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REVIEW – MEASURE RESTRICTING THE FREEDOM OF MOVEMENT OF MIGRANTS AND ASYLUM SEEKERS

from the perspective of the European Court of Human Rights

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(Group 484)

Belgrade, July 2020

Kingdom of the Netherlands

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Relevant terms used in the masculine grammatical gender refer to all persons without discrimination and regardless of their gender, unless otherwise indicated.

Kingdom of the Netherlands

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Introduction

Political statements about 'letting' several dozens of thousands of migrants pass through, and the developments on Turkey-Greece border marked the beginning of 2020 and doubtlessly announced an uncertain spring for the countries on the Western Balkan migrant route. While the countries were preparing to take measures aimed at precluding or impeding the movement of migrants across the border, or the measures for building up capacities in case of an increased influx of migrants, detection of first COVID-19 cases and the spreading of the virus in Europe were strongly affecting the migration flow dynamics and caused establishment of special regimes of treatment of migrants and asylum seekers.

A state of emergency was declared in Serbia on 15 March, which was followed by a series of measures aimed at citizens, but also some specific measures aimed at foreigners, asylum seekers and migrants. Measures introduced during the state of emergency were indirectly also aimed at protecting the national healthcare system as they were supposed to prevent the collapse of the system and thus ensure avoiding bad scenarios that some EU Member States were facing. The Decision on Lifting the State of Emergency was adopted on 6 May 2020,[1] and according to publicly available data, not a single migrant or asylum seeker was infected by COVID-19 virus. The Decision on Lifting the State of Emergency did not include lifting movement restrictions for migrants and asylum seekers that remained in force until 14 May 2020.

A total of 66 initiatives were submitted to the Constitutional Court to institute the proceedings for an assessment of constitutionality and legality of a series of decisions and regulations related to introducing a state of emergency for the purpose of preventing the spreading of the coronavirus disease (COVID-19), some of which referred to migrants and asylum seekers.

As regards the introduction of a state of emergency, a notification was addressed to the Secretary General of the Council of Europe on the derogation from the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

The facts and circumstances enlisted in the notification provide the framework in which the measures adopted and regimes established may be analysed. There is an impression that, unlike with other measures, the measures aimed at restricting the freedom of movement have been analysed not only from the aspect of the national legal framework, but also from the aspect of international standards, in particular through the prism of the case-law of the European Court of Human Rights (hereinafter: ECtHR). The authors of this document recognise the regional protection system established through the Council of Europe as a particularly important one and they take it as a reference framework for this analysis, for several reasons. The first reason is that the Republic of Serbia invoked the provisions of the ECHR that provide the Contracting Parties with a possibility to derogate from the provisions of the ECHR under certain circumstances. Direct consequences of this are different standards that the ECtHR would apply in the proceedings that would be instituted for the potential violation of rights guaranteed by the ECHR during a state of emergency. Then, it is a fact that after exhausting national legal remedies, the proceedings before the European Court of Human Rights, or not so often before the UN's monitoring bodies that provide a possibility of submitting individual applications, are most usually instituted. The third reason stems from a particular vulnerability of migrants and asylum seekers and from the fact that some of the most rigorous measures in the first wave of the pandemic referred to them. Therefore, it seems pivotal to comprehensively consider relevant key positions of the ECtHR.

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1 "Decision Declaring a State of Emergency" ('Official Gazette of RS' No. 29/20) was adopted on 15 March 2020 and it was in force until 6 May 2020 when the 'Decision on Lifting the State of Emergency" ('Official Gazette of RS', No. 65/20).

Although the state of emergency has been lifted, the COVID-19 pandemic is still present both in the Republic of Serbia and in other European countries. The coronavirus pandemic makes the countries pursue various strategies in a response to the virus and protect their populations, by giving recommendations or introducing rigorous measures that restrict rights and freedoms. As the development of the situation is not possible to predict, we cannot neglect the possibility of reimposing rigorous measures and restricting some rights and freedoms and in this regard, the possibility of introducing special regimes intended particularly for the population of migrants and asylum seekers.

Without diminishing the level of obligation of a state to apply standards of protection of human rights and freedoms even in the period of the first wave of the pandemic, it seems that the competent authorities need to be particularly and additionally careful if they are to reimpose the restrictive measures. In that regard, the document before you is mostly intended for decision makers, so that when considering introducing potential measures they would take into account whether and to what extent the measures applicable to asylum seekers and migrants during a state of emergency comply with the relevant standards of the protection system established within the Council of Europe.

The document outlines relevant provisions of the ECHR and the relevant ECtHR case-law related to the possibility of a Contracting Party’s derogation from the ECHR provisions, as well as the standards and positions of the ECtHR that are relevant for understanding the qualification of restrictions of freedom of movement or deprivation of liberty and the application of Article 5 of the ECHR (Right to liberty and security), Article 3 of the ECHR (Prohibition of torture, inhuman or degrading treatment), as well as some key measures introduced during the state of emergency aimed at asylum seekers and migrants. In addition, the document also outlines the measures applied to migrants and asylum seekers in other European countries during the peak of the COVID-19 pandemic crisis. The conclusion of the document offers key observations of the authors.

1. Derogations from the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms – implementation of Article 15

International treaties[2], including the ECHR, allow the derogation from some human rights. This is a measure that applies exceptionally, in exceptional circumstances, when even democratic societies need to protect themselves against great dangers[3].

Pursuant to ECHR Article 15 "any High Contracting Party may take measures derogating from its obligations under this Convention". The conditions that need to be met for the derogation to be in compliance with the ECHR are that:

1) the derogating measures are imposed "in time of war or other public emergency threatening the life of the nation";
2) the derogation is to the extent strictly required by the exigencies of the situation;
3) derogating measures are consistent with the country's other obligations under international law;
4) the derogation does not refer to the right to life (Art. 2), prohibition of inhuman, degrading treatment or punishment (Art. 3), prohibition of slavery and servitude (Art. 4, para. 1), no punishment without law (Art. 7);
5) the state concerned keeps the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons for taking them and of the moment when such measures have ceased to operate.

The ECtHR case law related to violation of some of the rights from the ECHR in the circumstances when a Contracting Party has derogated from certain obligations by invoking Article 15, indicates that the Court preliminary considers whether the derogation itself was in compliance with the requirements from this Article, i.e. **whether the circumstances preceding the state of emergency were "threatening the life of the nation**" and **whether formal notification-related requirements were met.** Only then does it start the *meritum* assessment of the violation of individual rights, and examine the proportionality of the derogating measure or whether the derogation was to the extent required by the public threat situation. In the Case of *Ireland v. the United Kingdom,* the Court emphasises that it will, of course, be necessary to have regard to Article 15 (art. 15) in deciding whether any derogations from Article 5 were, in the circumstances of the case, compatible with the Convention, but also that "**it should ascertain in what respects the measures complained of derogated from Article 5 before assessing them under Article 15**".[4]

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2 Four human rights treaties contain a derogation clause, Article 4 of the International Covenant on Civil and Political Rights, Article 27 of the American Convention on Human Rights and Part V Article F of the European Social Charter and Article 15 of the European Convention on Human Rights.

3 Dimitrijević, Vojin; Popović, Dragoljub; Papić, Tatjana; Petrović, Vesna. *International Human Rights Law* – Belgrade, 2007: 128.

