categories of "sensitive" personal

[9] For further information please consult the official website: https://www.immuni.italia.it/

data.[10] Some European states, Italy included, also implied drones in order to detect possible violations of the lockdown measures (Nicolicchia 2020).

In Russia, especially in the capital city Moscow, a wide use of video surveillance was activated in public places through cameras, equipped with face recognition systems (Khurshudyan 2020, Roth 2020, Nazeer 2020). All these individual and mass surveillance measures should be temporary and stand the test of the necessity and proportionality principles to avoid the risk of abuse which would lead to nothing short of an Orwellian society.[11] The use of such technologies has been harshly criticised for the risks they pose to privacy and the respect for private and family life (Art. 8 ECHR). Nevertheless, according to Della Morte (2020), the trade-off between the right to health and the respect of privacy is just a misinterpretation, given that the two are not mutually exclusive, provided the emergency measures are temporary and stand the test of graduality and proportionality, both rights could and should be upheld by national authorities.

The emergency measures adopted so as to guarantee social distancing also affected the right to education (Art. 2 of the first Protocol to the ECHR), as kindergartens, schools, universities and other institutions of education were closed and teaching and learning became almost exclusively online activities. The closure of churches and other institutions determined a curtailment of the right to marry (Art. 12 ECHR) and to manifest religion and belief, especially in community with others, a right enshrined in Art. 9 of the ECHR (Freedom of thought, conscience and religion).

In addition, there has been a continuous comparison between these new emergency measures and the post-9/11 situation, when the new normal kept in place certain measures limiting civil rights, fundamental freedoms and the right to privacy even after the emergency situation. Experts like Zagato (2006) underline the risks posed by potential abuse in case the new normative schemes are applied before, after and regardless of the concrete emergency; he also draws attention to

[10] See the website of the Italian Data Protection authority and read the deliberation, available online at: https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9356568?fbclid=IwAR3zg-vKMcDYvS7Vje_nhGMp6f6sYfgAhXktwbdMhYT82ADOV9fZjr55EnY; see also Cirone, E., *L'app italiana di contact tracing alla prova del GDPR: dall'habeas data al ratchet effect il passo è breve?* in "SIDIblog", 13.05.2020, available online at: http://www.sidiblog.org/2020/05/13/lapp-italiana-di-contact-tracing-alla-prova-del-gdpr-dallhabeas-data-al-ratchet-effect-il-passo-e-breve/. For the official CoE position with regard to the use of contact-tracing apps, see *Coronavirus Pandemic in the EU – fundamental rights implications: with a focus on contact-tracing apps*, Bulletin #2, 21 March – 30 April 2020, available online at: https://fra.europa.eu/en/publication/2020/covid19-rights-impact-may-1

[11] For an updated situation of the restrictions of civil rights that are realised with digital technologies please consult: https://pandemicbigbrother.online/en/?fbclid=IwAR3uEceyvbi5HtILjxpZgVJQQE0_5DeWJNMcAk_Yu_AvwdymaTmeLXphiX4. For a comparative analysis of covid-related measures in different States, please refer also to: www.covid19healthsystem.org.

