



PRACTICAL GUIDE
FOR MONITORING
HUMAN RIGHTS VIOLATIONS
IN THE TIME OF CRISIS

IMPRESSUM

Published by
Civil Rights Defenders

For Publisher
Goran Miletic

Authors
Vladica Ilic
Jelena Unijat

Editor
Neda Mirkovic

Design
Marko Kovachevski



PRACTICAL GUIDE FOR MONITORING HUMAN RIGHTS VIOLATIONS IN THE TIME OF CRISIS

Belgrade, February 2021

The production of this publication was made possible with the support of the American people through the United States Agency for International Development (USAID). The contents of this publication are the sole responsibility of Civil Rights Defenders and do not necessarily reflect the views of USAID or the United States Government.

CONTENT

| | |
|---|----|
| INTRODUCTION | 5 |
| I. TYPES OF CRISIS AND INTERNATIONAL LEGAL OBLIGATIONS OF THE STATE IN THE TIME OF CRISIS | 6 |
| A. Types of Crisis | 6 |
| B. International Legal Obligations of the State in the Time of Crisis | 7 |
| A. MONITORING OF HUMAN RIGHTS VIOLATIONS IN THE TIME OF CRISIS | 11 |
| A. Derogations of Human Rights in the Time of Crisis – Relevant Principles | 11 |
| • A1. Permissibility of Derogations | 11 |
| • A2. Legitimacy of Derogations | 15 |
| • A3. Legality of Derogations | 17 |
| • A4. Proportionality of Derogations | 20 |
| • A5. Non-Discriminatory Impact of Derogations | 23 |
| B. Positive Obligations of the State in the Time of Crisis | 26 |
| III. CONTROL AND OVERSIGHT MECHANISMS FOR THE PROTECTION OF HUMAN RIGHTS IN THE TIME OF CRISIS | 34 |
| A. Parliamentary Oversight | 34 |
| B. Judiciary Control | 36 |
| C. Constitutional Court Oversight | 37 |
| D. Independent Institutions Oversight | 38 |
| E. Oversight by International Institutions and Mechanisms | 44 |
| ANNEX I: INSTRUCTIONS FOR THE USE OF CERTAIN LEGAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS IN THE TIME OF CRISIS BY HUMAN RIGHTS DEFENDERS | 46 |
| A. Complaint and the Initiative to the Protector of Citizens | 46 |
| B. Initiative to the Constitutional Court to Assess the Compliance of Derogating Measures with the Constitution and International Law | 47 |
| C. Request for Interim Measure to ECtHR | 48 |
| ANNEX II: RECOMMENDATIONS FOR SOURCES FOR RESEARCH AND LEGAL ARGUMENTATION | 49 |

INTRODUCTION

From the beginning of 2020, the whole world has been facing a strong and prolonged public health crisis. In order to control the COVID-19 pandemic, states were forced to restrict some of the human rights of their citizens. Many of them closed their borders and restricted the freedom of movement of foreigners and domicile citizens who entered the state territory. A number of other fundamental freedoms and human rights were subject to restrictions, and some countries have taken measures derogating from their obligations under the international instruments.

A number of States Parties to the International Covenant on Civil and Political Rights have notified the Secretary-General of emergency measures, and on the other hand, several other States Parties have resorted to emergency measures in response to the COVID-19 pandemic in a manner seriously affecting the implementation of their obligations under the Covenant, without formally submitting any notification of derogation from the Covenant.¹ Within the Council of Europe, from March 2020 from the total of 47 country members only 10 countries² declared a state of emergency and human rights derogations according to the Article 15 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). As we can see, three of those countries are Western Balkans countries - Albania, North Macedonia and Serbia. The other European countries also introduced some limitations of human rights, but this was done in the scope of regular exceptions of the human rights and fundamental freedoms guaranteed by ECHR.

Bearing in mind that human rights can be justifiably derogated in the period of crisis, but also that crisis can be misused for some other purposes that are not directly or indirectly connected with overcoming identified challenges, risks and threats caused by the crisis, it is very important to make a distinction between justified and unjustified derogations of human rights and fundamental freedoms. Thus, one of the main purposes of this Guide is to point out to civil rights defenders the relevant criteria for assessing the justification of derogations from human rights and freedoms during a crisis. Many examples of restrictive measures used during emergencies and crises will be presented, including those that were absolutely unjustified from a human rights perspective. Additionally, as during the COVID-19 crisis a lot of civil rights organizations (CSOs) conducted various activities regarding the violations of human rights in a state of emergency, authors used their experiences and lessons learned in order to provide guidelines for human rights defenders for monitoring human rights violations in times of crisis.

The Guide is intended to be of help to human rights defenders who are monitoring the rule of law and the state of human rights protection in Serbia. Furthermore, because of its nature, it offers a methodology which can be also applied outside of Serbia, especially regarding the monitoring of the implementation of international standards for human rights protection.

At the beginning of the Guide, after the introductory part, different types of crisis are presented, followed by a description of international legal obligations of the state in connection with the declaration of the crisis and derogations from human rights and freedoms.

The central part of this Guide is the monitoring methodology of human rights violations in the time of crisis. The monitoring methodology, which includes monitoring advices and numerous examples – of which the largest number refers to the measures prescribed in Serbia during the COVID-19 pandemic, is divided into two subchapters: on relevant principles for monitoring of human rights derogations and on monitoring of the positive obligations of the state in the time of crisis.

This Guide further presents various types of control and oversight mechanisms and what human rights defenders can do regarding the violations of human rights. In the annexes, the authors put instructions for the use of certain legal instruments for the protection of human rights in the time of crisis by human rights defenders and information on where credible information for legal argumentation can be found.

¹ Human Rights Committee: *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, 24 April 2020, CCPR/C/128/2, § 1 (available at: www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf).

² Latvia, Romania, Armenia, Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino.

I TYPES OF CRISIS AND INTERNATIONAL LEGAL OBLIGATIONS OF THE STATE IN THE TIME OF CRISIS

A. Types of Crisis

There are different types of crisis that can request the introduction of some special measures, either by imposing a state of emergency or by applying regular limitations of human rights. Some of the crisis that requires special measures implementation are wars, terrorist threats and attacks, pandemics, floods, earthquakes and other natural disasters.

In the 21st century, we have been witnessing a number of **terrorist attacks** all over the world, and it is not a rare occasion to see that in the fight against terrorism states use all available means which would not be convenient under normal circumstances. For example, as allowed exceptions of the right to privacy states use different forms of surveillance, phone tapping, undercover agents, and other special investigations techniques. Using these techniques is mainly regulated in national criminal legislation, but also can be regulated in some special laws and state authorities with extraordinary competencies can be established. Besides that, in some extreme situations, special measures can be regulated by *lex specialis* that usually lasts for a certain period of time and is adopted immediately after the event, usually in fast procedure without public discussion. It usually introduces specific types of interrogations and police detention that can last much longer than in regular circumstances.

In cases of terrorist attacks, states sometimes resort to the use of *incommunicado detention*, during which persons deprived of their liberty are denied contact with family members, an attorney or an independent physician. During *incommunicado detention*, the fundamental guarantees for protection against torture, other forms of ill-treatment and arbitrary deprivation of liberty have been suspended.

