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The European Convention on Human Rights states that human rights can be derogated only during "war", which has never been done, or "other public emergency threatening the life of the nation", which was first defined a threat to the State's community organised life affecting its whole population (Lawless case). In the Greek case the Court specified that the danger must be imminent and actual, have effects on the whole nation, threaten the continuance of the community's life and be unmanageable by measures of ordinary law. The Court thereafter affirmed that a public emergency can last many years and that the crisis can be present only in part of a state's territory. The State, however, has no "unlimited power of appreciation" due to the Court's supervision. The author thinks that Covid-19 can be deemed a public emergency because the conditions from the Greek case are fulfilled.

Keywords: *war, other public emergency threatening the life of the nation, European Court of Human Rights, Lawless case, Greek case.*

1. INTRODUCTION

Sometimes, States can be faced with situations threatening the general safety of their people. Those precarious situations, during which violent conduct is frequent (Schreuer 1982, 113), could be referred to as the ones with a danger far beyond the normal limit and may be caused both by internal factors, such as civil wars, political tensions, uprisings, revolutions or natural disasters, and external, like international armed conflicts or international terroristic activity. In

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those particular circumstances, if certain additional conditions are met, the States can establish a specific "extraordinary legal system" in which the "legal protection of human rights is reduced" (Eboli 2010, 1–3). Indeed, most international[1] and regional[2] human rights treaties express the possibility of the parties to derogate human rights under some circumstances.[3] Pursuant to this approach of the different human rights conventions, the legal doctrine considers the possibility to derogate (some)[4] rights when certain conditions are fulfilled one of the basic principles of international human rights law, given that "their unlimited use would mean such rights do not really exist for everyone" (Paunović, Krivokapić, Krstić 2010, 62).

The same method was used when adopting the European Convention on Human Rights (hereinafter ECHR). According to Art. 15 (1) thereof, States need to satisfy three requisites to derogate human rights and freedoms. First, derogation can only be invoked "in time of war or other public emergency threatening the life of the nation".

[1] See, for example, Art. 4 of the International Covenant on Civil and Political Rights (hereinafter ICCPR).

[2] See e.g., Art. 27 of the American Convention on Human Rights.

[3] However, some do not. For instance, the International Covenant on Economic, Social and Cultural Rights does not explicitly declare the right of the State to limit rights, but instead generally affirms that "the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (Art. 4). The topic is dealt in the same way in Art. 29(2) of the Universal Declaration of Human Rights. On the other hand, the African Charter on Human and Peoples' Rights does not contain any general derogation clause and it allows the Contracting Parties to derogate human rights according to their domestic laws, which is really problematic since they are restrictive and extremely severe (wa Mutua 2000, 5–6; Paunović, Krivokapić, Krstić 2020, 63–64, 67).

[4] Most human rights treaties have a list of some rights that can never be derogated, not even in situations of dangers for the whole nation. They are deemed to have a "special place in the hierarchy of rights" (Malcolm N. Shaw 2008, 274–275). According to the ECHR and its protocols, the non-derogable rights are the one to life except in cases resulting from lawful acts of war, the prohibition of slavery and forced labour, the non-retroactivity of criminal offences (Art. 15 (2) ECHR), the prohibition of death penalty in time of war (Art. 3 of the Protocol no. 6) and the right not to be tried or punished twice (Art. 34. of the Protocol no. 7). This was confirmed, for example, in *Selmouni v. France* (ECtHR, application no. 25803/94, judgement of 28 July 1999), when the Court declared that, "even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment (para. 95). See Paunović, Krivokapić, Krstić 2010, 66–67; Lauso Zagato 2006, 143–144; Shaw 2008, 274–275.

Second, the measures can only be taken "to the extent strictly required by the exigencies of the situation". Ultimately, they need to be consistent with the Contracting Party's other obligations under international law. This paper deals only with the first condition, analysing the terminology used in Art. 15 and interpreted by the European Court of Human Rights (hereinafter ECtHR or the Court) in its jurisprudence. The importance of this issue has been brought up again with the outbreak of a global pandemic caused by *Covid-19*.

2. "WAR" IN THE LEGAL DOCTRINE

The term "war" is hitherto unexplained in the ECtHR's jurisprudence. The Court has underlined in its Guide on Article 15 (2021) that it has never needed to give an explanation of the term, considering that derogations on this ground are yet to be made (see Stefan Kirchner 2010, 10). That is why this section only refers to the theoretical point of view of the legal doctrine on this topic.

