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# Human Rights Derogation in Times of Emergency of Covid-19

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## Abstract

The Covid-19 pandemic has prompted governments around the world to take restrictive measures against the pandemic, also the governments around the world have been challenged to respect human rights, democracy and the rule of law in the fight against the pandemic. In an effort to deal with the immediate catastrophic effects of the virus, nations have resorted to various measures, including restricting freedom of movement and closing national borders. Under international human rights law, states can restrict the exercise of most human rights if it is necessary to protect the rights of others or collective interests. The paper aims to make an analysis and presentation of the exceptional circumstances caused by the global pandemic Covid-19, that are leading to human rights restrictions in emergency time, varying in scope and duration.

The authors will also provide a theoretical overview of the derogation according to the European Convention on Human Rights (ECHR) that can apply 'in times of war or other public emergency threatening the life of the nation'. More recent legal instruments usually do not refer to 'war' but contain similar reference to public emergency. The authors also presented the specific right of states to deviate from human rights in conditions of public emergency and conditions of legitimate deviation in the context of Covid-19. At the end of the paper, conclusions and recommendations are given, that the respect for human rights during the Covid-19 pandemic calls for multilateral cooperation and solidarity at all levels. Within states, measures to combat the pandemic should be motivated by the conviction of all people to contribute to preventing the virus' spread, while states must stand by those most at risk. All states in Europe, whether they are members of the Council of Europe or the European Union, have committed to upholding human rights, democracy and the rule of law, including under the European Convention on Human Rights, the EU Charter of Fundamental Rights and UN treaties.

*Keywords:* Covid-19 pandemic, human rights, restrictions, emergency time, ECHR.

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## 1. Introduction

Countries, as the main players on the international level, in mutual relations are often seen as sovereign, which means they are not vulnerable to any higher political authority. The duty which corresponds to the right of sovereignty is non-interventional, an obligation not to interfere in actions which essentially fall within the domestic jurisdiction of sovereign countries. Human rights, which usually imply the treatment of its own citizens by the country in its own territory, traditionally belong to the domain of domestic jurisdiction. The aspiration to protect the human dignity of all human beings is central to the concept of the human rights. This concept at the center leaves the man and the common universal system of values dedicated to the sanctity of life and provides a framework for building a human rights system protected by internationally accepted norms and standards<sup>1</sup>.

In March 2020, a global pandemic caused by the corona virus was declared, which in 2021 is still ongoing. The virus destroys many lives, but in the fight against the infection, the main challenge besides preserving human health was not to allow the pandemic to violate human rights and not to destroy the basic values of free societies. The pandemic has prompted governments around the world to take restrictive measures against the virus, and the Council of Europe has urged governments across Europe to respect human rights, democracy and the rule of law during the Covid - 19 crisis. Human rights are key in shaping the pandemic response, both for the public health emergency and the broader impact on people's lives and livelihoods. Human rights put people centre-stage. Responses that are shaped by and respect human rights result in better outcomes in beating the pandemic, ensuring healthcare for everyone and preserving human dignity. But they also focus our attention on who is suffering most, why, and what can be done

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<sup>1</sup> Stojanovska-Stefanova, Aneta and Atanasoski, Drasko and Chacorovski, Zoran (2017) *Human Rights as a subject of world politics*. US China Law Review, 14 (6). pp. 321-334. ISSN 1548-6605 (Print) 1930-2061 (online)

about it. They prepare the ground now for emerging from this crisis with more equitable and sustainable societies, development and peace<sup>2</sup>.

Hence the biggest social, political and legal challenges which the countries faced were their abilities to respond effectively to this crisis, while ensuring that the measures they take would guarantee the preservation of the core values of human rights, democracy and the rule of law.

## 2. Methodology

The main hypothesis of the authors for writing this paper is that "the Covid-19 pandemic caused the derogation of human rights". Auxiliary hypotheses are that "the freedom of movement is one of the basic human rights enshrined in many international conventions" and "the pandemic calls for a co-operative, transparent, science-based and coordinated global response".

The hypotheses are tested and discussed by the authors through the available data, analysis of European Convention on Human Rights, EU Charter of Fundamental Rights and UN treaties, as well as analyzes of the knowledge and proposed measures by governments and international organizations such as Council of Europe and United Nations. The authors will try to prove the basic and auxiliary research hypothesis through a process of analysis and synthesis, abstraction and concretization.