Pandemics are public health catastrophes that also require some special measures whose primary aim should be securing public health. Taking into consideration the nature of this disaster (high transmissible), states are very often forced to limit freedom of movement on the entire territory of the state or on some parts of the territory. In those circumstances, it is very important to find a fine balance and monitor whether the long-term, intense and supervised restrictions of freedom of movement has turned into unjustified deprivation of liberty. In cases where it becomes deprivation of liberty, a state has got new obligations and has to impose and implement certain safeguards. As we all have direct and recent experience with the COVID-19 pandemic, the most practical explanations and examples in this Guide are related to this pandemic and the states' responses to it.

Natural disasters mostly require timely and territorial limitations of human rights, but also some positive obligations related to the humanitarian assistance provided to those who are endangered and have suffered greater material damage. In very extreme cases, people who live in some territories are forced to leave their homes and become natural disaster refugees or displaced persons.³

Wars, civil wars and other armed conflicts cause political crises, lawlessness and violence on a larger scale. In these situations, personal security and human rights of civilians, especially of vulnerable groups, such as women, children and others, are extremely endangered. Very often, rebellion groups recruit children and they become child soldiers. These boys and girls suffer

³ Read more at UNHCR webpage: www.unhcr.org/climate-change-and-disasters.html.

extensive forms of exploitation and abuse and many girls are subjected to gender-based violence.⁴ People who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war) are protected by the Geneva Conventions and their Additional Protocols.⁵

In the last few years armed conflicts on the Asian and African continent caused **mass migration** and arrivals at European soil of people of different nationalities, ages, cultural backgrounds and other different characteristics, who are in need of international protection. Refugee crisis culminated in 2015, when somewhat more than 1.3 million⁶ people applied for asylum in Europe. That year, about 600,000⁷ asylum seekers passed across the territory of the Western Balkans (WB). Their transit and a short stay in the WB countries imposed certain positive obligations to the transit states, primarily consist of humanitarian aid.

B. International Legal Obligations of the State in the Time of Crisis

In the time of crisis, states are authorized to temporarily prescribe derogations from certain human rights in their territories in accordance with the relevant international human rights treaties to which they are state parties. The most important international instruments on European soil in this regard are the UN International Covenant on Civil and Political Rights (ICCPR)⁸ and the European Convention on for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹

ICCPR, Article 4:



1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

⁴ More about children recruited by armed forces at UNICEF website: www.unicef.org/protection/children-recruited-by-armed-forces.

⁵ More about Geneva Conventions and Additional Protocols is available at International Committee of the Red Cross website: www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

⁶ Available at: www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/.

⁷ Annual Report of the Protector of Citizens of the Republic of Serbia for 2015, p. 54 (available at: www.ombudsman.rs/attachments/article/5555/Annual%20Report%202015.pdf).

⁸ Adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 (available at: www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).

⁹ Adopted on 4 November 1950, entry into force 3 September 1953 (available at: www.echr.coe.int/documents/convention_eng.pdf).



ECHR, Article 15:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

According to ICCRP and ECHR, **substantive conditions** for valid derogation from human rights are:

- the existence of public emergency threatening the life of the nation (these should be exceptional and imminent dangers or crises affecting the whole population or the population on a particular region);¹⁰
- taken measures must not go beyond the extent strictly required by the exigencies of the situation;
- taken measures must not be inconsistent with the State's other obligations under international law;
- taken measures must not be discriminative;
- the state party is required to officially declare a state of emergency (pursuant to ICCPR and the opinion of the Human Rights Committee – HRC).¹¹

There are also **procedural obligations** of states that intend to temporarily derogate from human rights in the time of crisis. *Notification* on derogations should be sent to the Secretary-General of the United Nations and to the Secretary General of the Council of Europe without any unavoidable delay (ICCPR: immediately), together with sufficient information concerning them.

In the case of *Lawless v. Ireland* (No. 3),¹² the European Court of Human Rights (ECtHR) ruled that the notification of derogating measures to the Secretary-General after 12 days of their entry into force was made without delay, but in the earlier case of *Greece v. the United Kingdom*,¹³ the Commission of Human Rights concluded that the three-month period between the entry into force of the derogating measures and the notification of the State was too long (“was longer than can fairly be attributed to inevitable causes”) and found, in that respect, a violation of the Article 15 § 3 of ECHR.

The question of whether a notification by a State complies with the formal requirements provided by Article 15 § 3 of ECHR will be examined by ECtHR of its own motion if it has not been contested by any party to the proceedings before ECtHR.¹⁴ Similarly, HRC emphasizes that its duty to monitor the law and practice of a State Party for compliance with Article 4 does not depend on whether that State Party has submitted a notification.¹⁵

¹⁰ Case of *Ireland v. the United Kingdom*, ECtHR, App. no. 5310/71, 18 January 1978, § 205.

¹¹ HRC: *General Comment No. 29: Article 4: Derogations during a State of Emergency*, adopted on 31 August 2001, CCPR/C/21/Rev.1/Add.11, § 2.

¹² Case of *Lawless v. Ireland* (No. 3), ECtHR, App. no. 332/57, 1 July 1961, § 47.

¹³ Case of *Greece v. the United Kingdom*, ECtHR, App. No. 176/56, Commission report of 26 September 1958, § 158.

¹⁴ Case of *Aksoy v. Turkey*, ECtHR, App. no. 21987/93, 18 December 1996, §§ 85-86.

¹⁵ HRC: *General Comment No. 29*, § 17.

According to ECtHR, in the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent State.¹⁶

The notification of the state should contain a clear explanation of the reasons for the derogation, information on the provisions from the international treaty from which it has derogated (concrete human rights and freedoms) and full information of the measures taken, particularly in terms of their duration and application. Additional notifications are required if the state subsequently takes further measures of derogation – for instance by introducing new measures, changing their territorial scope, or extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation.

The state's obligation to notify the Secretary-General of the United Nations and the Secretary General of the Council of Europe of the measures taken and the reasons is met by attaching copies of the legal acts under which the emergency measures will be taken, with an explanation of their purpose. If copies of all relevant measures are not provided, the requirement will not be met.¹⁷

On 6 April 2020, Serbia informed the Secretary-General of the Council of Europe that it had declared a state of emergency on 15 March 2020 “in order to take measures necessary to prevent the occurrence and spread of, and to suppress the COVID-19 contagious disease”, and that implemented measures that “have derogated from certain obligations provided for in ECHR to the extent strictly required by the exigencies of the epidemiological situation and medical necessity”.¹⁸ Notification letter did not contain information on human rights and freedoms that were being derogated from and to what extent, on the duration of the state of emergency and the precise period of reviewing the measures (“they have been constantly under review taking into account the epidemiological situation, recommendations of the WHO and experiences in fighting this contagious disease”). Copies of the legal acts providing for individual derogating measures were not sent and instead of that the notification contained a link to a special web page of *the Official Gazette* containing all applicable legal acts adopted during the state of emergency, only in the Serbian Cyrillic. Serbian Government did not inform the Council of Europe about the numerous changes in the measures of derogation that were adopted during this state of emergency.¹⁹ Withdrawal of Derogation was made on 12 October 2020, more than 5 months after the lifting of the state of emergency on 6 May.²⁰

States should not derogate from human rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility of introducing reasonable limitations on certain rights, in accordance with their provisions.²¹ In this regard, international bodies are authorised to examine whether ordinary laws would had been sufficient to meet the danger caused by the public emergency.²²

¹⁶ Case of *Cyprus v. Turkey*, ECtHR, App. No. 8007/77, Commission report of 4 October 1983, §§ 66-68.