Strictly referring to Art. 15, the term "war" would just regard conflicts between States. However, when adopting the ECHR, the lawgivers could not consider the subsequent advances of international humanitarian law, namely the ones in the second part of the 20th and the 21st century (Kirchner 2010, 10–11). Currently, the word "war" does not only mean a "formally declared conflict", but also every declared or non-declared international conflict (Zagato 2006, 140). Even if before World War II, for a war to be considered as such legally, it required an officially made declaration, those declarations are now essentially "non-existent" (Andreas Paulus, Mindia Vashakmadze 2009, 97), especially in light of the possibility of the denial of the presence of war by a State in a conflict. Indeed, wars may exist if negated by one party (Jean Pictet 1952, 32; Zagato 2006, 140). In other words, as of today, a formal declaration of war or the acknowledgement that one exists is not necessary.[5] Hence, the term "war" has been deliberately substituted with the expression "armed conflict", which can be of international or internal character (see Shaw 2008, 1190–1199). The former, in relation to Art. 2 of the 1949 Geneva Conventions, was defined by Pictet (1952, 32) in the *Commentary on the I Geneva Convention* as "any difference

[5] So, the Geneva Conventions are to be applied even without formal declarations of war (Shaw 2008, 1190).

arising between two States and leading to the intervention of member of the armed forces", whilst the latter exists when there is resort to armed force "or protracted armed violence between governmental authorities and organised armed group or between such groups within a State".[6] Regarding the question whether an internal conflict can be regarded as a situation of war or if it should be considered a public emergency, Zagato (2006, 140–141) provides that in case of civil wars effectively taking place in the whole territory of a nation an armed conflict still exists. As an illustration, he mentions the jurisprudence given to the ICTY,[7] which was responsible for the crimes committed in the former Yugoslavia in the 1990s. He concludes by stating that asymmetrical conflicts (international terrorism, which mostly involves both state and non-state entities)[8] should be considered public emergencies that threaten the life of the nation. The author shares Zagato's point of view on situations of internal armed conflicts, in light of the replacement of the term "war" with the expression "armed conflict". Indeed, armed conflicts can be both internal and international and can thus be regarded as "war", since the latter is a synonym of an "armed conflict". Nevertheless, considering that international humanitarian law does not apply in situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature",[9] a "protracted armed violence" is what needs to exist for a state to be able to invoke Art. 15 of the ECHR.

Notwithstanding the aforementioned, defining the term "war" is not as important as elucidating the meaning of the locution "other public emergency threatening the life of the nation", as the former constitutes just an illustration of the latter (Kirchner 2010, 10; Zeidy 2003, 283; Svensson-McCarthy 1998, 290). Svensson-McCarthy (1998, 290) adds that neither the *travaux preparatoires* nor the jurisprudence of the Court (and the opinions of the Commission) give any reason to dispute this conclusion. For a valid derogation in time of war, such war needs to be a threat to the life of the nation, as the status of war does not automatically mean that the nation is in danger (Zagato 2006, 140).

[6] International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY), *The Prosecutor v. Duško Tadić*, IT-94-1-A, judgement of 26 January 2000, para. 70.

[7] Zagato, however, does not refer to a specific case.

[8] E.g., the conflict between Israel and Hamas (Paulus, Vashakmadze 2009, 97, 108).

[9] Art. 1 (2) of the Additional Protocol II of 1977 to the Geneva Conventions.

In the Report of the Commission of the *Lawless* case,[10] nine out of 14 Commissioners[11] held that the expression "time of war" does not only mean "total wars", but also "less comprehensive war situations" if they "threaten the life of the nation". Indeed, considering only total wars would be revising the ECHR.

What can be concluded is that if a war is official declared by or towards a Contracting party, or if there exists its involvement in an international or internal armed conflict (Zeidy 2003, 283) and if the life of the nation is threatened, the first condition from Art. 15 is clearly fulfilled.