## 3. Literature review

The existence of international norms, by itself, does not give authority to the United Nations to explore how the countries implement or not implement them. The Acts for Human Rights, along with the Universal Declaration, represent an authoritative exhibiting of the norms of international human rights, standards of behavior in which all countries should strive for. These three documents, which collectively are called International acts of human rights, represent the summarized exhibition of the minimum social and political guarantees recognized by the international community as necessary for a decent life in the modern world<sup>3</sup>. The duty to protect requires the country to prevent violence and other human rights violations among the people on its territory. According to this, human rights also have a "horizontal dimension", which has become increasingly important in the era of globalization, raising the question of social responsibility of international corporations. Another trend of development is the growing emphasis on the prevention of the human rights abuse by structural measures, respectively through national institutions or by including the dimension of the human rights in the operations of peacekeeping. Prevention is also a priority and access of human security to human rights.<sup>4</sup> Behind the current country of human rights on an international level, stands a long process of acquiring certain rights, their affirmation and promotion of their practice. In international relations, the central role is given to the individual, and thus human rights play an important role in international relations. Theorists speak about three groups of developmental stages of human rights. The first group includes those rights that should allow the release of the man from the pressure of the country, i.e. rights aimed at freedom, and they include civil and political rights. As such, they should allow a person active engagement in the management of the country and its control. Among civil and political rights include: the right to life, liberty and security of person, freedom of thought and expression, the right to a fair trial, the right to effective remedies, and freedom of association. Some of these rights can also be restricted, for example, in the case of an emergency or crisis in the country. The second group includes: economic, social, and cultural rights, i.e. rights aimed at protecting the man. They enable the existence of man, adequate standard of living, employment, social, and health care and so on. The third group of rights is called collective rights that are still called solidarity, because their realization requires cooperation on the international level. In order for all three groups of rights to implement, promote, and protect, it is extremely important that the country, as a subject of international law, finds ways and models on how to successfully support individuals in finding the way to their accomplishments<sup>5</sup>.

Hartman F. Joan noted that international protection of human rights is essential in crisis situations where states suspend basic freedoms and frequently commit massive violations of human rights treaties<sup>6</sup>.

Stojanovska-Stefanova A and Runcheva-Tasev H, argued that human rights should be a central focus of states, both in times of prosperity and in times of crisis. Thus, the Covid-19 pandemic posed serious challenges to effective access by providing measures

<sup>2</sup> United Nations, (2020), "Covid-19 and Human Rights, We are all in this together", available at: [UNSDG | COVID-19 and Human Rights: We are all in this together](#), last accessed: 24.09.2021

<sup>3</sup> Donnelly Jack, (2004), International human rights, (MI-AN, Skopje), pg.17

<sup>4</sup> Understanding the human rights (2008), The Macedonian Information Center in Cooperation with the Directorate for Public Diplomacy, Ministry of Foreign Affairs of Macedonia, Printing House Europe 92, Kocani, pg.34.

<sup>5</sup> Stojanovska-Stefanova, Aneta and Atanasoski, Drasko and Chacorovski, Zoran (2017) *Human Rights as a subject of world politics*. US China Law Review, 14 (6). pp. 321-334. ISSN 1548-6605 (Print) 1930-2061 (online)

<sup>6</sup> Hartman F Joan, (1984) *Derogation from Human Rights Treaties in Public Emergencies-A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*,

to deal with the health and economic crisis, while at the same time exposing them to the need to preserve the core values of democracy and the rule of law<sup>7</sup>.

Marinelo T, argues that it is difficult to compromise between defending national interests and protecting individual rights during public emergencies.<sup>8</sup> In such situations, insistence on special individual interests can have serious detrimental effects on community welfare, said Schreuer Christoph. The need to accommodate both sets of claims is recognized in international documents dealing with the protection of human rights as well as in national instruments safeguarding basic rights and fundamental freedoms. While it is clear that individual rights are not absolute, the international community must guard against spurious invocations of community interests to excuse violations of human rights<sup>9</sup>.

Hartman F. Joan, notes that states of emergency involving the suspension of fundamental right for the purported reason of national self-protection<sup>10</sup>.