the fact that the emergency measures applied in the 9/11 aftermath were based on discrimination, since – by definition – they only applied to certain categories of foreigners. Similarly, during the COVID-19 emergency and, especially when the first cases were diagnosed in Europe (and then in the USA), alarming discriminatory rhetoric permeated the news: COVID-19 was frequently called "the Chinese virus" by the media and several political leaders, which led to violence against members of the Chinese communities in Europe (and USA) and, by extension, against the Asian / people with Asian traits (HRW 2020a). As discrimination, prohibited by Art. 1 of the Protocol No. 12 to the ECHR, has dramatically increased during the coronavirus pandemic, several NGOs insisted on the dangers of misinformation and press responsibility in fomenting hate speech, both online and offline (Article 19, 2020). The WHO (2020) came to recommend that the descriptions of diseases should avoid any adjectives that might incite hate speech and/or discrimination. As Italy became the first European country to report a coronavirus epidemic, Italian citizens faced discrimination abroad and were imposed limits on their freedom of movement when countries closed their borders for the possessors of Italian passports regardless of their health status. The European Union Agency for Fundamental Rights (AFR, 2020) drew attention to the dramatic increase in racist and xenophobic incidents linked to the coronavirus pandemic, most of which were fuelled by statements made by public figures, politicians and misinformation spread by the media. Precisely for these reasons, the UN Secretary General Antonio Guterres underlined how the sanitary emergency was becoming a human rights crisis. Of course, discrimination hit harder the already vulnerable categories of society: while emergency measures rarely respected the special needs of the physically and mentally disabled, the lockdown had a catalyst impact on the spread of domestic violence (De Vido 2020a; Staiano 2020) and online education penalised the poor and exacerbated the digital and technological divide (De Vido 2020b).[12] As the lockdown had a major impact on economy, socially the lower classes and the unemployed suffered the worst consequences. Besides, certain minorities – first of all the Roma communities in Europe – were strongly affected by the emergency measures, becoming even more discriminated and marginalised (OHCHR 2020). Not to mention the refugees in camps and the homeless, lacking appropriate housing, food and the minimum sanitary basics to face the pandemic.

[12] The right to education is enshrined in Art. 2 of the first Protocol to the ECHR.

To Derogate or Not To Derogate?

It is clear that the COVID-19 pandemic has determined the limitation and/or restriction of rights and freedoms protected by the ECHR in all member States of the CoE. The States who notified their derogation – except San Marino – are part of the so-called "eastern bloc", thus critics have linked the choice of notification to their brief democratic histories. This was interpreted either as willingness to be as transparent as possible by standing the scrutiny of CoE bodies, either as a worrying alarm signal. As previously explained, the other 37 CoE member States did not notify any derogation of the ECHR, even if the emergency measures they adopted had quite similar effects, curtailing the protection of human rights and fundamental freedoms. It remains to be assessed whether such curtailment in the absence of a formal notification can be considered a form of *de facto* derogation and most important whether the concept of *de facto* derogation can preclude wrongfulness in front of the ECtHR for limitations and restrictions on human rights during the pandemic.

In general, the scholarly debate regarding the derogation of human rights due to the coronavirus sanitary emergency is dividing jurists in two separate groups: those who are in favour of the notification of derogation and those who are against it. The second group is represented by ideas such as those explained by Dzehtsiarou (2020), who contends that "in case of pandemic, Article 15 derogations are not particularly useful and they send an unnecessary message to people". He insists that the "deployment of Article 15 will not make too much difference in the context if the COVID-19 crisis", arguing that the articles of the ECHR contain provisions for limitations such as: for the protection of health in Art. 8 on right to respect for private and family life; Art. 9 on freedom of thought, conscience and religion; Art. 10 on freedom of expression and Art. 11 on freedom of assembly and association; and to prevent the spread of infectious diseases in Art. 5.1(e) regarding the right to liberty and security. Therefore, in Dzehtsiarou's view there is no need to notify the derogation of the ECHR in case of pandemic. His reasoning is also shared by several MEPs like Nathalie Loiseau and Ramona Strugariu (Makszimov 2020).

Other scholars, like Scheinin (2020) start off their legal reasoning by insisting as much as possible on the importance of the 'principle of normalcy' as "the safe course of action" to minimise the risk of abuse, explaining the importance of "resisting panic" by handling the crisis without derogating human rights: "through normally applicable powers and procedures and insist on full compliance with human rights even if introducing new necessary and proportionate restrictions upon human rights on the basis of pressing social need created by the pandemic." However, when faced with the unescapable choice of one of the two sides, he adopts a more moderate position,

but in the end in favour of derogation, though as last resort: "One can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred. If those available options prove insufficient during COVID-19, then it is better to derogate than not to derogate" (Scheinin 2020).