3. "OTHER PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION" IN THE JURISPRUDENCE OF THE ECTHR

3.1. The Court's initial point of view in *Lawless v. Ireland*

3.1.1. The facts of the case

Having been arrested two times already after he admitted being a member of the illegal Irish Republican Army (hereinafter IRA), Gerard Richard Lawless was re-arrested on 11th July 1957 as it was suspected that he still was a member of the IRA.[12] He was detained with no charge nor trial until 11th December.[13] The Court held that the situation could be regarded as a "public emergency threatening the life of the nation", pointing out the three main points that contributed to bringing such judgement: first, the presence, in the Republic of Ireland, of a "secret army engaged in unconstitutional activities" which used violence for reaching its goals; second, its operations were not only undertaken within the Republic but also in the neighbouring states, outside the territory of the State, therefore endangering their relations with the Republic; third, the persistent and alarming growth of terrorist activity in the autumnal time of 1956 and the first half of 1957.[14]

[10] ECtHR, *Lawless v. Ireland*, application no. 332/57 (A/3), judgement of 1 July 1961.

[11] Report of the Commission, ECtHR, Series B, 1960–1961, 81–82, para. 90; see also Svensson-McCarthy 1998, 294–295.

[12] *Lawless v. Ireland*, paras. 19–20.

[13] See *ibid*., paras. 20–28.

[14] *Ibid*., para. 28.

It was not specified how much those factors contributed to the final decision, so it is to be deduced that they cumulatively resulted in the final evaluation of the case (Svensson-McCarthy 1998, 293).

3.1.2. "Other public emergency threatening the life of the nation"

The expression was explained for the first time in the Commission's report of the *Lawless* case.[15] Nine of its members held that it could be regarded as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question". However, in his dissenting opinion, the Commission member Ermacora[16] affirmed that a state of emergency could only exist if the various branches of the government are no longer able to function, whereas Susterhenn[17] held that the term "public emergency" has to be "tantamount to war".

The aforementioned definition was rephrased in the judgement, where the Court stated that a public emergency is "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[18] It can be deduced that the Court held that there are three main requisites for a situation to be considered a public emergency: first, its exceptionality and imminence; second, the whole population has to be affected; last, the "organised life of the community" must be threatened (Svensson-McCarthy 1998, 292). This definition is really important as it represented the "starting guideline" of all the later Court's judgements on this topic (Zeidy 2003, 281), even if no closer explanation of those requirements was given. The issue with the definition is that the English version of the judgement is slightly different from the French one.[19] Indeed, the latter affirms that the emergency should not only be exceptional but also imminent. On the one

[15] Report of the Commission, ECtHR, Series B, 1960–1961, 82, para. 90.

[16] *Ibid*., 101, para. 96.

[17] *Ibid*., 95, para. 93.

[18] *Lawless v. Ireland*, para. 28.

[19] It is important to underline this due to both texts being "equally authentic", as provided not only at the end of the ECHR, but also after every Protocol thereto. Moreover, the Commission held that the French version is neither a translation of the English one, nor that the preparatory material for the convention show this (*ibid*., para. 11; Duke Law Journal 1962, 253–254).

hand, thanks to this addition, it can be deduced that situations that may only possibly become a threat to the nation cannot be regarded as imminent. On the other, it suggests that the danger does not need to be actual. The difference between "actuality" and "imminence" is that the latter means "existing" or "real", whereas the former refers to a danger that is "about to happen" (Svensson-McCarthy 1998, 292, 298–299).

Concerning the last requisite, different points of view exist. Kirchner (2010, 11) maintains that a situation "threatening the life of the nation" does not signify a danger for the existence of the state or its people, but that it should be rather interpreted broader, in the context of the safeguarded "way of life". It could also indicate danger for the present "power structure", but this understanding could be problematic due to it not being specific. Its strict interpretation could lead to the conclusion that, in cases of oppositions winning an election, the "power structure" would also be in danger so human rights could be derogated by the Government. An even more doubtful interpretation of the term would be the "economic condition of a community", owing to its unpredictability, which could result in a State introducing forced labour as an excuse to solve it. So, Schreuer (1982, 122–123) suggests that the proper meaning is the physical health of the citizens of a State, particularly in the context of widespread violence. The problem here would be the State causing a violent climate within it just to justify its claim of the existence of a dangerous situation. The author deems the possibility of the people to exercise the rights guaranteed to them to be the essential factor. First, agreeing with Schreuer, the "physical well-being of the population" is fundamental since, if the physical welfare of the people is in danger, especially in situations of violent disturbances, they will not be able to enjoy their rights. Second, the community relies on the government, the parliament, the courts, and the other organs to protect them when their rights are violated. If such organs are in jeopardy, they cannot possibly defend people's rights.