The coronavirus tested the (un) readiness of the countries worldwide to deal with the health crisis, and then with the severe economic crisis caused by restrictions on freedom of movement. As of April 7, 2020, Ireland was the only EU country that did not impose restrictions on state borders for entry / exit of its own and third-country nationals. A total of 26 EU member states have closed colleges, schools, kindergartens, museums, libraries, etc., while Sweden was the only country that decided to practice the method of acquiring collective immunity without the introduction of restrictions and quarantines.

Having in mind that we are approaching the two years' period since the coronavirus appeared on European field and was then declared a pandemic by the World Health Organization, the question that arises is whether the measures restricting freedom of movement were legitimate and whether they helped fight the virus? The answer is obvious if we analyze the increasing number of active cases, first in the Balkans, then at the European and generally at the global level<sup>11</sup>.

The Council of Europe, in order to assist the 47 Member States, has issued an Information Document<sup>12</sup>, as a tool designed to assist countries in taking action during the current crisis, in order to remain proportionate to the threat of the spread of the virus and to have a time limit.

The document covers four key areas:

- derogation from the European Convention on Human Rights in emergencies, respect for the rule of law and democratic principles in emergencies, including restrictions on the scope and duration of emergency measures;
- basic standards for human rights, including freedom of expression, privacy and data protection, protection of vulnerable groups from discrimination and the right to education;
- protection and protection of victims of crime, especially in relation to gender-based violence.

-the document aimed to facilitate the process of implementing corona virus protection measures that in many countries included restrictions and bans on movement, in addition to the already known rules for wearing masks and maintaining social distance.

Also, the United Nations has available a powerful set of tools, in the form of human rights, that equip States and whole societies to respond to threats and crises in a way that puts people at the centre. Observing the crisis and its impact through a human rights lens puts a focus on how it is affecting people on the ground, particularly the most vulnerable among us, and what can be done about it now, and in the long term. Although this paper presents recommendations, it is worth underlining that human rights are obligations which States must abide by<sup>13</sup>.

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<sup>7</sup> Stojanovska-Stefanova, Aneta and Runcheva-Tasev, Hristina (2021) *Современи предизвици за заштита на човековите права*. Правен дијалог (23). pp. 5-13. ISSN 1857-7644

<sup>8</sup> Mariniello, T. (2019). Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system. *German Law Journal*, 20(1), 46-71. doi:10.1017/glj.2019.3

<sup>9</sup> Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. INT'L L. (1982). Available at: <https://digitalcommons.law.yale.edu/yjil/vol9/iss1/6>

<sup>10</sup> Hartman, J. F. (1984). [Review of *States of Emergency: Their Impact on Human Rights*, by International Commission of Jurists]. *Human Rights Quarterly*, 6(1), 125–132.

<sup>11</sup> Стефановска В. (2020), *Импlications врз слободата на движење за време на пандемијата Ковид-19*, IHR - Платформа блог, 22.09.2021

<sup>12</sup> Council of Europe, *Informative document SG/Inf(2020)11*, link: <https://rm.coe.int/covid-toolkit-ms-mkd/16809e3e21>, last accessed 11.09.2021

<sup>13</sup> United Nations, (2020), "Covid-19 and Human Rights, We are all in this together", available at: [UNSDG | COVID-19 and Human Rights: We are all in this together](https://www.un.org/sustainabledevelopment/covid-19/), last accessed: 24.09.2021

#### 4. *State measures as a response to Covid-19 pandemic*

*In accordance with human rights standards, states must use their maximum available resources to fully realise economic and social rights as expeditiously and effectively as possible. They must avoid retrogressing in service standards, and ensure substantive equality by mitigating disproportionate impacts on those most at risk. This should be carried out transparently and with the meaningful participation and consultation of those affected. Both states and the EU's economic response must keep in line with these human rights principles<sup>14</sup>.*

*The world is currently facing one of its most severe public health crises. At the time of this paper, there are more than 234.863.214 confirmed cases of Covid-19 worldwide.<sup>15</sup>*

The Covid-19 pandemic is far more than a health crisis: it is affecting societies and economies at their core. While the impact of the pandemic will vary from country to country, it will most likely increase poverty and inequalities at a global scale, making achievement of SDGs even more urgent. Without urgent socio-economic responses, global suffering will escalate, jeopardizing lives and livelihoods for years to come. Immediate development responses in this crisis must be undertaken with an eye to the future. Development trajectories in the long-term will be affected by the choices countries make now and the support they receive. The UN Development System therefore has a dual imperative. It must respond urgently to stem the impact, and it must do so by helping governments and populations respond in a way that builds a better future. Speed is of the essence; but how we accelerate our development offer of support must be fully consistent with the principles that underpin the United Nations Secretary-General's global call. The responses should aim to protect people and planet; preserve gains across all the SDGs; ensure equality; promote transparency, accountability, and collaboration; increase solidarity; and place the voice, rights and agency of people at the center<sup>16</sup>.