4 ECtHR. *Case of Ireland v. The United Kingdom.* Application No. 5310/71), para. 191.

The circumstances of "public emergency threatening the life of the nation" include "a situation of exceptional and imminent danger or crisis affecting the general public, and constituting a threat to the organised life of the community which composes the State in question".[5] In its case law, in several cases, the Court has taken a position that the threat could be the foundation of derogation from the Convention's provisions under the following conditions: 1) it must be actual or imminent (where the Court emphasises that the imminence of the situation may not be interpreted narrowly as that the state concerned is expected to wait for an emergency to occur before taking measures to tackle it);[6] 2) its effects must involve the whole nation; 3) it must constitute a threat to the organised life of the nation, and 4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.[7] In its case law, the Court underlines that Contracting States have a wide margin of appreciation to determine whether the life of the nation is threatened by a "public emergency", and how far it is necessary to go in attempting to overcome the emergency. In addition, it stresses that the national authorities seem better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.[8] **While analysing the Court's case-law in cases where the Contracting States invoked Article 15, it could be noted that in none of the cases so far has the Court disputed the justifiability of declaring a "public emergency threatening the life of the nation", and it could be seen that the Court has recommended an assessment by national authorities.**[9] **Moreover, it is important to mention that in its case-law so far, the Court has not decided on the circumstances threatening the health of a nation or part of a nation.**

On the other hand, the Council of Europe's guidelines do not dispute that the threat posed by COVID-19 virus is a legitimate foundation for imposing measures derogating from the Convention, and "it is also understood that the regular functioning of society cannot be maintained, particularly in the light of the main protective measure required to combat the virus, namely confinement".[10] Furthermore, the guidelines also emphasises the frameworks in which the states in such situations may act, in line with basic values of democracy, rule of law and human rights.

Due to the threat of spreading COVID-19, many Council of Europe member states, upon invoking Article ECHR Art. 15, informed the Secretary General of the Council of Europe on derogations from the ECHR in a state of emergency: Albania, Georgia, Estonia, Armenia, Serbia, Romania, Latvia, North Macedonia, Moldova and San Marino.

As regards **the formal requirements**, according to the Court's position, the notice of **derogation** needs to be official and public and in the absence of such a notice, Article 15 does not apply to the measures taken by the respondent state.[11] Moreover, the requirement to notify the Secretary General is usually met by writing a letter and attaching copies of the legal texts under which the emergency measures will be taken, with an explanation of their purpose.[12] As Article 15 para. 3 does not provide for strict time limits for making the notification, closer guidelines are provided by the Court's case-law. In the case of *Greece v. the United Kingdom*, the Commission found that it was clear from the wording – "(keep the

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5 ECtHR. *Case of Lawless v. Ireland* (no. 3). Application No. 332/57, 1 July 1961, para. 28.

6 ECtHR. *Case of A. and others v. the United Kingdom*. Application No. 3455/05, 19 February 2009, para 177.

7 Nos. 3321-3/67 and 3344/67, 5.11.69, Yearbook of the European Convention on Human Rights, Vol. 12, 1969, 1, para. 113.

8 ECtHR. *Case of Demir and others v. Turkey*. Application No. 71/1997/855/1062-1064, 23 September 1998, para.43; *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 68.;

9 Guide on Article 15 of the European Convention on Human Rights, Updated on 31 December 2019: 6.

10 Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states, 7 April 2020: 2.

11 ECtHR. *Cyprus v. Turkey*. Application No. 8007/77, Commission Report of 4 October 1983, para. 66-68.

12 ECtHR. *Lawless v. Ireland (no. 3),* Application No. 332/57, para. 47.

Secretary General of the Council of Europe fully informed of the measures) that were undertaken and the resons for them" – that the notification did not need to be made before the measure in question had been introduced, but also that the wording of this paragraph did not give guidance either as to the time within which the notification must be made or as to the extent of the information to be furnished to the Secretary General. The Commission considered that it was for the State concerned to notify the derogating measures in question without any unavoidable delay together with sufficient information concerning them, to enable the other Contracting Parties to assessmentthe nature and extent of the derogation which the measures involved.[13] In this case the Commission found that, the three-month period between the taking of the derogating measure and its notification had been too long and could not be justified by 'unavoidable reasons'. On the other hand, in the case of *Lawless v. Ireland (no. 3),* the Court found that the notification twelve days after the measures entered into force was sufficient.[14] Furthermore, in the case of *Alpay* [15] *and Altan*[16] *v. Turkey*, the Court found that the formal requirements under Article 15 were met although Turkey had stated in the notice of derogation only that "measures taken may include derogations from its obligations under the Convention" without stating the Convention provisions from which it derogates. It is important to underline that in each individual case where the breach of Article 15 of the ECHR is mentioned, the Court will examine *motu proprio* whether a notification by a State complies with the formal requirements, even if it has not been contested by any of the other parties.[17]

As regards **the Republic of Serbia, on 7 April, the Ministry of Foreign Affairs addressed** a note verbale **to the Secretary General of the Council of Europe informing him that "pursuant to Article 15 of the ECHR, the Republic of Serbia declared a state of emergency on 15 March 2020, in accordance with Article 200 of the Constitution of the RS, for the purpose of taking measures necessary for preventing the occurrence and the spreading of the COVID-19 viral disease caused by virus SARS-CoV-2".** The notification did not contain any information on the duration of the state of emergency, nor on the period in which the measures derogating from the guaranteed rights will last, and the reasons given for introducing the measures were that "they were taken to the extent strictly required by the exigencies of the epidemiological situation and medical necessity", and that they "have been constantly under review taking into account the epidemiological situation, recommendations of the WHO and experiences in fighting this contagious disease".[18] Copies of legal texts providing for individual derogating measures were not attached. Instead, the notification itself contained a link to a special web page of the "Official Gazette" containing all applicable legal acts adopted during the state of emergency, in Serbian language. For examining whether the requirement of delivering full information on the measures derogating from the Convention's provisions, it is important to mention that the above mentioned web page is updated on regular basis and that when updating it, legal acts adopted in the beginning of the state of emergency were not included, and later they were replaced by new acts.

13 ECtHR. *Greece v. the United Kingdom* (Volume I), Application No. 176/56, para. 158.

14 ECtHR. Application No. Application No. 332/57, para. 47.

15 ECtHR. *Alpay v. Turkey*, Application No.16538/17, para. 73.

16 ECtHR. *Altan v. Turkey*, Application No. 13237/17, para. 89.

17 ECtHR. *Aksoy v. Turkey*, Application No. 21987/93, para. 85-86.

18 See more information at: <https://rm.coe.int/16809e1d98>.

It is up to the Contracting Parties to decide on the manner in which the measures derogating from the Convention's provisions will be introduced in the national legal framework. In this regard, the ten Council of Europe member states that have so far invoked Article 15 due to the COVID-19 pandemic have taken measures by first declaring a state of emergency (Romania, Moldova, North Macedonia, Georgia, Armenia) or an emergency situation (Estonia, Latvia, Albania – in the case of natural disaster), based on which further administrative measures have been taken, or, as it was the case with Sanremo, only "a series of urgent and necessary measures were introduced to prevent and supress the spread of COVID-19" without previously declaring a state of emergency or an emergency situation. Also, it is important to underline that **the Council of Europe Information Document** Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states[19] states that **"A derogation under Article 15 is not contingent on the formal adoption of the state of emergency or any similar regime at the national level, and that any derogation must have a clear basis in domestic law in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency."**

Other Contracting Parties that derogated from some ECHR provisions due to the COVID-19 pandemic, determined in the very notification (*note verbale*) the period in which the restrictive derogating measures will apply, and the period of duration of the state of emergency (or as in the case of Albania – emergency in the case of natural disaster), during which the restrictive measures will apply. In addition, after sending the first notification, majority of the countries successively informed the Secretary General on individual measures (all countries except for Serbia), delivered relevant acts in original and English languages (Romania, North Macedonia, Albania, Georgia) and/or specified which rights instituted by the Convention were derogated from (Moldova, North Macedonia, Georgia, Estonia, Albania).