3.1.3. The Court's decision

Some unconvincing arguments can be found in the Court's judgement. First, the ECtHR affirmed that, regardless of the dire situation, the Irish Government had been able to keep the "more or less" normal function of the public institution using measures of "ordinary legislation".[20] The question that arises is: if a government can solve a

[20] *Ibid*., para. 29.

crisis only utilising ordinary legislation, how can that situation be considered a public emergency? Svensson-McCarthy (1998, 294–295) maintains that the evidence that a state should be able to overcome a hazardous state of affairs resorting only to standard restrictions on the enjoyment of human rights strongly indicates that a situation should not be regarded as exceptional. Five members of the Commission also opined there was no ground for a public emergency, considering the ordinary functioning of the various Irish organs. For them, the emergency could only be regarded as latent (Svensson-McCarthy 1998, 298). Defending the decision of the Court, Oren Gross (1998, 469) provides that it was probably decided this way in light of the Court's opinion that there was the need for a derogation to "combat an illegal military organization" which had used violence versus a legitimate government, which is essentially the opposite situation of the "*Greek* case"[21] (see below).

3.2. The Greek case – a more precise understanding of a "public emergency"

3.2.1. The facts of the case

Denmark, Norway and Sweden Netherlands thought the Greek junta, an unlawful military association that had made use of violence to overthrow a legitimate Government (Gross 1998, 469), successfully doing so, had violated the ECHR, banning political parties and parliamentary elections, setting up special courts, imprisoning thousands of people for prolonged time while not bringing them before a competent judicial authority and applying censorship to the press and private communications while not proving that those measures were taken in a public emergency.[22] Despite the junta affirmations that such activities had been done because the Communists in Greece had created a situation "which was bringing the country to the brink of anarchy", resulting in the killing of hundreds policeman and civilians in the quotidian political strikes,[23] the Court held that the ECHR had been breached as there was no basis for a public emergency.[24] The records did not show that the police was at or near the limit of their ability to

[21] ECtHR, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "*Greek case*"), application no. 3321/67, 3322/67, 3323/67, 3344/67.

[22] *Ibid*., para. 40.

[23] *Ibid*., paras. 133–136.

[24] *Ibid*., para. 164.

deal with protests and disturbances and that "they acted without need of assistance from the armed services".[25] It was added that not only was the picture of strikes and work stoppages similar to the one in many other countries in Europe over a similar period, but also "the length of strikes and stoppages" was "more favourable than in some".[26] Therefore, the Greek junta had failed to "show that the conditions justifying measures of derogation under Art. 15" had been and continued to be met, since the burden to prove a public emergency exists lies upon the Government.[27]

3.2.2. Further developments of the definition

A closer explanation of the locution "public emergency threatening the life of the nation" was given in the *Greek* case.[28] It was declared that a situation can be regarded as a public emergency if four conditions are fulfilled cumulatively. First, actuality and imminence are required. Second, "its effects must involve the whole nation". Third, "the continuance of the organised life of the community" needs to be threatened. Finally, the crisis or the danger has to 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".

Unlike in the *Lawless* case, the ECtHR opted for the same French and English definition, this time adding the French term *imminent* to the English version. Therefore, a time limit was set. The Court also specified that imminence and actuality must exist at the moment when a State adopts the various extraordinary means to solve the hazardous situation.[29] Indeed, the Contracting Parties to the ECHR cannot invoke a public emergency as a preventive measure, which means that States cannot restrict human rights in response to exceptional situations that are yet to arise (Zeidy 2003, 284). So, the specific threatening circumstances need to be "present" (Svensson-McCarthy 1998, 301). Another dissimilarity with the *Lawless* case is that, instead of the term "population", the Court decided that "nation" was the more suitable expression, despite not explaining the reason behind the switching.

25 *Ibid*., para. 160.
26 *Ibid*., para. 161.
27 *Ibid*., para. 154.
28 Para. 153.
29 *Ibid*., para. 157.

Svensson-McCarthy (1998, 301–302) suggests that a possibility is that the Court regarded the latter term the better, since it is the one used in Art. 15. The criterion of "exceptionality" means that it is necessary the existence of "clear and reliable evidence" that measures of ordinary law are non-sufficient for dealing with a dangerous situation. This was clearly a correction of the *Lawless* judgement.