The UN development system is placing all of its relevant assets in support of an immediate development response to complement the humanitarian and emergency health interventions. These assets include<sup>17</sup>:

- A wide and deep presence
- The required knowledge
- a broad mandate
- a large development portfolio to build on
- A wide and flexible range of support modalities
- The ability to deliver integrated, coordinated support
- Established funding modalities for rapid disbursements
- Strong partnerships for greater reach and impact
- An impartial, normative approach
- An operational infrastructure fit for purpose.

The Covid-19 crisis impacts the world's poorest and most vulnerable hardest, with significant intergenerational implications for poor families. As demonstrated during the 2008 financial crisis, countries with strong social protection systems and basic services suffered the least and recovered the fastest. Over the next few months, governments around the world will need to adapt, extend and scale-up cash transfers, food assistance programmes, social insurance programmes and child benefits to support families, among others.

However, 4 billion people – accounting for 55 percent of the world population, including two out of three children – have no or inadequate social protection to start with. Social protection responses must consider differentiated impacts of Covid-19 on vulnerable groups, women and men and those surviving on income in the informal sector, as well as those now shouldering additional unpaid care work. Therefore, the scope of the challenges ahead requires an extraordinary scale-up of support<sup>18</sup>.

The Covid-19 crisis is a brutal reminder of the importance of ensuring lasting progress with respect to social rights enjoyment, particularly through the development of universal public health services. The pandemic shows in practical terms the indivisibility of human rights.

*As the Covid-19 disease pandemic continues to develop, preventing spread of infection to and from health care workers and patients relies on effective use of personal protective equipment. A critical shortage of all of these is putting health care workers*

<sup>14</sup> European Network of National Human Rights Institutions, (2020), *Statement The EU must put economic and social rights at the heart of its economic response to COVID-19*, link: <http://ennhri.org/statement-covid-19-esr/>, (22.03.2021)

<sup>15</sup> Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at John Hopkins, link: <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>, (03.10.2021)

<sup>16</sup> United Nations, (2021), *A UN framework for the immediate socio-economic response to COVID-19*, link: [https://www.un.org/sites/un2.un.org/files/un\\_framework\\_report\\_on\\_covid-19.pdf](https://www.un.org/sites/un2.un.org/files/un_framework_report_on_covid-19.pdf), (22.03.2021)

<sup>17</sup> Ibid

<sup>18</sup> UN, (2020), *A UN framework for the immediate socio-economic response to COVID-19*, link: [https://www.un.org/sites/un2.un.org/files/un\\_framework\\_report\\_on\\_covid-19.pdf](https://www.un.org/sites/un2.un.org/files/un_framework_report_on_covid-19.pdf), (22.03.2021)

*at risk. The right of every worker to a safe and healthy working environment, enshrined in the Article 3 of the European Social Charter, is a widely recognised principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights. It applies to the whole economy, covering both the public and private sectors, employees and the self-employed.*

Older persons face special challenges during the Covid-19 crisis. In the global response to Covid-19, it is essential that States protect the rights of older persons on an equal basis with others without discrimination and without exception and in line with international standards. The rights of elderly persons are protected under Article 23 of the European Social Charter<sup>19</sup>. The main purpose of Article 23 is to enable elderly persons to remain full members of society and requires States Parties to establish an adequate legal framework making it possible to combat age-based discrimination and providing for a procedure for “assisted decision-making”<sup>20</sup>.

Article 11 of the European Social Charter (“the Charter”) enshrines the right to protection of health. In terms of that right, States Parties have undertaken to take appropriate measures designed, inter alia, to prevent epidemic diseases (Article 11§3), remove the causes of ill health (Article 11§1), and provide advisory facilities for the promotion of health and the encouragement of individual responsibility in matters of health (Article 11§2).

In times of pandemic, during which the life and health of many people are under serious threat, guaranteeing the right to protection of health is of crucial importance, and governments should take all necessary steps to ensure that it is effectively guaranteed.