Under Article 15 paragraph 3, the state in question also has an **obligation to inform the Secretary General when it withdraws the derogating measures**. Until 18 June 2020, the only countries that had informed the Secretary General on withdrawing the measures derogating from the Convention's provisions were Estonia, Latvia, Moldova and Romania. The Republic of Serbia did not send a notification on withdrawing the derogating measures, that is, in this case, on lifting the state of emergency. It should be born in mind that some measures restricting the rights remained in force even after lifting the state of emergency, but under a new legal regime, which will be discussed in chapters below.

Following the Court's rationale for the cases where the derogating measures taken by invoking Article 15 were examined, it may be seen that **after the Court clarifies the existence of a "public emergency threatening the life of the nation" and that the formal requirement for sending the notification has been met, the next step is to assess whether the derogation has been "strictly required by the exigencies of the situation and consistent with the other obligations under international law".**[20]

For the ECtHR to examine the violation of the Convention, an authorised person, considered to be the victim of the violation, first needs to submit an individual application and all the other admissibility criteria need to be met. In case of submitting an application for violation of rights as a consequence of restrictive measures taken during a state of emergency, the Court, after examining the admissibility criteria, will first examine the circumstances of the state of emergency, and then it will start examining violations of individual rights.

19 Council of Europe, Information Document: Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states, SG/Inf (2020)11, 7 April 2020

20 ECtHR. *Mehmet Hasan Altan v. Turkey*. Application No. 13237/17: para. 90; *Lawless v. Ireland (no. 3),* 1 July 1961, para. 22, p. 55, Series A No. 3.

To ascertain whether a restrictive measure was adequate, the Court has established in its case-law a series of criteria based on which it assesses:

- whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;
- whether the measures are a genuine response to an emergency situation;
- whether the measures were used for the purpose for which they were granted;
- whether the derogation is limited in scope and the reasons advanced in support of it;
- whether the need for the derogation was reviewed before introducing the measure;
- whether there has been any attenuation in the measures imposed;
- whether the derogating measures were subject to safeguards;
- the importance of the right at stake;
- whether a judicial control of the measures was practicable;
- the proportionality of the measures and whether they involved any discrimination;
- whether the measure was lawful and had been effected in accordance with a procedure prescribed by law;
- whether the views of any national courts which have considered the question have been taken into account.[21]

2. Qualification of restriction of freedom of movement and deprivation of liberty

In several cases, the ECtHR has taken a clear position that the difference between a restriction of freedom of movement, that is serious enough to be considered a deprivation of liberty pursuant to Article 5, paragraph 1, and restriction of freedom of movement provided for by Article 2 of the Protocol No. 4, refers to the **degree or intensity**, and not to the nature or substance of the restriction.[22] Moreover, to assess whether someone was "deprived of liberty' within the meaning of Article 5, the concrete situation of the person concerned must be taken into account, as well as a whole range of criteria such as the nature, duration, effects and manner of execution of the measure in question.[23] In the case of *Abdolkahani and Karimnia v. Turkey,* the Court observes that the applicants were not allowed to leave the Foreigners' Admission and Accommodation Centre of the police headquarters and that they were only able to meet a lawyer if the latter could present to the authorities a notarised power of attorney. Moreover, access by the UNHCR to the applicants was subject to the authorisation of the Ministry of the Interior. In the light of the above, the Court concludes that the applicants' placement in the aforementioned facilities amounted to a "deprivation of liberty" given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law.[24]

Before considering the question of whether a state violated Article 5 by restricting liberty, or whether it exceeded the level strictly required by an emergency situation pursuant to the requirements referred to in Article 15, it is important to analyse whether the effects of the measure taken in the circumstances of an emergency situation amount to deprivation of liberty at all.

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21 Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency, updated on 31 December 2019.

22 ECtHR, *Guzzardi v. Italy*, Application No. 7367/76, 6 November 1980, para. 93; *Rantsev v. Cyprus and Russia*, Application No. 25965/04, para. 314; *Stanev v. Bulgaria*, Application No. 36760/06, para. 115.

23 *Engel end others v. Netherlands*, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 59, *Guzardi v. Italy*, para. 92-93.

24 Application No., para. 127.

3. Right to liberty and security (ECHR Article 5)

The provisions that states most usually derogate from in time of war or public emergency threatening the life of the nation also include Article 5 of the ECHR.[25] Right to liberty and security of person should prevent arbitrary or unfair deprivation of liberty. **It is not absolute in its nature and allows for derogations even in regular circumstances.** For a deprivation of liberty to be in accordance with with Article 5, it needs to be **lawful** (procedurally and substantially) and **conducted by invoking one of the grounds laid down in Article 5, paragraph 1:** based on the conviction by a competent court; for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; in the case of the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; in the case of the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; in the case of the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

During the consideration procedure, the Court particularly emphasises the importance of examining the "type" and "manner of implementation" of the measure in question as this enables it to have regard to the context in which the measure is taken, since "situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good."[26]

Immediately after declaring a state of emergency on 16 March 2020, under Article 6 paragraph 1 of the Law on Protection of Population against Infectious Diseases,[27] the Government of the Republic of Serbia adopted a **Decision on temporarily restricting the movement of asylum seekers and irregular migrants accommodated in asylum and reception centres in the Republic of Serbia.**[28] The Decision provides for the following:

"1. For the purposes of **protection against the spread of infectious diseases in the territory of the Republic of Serbia, prevention of uncontrolled movement of persons who may be carriers of the virus and of preventing them from arbitrarily leaving** asylum and reception centres, **movement** of asylum seekers and irregular migrants accommodated in asylum and reception centres in the Republic of Serbia **shall be temporarily restricted**, and **enhanced surveillance and security** of these facilities **shall be established**.

2. Asylum seekers and irregular migrants shall be allowed to leave the facilities referred to in point 1 od this Decision only **in exceptional and justified cases** (to visit a physician or for other justified reasons), and with a **special permission of the Commissariat for Refugees and Migration of the Republic of Serbia**, which shall be limited in time depending on the reason for which it is issued."

25 ECtHR, *Hassan v. the United Kingdom*, Application No. 29750/09, para. 98.

26 ECtHR. *Nada v. Switzerland*, para. 226, *Engel and Others*, para. 59, and *Amuur v. France*, Application No. 19776/92, para. 43.

27 *Official Gazette of RS*, Nos. 15/16 and 68/2020.

28 *Official Gazette of RS*, No. 32/20.

It may be concluded from the above mentioned provisions that the temporary restriction of movement of asylum seekers and migrants was introduced for three main purposes: 1. protection against the spread of infectious diseases in the territory of the Republic of Serbia, 2. prevention of uncontrolled movement of persons and 3. preventing them from arbitrarily leaving the centres. For the purposes of implementing the above provisions in practice and really complying with them, the Decision provided for establishing enhanced surveillance and security at asylum and reception centres. For this reason, the Serbian Armed Forces were engaged to ensure enhanced surveillance, control of entrances and exits and security of these facilities.[29]

However, this restriction of movement was not an absolute one as the Decision provides for a possibility of leaving a centre in exceptional and justified cases, such as for the purpose of visiting a physician. Permissions for leaving were provided by the Commissariat for Refugees and Migration (or "SCRM") that was left with a wide margin of discretion by this provision to decide in each individual case on when and for how long somebody would be allowed to leave a centre. The Decision did not define the contents of the request for leaving, the manner of defining exceptional and justified reasons, the time limits for the SCRM to decide on the request and whether the person in question had a possibility of complaining, to whom and under what procedure he could complain in case he received a negative reply or in case his request for leaving the centre was not approved.