¹⁷ Case of *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), App. nos. 3321/67 and 3 others, Commission report of 5 November 1969, § 81; HRC: *General Comment No. 29*, § 17.

¹⁸ *Nota Verbale* is available at the following link: rm.coe.int/16809e1d98.

¹⁹ An identical notification was sent to the Secretary General of the United Nations on 6 April 2020 (it is not available on the United Nations website).

²⁰ Withdrawal of Derogation is available at the following link: rm.coe.int/16809fee1a.

²¹ HRC: *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, § 2(c).

²² *Lawless v. Ireland* (No. 3), § 36; *Ireland v. the United Kingdom*, § 212.



Monitoring advice

Facts that human rights defenders should check relating to the official notification of derogation are:

1. whether the derogated human rights provisions from the correspondent international treaty (ICCPR, ECHR) are listed;
2. whether the reasons for introducing, changing or extending measures of derogation are explained;
3. whether the reasons given are in correlation with derogated human rights and freedoms;
4. whether the duration of measures of derogation is stated;
5. whether the measures of derogation are reviewed before the extension;
6. when the notification was sent and when it was withdrawn;
7. whether the notification on the changing or extension of measures of derogation was sent;
8. whether the copies of the legal acts under which the measures will be taken, with an explanation of their purpose, are attached to the notification.

II MONITORING OF HUMAN RIGHTS VIOLATIONS IN THE TIME OF CRISIS

A. Derogations of Human Rights in the Time of Crisis – Relevant Principles

A1. Permissibility of Derogations

Given the permissibility of derogating certain human rights due to exceptional circumstances such as wars, terrorism, natural disasters or other public emergencies, human rights are divided into *derogable* and *non-derogable*. This division should be distinguished from the division of human rights into *absolute* and *relative*, which refers to the question of whether the enjoyment of a certain human right must be balanced with the protection of another legitimate interest even in regular circumstances. In that respect, *derogations from certain human rights could be understood as their temporary and additional restrictions or limitations during a war or other public emergencies, beyond the framework that applies in regular circumstances.*

Although non-derogable (“inviolable”) rights are mainly those that are absolute, there are also relative rights that cannot be derogated. Public international law, international human rights treaties and national constitutions usually determine which human rights are non-derogable, so the remaining human rights are, *a contrario*, considered subject to derogations.

The effect of the non-derogation clauses is that the rights to which they refer continue to apply during any time of war or other public emergency, irrespective of any derogation made by a state. In other words, derogations from these rights have no legal force (they are void) but constitute a violation of these rights.



As stated in Article 4 § 2 of ICCPR and in Article 6 of the Second Optional Protocol to ICCPR,²³ no derogation may be made from:

- right to life (Art. 6 of ICCPR),
- prohibition of torture and other forms of ill-treatment (Article 7 of ICCPR),
- prohibition of slavery, slave-trade and servitude (Article 8, §§ 1 and 2 of ICCPR),
- prohibition of imprisonment because of inability to fulfil a contractual obligation (Article 11 of ICCPR),
- principle of legality in the field of criminal law – no punishment without law (Article 15 of ICCPR),
- right to recognition as a person before the law (Article 16 of ICCPR),
- right to freedom of thought, conscience and religion (Article 18 of ICCPR),
- abolition of the death penalty (Articles 1 and 6 of the Second Optional Protocol to ICCPR).

²³ Adopted by the UN General Assembly resolution 44/128 of 15 December 1989, entry into force 11 July 1991 (available at: www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx).



According to the Article 15 of ECHR and its protocols, non-derogable rights are:

- right to life, except in respect of deaths resulting from lawful acts of war (Article 2 of ECHR),
- prohibition of torture and other forms of ill-treatment (Article 3 of ECHR),
- prohibition of slavery and servitude (Article 4, § 1 of ECHR),
- principle of legality in the field of criminal law – no punishment without law (Article 7 of ECHR),
- abolition of the death penalty in time of peace and limiting the death penalty in time of war or of imminent threat of war (Articles 1, 2 and 3 of Protocol 6),
- right not to be tried or punished twice - *ne bis in idem* principle (Article 4 of Protocol No. 7), and
- abolition of the death penalty in all circumstances (Articles 1 and 2 of Protocol No. 13).

Immediately after the introduction of the state of emergency, the Serbian Government, with the co-signature of the President of the Republic, passed a Decree on Misdemeanour for Violation of the Order of the Minister of Interior on Restriction and Prohibition of Movement of Individuals on the Territory of the Republic of Serbia.²⁴ The Decree stipulated that citizens who violate the ban on movement during the state of emergency will be fined for having committed a misdemeanour, from 50 to 150 thousand Serbian dinars. However, the above-mentioned Decree stipulated that misdemeanour proceedings could be initiated and completed even in the event that the criminal proceedings against the same person were previously finally terminated for a criminal offense that includes all elements of the above-mentioned misdemeanour, which was undoubtedly a violation of the non-derogable *ne bis in idem* principle.²⁵

HRC has identified elements of other rights that cannot be made subject to a lawful derogation under Article 4 of ICCPR because they express peremptory norms of general international law (*jus cogens*)²⁶ or constitute principles or treaty obligations inherent in ICCPR as a whole, such as:

- right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Article 10, § 1 of ICCPR);
- prohibitions of taking of hostages, abductions or unacknowledged detention;
- prohibition of genocide and crimes against humanity,
- prohibition of propaganda for war, or in advocacy of national, racial or religious hatred that would constitute an incitement to discrimination, hostility or violence,
- right to effective legal remedy for any violation of the provisions of ICCPR (Article 2, § 3 of ICCPR),
- fundamental requirements of the right to a fair trial (e.g. presumption of innocence and right to take proceedings before a court by which the lawfulness of detention shall be decided without delay).²⁷

²⁴ Official Gazette of the Republic of Serbia, no. 39/20.

²⁵ Inconsistency of the possibility of misdemeanour prosecution after the final termination of the criminal proceedings with the Serbian Constitution and Article 7 of ECHR was determined by the Constitutional Court of the Republic of Serbia, in decision no. IUo-45/2020, dated 17 September 2020 (available at: www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/16517/?NOLAYOUT=1).

²⁶ On the peremptory norms of general international law, read more: Report of the International Law Commission, 71st session, A/74/10, §§ 46 and further (available at: legal.un.org/ilc/reports/2019/).

²⁷ HRC: General Comment No. 29, §§ 13, 14 and 16. A similar point was made by HRC in: *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, § 2(d).

Besides international law and international human rights treaties, non-derogable rights are usually defined in national constitutions and the list of those rights can be longer, which means that states can stipulate more guarantees than it is guaranteed in the international instruments.