3.2.3. The Court's decision

This Court's judgement is the sole case wherein it had to decide whether a public emergency existed which resulted in a denial of the Government's claims. Gross (1998, 468–469) thinks the Court's job was easy since the Greek junta was a non-democratic regime, unsupported by all the other Contracting Parties to the ECHR. Being undoubtedly different from all the future cases concerning democratic regimes, this decision would not compromise them.

At this point, a question arises: had the Court instead found that the necessary grounds for a public emergency existed, would the derogation have been valid? Indeed, Art. 18 of the ECHR provides that the "restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". The ECtHR explicitly affirmed that the scope of Art. 18 is "to prohibit the misuse of power".[30] It seems appropriate to deduce that a non-democratic Government trying to keep power by derogating human rights in a public emergency caused by itself when overthrowing the previous one is not acting within the scope of the ECHR. Hence, such derogations, even if made on plausible grounds, would not be accepted by the Court due to it not complying with Art. 18. Ermacora thought that the proclamation of a public emergency in the *Greek* case would have been "incompatible" with the Convention, even if there was the basis for a public emergency (Svensson-McCarthy 1998, 306–307).

3.3. The later jurisprudence

Despite being clear in the *Greek* case, not only has the Court analysed and explained more in detail some of the mentioned conditions, but it has also changed its point of view on some of them.

[30] ECtHR, *Merabishvili v. Georgia*, application no. 72508/13, judgement of 28 November 2017, para. 303; ECtHR, *Ilgar Mammadov v. Azerbaijan*, application no. 15172/13, judgement of 29 May 2019, para. 189.

As for the adjective "imminent", the Court furtherly pointed out that there is no need for a state to suffer damage before taking action. In *A. and Others v. the United Kingdom*,[31] it affirmed that the condition of imminence has to be understood wider, thereby not requiring a disaster to happen in a State for it to be able to handle a dangerous situation by derogating human rights. That is why it was accepted that, following the al-Qaeda attack in the United States, a threat to the United Kingdom could exist even if no terroristic attacks had taken place in the latter state. Due to the imminence of the attack, which means that an atrocity could have been committed at any moment without a warning, the Court held that "the danger was credible".[32] It also emphasised that, having in mind the scope of Art. 15, the presence of a danger threatening the life of the nation needs to be evaluated, in the first place, concerning the known facts at the moment when the derogation was made, but the ECtHR can still consider the information subsequently discovered.[33]

As previously mentioned, in the *Greek* case, the Court stated that the crisis must involve the whole nation. This requisite needs to be furtherly explained, as one would think that the whole population of a country needs to be put in danger. In its jurisprudence, the ECtHR showed that there is no need for danger to be present in the whole territory of a State since it can exist only in a part thereof: human rights can be restricted only in a region of it. What is important is that the whole nation is endangered, which can be caused both by events happening in the whole State or only an area of it (Zeidy 2003, 284). It is not thus required for the whole country to be in danger. This was clarified, for example, in *Ireland v. the United Kingdom*.[34] The Court held that a public emergency existed in the six counties of Northern Ireland, considering the high number of deaths in the fight against the IRA.[35] The ECtHR used the same approach in *Aksoy v. Turkey*,[36] when it held that PKK terrorist activity[37] had created a public emergency in South-East Turkey.

[31] ECtHR, *A. and Others v. the United Kingdom*, application no. 3455/05, judgement of 19 February 2009, para. 177.

[32] *Ibid*.

[33] *Ibid*.

[34] ECtHR, *Ireland v. the United Kingdom*, application no. 5310/71, judgement of 18 January 1978, para. 205.

[35] See *ibid.*, paras. 12 and 29–75.

[36] ECtHR, *Aksoy v. Turkey*, application no. 21987/93, judgement of 18 December 1996, para. 70.

[37] Terroristic activity, in general, has been present in many of the cases regarding Art. 15 in light of the goal of terrorism, which is to endanger the most impor-

The question of the temporality of a public emergency must also be addressed. In other words, how much time can the emergency last? The ECtHR has never set a time limit. In *A. and Others v. the United Kingdom*,[38] it maintained that, in its jurisprudence, it had never expressly required the emergency to be temporary. Indeed, even if the proportionality of the reaction might be related to the length of the crisis, a public emergency could last several years. The Court did not consider the derogation in the UK to be unlawful just because it was not temporary. This principle was also applied in the situation in Northern Ireland in *Ireland v. the United Kingdom*,[39] *Marshall v. the United Kingdom*[40] and *Brannigan and McBride v. the United Kingdom*.[41]