In addition, on the same day (16 March 2020), pursuant to Article 200 of the Constitution, the Government passed a Decree on Measures during the State of Emergency,[30] whose Article 3 lays down the following:

"The Ministry of Interior **may order closure of all approaches to an open place or entrances to a facility, and prevention of leaving this space or facility without a particular approval**, and an **obligatory stay for certain persons or groups of persons in a specific place or in specific facilities** (migrants' reception centres and alike**)."**

The above mentioned provisions had similar meaning and purpose - to restrict movement of persons. Therefore, justification of the measures aimed at restricting the freedom of movement laid down by two Government's regulations, adopted on the same day, may be brought into question. Provisions of Article 3 of the Decree are general in nature because the migrants' reception centres are mentioned as an example, which means that this provision could be applied to other open spaces and facilities.

The Decision and Article 3 of the Decree in its original form were applicable until 9 April 2020 and on that day a Decree Amending the Decree on Measures during the State of Emergency,[31] was adopted. The latter revoked the Decision and amended Article 3 of the original Decree by adding two more paragraphs after the first paragraph, similar in contents as the revoked Decision:[32]

"For the purposes of **prevention of uncontrolled movement** of persons who may be carriers of the virus **and of preventing them from arbitrarily leaving** asylum and reception centres, movement of asylum seekers and irregular migrants accommodated in asylum and reception centres in the Republic of Serbia shall be temporarily restricted, and **enhanced surveillance and security** of these facilities **shall be established**.

29 "Vojska Srbije obezbeđuje granične prelaze, migrantske centre i bolnice", (Serbian Armed Forces secure borders, migrant centres and hospitals) N1, 18 March 2020, <https://bit.ly/3hXxk71>, 22 July 2020.

30 *Official Gazette of RS*, No. 31/20.

31 *Official Gazette of RS*, No. 53/20.

32 The following was deleted: "for the purpose of protection against the spread of infectious diseases in the territory of the Republic of Serbia..."

Asylum seekers and irregular migrants shall be allowed to leave asylum and reception centres only in exceptional and justified cases (to visit a physician or for other justified reasons), and with a special permission of the Commissariat for Refugees and Migration of the Republic of Serbia, which shall be limited in time depending on the reason for which it is issued."

Having regard to the abovementioned standards and parameters for assessing whether there was deprivation of liberty, **for analysing the degree of restriction of migrants', asylum seekers' and refugees' freedom of movement in the Republic of Serbia, as a consequence of the measure restricting the freedom of movement of migrants for the purpose of protection against the spreading of infectious diseases in the territory of the Republic of Serbia, the ECtHR would probably consider the following:**

- type of the measure: 24/7 ban on leaving asylum and reception centres in the period from 16 March to 6 May 2020;
- manner of implementing the measure: with an enhanced surveillance and security of the facilities, and with military forces controlling both entering and leaving of the facilities and securing the facilities from the outside;
- intensity of the measure: the ban was not absolute in nature, which means that persons accommodated in these facilities were allowed to leave in exceptional cases, such as a visit to a physician or for other reasons;
- contact with the outside world: that they were able to communicate with the outside world by using internet and mobile phones, including communication with their legal representatives.

4. Deprivation of liberty standards

If the Court concluded that the degree of restriction of freedom of movement of migrants and asylum seekers due to the above measures amounted to a deprivation of liberty within the meaning of Article 5 of the ECHR, it would then examine the **lawfulness of deprivation of liberty and absence of arbitrariness**.

The requirement for lawfulness includes that every deprivation of liberty must be "in accordance with a procedure prescribed by law". This means that deprivation of liberty needs to be in conformity with the substantive and procedural rules of national law[33]or international law, where appropriate.[34] In addition, it is important to mention that, pursuant to the Information Document of the Council of Europe, in an emergency situation "(...) **The "law" includes not only acts of Parliament but also, for example, emergency decrees of the executive, provided that they have a constitutional basis.** Many constitutions provide for a special legal regime (or regimes) increasing the powers of the executive authorities in the case of a war or a major natural disaster or another calamity. It is also possible for the legislature to adopt emergency laws specifically crafted for dealing with the current crisis, which go beyond the already existing legal rules. Any new legislation of that sort should comply with the constitution and international standards and, where applicable, be subjected to review by the Constitutional Court."[35]

According to the Court, "although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with (see *Mooren v. Germany*, [Vv], No. 11364/03, § 73, 9 July 2009). The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. The Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied (ibid, § 76). In laying down that any deprivation of liberty must be "lawful" and be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the **"quality of the law", requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention."**[36]

In addition, the Court's case-law underlines that deprivation of liberty will not be lawful if it is not based on one of the permitted grounds set out in Article 5.[37] **One of the legal grounds on which a person may be deprived of liberty is prevention of the spreading of infectious diseases.** In the case of *Enhorn v. Sweden* the Court finds that the essential criteria when assessing the lawfulness of the detention of a person "for the prevention of the spreading of infectious diseases" are: "(...) **whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard**

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33 ECtHR. *Del Rion Prada v. Spain*, Application No. 42750/09, 21 October 2013, para. 125

34 ECtHR. *Medvedyev and Others v. France,* Application No. 3394/03, 29 March 2010, para. 79; *Toniolo v. San Marino and Italy*, Application No. 44853/10, 19 November 2012, para. 46.

35 *Information Document: Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states, pg. 3.*

36 ECtHR. *Mehmet Hasan Altan v. Turkey*, para. 137.

37 ECtHR. *Khlaifia and Others v. Italy*, Application No. 16483/12, para. 88.

the public interest."[38] In addition, the Information Document of the Council of Europe underlines that before resorting to the measures of deprivation of liberty under Article 5, paragraph 1 (e), "states are expected to control the existence of a relevant legal basis and consider whether measures amounting to deprivation of liberty are strictly necessary against any less stringent alternatives. The length of compulsory confinement and the way it is enforced in practice are relevant in this context."

In the case of *A. and Others v. the United Kingdom*[39] the Court underlines "that compliance with national law is not sufficient and Article 5 paragraph 1 requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness." It further emphasises that "it is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1", and the notion of "arbitrariness" extends beyond the notion of "lawfulness".[40] While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis.[41] Among the key principles the Court emphasised for assessing whether there is arbitrariness present, it is important to mention the following: if there has been an element of bad faith or deception on the part of the authorities; if the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 §1; if there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and if there was no relationship of proportionality between the ground of detention relied on and the detention in question[42] (this principle is particularly stressed in the cases where deprivation of liberty relies on the grounds referred to in sub-paragraphs: (b), (d) and (e)).[43]

Pursuant to ECHR, besides lawfulness and protection against arbitrariness of deprivation of liberty, right to liberty and security of person also includes the right of everyone who is arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him (Art. 5, para. 2 of the ECHR), as well as the right to take proceedings by which the lawfulness of his detention will be decided speedily by a court and his release ordered if unlawfully deprived of liberty (Art. 5 para. 4). According to the Court, the "arrest" extends beyond the realm of criminal-law measures.[44]

Article 5 para. 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty and is an integral part of the scheme of protection afforded by Article 5. Where a person has been informed of the reasons for his arrest or detention, he may, if he sees fit, apply to a court to challenge the lawfulness of his detention in accordance with Article 5 § 4.[45] Information on the reasons for deprivation of liberty may be provided to the individual or his representative[46] or a guardian[47] and it does not need to be provided in writing or in any particular form,[48] while whether the content of the information conveyed were sufficient is to be assessed in each case according to its special features.[49]

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38 ECtHR. Application No. 56529/00, 25.01.2005.

39 ECtHR. *A. and Others v. the United Kingdom*, Application No. 3455/05, 19 February 2009.

40 Deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Saadi v. the United Kingdom* [GC], Application No. 13229/03, para. 67, ECHR 2008).

41 *Ibid*, para. 68.

42 ECtHR. Application no*Guide on Article 5 of the Convention – Right to liberty and security*, 2014

43 ECtHR. *Saadi v. the United Kingdom*, para. 70.

44 ECtHR. *Van Der Leer v. The Netherlands*, Series A, NO 170; Application No 11509/85, para. 27.

45 *Guide on Article 5 of the Convention*, 2014: 21.