The Serbian Constitution (Article 202, § 4)²⁸ contains a list of 17 non-derogable rights. In addition to rights that are not-derogable under ICCPR and ECHR, the following rights are also considered inviolable in a state of war or public emergency: free development of individuals, prohibition of forced labour, right to a fair trial, right to citizenship, right to legal person, conscientious objection, freedom of expressing national affiliation, prohibition of inciting racial, ethnic and religious hatred, right to enter into marriage and equality of spouses, freedom to procreate, rights of the child and prohibition of forced assimilation. A similar list is contained in the Constitution of Montenegro (Article 25, §§ 3-4),²⁹ while in the Constitution of North Macedonia (Article 54)³⁰ the list of non-derogable rights is shorter than in the international instruments (only right on life, prohibition of torture and other forms of ill-treatment, principle of legality in the field of criminal law – no punishment without law, and right to freedom of thought, conscience and religion).



Monitoring advice

When examining whether a human right is non-derogable in a state, its constitution, ratified international treaties (e.g., ICCPR and ECHR) and binding peremptory norms of general international law should be considered together. If the human right in question is non-derogable by any of these sources, it is sufficient to claim that it is non-derogable in that state. When interpreting international human rights treaties, the legal opinions and practice of international bodies that monitor their implementation (e.g., HRC³¹ and ECtHR³²) should mandatorily be examined.

HRC stressed that it is inherent in the protection of rights explicitly recognized as non-derogable that they must be secured by procedural guarantees, including, often, judicial guarantees, underlining that the provisions of ICCPR relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.³³ In the same respect, ECtHR emphasized the importance of the procedural obligation under Article 5 § 3 of ECHR (which is not explicitly non-derogable) to bring a person deprived of liberty promptly before a judge, in the context of the non-derogable obligation of the state to protect everyone from torture or other forms of ill-treatment.

²⁸ Official Gazette of the Republic of Serbia, no. 98/06.

²⁹ Official Gazette of Montenegro, nos. 1/07 and 38/13.

³⁰ Official Gazette of the Republic of Macedonia, nos. 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 13/09 and 49/11.

³¹ The Practice of HRC is available at: tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx.

³² ECtHR case law is available at: hudoc.echr.coe.int/.

³³ HRC: General Comment No. 29, § 15.

In the case of *Aksoy v. Turkey*, the applicant was detained for at least 14 days without being brought before a judge or other officer. The Government sought to justify this measure by making references to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support. Although recognizing that the investigation of terrorist offenses undoubtedly presents the authorities with special problems, ECtHR did not agree with the Government that it was necessary to hold a suspect for 14 days without judicial intervention, pointing out that this period was exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture.³⁴

During the state of emergency introduced in Serbia in 2020 due to the COVID-19 pandemic, the Government adopted a Decree³⁵ authorizing judges to hold hearings without the presence of defendants in the courtroom, who could attend hearings through technical means of audio and video transmission. Conducting hearings in this way derogated an important safeguard for protection from torture and other forms of ill-treatment which consists in promptly bringing a person deprived of liberty before a judge before whom the person will be able, among other things, to allege ill-treatment suffered in detention. A defendant who is during the hearing under control by officers who ill-treated him may be discouraged from disclosing allegations of ill-treatment to the judge due to the fear of retaliation, especially in the situation whereby the person does not make a direct contact even with his defence counsel but rather communicates through technical means of transmitting sound and images, as suggested by the Serbian Ombudsperson at the time.³⁶ On the other side, such hearings significantly reduced the possibility of judges to notice injuries into the defendant's body, which had a negative impact on the execution of another procedural obligation of the state under Article 3 of ECtHR – to conduct an official investigation if there are clear indications that ill-treatment occurred, even when no complaint has been made.³⁷

This manner of participation of the defendant in the trial hearings brings up, above all, the issue of derogation from the right to a fair trial, due to the reduced ability of the defendant to participate effectively and equally in the criminal proceedings and given that there were no restrictions on prosecutors' access to courtrooms. As already mentioned, according to the Serbian constitution, the right to a fair trial is a non-derogable human right.

A2. Legitimacy of Derogations

After examining whether the introduced measures of derogation relate only to the human rights in respect of which derogations are allowed, it should be checked whether those measures are necessary and directed towards the protection of endangered public interests (e.g., public health or national security).

In times of crisis, the executive may be given broader powers and competencies than it regularly has. Regulations are usually enacted in an emergency procedure, without a prior public discussion and without the period between the promulgation and the time the regulation takes legal effect (*vacatio legis*). Such a concentration of power in the hands of executive authorities can sometimes be abused to achieve illegitimate aims (to conceal information of public importance or to gather personal data of citizens, to conduct non-transparent public procurement, to conduct unfair political campaigns in the time of crisis, to conduct penal populism, i.e., prescribe rigid measures to suppress crime that will appeal to a majority of citizens, etc.).

ECtHR has repeatedly pointed out that in cases where derogating measures encroach upon fundamental Convention rights, such as the right to liberty, it 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.³⁸

In mid-March 2020, a few days after the declaration of the state of emergency, on the recommendation of the Ministry of Justice,³⁹ the Republic Public Prosecutor issued an Obligatory Instruction,⁴⁰ ordering public prosecutors in Serbia to propose to the court pretrial detention against all defendants in cases of violation of the quarantine measure, while for all defendants aged 65 and over prosecutors were obliged to propose a measure of home confinement. In addition, it was envisaged that public prosecutors who did not follow the instructions would be disciplined.

Although the final decision on ordering pretrial detention is always made by the court, the content of the Instruction clearly indicates that the Republic Public Prosecutor abused her authority. Apart from the fact that the Instruction was adopted on the recommendation of an unauthorized administrative body (Ministry of Justice), it required all prosecutors, under the threat of disciplinary sanctions, to propose the most severe measure to ensure the presence of the defendant (pretrial detention) in all cases, even in those where legitimate aim in criminal proceedings could have been achieved without the imposition of any measure or by the imposition of a milder measure.⁴¹

³⁴ *Aksoy v. Turkey*, §§ 76-87.

³⁵ Decree on the Manner of Participation of the Accused in the Main Trial in the Criminal Proceedings Held During the State of Emergency Declared on 15 March 2020, *Official Gazette of the Republic of Serbia*, no. 49/20.

³⁶ The Ombudsperson's Opinion addressed to the Serbian Ministry of Justice is available at: www.ombudsman.org.rs/index.php?option=com_content&view=article&id=193:the-protector-of-citizens-issued-an-opinion-to-the-ministry-of-justice&catid=49:activities&Itemid=16.

³⁷ Read more at: www.bgcentar.org.rs/bgcentar/eng-lat/skype-hearings-erode-safeguards-against-ill-treatment/.

³⁸ Case of *Brannigan and McBride v. the United Kingdom*, ECtHR, App. nos. 14553/89 and 14554/89, 25 May 1993, §§ 49-51; Case of *A. and Others v. the United Kingdom*, ECtHR [CG], App. no. 3455/05, 19 February 2009, § 184; Case of *Alparslan Altan v. Turkey*, App. no. 12778/17, 16 April 2019, § 116.

³⁹ Available at: www.mpravde.gov.rs/sr/vest/29545/postravanje-sankcija-za-lica-koja-prekrse-mere-samoizolacije-.php.

⁴⁰ Unlike other instructions, this Instruction was not published on the website of the Republic Public Prosecutor's Office.

⁴¹ See: Articles 188, 189, 210 and 211 of the Criminal Procedure Code of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, nos. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19).