3.4. The "margin of appreciation"

Given that a state can limit human rights before a disaster occurs, it is, at first, for the State to decide whether a situation can be considered a public. According to Steven Greer (2000, 5), this right of the State, called "margin of appreciation", is the leeway that the "Strasbourg institutions" are willing to provide the national authorities in carrying their responsibilities under the ECHR. Gross (1998, 496) suggests that it signifies that, in the determination of an emergency situation, neither the Commission nor the Court will intervene in the decision of a State if it believed that extraordinary measures were essential to solving the crisis if this judgement "falls within a certain margin of appreciation". Not contained in the Convention, the margin of appreciation was affirmed as a principle for the first time by the Commission in *Greece v. the United Kingdom*[42] and it was confirmed in many cases.[43]

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tant democratic institutions of a state, which can result in a public emergency if the state is unable to protect itself and its citizens by ordinary means (Tanca 1990, 269).

[38] Para 178. The case is different with the ICCPR since the United Nations Human Rights Committee thinks that the measures derogating from this treaty have to be of "an exceptional and temporary nature". See also para. 110 of the same case, which refers to General Comment No. 29 of 24 July 2001 on Art. 4 of the ICCPR.

[39] Paras. 205, 212.

[40] ECtHR, *Marshall v. the United Kingdom*, application no. 41571/98, judgement of 10 July 2001.

[41] ECtHR, *Brannigan and McBride v. the United Kingdom*, application no. 14553/89; 14554/89, judgement of 25 May 1993, para. 47.

[42] Yearbook of the European Convention on Human Rights, vol. 2 (1959), 1960, 172–197.

[43] E.g., *Brannigan and McBride v. the United Kingdom*, para. 43; ECtHR, *Mehmet Hasan Altan v. Turkey*, application no. 13237/17, judgement of 20 March 2018, para. 91.

In *Ireland v. the United Kingdom*,[44] the Court affirmed that it is first and foremost the obligation of every Contracting Party to evaluate if the life of the nation thereof is endangered by a public emergency. If the answer to this question is positive, the State, primarily, has also the right to decide "how far it is necessary to go" when trying to deal with the crisis, due to the national authorities being "in a better position" than the ECtHR when deciding about the existence of a public emergency and the useful measures undertaken to handle it, in light of "their direct and continuous contact with the pressing needs of the moment". This is the appropriate way of coping with a crisis, considering that the management of a dangerous situation has a political character, not judicial, as well as because various states may require nonidentical ways of dealing with an emergency (Greer 2000, 24). Taking into account that it is almost a certainty that the Court will accept the government's reasoning (Gross 1998, 497), most of the states interpreted the "margin of appreciation" less strictly (Zeidy 2003, 284). In addition, the principle varies depending on the protected right since the Court deems national interests to be more relevant than individual ones, making the "margin of appreciation" broader when the former ones are at risk. Kirchner maintains that approaching the principle in this way is dubious as the aim of human rights law is to safeguard individuals in opposition to the majority (Kirchner 2010, 8).

Nevertheless, an upper limit is set, which means that States have no "unlimited power of appreciation", due to the ECtHR having the right to judge if they have exceeded the "extent strictly required" to handle the emergency.[45] The State's right to primarily decide if the life of the nation is threatened is "accompanied by a European supervision".[46] The problem is that this supervision does not take place *ex officio*, but rather there has to be a complaint filed by another Contracting Party or by a non-governmental organisation, an individual or a group thereof.[47] Under Art. 15(3), there is only a general obligation for the State to notify the Secretary General of the Council of Europe (hereinafter Secretary General) about the derogation and the undertaken measures, with the latter just registering notices of derogation without examining the merits. That's why Schreuer (1982, 131) affirms

[44] Para. 207.

[45] *Brannigan and McBride v. the United Kingdom*, para. 43.

[46] E.g., *ibid*.; *Ireland v. the United Kingdom*, para. 207; *Mehmet Hasan Altan v. Turkey*, para. 91.

[47] See Art. 33–35 of the ECHR.

that the establishment of a perpetual supervisory organ analysing the derogations *ex officio* is recommendable.

Finally, it can be concluded that, even if the "margin of appreciation" has its limits, it is very likely that a State will never reach them, as the ECtHR's case-law shows. Except for *Greek* case, there are no judgements wherein the Court held that there were no grounds for accepting the reasoning of a state for declaring a public emergency.