46 ECtHR. *Saadi v. the United Kingdom*.

47 ECtHR. *X. v. the United Kingdom*, Application No. 7215/75, Commission report, para. 106; *Z. H. v. Hungary*, Application No. 28973/11, para. 42-43.

48 ECtHR. *X. v. Germany*, Application No. 7705/76, Commission Decision of 13 December 1978: 118.

49 ECtHR. *Fox, Campbell and Hartley v. the United Kingdom*, Application No. 12244/86; 12245/86; 12383/86, para. 40.

The measure of temporary restriction of movement of asylum seekers and migrants taken to prevent the spreading of the COVID-19 infectious disease is based on the law, i.e. the Decision and Decree of the Government of the Republic of Serbia adopted in the framework of the legal regime applicable in the state of emergency. As mentioned above, these documents do not contain provisions closely regulating the very procedure of restricting the freedom of movement.

On the other hand, ordinary legal regime governing the stay of foreigners and asylum seekers regulates the procedure for restricting their freedom of movement in the following manner:

Article 77, paragraph 1 (4) of the Law on Asylum and Temporary Protection stipulates that **an asylum seeker's movement may be restricted by a decision for the purpose of ensuring "the protection of security of the Republic of Serbia and public order in accordance with law".** Moreover**,** the restriction measures may be implemented starting from those less restrictive, like a ban on leaving an asylum centre, a particular address, or a designated area to ordering accommodation at a reception centre for foreigners established in accordance with the law governing the residence of foreigners, under intensified police supervision (Art. 78, para. 1). It is important to emphasise that the measure entailing ordering accommodation at a reception centre for foreigners is a measure of last resort that may be imposed only if it has been established, based on an individual assessment, that the other measures could not achieve the effect of the restriction of movement (Art. 78, para. 2). The Law further provides for a special regime of restricting freedom of movement, particularly for vulnerable categories, that is, persons requiring special procedural and/or reception guarantees (Art. 80). This regime involves ordering such a person to stay at a reception centre for foreigners exclusively if it has been established, based on an individual assessment, that such accommodation is appropriate, taking into account his/her personal circumstances and needs, and particularly his/her health condition, and ordering an unaccompanied minor to stay in a social welfare institution for minors under intensified supervision in case the alternative measures cannot be applied effectively.

As regards other migrants who have not applied for asylum, the Law on Foreigners provides for a possibility of ordering a mandatory stay in a designated place to a "foreigner subject to the return procedure" or a foreigner who has been issued a return order and there is a risk that the foreigner will not be available to the competent authority to execute forced removal (Art. 93), or for a possibility of ordering a stay in a reception centre for foreigners (Art. 87). Observance of irregular migrants' freedom of movement restriction procedures includes previous return order, legal foundation for imposing the measure and, depending on the measure's proportionality level, a special decision ordering their stay in a designated place or at a foreigners' reception centre. In both of the cases, a foreigner is entitled to have the decision reviewed by a second-instance court – the Administrative Court.

In this regard, if the Court finds that there are circumstances giving grounds for qualifying the regime applied to migrants and asylum seekers as deprivation of liberty, the question is how the Court would assess the lawfulness of the measure, particularly having in mind that no special procedure was prescribed and the regular procedure was not applied.

Finally, to assess the proportionality of the derogating measures and whether the measures were beyond the "extent strictly required", the Court "enquires into the necessity for, on the one hand, deprivation of liberty contrary to paragraph 1 of Article 5 and, on the other hand, the failure of guarantees to attain the level fixed by paragraphs 2 to 4.[50] As regards the need for introducing the measures derogating from the Convention's provisions, the Court has emphasised in several cases that the national authorities have a wide margin of appreciation to decide on the nature and scope of the derogating measures

50 ECtHR. *Ireland v. UK*, para. 211.

necessary to avert the emergency.[51] For considering the scope of this margin of appreciation left to national authorities, it is important to underline two approaches taken by the Court:

- according to the Court's position in the case of *Ireland v. the United Kingdom*, the Court must do no more than review the lawfulness, under the Convention, of the measures adopted from the moment of introducing derogating measures.[52]
- according to another position, it is ultimately for the Court to rule whether the measures were "strictly required". In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.[53]

It is important to reiterate that in the above cases (as in other cases in which the states derogated from the right to liberty and security of person by invoking Article 15 of the ECHR) the Court did not consider derogations from the the Convention's provisions for the purpose of preventing the spreading of an infectious disease, so there is a question of which approach the Court would take or whether it would develop a new one.

51 ECtHR. *A. and Others v. the United Kingdom*, para. 184.
52 Ibid, para. 214.
53 ECtHR. *A. and Others v. the United Kingdom,* para. 184, *Brannigan and McBride v. The UK*, para. 48–66; *Aksoy v. Turkey*, para. 71–84.

5. Prohibition of torture (ECHR Article 3)

Article 3 of the ECHR lays down that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Having in mind the absolute nature of this right, Article 3 may not be limited for any reasons, nor violated under any circumstances, not even in times of the state of emergency while Article 15 of the ECHR is being applied. In this regard, any *de facto* derogation from the standards arising from Article 3, even in times of public emergencies, amounts to violation of the Convention.

As regards the application of Article 3, it is important to mention that not all types of harsh treatment fall within the scope of Article 3. The Court, from the beginning, has made it clear that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. Furthermore, the Court clearly emphasised that the assessment of the minimum level of severity was relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[54] In its later case-law, in one of the key case *Soering v. the United Kingdom*, the Court added that the severity “depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution”.[55] This means that based on the Court’s case-law in this issue, examining the application of Article 3 includes both ‘objective’ and ‘subjective’ elements.

Over the years, the ECHR increasingly started including and developing the abovementioned principles in the cases relating to migration and asylum issues. Although the Court prevailingly interpreted Article 3 as offering efficient safeguards against all forms of return to places posing a risk for a person of being subjected to torture or inhuman or degrading treatment or punishment, it was also considered in the cases where there was a risk of inhuman or degrading treatment due to the reception conditions related to the shortcomings in the asylum procedure of the receiving country.[56] Article 3 seems also particularly important in assessing the effects of the measurers and conditions under which migrants and asylum seekers were deprived of liberty.

According to the ECtHR case-law, conditions of detention or deprivation of liberty may, in some cases, amount to inhuman or degrading treatment, in violation of Article 3. Some of the relevant factors for assessing whether there was inhuman and degrading treatment in a detention are, among other things, the following: personal space standards,[57] heating, ventilation,[58] medical treatment, toilets, sleeping and recreational places, and manner of keeping contacts with the outside world,[59] as well as the period in which the applicant concerned was subjected to the treatment he claims to have been inhuman and degrading. In one case, the Court underlines that “when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant.”[60]

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54 ECtHR. *Ireland v. the United Kingdom*, 18 January 1978, para. 162.

55 ECtHR. *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, para. 100.

56 *M. S. S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

57 ECtHR. *Sulejmanovic v. Italy*, Application No. 22635/03.

58 ECtHR. *Florea v Romania*, Application No. 37186/03, *Elefteriadis v. Romania*, Application No. 38427/05.

59 In the *Greek case* the Commission concluded that conditions of detention which were overcrowded and had inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contacts with the outside world were degrading.