In the light of this, States Parties must ensure that the right to protection of health is given the highest priority in policies, laws and other actions taken in response to a pandemic.

In this regard, the Committee recalls that the right to protection of health includes the right of access to healthcare, and that access to healthcare must be ensured to everyone without discrimination. This implies that healthcare in a pandemic must be effective and affordable to everyone, and that groups at particularly high risk, such as homeless persons, persons living in poverty, older persons, persons with disabilities, persons living in institutions, persons detained in prisons, and persons with an irregular migration status must be adequately protected by the healthcare measures put in place<sup>21</sup>.

*The Covid-19 crisis has demonstrated just how crucial multilateral institutions are to our collective health, prosperity, and security. The Covid-19 pandemic is a wake-up call for multilateralism. Trying to cope with the immediate devastating effects of the virus, nations have turned toward imposing unprecedented executive measures, including closing borders. However, a virus knows no borders. All countries are affected. We must remain united in our shared humanity. The fight against this global pandemic, which is taking so many lives and challenging our societies, requires more and enhanced international cooperation and worldwide solidarity. Containing and countering this pandemic calls for a co-operative, transparent, science-based and coordinated global response. We are concerned by the serious threat to all countries, particularly developing and least developed countries, countries in situations of conflict and post-conflict countries, where health systems are less prepared, as well as the particular risk faced by refugees and displaced persons. We realise that the pandemic poses a serious threat to the essential right to the highest attainable standard of physical and mental health. At the same time, in a situation of emergency, it is of utmost importance to maintain principles of democracy and the rule of law. We call on all governments to strictly ensure that any measures taken to counter the pandemic must be necessary and proportionate, pursue legitimate purposes, be limited in time, non-discriminatory and respectful of international law, including human rights law. Adopting a gender-responsive approach will be essential<sup>22</sup>.*

## 5. Human rights derogation according the European Convention on Human Rights

Controlling the virus, and protecting the right to life, means breaking the chain of infection: people must stop moving and interacting with each other. The most common public health measure taken by States against Covid-19 has been restricting freedom of movement: the lock-down or stay-at-home instruction. This measure is a practical and necessary method to stop virus transmission, prevent health-care services becoming overwhelmed, and thus saves lives.

<sup>19</sup> Council of Europe, *The Charter in four steps*, link: <https://www.coe.int/en/web/european-social-charter/about-the-charter>, link: <https://www.coe.int/en/web/european-social-charter/about-the-charter>, (29.09.2021)

<sup>20</sup> Council of Europe, (2021), *Council of Europe Social Rights in times of pandemic*, link: <https://www.coe.int/en/web/european-social-charter/social-rights-in-times-of-pandemic>, (23.03.2021)

<sup>21</sup> EUROPEAN COMMITTEE OF SOCIAL RIGHTS COMITE EUROPEEN DES DROITS SOCIAUX, (2020), Statement of interpretation on the right to protection of health in times of pandemic, link: <https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>, 22.03.2021

<sup>22</sup> *The Organization of American States, Alliance of Multilateralism*, link: <http://www.oas.org/fpdb/press/Declaration-AfM-COVID-final.pdf>, last accessed 10.09.2021



However, the impact of lockdowns on jobs, livelihoods, access to services, including health care, food, water, education and social services, safety at home, adequate standards of living and family life can be severe. As the world is discovering, freedom of movement is a crucial right that facilitates the enjoyment of many other rights. Individual human rights, by their very nature, are limited by the correlative rights of other individuals and by the legitimate needs of society<sup>23</sup>. International human rights lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups<sup>24</sup>.

While international law permits certain restrictions on freedom of movement, including for reasons of security and national emergency like health emergencies, restrictions on free movement should be strictly necessary for that purpose, proportionate and non-discriminatory. The availability of effective and generalised testing and tracing, and targeted quarantine measures, can mitigate the need for more indiscriminate restrictions<sup>25</sup>.

Sommario E. noted that the existence of a public emergency of significant magnitude may temporarily exonerate States from the duty to fully respect their human rights commitments, either through the operation of specific clauses that are included in the relevant treaties (so-called “derogation clauses”), or - where no such provision is present - by invoking certain justifications recognized in international law as valid excuses for the non-performance of legal obligations<sup>26</sup>.

Hafner-Burton E. et al.<sup>27</sup> defined derogations as a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties.