Greene (2020) represents the leading voice of the group of experts in favour of the notification of derogation of the ECHR, shared also by the author of the present article, since "international notification of an emergency may reflect a country's commitment to legality and the full restoration of normalcy as soon as possible." (Scheinin 2020 referring to Green's approach). He focuses on "the fundamental problems that arise from accommodating exceptional powers under the parameters of 'normalcy' without the quarantining effect of a de jure state of emergency. Such accommodation is often the product of overly deferential judicial scrutiny in a time of crisis, giving rise to [a] legal grey hole" (Greene 2020). Green (2020) defines legal grey holes as "zones of discretionary power where, ostensibly there appears to be legal oversight and judicial review of this discretion but such judicial oversight is so light touch as to be non-existent", that are different from legal black holes which stand for "zones of discretion created by law but within which there is little to no legal constraints on the decision maker." The definitions are derived from the theories of Carl Schmitt regarding the so called "zones of lawlessness".

Another fundamental aspect of Green's analysis regards the difficulty posed by determining the end of the emergency, in other words the exact moment when the emergency ceases to exist and thus the measures should be lifted and the full spectrum of human rights and freedoms should be restored. He explains that 'objective emergencies' like pandemics tend to lead to other 'less objective' crises like an economic one and even 'more subjective crises' determined by social unrest. This scenario of a progression of one crisis leading to another has already verified in several CoE member States, with economic recession hitting hard Italy, Spain, Russia and other countries, and protests against the emergency measures taking place in Serbia and, even if less violent for now, in European States like Romania, Italy and France. As the demarcation lines necessary to define what Green (2020) calls a more or less objective crisis fade away, it becomes more and more difficult to put an end to emergency measures while the risk of abuse of exceptional powers increases at the same time:

> History shows us that emergency powers often outlive the phenomenon that triggers the introduction of emergency powers in the first instance. While the need for exceptional powers may be obvious at the outset of the emergency, assessment of the point where these powers are no longer needed is considerably more problematic (Greene 2020).

While sanitary emergencies render necessary the adoption of certain measures which may restrict human rights and freedoms as previously explained, economic crises and social unrest might entail other limitations of human rights or the prorogation of the derogations already in place. Precisely for this reason, it is crucial to identify exactly what kind of crisis triggered each one of the emergency measures, which should always be reasonable and temporary, tailor-made for that specific crisis and constantly tested against the principles of necessity and proportionality. Green's analysis stresses these crucial considerations as he concludes that:

> The story of emergency powers since the Twentieth Century and, particularly since 11 September 2001 has not been one of abuse of officially declared states of emergency; rather, it has been the story of permanent emergency powers enacted without such declarations. It has been a story of de facto emergencies. Moreover, where de jure states of emergency have been declared, their ending has not resulted in a return to the status quo ex ante; instead, many of the emergency powers are re-enacted as ordinary, permanent laws (Greene 2020).

Considering both the arguments in favour and against the derogation of the ECHR, what is striking is that jurists on both sides agree on one crucial issue: they all identify the same main problem triggered by emergencies in the abuse of exceptional powers restricting and limiting human rights and fundamental freedoms. Even Dzehtsiarou (2020) underlines that

> it is especially crucial in case of emergency to hold on to human rights, to keep the authorities accountable and within certain limits because the crisis legislation giving new extensive powers to the executive branch can have long-lasting disproportionate effects on our lives, our freedoms and our societies.

As the President of the ECtHR, Robert Spano, recently emphasised with regard to the protection of human rights in times of coronavirus pandemic, emergency legislation should not become the new normality, declaring that the CoE will be on the frontlines to uphold the fundamental values of the ECHR (Chiellino 2020).

Conclusion

Situations of emergency in general require more commitment on behalf of CoE monitoring bodies in order to uphold the fundamental rights, freedoms and values of the ECHR, by activating the close supervision of all member States, even those who did not formally notify the derogation of the Convention. To this end, the SG could enhance its role by enacting mechanisms of inquiry, as provided for in Art. 52

ECHR. The COVID-19 emergency should become an opportunity for the ECtHR to better clarify the substantial and procedural requirements for derogation and set out whether *de facto* derogation without notification is acceptable in the context of pandemics. Given that the curtailment of human rights and freedoms such as the right to private and family life, the freedom of assembly and association, freedom of movement and freedom of expression was a direct effect of the measures imposed to deal with the dangers posed by the pandemic and to protect the right to health and the right to life, the most important aspect has become to guarantee emergency powers are kept at bay and derogations are only temporary, while emergency measures are constantly tested against the principles of necessity and proportionality so that they do not become "the new normal", catapulting Europe (and potentially the rest of the world) into the darkness of wide-spread discriminations and human rights crisis exacerbated by the pandemic.