3.5. Covid-19

According to the Council of Europe Factsheet (2020), at the beginning of 2020, the *Covid-19* pandemic spread, causing ten Contracting Parties to the ECHR, between March and April, to notify the Secretary General of the decision to invoke Art. 15. Despite having in common the declaration of the state of emergency, not all countries did use the same terminology. Only Romania,[48] Armenia,[49] the Republic of Moldova,[50] Georgia,[51] the Republic of North Macedonia[52] and the Republic of Serbia[53] referred to it as a "state of emergency". Estonia[54] and Latvia[55] labelled it as an "emergency situation", Albania[56] as a "state of natural disaster" and the Republic of San Marino[57] as "urgent measures" (Krstić 2020, 8).

The Court, of course, has not yet had the opportunity to give its opinion on whether those declarations have been made according to the ECHR, which means that it is an open question if a "disease" can be considered a public emergency. In its jurisprudence, the ECtHR

[48] See its Note verbale of 18 March 2020 at: *https://rm.coe.int/09000016809cee30*.

[49] See its Note verbale of 20 March 2020 at: *https://rm.coe.int/09000016809cf885*.

[50] See its Note verbale of 20 March 2020 at: *https://rm.coe.int/09000016809cf9a2*.

[51] See its Note verbale of 20 March 2020 at: *https://rm.coe.int/09000016809cff20*.

[52] See its Note verbale of 2 April 2020 at: *https://rm.coe.int/09000016809e1288*. While most of the states notified the Secretary General in eight days or less, the Republic of North Macedonia did it after 14 days (Krstić 2020, 9).

[53] See its Note verbale of 7 April 2020 at: *https://rm.coe.int/09000016809e1d98*. Serbia waited exactly three weeks to send its notification (Krstić 2020, 9).

[54] See its Note verbale of 20 March 2020 at: *https://rm.coe.int/09000016809cfa87*.

[55] See its Note verbale of 16 April 2020 at: *https://rm.coe.int/09000016809e2bd8*.

[56] See its Note verbale of 1 April 2020 at: *https://rm.coe.int/09000016809e0fe5*.

[57] See its Note verbale of 14 April 2020 at: *https://rm.coe.int/09000016809e2770*. Of the ten aforementioned states, the Republic of San Marino is the one which sent its notification to the Secretary General with the biggest delay, that is 36 days (Krstić 2020, 9).

has discussed illnesses only in a little number of cases, which mainly concerned Art. 3 of the ECHR. Therefore, diseases have never been acknowledged as a public emergency (Krstić 2020, 4). So, there can only be speculations about that, as the answer to this question will only be given in the Court's future jurisprudence, if a complaint is filed.

The author is certain that complaints will be filed regarding the situation in Serbia. After declaring the state of emergency on 15 March 2020,[58] different acts[59] were adopted for dealing with the crisis. It was decided that individuals above the age of 65[60] and 70[61] could not leave their houses. The only exception was made on Sundays from 3.00 a.m. to 8.00 a.m. for buying the necessary groceries.[62] Nikola Kovačević (2020, 23–25) thinks that this "humiliating measure" (Petrović, Pokuševski 2020, 81) is practically the same as the prohibition of leaving the apartment without electronic surveillance provided in the Serbian Code of Criminal Procedure.[63] It is also stricter than house arrest, which was deemed a deprivation of liberty by the ECtHR in *Dacosta Silva v. Spain*[64] because, during home arrest, individuals can leave their home for maximum two hours from 7 a.m. to 5 p.m. to get fresh air or go to work or school. That is why he thinks that the Order and the Decree did not regard the freedom of movement, but the right to liberty and security as provided in Art. 5 of the ECHR. Noting that "compulsory isolation orders" are to be regarded as "deprivation of liberty",[65] he emphasises

[58] See Odluka o proglašenju vanrednog stanja [Decision on declaring the state of emergency], *Official Gazette of the RS*, 29/2020–3.

[59] E.g., Naredba o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Order on the Restriction and the Prohibition of Movement of Persons on the Territory of the Republic of Serbia (hereinafter Order)], *Official Gazette of the RS*, 34/2020–3, 39/2020–6, 40/2020–4, 46/2020–3, 50/2020–12 and Uredba o merama za vreme vanrednog stanja [Decree on the Measures During the State of Emergency (hereinafter Decree)], *Official Gazette of the RS*, 31/2020–3, 36/2020–3, 38/2020–3, 39/2020–3, 43/2020–3, 47/2020–3, 49/2020–3, 53/2020–3, 56/2020–3, 57/2020–11, 58/2020–3, 60/2020–5, 126/2020–21.