In the beginning of the state of emergency, the Government of the Republic of Serbia issued a Conclusion on centralized informing of citizens about the epidemiological situation and the consequences of COVID-19 in Serbia.⁴² According to the Conclusion, the only authorized bodies for informing the citizens about COVID-19 were the Prime Minister and the persons authorized by the Crisis Response Team of the Government. Local municipalities, emergency headquarters and healthcare facilities (hospitals, etc.) were not authorized to communicate with the public but had to provide all information exclusively to the Crisis Response Team of the Government. According to the Conclusion, information originating from institutions outside the Crisis Response Team was not considered reliable, and the possibility of punishment for spreading misinformation in a state of emergency was indicated.

In the explanation, the Government stated that its adoption is conditioned by the citizens' need to receive exclusively verified and accurate information on the epidemiological situation of the COVID-19 disease. From the content of the Conclusion it could be logically and implicitly but understood that there was a suspicion that local and healthcare institutions would provide inaccurate information to the public about the epidemic in the local community area. However, it did not seem convincing that in the time of a widespread health crisis, during which there was an increased citizens' need to receive various information, it was necessary to centralize all information about the epidemiological situation in the country in order to protect citizens from alleged misinformation originating from local and state institutions outside the Government's Crisis Response Team.

The day after the Government's Conclusion was published, a journalist was arrested and detained by the police on charges of disturbing the public with a text stating that one healthcare facility had a problem with a lack of protective equipment and that working conditions for doctors were poor. The text stated that the source of information were employees from that institution, as well as that the journalist tried to get comments from the management of the institution and the provincial secretary for health on the information she had, but that no one answered her questions.⁴³ Under the pressure of the international and domestic public and the assessment that it was a matter of censorship, the journalist was released from custody the next day, and shortly after that, the Government Conclusion was revoked.



Monitoring advice

Note: Try to discern reasons for the illegitimate measures of the authorities; they can sometimes be seen after a while.

Suspicious that the Government tried to conceal information about the epidemiological situation of COVID-19 from the public significantly increased after the June parliamentary elections, when journalists reported that the official data on the number of patients and deaths from COVID-19 from March to early June 2020 were a few times smaller than the real ones (obtained from the healthcare facilities).⁴⁴ Later, a member of the Crisis Response Team of the Government admitted that there were three times more deaths from COVID-19 in the same period than was officially reported, explaining it by the "inaccuracy of the information system".⁴⁵ According to the latest statement of the Minister of Health, the repeatedly promised revision of the official data on the number of patients and deaths from COVID-19 will be conducted "when the pandemic is over".

⁴² Conclusion of the Government of the Republic of Serbia, no. 53-2928/2020 (*Official Gazette of the Republic of Serbia*, no. 48/20).
⁴³ Read more at: nova.rs/vesti/drustvo/kc-vojvodine-pred-pucanjem-bez-zastite-za-medicinske-sestre/.
⁴⁴ More information is available at: birn.rs/korona-broj-umrljih-i-zarazenih-visestruko-veci-od-zvanicno-saopštenog/.
⁴⁵ Statement is available at: youtu.be/9PhPhSnsTCo?t=1075.

A3. Legality of Derogations

The principle of legality implies that when prescribing and applying measures of derogation of human rights, state authorities are obliged to respect material and procedural norms of national legislation. Measures of derogation should be prescribed by the competent authorities, in an appropriate procedure and in a prescribed form, and regulations should also have certain legal qualities.

The Serbian Constitution stipulates that in the event of a state of emergency the National Assembly prescribes measures of derogation from human rights, but that exceptionally, in the event that the National Assembly is unable to meet, these measures will be prescribed by the Government, with the co-signature of the President of the Republic (Articles 105 and 200).

By the Decree on Measures During the State of Emergency⁴⁶ (Articles 2 and 3), the Government of Serbia, with the co-signature of the President of the Republic, authorized the Ministry of Interior (MoI) to order the mandatory stay of asylum seekers in asylum centres and reception centres and to temporarily restrict and prohibit the movement of individuals in public areas.

Authorization of MoI to prescribe measures of derogation from human rights during a state of emergency - i.e. to determine the duration of measures, the area in which those measures apply, the citizens to whom they apply, the permitted exceptions, sanctions for violations of those measures, etc. - was challenged before the Constitutional Court. It was claimed that the Serbian Constitution does not allow anyone, except the National Assembly and the Government, with the co-signature of the President of the Republic, to prescribe derogating measures from human rights during a state of emergency and that the authorization given to MoI was unconstitutional.⁴⁷ However, most judges of the Constitutional Court held that the Government had laid down derogating measures from human rights by the very fact that it authorised MoI to adopt general acts restricting and prohibiting movement in public areas and that the succeeding MoI's decisions on the duration of the prohibition of movement, all the areas and people it applied to, exceptions from the prohibition, etc. were merely acts by which it "concretised" and "operationally implemented" derogating measures from human rights that had been laid down earlier.⁴⁸

ECtHR regularly checks whether the derogating measures were lawful and had been effected in accordance with a procedure prescribed by law,⁴⁹ as well as whether legal certainty is not compromised by a judicial interpretation running counter to the applicable provisions.⁵⁰

Although the principle of legality is important in derogating from any human right guaranteed by ICCPR or ECHR in order to prevent the arbitrariness of the authorities, the issue of the *quality of the law*, especially concerning its accessibility, certainty and foreseeability, is of paramount importance for measures prescribing criminal offenses, penalties and restrictions on the right to liberty and security of person.

⁴⁶ *Official Gazette of the Republic of Serbia*, nos. 31/20, 36/20, 38/20, 39/20, 43/20, 47/20, 49/20, 53/20, 56/20, 57/20, 58/20, 60/20 and 126/20.
⁴⁷ Read more at: www.bgcentar.org.rs/podneta-inicijativa-za-pokretanje-postupka-za-ocenu-ustavnosti-uredbe-o-merama-za-vreme-vanrednog-stanja-i-naredbe-o-ogranicnju-i-zabrani-kretanja-lica-na-teritoriji-republike-srbije/.
⁴⁸ Decision of the Constitutional Court of the Republic of Serbia, no. IUo-45/2020.
⁴⁹ Case of *Mehmet Hasan Altan v. Turkey*, ECtHR, App. no. 13237/17, 20 March 2018, § 140; Case of *Şahin Alpay v. Turkey*, ECtHR, App. no. 16538/17, 20 March 2018, §§ 119 and 183.
⁵⁰ Case of *Baş v. Turkey*, ECtHR, App. no. 66448/17, 3 March 2020, §§ 151-153.

After lifting the state of emergency and terminating the Decree on Measures during the State of Emergency, on 6 May 2020, the Minister of Health issued an order that banned the refugees, asylum seekers and migrants from leaving asylum and reception centres, except in exceptional cases (visiting a physician and alike) when they need a special approval by the Serbian Commissariat for Refugees and Migration. Duration of this measure was not set as it was laid down that it would be in force until the danger of spreading the COVID-19 disease in the territory of the Republic of Serbia passed. On the other side, misdemeanour liability was envisaged in case of taking an action contrary to the order.⁵¹

The mentioned order was issued under Article 52 § 1, point (b) of the Law on Protection of the Population from Infectious Diseases,⁵² which stipulates that the Minister of Health may order *restrictions on the movement of the population in the area affected by the emergency situation*. However, the order banned 24-hour leaving asylum and reception centres, which, given the intensity of restrictions on movement, indefinite duration of the measure, the existence of control over compliance with the measure, sanctions in case of violation, etc. could be considered a deprivation of liberty rather than a restriction on freedom of movement.⁵³ Besides that, at the moment when the order was issued, emergency situation had not been declared in any of the areas where asylum and reception centres are located.