According to Shraga, D “a clear delimitation of the State's power to derogate, as well as the absolute entrenchment of certain fundamental human rights and freedoms such as the right to life, freedom from torture, freedom from slavery and from retroactive application of criminal laws are necessary, however, to guarantee that the State does not abuse its power of derogation<sup>28</sup>.”

According to the European Convention on Human Rights (ECHR), derogation can apply ‘in times of war or other public emergency threatening the life of the nation’. More recent legal instruments usually do not refer to ‘war’ but contain similar reference to public emergency<sup>29</sup>.

Article 15 (derogation in time of emergency) of the European Convention on Human Rights affords to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention. The use of that provision is governed by the following procedural and substantive conditions<sup>30</sup>:

- the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation;
- a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation;
- any derogations may not be inconsistent with the State's other obligations under international law;
- certain Convention rights do not allow of any derogation: Article 15 § 2 thus prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the rule of “no punishment without law”; similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention;
- lastly, on a procedural level, the State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed.

<sup>23</sup> Lauterpacht H., (1950), *International Law and Human Rights*, pg.366

<sup>24</sup> United Nations, *International Human Rights Law*, link: <https://www.un.org/en/global-issues/human-rights>, (03.10.2021)

<sup>25</sup> United Nations (2020), Covid-19 and the Human Rights, link: <https://data2.unhcr.org/en/documents/download/75828>, (22.03.2021)

<sup>26</sup> Sommario E. (2012) Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters. In: de Guttery A., Gestri M., Venturini G. (eds) *International Disaster Response Law*. T.M.C. Asser Press, The Hague, The Netherlands. [https://doi.org/10.1007/978-90-6704-882-8\\_14](https://doi.org/10.1007/978-90-6704-882-8_14)

<sup>27</sup> Hafner-Burton, E., Helfer, L., & Fariss, C. (2011). Emergency and Escape: Explaining Derogations from Human Rights Treaties. *International Organization*, 65(4), 673-707. doi:10.1017/S002081831100021X

<sup>28</sup> Shraga, D. (1986). " Human Rights in Emergency Situations under the European Convention on Human Rights". In *Israel Yearbook on Human Rights*. Leiden, The Netherlands: Brill | Nijhoff. doi: [https://doi.org/10.1163/9789004423008\\_009](https://doi.org/10.1163/9789004423008_009)

<sup>29</sup> Audrey Le Bret, COVID-19 pandemic and derogation to human rights, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>

<sup>30</sup> European Court of Human Rights, (2020), Guide on Article 15 of the European Convention on Human Rights Derogation in time of emergency, link:

[https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf), (22.03.2021)

According to Neuman L. Gerald<sup>31</sup>, derogation clauses do not, contradict the notion human right but may on the contrary contribute to their effective protection.

In March and April 2020, in the context of the Covid-19 health crisis, Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia and San Marino, notified the Secretary General of the Council of Europe of their decision to use Article 15 of the Convention<sup>32</sup>.

Under international human rights law, States can limit the exercise of most human rights if it is necessary to protect the rights of others or collective interests. The exceptional circumstances brought by the Covid-19 global pandemic lead to more extensive, on both their scope and their duration, restrictions of human rights than in usual times<sup>33</sup>.

Respect for human rights during the Covid-19 pandemic calls for solidarity at all levels. Within states, measures to combat the pandemic should be motivated by the conviction of all people to contribute to preventing the virus' spread, while states must stand by those most at risk. As the pandemic knows no borders, states need to collaborate in their efforts, and the Council of Europe and European Union should mutually reinforce each other to help states align their actions with human rights.<sup>34</sup>

All states in Europe, whether they are members of the Council of Europe or European Union, have committed to upholding human rights, democracy and the rule of law, including under the European Convention on Human Rights, EU Charter of Fundamental Rights and UN treaties. Beyond the current management of this emergency, this crisis shows the fragility of health systems, urging governments to review their strategies and to (re)invest massively in the healthcare sector.<sup>35</sup>

Hafner-Burton E. et al., argue that derogations are a rational response to domestic political uncertainty. They enable governments facing serious threats to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signaling to these audiences that rights deviations are temporary and lawful<sup>36</sup>.

Marinello T, argues that the recent emergency laws and their widespread and apparently indiscriminate implementation present the risk of destabilizing the whole European system of protection, it becomes ever more necessary that the European Court of Human Rights depart from its previous jurisprudence and adopt a more rigorous and principled scrutiny of the derogation conditions under Article 15 of the Convention<sup>37</sup>.