60 ECtHR. *Dougoz v. Greece*, Application No. 40907/98, para. 46.

In establishing whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements:

(a) each detainee must have an individual sleeping place in the cell;

(b) each detainee must have at his or her disposal at least three square metres of floor space; and

(c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.[61]

In addition, when analysing the conditions of detention, the Court would also give special regard to individual circumstances of the applicant concerned, that is, to the age, psychophysical conditions and whether the persons deprived of liberty have any special needs. As regards the age, the Court emphasises that “while none of the provisions of the Convention expressly prohibits imprisonment beyond a certain age, the Court has already had occasion to note that, under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3”.[62] As regards children, the Court’s position is that detention facilities and conditions not meeting the special needs of children may result in violation of Article 3.[63]

Short overview of the conditions in the centres during the state of emergency

Reception centres for migrants and asylum centres were mostly **overcrowded,**[64] which is why beneficiaries could not keep the desirable distance. According to the data from the Centre Profiling,[65] most crowded centres in April were: Kikinda (occupancy: 649/capacity: 650/places per 3,5 m^2/person: max. 280 persons), Obrenovac (occupancy: 983/capacity: 1,000/places per 3,5 m^2/person: max. 600 persons), Preševo (occupancy: 1,447/capacity: 1,500/places per 3,5 m^2/person: max. 600 persons), Principovac (occupancy: 561/capacity: 565/places per 3,5 m^2/person: max. 315 persons), Sombor (occupancy: 494/capacity: 495/places per 3,5 m^2/person: max. 375 persons), Adaševci (occupancy: 1,079/capacity: 1,050/places per 3,5 m^2/person: max. 600 persons) and Bujanovac (occupancy: 263/capacity: 410/places per 3,5 m^2/person: max. 140 persons). According to the data overview and notably the fact that the occupancy was not higher than the official capacity,[66] we may conclude that each migrant, in compliance with the standard, had his/her own bed, but we may also conclude that the standard relating to the minimum available place per a person could not be met in the abovementioned centres because there was only about 2m^2 available space per person on average, and in some centres even less.

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61 ECtHR. *Ananyev and others v. Russia*, Application No. 42525/07 and 60800/08, para. 148.

62 ECtHR. *Papon v France*, Application No. 64666/01, *Priebke v. Italy*, Application No. 48799/99, *Sawoniuk v. the United Kingdom*, Application No. 63716/00.

63 ECtHR. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, *Kanagaratnam and Others v. Belgium*, Application No. 15297/09, *Popov v. France,* Application No. 39472/07 and 39474/07, *M.S. v. UK*, Application No. 24527/08, *Price v. UK*, Application No. 33394/96.

64 UNHCR, Centre Profiling – Republic of Serbia, April 2020.

65 *Ibid*.

66 Except in Adaševci RC.

SCRM passed a instruction stipulating that the centres should conduct primarily those activities that could help prevent the spreading of the disease. Migrants were informed, in the centres and in various manners, on the pandemic situation in Serbia and in the world, and they received a daily bulletin in several languages, while informational video material was played in shared facilities.[67] Civil society organisations were also included in educating migrants on the prevention of the spreading of coronavirus,[68] but it was mostly online, and already in the beginning of the crisis, a large number of them informed SCRM by an email that they would withdraw from the centres and suspend the activities or implement them from distance.[69] Significant reduction of frequency and types of non-governmental organisations' activities led to another unfavourable circumstance - the **lack of purposeful activities** of migrants in centres.

In its **Special Report on the Activities of the Protector of Citizens during the COVID-19 state of emergency**[70] the **Ombudsperson** indicates that during the state of emergency, the National Torture Prevention Mechanism (NTPM) visited Krnjača Asylum centre, Adaševci Reception Centre, as well as that the NTPM visited three times the Reception Centre in Obrenovac. The NTPM observed during the visits that the number of accommodated persons in some centres had increased, because the migrants who had been outside the centres were brought in and accommodated there. Particularly worrying is their observation that Obrenovac RC and Adaševci RC were overcrowded, with the accommodation conditions at an unsatisfactory level, and that mutual conflicts and other incidents among migrants were happening frequently so that the Centres' property was damaged and demolished. Moreover, there was an insufficient number of SCRM's officials, who were neither trained, nor did they have the legal authority they could apply in case of disturbing public order and peace in the centres. In order to prevent undesired events, the NTPM suggested that in this centre constant presence of police officers should be secured.

Personal safety of migrants and SCRM's officials in the centres was not significantly ensured and various incidents occurred despite the presence of military forces. In Adaševci Reception Centre, military forces members even had to use fire arms.[71] Obrenovac Reception Centre faced particularly violent incident when a young man, regardless of the presence of military forces, managed to charge into the centre by his car, thus threatening the safety of persons inside the centre.[72] Moreover, there were various incidents occurring inside the centres themselves. So, for instance, in Obrenovac RC, in which there were 983[73] adult men accommodated in April, fights among migrants broke out, attacks on SCRM's officials occurred[74], and in one of the massive fights, Deputy Ombudsperson accidentally found herself in one of the mass fights.[75]

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67 "Migranti u centrima pomažu u održavanju higijene i informišu se svakodnevno" (Migrants in Centres help maintain hygiene and they are informed on daily basis), KIRS, 10 April 2020, https://bit.ly/3fdEbI0 (19 July 2020).

68 See more details at: https://bit.ly/2BKXivj and https://bit.ly/3gh8sXI

69 "Aktivnosti u centrima tokom pandemije koronavirusa" (Activities in the centres during the coronavirus pandemic, SCRM, 26 April 2020, https://bit.ly/3jWUYma (19 July 2020).

70 "Special Report on the Activities of the Protector of Citizens", 10 June 2020, Belgrade, https://bit.ly/30eZ41b

71 "Incident u prihvatnom centru za migrante u Adaševcima: Vojska pripucala" ('Incident at Adeševci Migrant Reception Centre: Army fired shots') , Serbia Today, 19 April 2020, https://bit.ly/318SlF4 (19 July 2020).

72 "Kolima probio ogradu i uleteo u Prihvatni centar za migrante u Obrenovcu" ('Car crashed through a fence and charged into the Migrant Reception Centre in Obrenovac'), N1, 7 May 2020, https://bit.ly/3gh71si (19 July 2020).

73 UNHCR, Centre Profiling – Republic of Serbia, April 2020.

74 "Masovna tuča migranata u Obrenovcu! Poslate jake snage policije i vojske!" (Mass fight between migrants in Obrenovac! Strong police and military forces sent!), Pravda, 6 April 2020, https://bit.ly/2XfASK3 (19 July 2020).

75 "Pašalić o bakljadama: Uporedićemo broj prijava građana i broj reakcija policije" (Pašalić on tussles: we will compare the number of citizens' complaints and the number of police reactions), N1, 19 May 2020, https://bit.ly/33dJiWk (19 July 2020).

And finally, as regards the **access to the asylum procedure**, although the Asylum Office suspended its official duties from the moment of declaration of a state of emergency,[76] **asylum seekers could not suffer consequences for it, due to the fact that pursuant to the Decree on the Application of Time Limits in Administrative Procedures During the State of Emergency,**[77] **the parties may not bear the consequences of failure to act within the time limits prescribed by the Law on General Administrative Procedure or special laws**. The time limits that expired during the state of emergency and related to taking administrative actions, completion of administrative procedures and decisions on the legal remedies submitted were deemed expired 30 days upon lifting the state of emergency. Moreover, the Decision on the Status of Foreign Nationals in the Republic of Serbia during the State of Emergency[78] stipulates that ID cards for asylum seekers and ID cards for persons granted asylum, which expired, will be deemed valid during the state of emergency. This Decision also prescribes that until the conditions for safe taking of biometric data from foreigners are acquired, police officers will suspend actions related to statutory taking of these data, which gave grounds for suspension of migrants' registration procedure.

76 "Right to asylum in the Republic of Serbia", 2020 January-March Report, Belgrade Center for Human Rights, 2020: 41.

77 *Official Gazette of RS*, Nos. 41/20 and 43/20.

78 *Official Gazette of RS*, No. 41/20.