Bibliography

Bartolini, G.
2020 'Alcune questioni dell'emergenza COVID-19 in Italia in un'ottica di International disaster Law (Parte I e Parte II)', *SIDIblog – il Blog della Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea*.

Bruszt, L.
2020 'Viktor Orban: Hungary's Desease Dictator', *Reporting Democracy* – BalkanInsight.com.

Casolari, F.
2020 'La protezione dello stato di diritto nell'Unione europea ai tempi del coronavirus: se non ora, quando?', *SIDIblog*.

Chiellino, G.
2020 'La legislazione d'emergenza non diventi la nuova normalità. A tu per tu con Robert Spano', *Sole24ore*.

Cirone, E.
2020 'L'app italiana di contact tracing alla prova del GDPR: dall'habeas data al ratchet effect il passo è breve?', *SIDIblog*.

Clapham, N.
2020 'Derogation in the time of Coronavirus', *UK Human Rights Blog*.

De Vido, S.
2020a 'Violence against women during COVID-19 pandemic and the Istanbul Convention', *European Law and Gender action* (ELaN), https://elan.jus.unipi.it/

2020b 'Diritto all'istruzione e accesso ad internet all'epoca del COVID-19', *SIDIblog*.

Dzehtsiarou, K.
2020 'COVID-19 and the European Convention on Human Rights', *Strasbourg Observers*.

Emmos, C.
2020 'International Human Rights Law and COVID-19 States of Emergency', *Verfassungsblog on Constitutional Matters*.

Epure, G.
2020 'Strengthening the supervision of ECHR derogation regime. A non-judicial avenue', *Strasbourg Observers*.

Greene, A.
2020 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic', *Strasbourg Observers*.

Holcroft-Emmess, N.
2020 'Derogationg to Deal with Covid 19: State Practice and Thoughts on the Need for Notification', *Ejil:Talk! Blog of the European Journal of International Law*.

Istrefi, K.
2020a 'A new mechanism for supervision of derogations from the European Convention on Human Rights: filling the accountability gap?', *Blog van het Utrecht Centre for Accountability and Liability Law*.

2020b 'Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe', *EJIL:Talk!*

Khurshudyan, I.
2020 'Coronavirus is testing the limits of Russia's surveillance state', *The Washington Post*.

Lowe, V.
2011 *International Law*, Oxford, Oxford University Press.

Lugarà, R.
2020 'Emergenza sanitaria e articolo 15 CEDU: perché la Corte europea dovrebbe intensificare il sindacato sulle deroghe ai diritti fondamentali', *Osservatorio Costituzionale*, 3/2020.

Makszimov, V.
2020 'Coronavirus derogations from human rights send wrong signal, say MEPs', EurActiv.com

Martin, S.
2020 'A Domestic Court's Attempt to Derogate from the ECHR on behalf of the United Kingdom: the implications of Covid-19 on judicial decision-making in the United Kingdom', *Ejil:Talk!*

McBride, J.
2020 'An Analysis of Covid-19 Rensponses and ECHR Requirements', *ECHR blog*.

Nazeer, T.
2020 'Digital Surveillance and 'Technological Totalitarianism', *Byline Times*.

Nicolicchia, F.
2020 'Sorveglianza di massa e prerogative di riservatezza dell'individuo durante l'emergenza Sars-CoV-2. Scenari attuali e prospettive future', *Diritto virale. Scenari e interpretazioni delle norme per l'emergenza Covid-19*, www.giuri.unife.it/it/coronavirus/diritto-virale

Ozturk, A.
2020 'COVID-19: Just Disastrous of the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the COVID-19 Outbreak', *American Society of International Law Insights,* Vol. 24, issue 6.