Crisis or emergency situations usually involve violence and the imminent or actual breakdown of minimum order. In such situations, insistence on special individual interests can have serious detrimental effects on community welfare<sup>38</sup>.

The making of a derogation need not be a concession that the State will not be able to guarantee the rights contained in the Convention. Indeed, the practice when lodging a derogation has been for the Contracting State to state that the measures it is taking "may" involve a derogation from the Convention<sup>39</sup>.

The year 2020 has been a disastrous year for human rights in Europe, in the rethoric of the Council of Europe Commissioner for Human Rights. In her speech on Human Rights Day at the end of 2020, she goes on to argue: "While, increasingly, commitment to upholding human rights standards has been faltering all over the continent for several years, the Covid-19 pandemic has accelerated the erosion of the democratic fabric of our society, on which protection of human rights ultimately depends".

The Western Balkans have not been an exception to this trend. On the contrary, the states in the region, including North Macedonia have imposed strict restrictions and have struggled to keep up with the multiple human rights challenges brought about by the pandemic.

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<sup>31</sup> Neuman L. Gerald., *Constrained Derogation in Positive Human Rights Regime*, in Evan J. Criddle, *Human Rights in Emergencies* (CUP, 2026), pp. 15–31.

<sup>32</sup> European Court of Human Rights (2020), *Derogation in time of emergency*, link: [https://www.echr.coe.int/documents/fs\\_derogation\\_eng.pdf](https://www.echr.coe.int/documents/fs_derogation_eng.pdf), (21.03.2021)

<sup>33</sup> Lebet Audrey, COVID-19 pandemic and derogation to human rights, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>

<sup>34</sup> European Network of National Human Rights Institutions (ENNHRI), *Now is the time for solidarity on human rights*, link available: <http://ennhri.org/statement-on-covid-19/>, last accessed 26.09.2021

<sup>35</sup> Audrey Lebet, COVID-19 pandemic and derogation to human rights, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>

<sup>36</sup> Hafner-Burton, E., Helfer, L., & Fariss, C. (2011). *Emergency and Escape: Explaining Derogations from Human Rights Treaties*. *International Organization*, 65(4), 673-707. doi:10.1017/S002081831100021X

<sup>37</sup> Marinello, T. (2019). *Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system*. *German Law Journal*, 20(1), 46-71. doi:10.1017/glj.2019.3

<sup>38</sup> Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 *YALE J. INT'L L.* (1982). Available at: <https://digitalcommons.law.yale.edu/yjil/vol9/iss1/6>

<sup>39</sup> European Court of Human Rights (2021), *Guide on Article 15 of the European Convention on Human Rights*, link: [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf), (03.10.2021)

In this context, the pandemic is likely to broaden the already existing gap between legislation and reality in human rights protection in the country. When one looks at the fundamental rights protection in the country over the years it is clear that despite the increasing obligations to implement international standards, the pace of their enforcement at the national level lags behind<sup>40</sup>.

The Covid-19 pandemic altered the lives of everyone in the European Union in 2020, with some member states more affected than others by the public health emergency and socioeconomic consequences of lockdown measures. Despite some efforts at the EU and national levels to mitigate the worst impacts, the public health crisis had a disproportionate impact on certain groups—older people, people in poverty, marginalized groups including people with disabilities, Roma, and migrants—and deepened existing fault lines in EU societies and politics<sup>41</sup>.

The Secretary General of the Council of Europe, has called for increased multilateral cooperation among the organisation's member states to draw lessons from the pandemic crisis and enhance preparedness for addressing health concerns on the basis of common principles and best practices.

The Council of Europe urged member states to engage in a new multilateral cooperation project to be launched by the Council of Europe. The cooperation activities will be conducted on the ground in order to identify the most acute issues and effective solutions<sup>42</sup>. There are few doubts that this health crisis is an emergency threatening the life of the nation. If states have some discretion to determine the emergency, international human rights courts will scrutinize the necessity of the measures adopted to face it by applying the principle of proportionality. States must pay particular attention to vulnerable populations in order to ensure they are not disproportionately affected. In their scrutiny, international courts would rely on different indicia to determine if, at the time they were adopted, less severe measures could have achieved the same results<sup>43</sup>.