[60] In case they lived in cities with more than 5.000 people.

[61] If they lived in cities with less than 5.000 inhabitants.

[62] Order, point 1. On the other hand, younger people could go out from 5.00 p.m. to 5.00 a.m., with some exceptions on Saturdays and Sundays (see Order, point 2).

[63] Zakonik o krivičnom postupku [Code of Criminal Procedure], *Official Gazette of the RS*, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 and 62/2021, Art. 190.

[64] Application no. 69966/01, judgement of 2 November 2006, para. 45.

[65] ECtHR, *Enhorn v. Sweden*, application no. 56529/00, judgement of 25 January 2005, para. 33.

that there were no individual decisions nor was anyone individually informed about the reasons why they could not leave their homes, even if those reasons were publicly known. Finally, he maintains that they could not bring the question of lawfulness and constitutionality of their deprivation of liberty before a competent court, so he deduces that Art. 5 of the ECHR has been breached since they have not been "informed promptly" of the reasons for their deprivation of liberty[66] nor were they "entitled to take proceedings by which the lawfulness" of their detention would be "decided speedily by a court".[67]

4. CONCLUSION

While the term "war" has never given the Court any problems, as no derogations were made on this ground, the same cannot be affirmed about what a "public emergency" is. From the first definition given in *Lawless v. Ireland*, through the better explanation made in the *Greek* case, to some of the details expressed in cases such as *A. and Others v. the United Kingdom*, *Ireland v. the United Kingdom*, *Aksoy v. Turkey* and *Brannigan and McBride v. the United Kingdom*, the Court dealt with the topic various times, even changing its initial opinion concerning some of the issues.

By referring to the conditions explained in the *Greek* case and considering the later jurisprudence, the ECtHR will soon judge whether illnesses and diseases can be considered public emergencies. According to the author, having in mind that the virus, after having emerged unexpectedly, spread insanely fast in the whole world and that it has been present for almost two years now there is no doubt that the criterion of imminence and actuality has been fulfilled. Owing to the thousands of deaths[68] and all the individuals who were hospitalised and its capacity to spread quickly, the effects of the crisis undoubtedly involved the whole nation of most States and there existed a threat to the continuation of the community's organised existence. Regarding the last condition, the author thinks that it was for each Contracting Party to decide whether the "crisis or danger must be exceptional in that the normal

66 Art. 5(2) ECHR.

67 Art. 5(4) ECHR.

68 On 23 February 2020 the number of deaths was about 2.500.000 (see Krstić 2020, 2).

measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate", as that could vary for different states. Keeping in mind how fast the virus spread and the copious number of deaths, the author thinks that the normal measures were not enough to handle the situation. Hence, in the author's opinion, *Covid-19* may be deemed a public emergency. Of course, derogation can be valid only if all the other conditions from the ECHR and especially Art. 15[69] thereof are met (see Krstić 2020, 3–7).

However, even if the requisites from the *Greek* case were not satisfied so convincingly and were thus debatable, the author thinks that the ECtHR would, in principle, accept a derogation made by a State, except for the situation. when power has been obtained unlawfully by an illicit government, which overthrew a democratic one utilising violent conduct. In every other case, the ECtHR is most likely to accept the State's claims for affirming there was an acceptable basis for declaring a public emergency. Considering that, currently, not in one of the forty-seven Contracting Parties to the ECHR has a government come into power illicitly, the Court is most likely to accept every declaration of the state of emergency caused by the pandemic. Analysing if a government is democratic or not is one of the ways whereby the issue of public emergencies has been handled in other regional systems protecting human rights. For example, the Inter-American Court on Human Rights underlined in the *Habeas Corpus in Emergency Situations* advisory opinion[70] that solely democratic governments can make use of the possibility of human rights derogations within a state of emergency (Shaw 2008, 389).

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[69] So, despite the existence of a public emergency, concerning Art. 15, the question remains whether the measures taken were strictly required by the situation and if there was consistency with the other obligations the state has under international law.

[70] IACtHR, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights),* Advisory Opinion OC-8/87, 30 January 1987.

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