After only eight days of implementation, and after a group of CSOs submitted an initiative to the Constitutional Court to assess the constitutionality of the order dated 6 May,⁵⁴ the Minister of Health revoked the order on 14 May 2020.⁵⁵

As regards the *accessibility*, it should be verified whether the law on which the conviction was based or the regulation containing derogating measures were sufficiently accessible to those concerned, that is to say whether it had been made public. ECtHR made it very clear that journalistic reporting cannot substitute for an official publication of the text of the decision, or at least of its operative part, underlying that only a publication emanating from an official source can give an adequate and reliable indication of the legal rules applicable in a given case.⁵⁶

The state of emergency declared in Serbia due to the COVID-19 pandemic has introduced challenges for some citizens in receiving timely and complete information with the regulations of the Government and other state authorities. These regulations, which prescribed penalties for citizens who do not adhere to epidemiological measures, were changed very often, sometimes several times a week, and as a rule they came into force immediately after their publication in the Official Gazette of the Republic of Serbia. Regulations related to COVID-19 pandemic were available on the website of the Serbian Government and on the webpage of the electronic database of laws and other regulations of Serbia (Legal Information System).⁵⁷ The only opportunity for citizens who did not have access to the Internet to be informed about the adopted measures were daily conferences of the Government's Crisis Response Team at which the introduced measures were read and briefly explained, sometimes incompletely. Those who did not understand the Serbian language were not even able to inform themselves about the content of the adopted measures.

51 Official Gazette of the Republic of Serbia, no. 66/20.

52 Official Gazette of the Republic of Serbia, nos. 15/16, 68/20 and 136/20.

53 On the criteria for distinguishing deprivation of liberty from restriction of freedom of movement, read more in: Case of *Guzzardi v. Italy*, ECtHR, App. no. 7367/76, 6 November 1980, §§ 92-93.

54 Read more at: www.bgcentar.org.rs/bgcentar/eng-lat/initiative-filed-with-the-constitutional-court-to-review-the-constitutionality-and-legality-of-the-order-restricting-movement-on-roads-leading-to-asylum-and-reception-centre-facilities-and-grounds/.

55 Official Gazette of the Republic of Serbia, no. 74/20.

56 Case of *Kasymakhunov and Saybatalov v. Russia*, ECtHR, App. nos. 26261/05 and 26377/06, 14 March 2013, §§ 92-93.

57 Available at: www.pravno-informacioni-sistem.rs/fp/covid19.

Regulations prescribing derogating measures from human rights should be sufficiently *precise and foreseeable* to enable individuals to act in accordance with them. Conditions for derogations from human rights must be clearly defined so that it meets the standard of *lawfulness*, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. On the other hand, this means that regulations must also demarcate clearly the scope of discretion for public authorities and prevent their arbitrariness.⁵⁸ The notion of *arbitrariness* is not to be equated with *against the law*, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.⁵⁹

During the state of emergency, a large number of people reported that they had been arrested and detained for violating the self-isolation measure they had not been properly notified of. They claimed that the flyers on COVID-19 protection measures they received when they entered the country did not specify that they must remain in their homes or that leaving their homes for a specific period of time was punishable by law – staying at home was only recommended. The people given flyers rather than rulings on self-isolation were arrested if they were found outside their homes and held in detention for several weeks on suspicion that they had violated the Criminal Code provision incriminating failure to act pursuant to health regulations during epidemic.⁶⁰



Monitoring advice

Note: Even in the state of emergency, authorities should act in accordance with applicable regulations, procedures should be fully respected, and individuals should be informed about their obligations in a legally prescribed manner. Crisis cannot be used by state authorities as an excuse for arbitrary behaviour, as well as omitting and breaching their official procedures and acts.

As for the above-mentioned example, it should be noted that Article 75 of the Law on Protection of the Population from Infectious Diseases prescribes that the measures ordered by the sanitary inspector shall be stated in a written decision, and by exception orally, which must be noted in the minutes on the conducted sanitary supervision. ECtHR also reiterates that, in order to meet the requirement of lawfulness, a deprivation of liberty must be in accordance with a procedure prescribed by substantive and procedural rules of national law.⁶¹

It follows that in case the claims of the citizens were true, i.e. that among the arrested and detained citizens on suspicion of having violated epidemiological measures there were also those who were not previously informed about their obligations in a legally prescribed manner, there is no doubt that there have been arbitrary behaviour of the authorities and violation of citizens' right to freedom and security of person.

58 According to the case-law of ECtHR, domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by ECHR. In matters affecting fundamental rights, it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in ECHR, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.

Case of *Hasan and Chaush v. Bulgaria*, ECtHR, App. no. 30985/96, 26 October 2000, § 84.

59 HRC: *General Comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, § 12. The same attitude in this regard was taken by ECtHR. Read, for example: Case of *Saadi v. the United Kingdom*, ECtHR [CG], App. no. 13229/03, 29 January 2008, §§ 68-74.

60 Article 248 of the Criminal Code (*Official Gazette of the Republic of Serbia*, nos. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19).

61 Case of *Mitrović v. Serbia*, ECtHR, App. no. 52142/12, 21 March 2017, § 40.

A4. Proportionality of Derogations

Proportionality is a fundamental principle of restrictions of human rights in both regular and extraordinary circumstances. It highlights that restrictions from human rights may be different and graded in intensity, duration, territorial and personal application, that every restriction in a given scope must have a specific legitimate aim (predominant public interest to be protected in the given circumstances) and that the state must consider the balance between the legitimate aim and restriction, and be able to demonstrate that balance.

Article 4 of ICCPR and Article 15 of ECHR contain an identical provision according to which, in time of public emergency threatening the life of the nation, states may take measures derogating from its obligations *to the extent strictly required by the exigencies of the situation*.

What is the limit of the human rights derogations that is “strictly required” depends on a number of relevant factors that must be taken into account (the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation). Although public authorities have a wide *margin of appreciation* in restricting human rights during a crisis, especially in cases where there is a lack of a uniform approach among Council of Europe member states to sensitive issues,⁶² this does not mean that they enjoy unlimited discretion.⁶³ The domestic margin of appreciation may be subject to a supervision of international human rights bodies.

At the beginning of the COVID-19 pandemic, numerous countries prescribed measures to restrict the freedom of movement of citizens, and in some of them, such as Serbia, violations of long-term bans of movement and other epidemiological measures were sanctioned in criminal and misdemeanour proceedings. On the opposite side, there were states that only recommended to the population or certain categories of people to stay at home. In some of these countries, the basic epidemiological measures that applied to the entire population were physical distancing and the mandatory use of protective equipment in public places.⁶⁴

In April 2020, HRC stressed that where possible, and in view of the need to protect the life and health of others, States Parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under ICCPR with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing.⁶⁵

Requirement of proportionality relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.⁶⁶ Derogations must, as far as possible, be limited, and any measures taken, including sanctions imposed in connection with them, must be proportional to the interest at stake.⁶⁷ In other words, introduced derogations must be the least intrusive option among those that might achieve the desired result.⁶⁸

62 Case of *S.H. and Others v. Austria*, ECtHR [GC], App. no. 57813/00, 3 November 2011, § 53.

63 *A. and Others v. the United Kingdom*, § 173.