### 3. Conclusion

The scope of measures taken in response to the current Covid-19 threat and the manner in which they are implemented vary considerably from country to country, at different points in time. The Covid-19 pandemic is greatly affecting our healthcare systems. There is need for anticipating the challenges and assessing the capacities needed requires efficient management in line with ethical principles and respect for human dignity. While some restrictive measures adopted by Council of Europe member states may be explained on the basis of the articles of the European Convention on Human Rights (the Convention) relating to the protection of health (see Article 5 paragraph 1d, paragraph 2 of Articles 8 to 11 of the Convention and Article 2 paragraph 3 of Protocol No. 4 to the Convention), measures of an exceptional nature may require derogation from the obligations of States under the Convention.

This analysis suggests that states need to be respecting and protecting human rights. It is up to each state to assess whether the measures it takes justify such derogations, depending on the nature and extent of the restrictions applied to the rights and freedoms protected by the Convention. The ability of states to implement such measures is an important characteristics of the system, which allows the continued application of the Convention and its oversight machinery even at the most critical times. Any derogation will be assessed by the European Court of Human Rights (Court) in cases before it.

In March and April 2020, in the context of the Covid-19 health crisis, Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia and San Marino, notified the Council of Europe of their decision to use Article 15 from the Convention. Therefore, we may conclude that the Covid-19 pandemic caused the derogation of human rights. Observing the crisis and its impact through a human rights lens puts a focus on how it is affecting people on the ground, particularly the most vulnerable among us, and what can be done about it now, and in the long term. The freedom of movement as one of the basic human rights enshrined in many international conventions was restricted through the taken measures. Therefore, the pandemic strongly calls for a co-operative, transparent, science-based and coordinated global response that guarantee human rights protection.

The Council of Europe recommended that "the key function of the judiciary - especially the constitutional courts, where they exist - should be maintained. It is important that judges are able to examine the most serious human rights restrictions imposed by

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<sup>40</sup> Kacarska S, (2021), Human rights protection and COVID-19 in North Macedonia: Patching or rebuilding a system?, link: <https://europeanwesternbalkans.com/2021/03/02/human-rights-protection-and-covid-19-in-north-macedonia>, (22.03.2021)

<sup>41</sup> Human Rights Watch, (2021), World Report: European Union: Events of 2020, link:

<https://www.hrw.org/world-report/2021/country-chapters/european-union-a-system/>, (22.03.2021)

<sup>42</sup> Council of Europe (2020), ACouncil of Europe contribution to support member states in addressing healthcare issues in the context of the present public health crisis and beyond, link:

<https://www.coe.int/en/web/human-rights-rule-of-law/-/secretary-general-member-states-must-work-together-to-learn-covid-19-health-crisis-lessons>, (22.03.2021)

<sup>43</sup> Audrey Lebret, COVID-19 pandemic and derogation to human rights, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>

emergency legislation. Procrastination, expediting or group handling of certain categories of cases may be allowed, and the preliminary court authorization may in some cases be replaced by ex-post judicial control<sup>44</sup>.

According to Article 15, derogation does not depend on the formal declaration of a state of emergency or a similar regime at the national level. At the same time, for each derogation there must be a clear basis in domestic law that allows protection against arbitrariness and it must be strictly necessary for the fight against public emergency. States must bear in mind that all measures taken must strive to protect the democratic order from threats to it, and must do their utmost to protect the values of a democratic society, such as pluralism, tolerance and open-mindedness. Although the court has accepted the derogations to justify certain exceptions to the standards of the Convention, they can never justify any action that is contrary to the most important requirements of the Convention on legality and proportionality. The rule of law in this context includes not only acts of Parliament, but also, for example, decrees of the executive branch in emergency situations, provided that there is a basis for them in the constitution. Many constitutions provide special legal regime that increases the powers of the executive in the event of war or a major natural disaster or other disaster. Also, it is possible for the legislature to enact emergency laws specifically designed to deal with the current crisis that go beyond existing legal rules. Any new legislation of this kind should be in accordance with the constitution and international standards and, where applicable, be subject to review by the Constitutional Court.

A fundamental principle of the rule of law is that the actions of the state must be in accordance with the law. Even in a state of emergency the rule of law must prevail. The recommendations are that the respect for human rights during the Covid-19 pandemic calls for multilateral cooperation and solidarity, the pandemic calls for a co-operative, proactive, transparent, science-based and coordinated global response.

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