6. Restriction of freedom of movement and application of other measures to migrants immediately after lifting the state of emergency in the Republic of Serbia

After lifting the state of emergency and terminating the Decree on Measures during the State of Emergency, the Minister of Health issued, on 6 May 2020, an Order restricting the movement at approaches to open spaces and facilities of reception centres for migrants and asylum centres.[79] The Order was issued under Article 52, para. 1, point (b) of the Law on Protection of Population against Infectious Diseases[80], on the proposal of the National Expert Commission for the Protection of Population against Infectious Diseases and the Institute of Public Health of Serbia "Dr Milan Jovanović Batut". The Order explicitly banned the beneficiaries of reception centres from leaving the centres, except in exceptional cases (visiting a physician and alike) when they need a special approval by SCRM. Duration of these measures was not set as it was laid down that they would be in force until the danger of spreading the COVID-19 viral disease in the territory of the Republic of Serbia passed. At the moment when the Order was issued, emergency situation had not been declared in any of the areas where the centres are located. Misdemeanour liability was envisaged in case of taking an action contrary to the Order.[81] **After only eight days of application, on 14 May 2020, the Minister of Health issued an Order terminating the Order restricting the movement at approaches to open spaces and facilities of reception centres for migrants and asylum centres.**[82] The grounds of the Commission's and Institute's proposal were not publicly available neither for issuing the Order, not for its termination.

Immediately after the termination of the Order, the President of the Republic, under Art. 17 para. 1 point 1 of the Law on Armed Forces, ordered the use of a part of the Armed Forces in the territory of Šid Municipality to assist the Ministry of Interior in securing asylum and reception centres.[83] The announcement of the Ministry of Defence of 16 May 2020 leads to a conclusion that based on the Order by the President of the Republic, Decision by the Ministry of Defence and Order by the Chief of General Staff, the Serbian Armed Forces were deployed to provide security to reception centres in Šid, Adaševci and Principovci.[84] The abovementioned reception centres were visited by the Head of the Military Police Directorate so it may be assumed that, in this particular case, the military police was engaged.[85]This kind of engagement is envisaged by the Law on Armed Forces. Pursuant to Art. 53 para. 8 of the Law on the Armed Forces, Military Police can be engaged in delivering assistance to the interior affairs bodies (police) in peacetime and during the state of emergency, pursuant to the demand of a competent authority, and following the approval of the Defence Minister. The same Article, paragraph 9, point 4 lays down that the Military Police may apply its official powers on civilians when providing assistance to the Police at public places, which means that these could be both migrants and citizens of Šid who find themselves in the vicinity of the centres.

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79 *Official Gazette of RS*, No. 66/20.

80 On the proposal of the Commission and the Institute, the Minister may order restriction of movement of the population in the **area affected by the emergency situation.**

81 "Law on the Protection of Population against Communicable Diseases" (*Official Gazette of RS*, nos. 15/16 and 68/20) Art. 85 para. 1 point 10 – Every natural person shall be fined from RSD 50,000 to 150,000 for the offence if he/she: 10) does not act in compliance with regulations, decisions or orders, issued by competent authorities in accordance with this Law, laying down measures for the protection of population against communicable diseases.

82 *Official Gazette of RS*, No. 74/20.

83 3. "Announcement of the Ministry of Defence", Ministry of Defence, 16 May 2020, https://bit.ly/3geLAbm (19 July 2020).

84 "The Serbian Armed Forces started providing security to reception centers in Šid", Ministry of Defence, 16 May 2020, https://bit.ly/39MAHuL (19 July 2020).

85 "Minister Vulin visited reception centres in the Municipality of Šid: Serbian Armed Forces are providing peace and security for all citizens of Šid and are protecting migrants", Ministry of defence, 17/5/2020, https://bit.ly/3jWHiaC (19 July 2020).

Powers of the Military Police are regulated by a Decree on police measures and actions and police powers, appearance, issuance, use and destruction of the official ID card and official badge of authorised officers of the Military Police,[86] adopted about twenty days before declaring the state of emergency, on 27 February 2020. The Decree provides for a wide range of Military Police powers that may be applied on civilians as well in case of assisting the police in pubic places (for instance, detaining persons and temporary restriction of freedom of movement, bringing in, and use of means of coercion, etc.)[87]

It is worth mentioning here that the armed forces had been engaged earlier to assist the border police in treatment of migrants, and this kind of engagement is also envisaged by the new Law on State Border Control,[88] Article 29 titled *Border Control in a Higher Risk Situation,* which is a unique legal solution among the Western Balkan countries. Pursuant to the provisions of this Article, if there is a higher risk of non-military challenges, risks and threats to the state border, public safety, people and assets **in a narrower and wider state border area,** members, funds and equipment of the Serbian Armed Forces may also be engaged **to provide assistance to the border police in carrying out border control tasks.** The Decision on implementation of measures and engagement of members, funds and equipment of the Serbian Armed Forces is made by the President of the Republic of Serbia, on a joint proposal of the Minister in charge of internal affairs and the Minister in charge of the defence, while the border police draws up an engagement plan, the implementation of which falls under the responsibility of the Ministry of Interior. This Article only provides for the assistance to the border police, and only in carrying out border control tasks in a narrower and wider state border area, which means we have answers to the following questions: who do they assist – the border police; in what do they assist – in border control tasks; and where do they assist – in a narrower and wider state border area. The Law defines the Border Police Directorate as an organisational unit of the General Police Directorate in MoI, directly carrying out border control tasks,[89] while the border control, within the meaning of this Law, includes supervision of state borders, border checks and the risk analysis of border security threats, which is done by police officers.[90] However, the Law does not define the narrower and wider state border area, so that it is not clear whether pursuant to this Law, Armed Forces may be engaged in migrants' reception centres that are not in the immediate vicinity of the border. In this particular case, engagement of the Armed Forces in Principovac Reception Centre located right next to Sot border crossing, a part of which is even located in the territory of the Republic of Croatia, could certainly be acceptable on this legal ground. It should be mentioned that the engagement of the Armed Forces was not accompanied by any formal decisions that might prevent migrants from leaving the centres.

Although it is not a binding document, when assessing the measures introduced after lifting the state of emergency, account should be taken of the positions expressed in the **Council of Europe Information Document** Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states, which was discussed in the chapters above. For the purpose of reminding, the Document states that "A derogation under Article 15 is not contingent on the formal adoption of the state of emergency or any similar regime at the national level, and that any derogation must have a clear basis in domestic law in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency." In this regard, it remains unclear whether the measures introduced after lifting the state of emergency would be assessed by the ECtHR with regard to their derogation from the Convention's provisions or the Court would assess the measures and facts of each individual case from the aspect of standards established under "regular circumstances".

86 *Official Gazette of RS*, No. 17/20.

87 Art. 3 of the Decree.

88 *Official Gazette of RS*, No. 24/18.

89 "Law on State Border Control": Article 3.

90 "Law on State Border Control": Article 2.

7. Comparative review

At the request of Member States for the advice on how to ensure a continuity of procedures and observance of fundamental rights of migrants and asylum seekers, the European Commission adopted COVID-19: *Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures.*[91] The Document provides that public health measures such as medical screening, social distancing, **quarantine** and isolation, introduced to prevent and contain the spread of COVID-19, should be applied as necessary for third-country nationals, including applicants for international protection, resettled persons or third-country nationals illegally staying in the Union **provided that these measures are reasonable, proportionate and non-discriminatory.**

It further underlines that a Member State could only apply quarantine/ isolation measures aimed at preventing and containing the spread of COVID-19 "in respect of applicants for international protection arriving at its borders provided that it applies measures of that kind, although not necessarily identical, in respect of all persons arriving from areas affected by the pandemic and appropriate measures in relation to persons already present on its territory." The Guidance document does not regulate further the issue of measures in respect of persons already present on the territory of Member States. In case of introducing quarantine, the Document recommends cooperation with IOM and UNHCR and informing asylum seekers and irregular migrants about hand hygiene, social distancing, coughing, quarantine or isolation, hygiene measures, prevention of gatherings, use of public spaces, ordered rules of behaviour, movement restrictions and what they have to do if they suspect that they might be infected.