64 Read more in: European Union Agency for Fundamental Rights (FRA), *Coronavirus pandemic in the EU – Fundamental rights implications: with a focus on contact-tracing apps*, Bulletin no. 2, 2020, pp. 19-21 (available at: fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf).

65 HRC: *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, § 2(b).

66 HRC: *General Comment No. 29*, § 4.

67 HRC: *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, § 2(b).

68 OHCHR: *Emergency Measures and Covid-19: Guidance*, 27 April 2020, p. 1 (available at: www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Events/EmergencyMeasures_COVID19.pdf&action=default&DefaultItemOpen=1). According to Article 20 of the Serbian Constitution, human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.

In order to be able to assess whether the authorities have established a fair balance between the conflicting interests, the state needs to provide an adequate explanation for the adoption of given derogating measures. Where this explanation is missing and when due to this lack it cannot be concluded which criteria and reasons the state was guided by when establishing the scope of adopted derogating measures from human rights, the requirement of proportionality will not be met.

Acting upon the citizens' appeals related to the act in which the Headquarters of the Federal Department of Civil Protection ordered the prohibition of movement of the persons less than 18 years of age and over the age 65 on the territory of the Federation of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina ruled that the human rights of these categories of citizens were breached. The Constitutional Court considered that the impugned measures do not fulfil the requirement of proportionality under Article 2 of Protocol No. 4 to ECHR, because they do not indicate the basis for the assessment of the Headquarters of the Federal Department of Civil Protection that the groups concerned have a higher risk of contracting or transmitting COVID-19 infection. Besides that, no consideration was given to the introduction of milder measures if such risk was justifiably present, and the measures were not strictly limited in time, nor were there an obligation to review them regularly to ensure that they last only as long as necessary, that is, that they should be mitigated or abolished as soon as the situation permits.⁶⁹

The decision of the Serbian Government to postpone all deadlines in administrative proceedings that expire during the state of emergency, and refer to undertaking administrative actions, completion of administrative proceedings and deciding on submitted legal remedies should be observed from the point of view of the mentioned criteria. Given that Government Decree⁷⁰ prescribed that those deadlines shall be considered expired after 30 days from the termination of the state of emergency, without any exceptions, it was not possible to effectively exercise the right to access to access information of public importance concerning public health concerning public health. The Government did not provide an adequate explanation for the adoption of this nonselective derogating measure, that treats all administrative proceedings in the same manner without any exception in urgent cases.

Periodic examinations of the justification for further application of derogating measures are of particular importance when the measures are applied for a long period of time.⁷¹ Sometimes, the justification for further application of derogating measures may be questioned by the fact that the relevant circumstances that existed at the time of the introduction of measures have changed,⁷² or by the fact that the state has mitigated other measures introduced to achieve the same goal.

69 Decision of the Constitutional Court of the Bosnia and Herzegovina, no. AP-1217/20, 22 April 2020 (available at: www.ustavisud.ba/dokumenti/en/AP-1217-20-1234093.pdf).

70 Decree on the Application of Deadlines in Administrative Proceedings during the State of Emergency, *Official Gazette of the Republic of Serbia*, nos. 41/20 and 43/20.

71 Case of *A.E. v. Poland*, ECtHR, App. no. 14480/04, 31 March 2009, § 49.

72 Case of *Villa v. Italy*, ECtHR, App. no. 19675/06, 20 April 2010, §§ 47-49.

From mid-March to the end of 2020, beneficiaries of social welfare institutions for the elderly were forbidden to leave these institutions. Visits to beneficiaries were also prohibited.⁷³ During this multi-month ban, the state repealed or mitigated many other epidemiological measures that were adopted with the same aim. The ban on the movement of the elderly outside social welfare institutions ceased to apply with the lifting of the state of emergency in early May 2020, and during the summer months, parliamentary elections and football matches were held in Serbia, and public gatherings of a large number of people were allowed (up to 500 indoors and without restrictions in the open).⁷⁴

Apart from the fact that the Government did not explain the need for the long-term application of strict measures towards the elderly in social welfare institutions, the above-mentioned circumstances strongly suggest that the ban on leaving social welfare institutions was disproportionate in its scope.

The absence of legal mechanisms to challenge the justification of the application and the given scope of derogating measures of derogating measures, in particular the lack of judicial control over the measures derogating the right to liberty and security of person⁷⁵ or freedom of movement, shall always be considered a disproportionate.

In accordance with Article 198 of the Constitution of the Republic of Serbia, the legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject of control before the court in an administrative proceeding, if other form of court protection has not been stipulated by the law.

Refugees, asylum seekers and migrants were forbidden to leave asylum and reception centres during the entire state of emergency in Serbia (from 16 March to 6 May 2020). The Government acts⁷⁶ did not prescribe a legal mechanism to challenge the justification of the (prolonged) application of this measure.

As this restriction was established by general, and not by individual acts of the Government, judicial control over the application of the mentioned measure could not be exercised through the mechanism under Article 198 of the Constitution. Filing a constitutional complaint was also not possible in this case, since, according to the Serbian Constitution (Article 170), a constitutional complaint may be lodged only against individual acts.

The only domestic legal mechanism for challenging the above-mentioned restriction of movement, which due to the manner and circumstances of its application could be considered deprivation of liberty, was the procedure for assessing constitutionality before the Constitutional Court. However, the decision of the Constitutional Court on this issue was made in mid-October 2020, i.e. after 7 months from the beginning of the application of the restriction of movement, which cannot be considered timely (speedily) judicial review.⁷⁷

The same shortcoming existed with regard to the prohibition of movement during the state of emergency that was prescribed for citizens aged 65 and over (this case is shown below).

⁷³ Order on the Prohibition of Visits and Restriction of Movement in the Facilities of Institutions for the Accommodation of the Elderly, *Official Gazette of the Republic of Serbia*, nos. 28/20, 66/20 and 87/20.

⁷⁴ Order on the Prohibition of Gatherings in the Republic of Serbia in Public Places, *Official Gazette of the Republic of Serbia*, no. 83/20.

⁷⁵ *Aksoy v. Turkey*, §§ 76-78; *Brannigan and McBride v. the United Kingdom*, §§ 58-60.

⁷⁶ Decision on Temporarily Restricting the Movement of Asylum Seekers and Irregular Migrants Accommodated in Asylum and Reception Centres in the Republic of Serbia, *Official Gazette of the Republic of Serbia*, no. 32/20, and Decree on Measures During the State of Emergency.

⁷⁷ Case of *Kavala v. Turkey*, ECtHR, App. no. 28749/18, 10 December 2019, §§ 176-196; *Baş v. Turkey*, §§ 216 and 230.



The proportionality test of the derogating measures should answer the following questions:

- whether the application of regular human rights limitations is sufficient to achieve a legitimate aim without prescribing derogation measures (whether ordinary laws are sufficient to respond to the public emergency);
- whether there are different more lenient derogating measures by which a legitimate aim can be achieved;
- whether a milder, shorter, territorially or personally more limited application of the same measure can achieve a legitimate aim;
- whether the need for derogation is officially explained;
- whether the derogating measures are regularly reviewed at reasonable intervals, according to the above criteria;
- whether the measures were subject to safeguards, e.g. whether timely judicial review of the derogating measures was possible.