Roth, A.,
2020 '«Cybergulag»: Russia looks to surveillance technology to enforce lockdown', *The Guardian*.

Scheinin, M.
2020 'COVID-19 Symposium: To Derogate or Not to Derogate?', *OpinioJuris*.

Staiano, F.
2020 'L'impatto della pandemia da COVID-19 sulle donne. Considerazioni sul Policy Brief del Segretario Generale dell'ONU del 9 aprile 2020', *SIDIblog*.

Tacconi, M.
2020a 'Orban, Visegrad e il volto autoritario del coronavirus', *ISPIonline*.

2020b 'Ungheria, dai pieni poteri ai pieni poteri: il trucco di Orban', *ISPIonline*.

Zagato, L.
2006 'L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani', *DEP. Deportate, esuli, profughe. Rivista telematica di studi sulla memoria femminile*, n.5-6/2006.

Zghibarta, P.
2020 'The Whos, the Whats, and the Whys of Derogations from the ECHR amid COVID-19', *Ejil:Talk!*

Zagrebelsky, V., Chenal, R., Tomasi, L.
2016 *Manuale dei diritti fondamentali in Europa*, 2º Ed., Bologna, Il Mulino.

Zorzi Giustiniani F., Sommario E., Casolari F., Bartolini G.
2018 *Routledge Handbook of Human Rights and Disasters*, London, Routlege.

Documents and other references

[All links last accessed on 14.12.2020]

2016 'Statement issued by Requena, M., in occasion of the 68th session of The International Law Commission of the United Nations', https://legal.un.org/ilc/sessions/68/pdfs/requena_stmt_7july2016.pdf

2020 'Statement by President von del Leyen on emergency measures in Member States', https://ec.europa.eu/commission/presscorner/detail/en/statement_20_567

2020 'Statement by David Sassoli, EP President, on the situation in Hungary in the context of the COVID-19 outbreak', https://multimedia.europarl.europa.eu/en/statement-sassoli-situation-hungary-covid19-outbreak_I187940-V_v

2020 'Letter from Council of Europe Secretary General Marija Pejčinović Burić, for the attention of Viktor Orbán, Prime Minister of Hungary', https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary

Centrul de resurse juridice (CRJ), / The Centre for Legal Resources
2020 'România suspendă temporar, prin derogare, aplicabilitatea Convenției Europene a Drepturilor Omului fără să-și anunțe cetățenii'. / Romania suspends the applicability of the ECHR, by derogating it, without announcing its citizens. [Author's translation from Romanian.]

Council of Europe
2019 'Guide on article 15 of the European Convention on Human Rights. Derogation in time of emergency'.

2020a 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states', Information Documents SG/Inf(2020)11.

2020b 'Coronavirus Pandemic in the EU – fundamental rights implications: with a focus on contact-tracing apps', Bulletins #1 & #2.

Covid-19 Health System Response Monitor, www.covid19healthsystem.org

Democracy reporting international,
2020 'Emergency Measures and the Rule of Law in the Age of COVID-19'.

European Court of Human Rights,
2019 'Annual Report', https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf

NGOs

ARTICLE 19,
2020 'Viral Lies: Misinformation and the Coronavirus', Policy Brief.

Office of the UN High Commissioner for Human Rights (OHCHR),
2020 'Bulgaria / Covid-19 response: «Stop hate speech and racial discrimination»'.

Human Rights Watch (HRW),
2020a 'Covid-19 Fueling Anti-Asian Racism and Xenophobia World Wide'.

2020b 'Armenia: Law Restricts Privacy Amid COVID-19 Fight'.

The European Union Agency for Fundamental Rights,
2020 'Coronavirus Pandemic in the EU – Fundamental rights implications', Bulletin #1.

United Nations

Human Rights Committee,
2018 'Genral Comment No.36 (2018) on article 6 of the International Covenant on Civil and Politicat Rights, on the right to life', CCPR/C/GC/36, 30 October 2018, adopted by the Committee at its 124th session (8 October to 2 November 2018).

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