According to the Fundamental Rights Research Centre's assessment,[92] **Belgium** undertook numerous measures that negatively affected the position of migrants. The arrival centre for asylum seekers was closed on 17 March 2020, hence new protection seekers could not seek international protection and thus be assigned reception places. All group activities in reception centres in **Bulgaria**[93] including school classes and kindergartens, as well as access of visitors to the centres were suspended. The health status of migrants accommodated in the centres was monitored on a daily basis, and information about the spread of COVID-19 was provided to them. Unlike the practice in Belgium, in Bulgaria the reception centres continued to register and accommodate newly arriving asylum seekers, placing them under 14-day mandatory isolation and monitoring. In **Germany**, the Bavarian Refugee Council appealed for an immediate dissolution of mass accommodation in refugee centres because of the risk of infection, proposing that refugees be housed in apartments or hotels.[94] An asylum seeker in an asylum centre in Thuringia tested positive for the virus and as a result about 500 asylum-seekers were quarantined. Some asylum seekers protested against the quarantine and the police had to relocate them to other facilities.

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91 Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02, C/2020/2516 OJ C 126, 17.4.2020, p. 12-27.

92 Fundamental Rights Research Centre: *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications*, EU Agency for the Fundamental Rights, 23 March 2020: 7.

93 Project One/Center for the Study of Democracy: *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications*, EU Agency for the Fundamental Rights, 23 March 2020: 9.

94 *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications in Germany*, EU Agency for the Fundamental Rights, 2020: 10-11.

In **Slovenia**, there was no restriction of movement in asylum centres during the pandemic, but their beneficiaries feared that this might happen.[95] Social workers with the asylum centres instructed asylum seekers when leaving premises to do this individually and not in groups. Reception centres for Seekers of International Protection in Zagreb and Kutina have temporarily restricted access to the facilities,[96] as the Ministry of the Interior of the **Republic of Croatia** has restricted access to these capacities for all persons who are not necessary for the normal functioning of these facilities. Persons residing in these centres were under constant medical supervision and they were informed about the spread of the COVID-19 disease and the measures that needed to be taken to prevent its further spread. Beneficiaries of the centres were advised to stay inside, and measures were taken inside the facilities to protect them, such as markings on the floor for distance, hygienic supplies, medical staff, etc. In **Cyprus**, at the Kofinou Reception Centre for Asylum Seekers and Refugees, the only reception centre in the country announcements were being made every few hours, urging the residents to stay inside the Centre.[97] The residents were permitted to leave and return to the Centre only if this was absolutely necessary, and there was one bus transferring residents to the nearest city which allowed only eight persons to board at a time. However, none of the non-governmental organisations were allowed to conduct any activities in the camp and access to their representatives was banned. After receiving an unconfirmed allegation that a military camp would be converted into a closed camp for asylum seekers, as a preventive measure against the spreading of coronavirus, the Parliamentary Committee on Internal Affairs investigated this allegation. The Kokkinotrimithia camp, where all new arrivals are referred to, was converted into a closed structure resembling a detention centre rather than a reception facility. Although the population at the camp exceeds by far the capacity of the camp (capacity for 400 persons, accommodating 700 persons), asylum seekers residing in hotels were given a deadline to move to this camp.

The above examples of practice demonstrate various approaches to restricting migrants' freedom of movement and lockdown of centres for migrants and asylum seekers. Thus, for example, in centres in Croatia, Slovenia and partially in Cyprus, restriction of movement and migrants' stay in the centres were in the form of recommendations and advice, and not in the form of strict restrictions and orders. In some countries, such as Belgium, the centres were **closed for the reception of newly arrived migrants**, so that there was fear that they would not have shelter and actually stay in streets, while in some other countries even asylum seekers who had been accommodated outside the centres were transferred to the centres (Cyprus). **For the purpose of preventing the spreading of the disease, activities of non-governmental organisations in the centres were significantly limited or suspended in most of the countries.**

95 Peace institute: *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications*, EU Agency for the Fundamental Rights, 23 March 2020: 8-9.

96 Centre for Peace Studies: *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications*, EU Agency for the Fundamental Rights, 23 March 2020: 5.

97 University of Nicosia and Symfliosi: *Coronavirus COVID-19 outbreak in the EU – Fundamental Rights Implications*, EU Agency for the Fundamental Rights, 24 March 2020: 9-10.

Concluding remarks

COVID-19 virus pandemic made a significant number of Council of Europe member states decide to derogate from ECHR provisions, relying on its Article 15. Notifications were mostly addressed by economically underdeveloped countries (and/or less democratic countries), while the developed countries based their response to the pandemic and protection of population on recommendations, application of more rigorous measures in certain areas, or introduction of other forms of special regimes. Major challenge in imposing restrictions is to find an adequate limit for it and a legitimate objective wished to be reached by introducing the restrictions. An aggravating circumstance in assessing and defining the measures is the fact that the European Court of Human Rights has not ruled on the application of Article 15 of the ECHR in the situations of public health emergency threatening the life of the nation. Having regard to a short time period that has passed since the pandemic broke out and the measures were taken, as well as the obligation of exhausting national legal remedies before submitting an application, we will also need to wait for the Court's positions for some time.

Under the given circumstances, when assessing and introducing measures derogating from some rights and restricting some freedoms, the countries should take into account the division of rights into those **that might be derogated from under certain circumstances and those that are deemed absolute and may not be subject to any restrictions**. In this regard, in the context of regimes and measures applied to asylum seekers and migrants, due account should be taken of the Court's standards relating to **prohibition of torture (ECHR Art. 3), having in mind an absolute nature of this right and its wide application in the protection of migrants and asylum seekers.** The same applies to ECHR Article 2 (right to life), that was not included in this analysis. Although the ECtHR has prevailingly interpreted Article 3 as providing an efficient protection in all forms of return into the countries where there is a risk for a person to be subjected to torture, inhuman or degrading treatment or punishment, the Court also underlines the application of Article 3 **in cases where there is a risk of inhuman or degrading treatment due to the accommodation and reception conditions and the shortcomings in the asylum procedure of the receiving country.**

On the other hand, as regards measures restricting freedom of movement, account should be taken of the Court's standards relating to **qualification of the restriction of freedom of movement or deprivation of liberty**. It is pivotal to take into account the fact that these are **rights not considered absolute and are subject to limitations.**

The second level to be taken into account is certainly Court's standards relating to application of **ECHR Article 5 (Right to liberty and security).** Under the circumstances of the pandemic, a significant ground to be considered when assessing "lawfulness" of deprivation of liberty of person is "for the prevention of the spreading of infectious diseases". As emphasised by the Council of Europe's Guide on Article 5 of the Convention, among other standards, main criteria for the assessment are the following: whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.

The authors additionally underline that it is **pivotal to comply with the individual assessment postulate in each particular case.**

It seems important to reiterate that the above ECtHR's standards and jurisprudence should not be seen **only as an issue of responsibility of a contracting state in individual cases, but more generally**, because the role of the Court is to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken

by them as Contracting Parties (*Ireland v the United Kingdom*, Application No. 5310/71, judgement of 8 January 1978, para. 154). In addition, account should be taken of the fact that in each particular case against Serbia or another contracting state, instituting the proceedings and their outcome will depend on a series of substantive and procedural facts, which indicates that special caution needs to be taken when addressing the Court, particularly about the rights guaranteed by the Convention, whose violation is the subject of the application.

Under special circumstances, such as the situation caused by the COVID-19 virus pandemic, particular importance is attached to human rights protection and observance, especially having in mind the effects the measures taken might have on the protection of life, freedom and the society as a whole.

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