A5. Non-Discriminatory Impact of Derogations

The principle of non-discrimination prohibits differences in treatment of persons in analogous or relevantly similar situations, as well as failures to treat differently persons whose situations are significantly different, *where no objective and reasonable justification exists for such discriminatory treatment*.⁷⁸

According to Article 4 of ICCPR, one of the conditions for the justifiability of any derogation from ICCPR is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though Article 26 or the other ICCPR provisions related to non-discrimination have not been listed among the non-derogable provisions in article 4 § 2, in the view of HRC, “there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances”.⁷⁹ In ECHR system, prohibition of discrimination (Article 12) and general prohibition of discrimination (Article 1 of the Protocol No. 12) are also not listed as non-derogable rights. Nevertheless, certain forms of discrimination can amount to degrading treatment proscribed by Article 3, which is a non-derogable provision, and when assessing whether derogating measures are “strictly required” under Article 15, ECtHR examines whether the measures implemented to respond to a public emergency discriminate unjustifiably between different categories of persons.⁸⁰

It can be concluded that derogation measures must not rely on discrimination on the basis of race, colour, sex, age, religion, political or other opinion, national or social origin, property status, culture, language, mental or physical disability, association with a national minority *or any other status*.

⁷⁸ Case of *Thlimmenos v. Greece*, ECtHR, App. no. 34369/97, 6 April 2000, § 44.

⁷⁹ HRC: *General Comment No. 29*, § 8.

⁸⁰ Biljana Braithwaite et al. (eds.), *COVID-19 and the Impact on Human Rights*, The AIRE Centre and Civil Rights Defenders, 2020, p. 134 (available at: rolplatform.org/wp-content/uploads/2020/10/covid-guide-eng.pdf); *A. and Others v. the United Kingdom*, § 190.

The Constitution of Serbia contains provisions on the prohibition of discrimination in two places. Firstly, the prohibition of discrimination is systematized as one of the fundamental principles in the part of the Constitution that guarantees human rights and freedoms. Article 21 of the Constitution stipulates that all direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited. Secondly, within the provisions on derogations from human and minority rights in a state of emergency and war, the Constitution stipulates that measures of derogation must not lead to discrimination on the basis of race, sex, language, religion, nationality or social origin.

In one case before the Constitutional Court of Serbia, the question was asked whether there was discrimination of citizens on the basis of age (due to the strict restriction of movement imposed on citizens aged 65 and over). Surprisingly, Constitutional Court ruled in its decision⁸¹ that measures derogating from human and minority rights in a state of emergency could not be reviewed from the perspective of the prohibition of discrimination on grounds of age, given that Article 202 do not state age as a personal feature, unlike Article 21 where it is explicitly stated.

Although it can be noted that the provision from Article 202 of the Serbian Constitution contains a very short exhaustive list of personal features on the basis of which discrimination is prohibited, this was not an obstacle for the Constitutional Court to directly apply provision from Article 21, which has the rank of a fundamental principle, or provisions of ratified international treaties (ICCPR, ECHR) under which the prohibition of discrimination is included in the catalogue of human rights which may be derogated from only to the extent strictly required.

Restriction of specific human rights of certain categories of the population does not necessarily constitute discrimination. It is on the state to recognize situations where it is justified to impose more strict measures in order to protect more valuable rights, such as the right to life and the right to health. That means more restrictions in the interest of vulnerable groups, but in these cases, it is essential to design targeting measures that give consideration to life conditions and vulnerabilities but do not go beyond their legitimate purpose.

In light of the COVID-19 pandemic, prohibition of discrimination will exist if the regulations and measures that state introduce to respond to protect health have a discriminatory effect, either because they have a more severe impact on members of certain groups or because they do not take into account and sufficiently accommodate for the needs of and differences between different groups.⁸²

During the state of emergency in Serbia declared due to COVID-19, the Government and MoI by their acts imposed prohibition of movement of individuals aged 65 and over.⁸³ The prohibition was in force from 18 March to 6 May 2020, with several different time slots when this group of citizens could go outside for a walk and shopping (mainly in early morning hours on the weekends). Violation of the prohibition was subject to criminal and misdemeanour liability. As opposed to the prohibition of movement imposed on individuals aged 65 and over, other categories of citizens at high medical risk of severe COVID-19 outcomes were not subject to such strict restrictions. Ten days after the lockdown for citizens aged 65 and over started, the Government only recommended that services in religious facilities be performed in the absence of the believers, while gyms, saunas, hair and beauty salons and gambling establishments were open until 1 April.

The prohibition of movement of the population aged 65 and over was not based on an assessment of the particular circumstances of the individuals (their health, hygiene conditions, et al.) but rather on a general authorities' assessment that, as opposed to the younger population, citizens aged 65 and over were at greatest risk of contracting severe forms of COVID-19 because of the typical chronic diseases they suffered from. In that respect, the competent authorities never explained the difference between people aged 65 and over and those under 65, suffering from grave chronic diseases associated with severe COVID-19 outcomes and subjected to much milder restrictions of movement. They also did not explain why milder measures (e.g. mandatory physical distancing and wearing of personal protection equipment outside their homes, or the possibility to leave their homes every day for hours at a time when individuals under 65 were under lockdown, etc.) were ineffective for protection of this population.

Despite all of the above, the Serbian Constitutional Court in its decision of mid-October 2020⁸⁴ concluded that the measure prohibiting the movement of citizens aged 65 and over had been imposed to protect the lives and health of this category of the population, "to the extent necessary to achieve the purpose for which it had been imposed."

81 Decision of the Constitutional Court of the Republic of Serbia, no. IUo-45/2020.
82 Biljana Braithwaite et al. (eds.), *op. cit.*, p. 135.

83 Order on Restriction and Prohibition of Movement of Individuals on the Territory of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, nos. 34/20, 39/20, 40/20, 46/20 and 50/20, and Decree on Measures During the State of Emergency.
84 Decision of the Constitutional Court of the Republic of Serbia, no. IUo-45/2020.

B. Positive Obligations of the State in the Time of Crisis

Positive obligations of the state mainly relate to the support of vulnerable groups or individuals in specific circumstances in order to exercise or protect their human rights. While the negative obligations essentially require states not to interfere in the exercise of rights, the positive obligations call for specific positive measures to give full realization and full effect to the specific right.⁸⁵

Depending on the expected action of the state, positive obligations are divided into substantive and procedural obligations. *Substantive obligations* are those which require the basic measures needed for full enjoyment of the rights guaranteed in legal acts⁸⁶ (e.g. laying down proper rules governing intervention by the police, regulating the licensing, setting up, operation, security and supervision of activities deemed to be inherently hazardous or dangerous, equipping prisons and other detention facilities, legal recognition to the status of transsexuals, etc.), while the *procedural obligations* are those that call for the organisation of domestic procedures to ensure better protection of persons and those that ultimately require the provision of sufficient remedies for violations of rights. This provides the background against which the right of individuals (alleging violation of their rights) to an effective investigation and, in the wider context, the duty of the state to enact criminal legislation which is both dissuasive and effective, must be seen.⁸⁷

States typically have a wide margin of appreciation regarding the methods adopted to fulfil their positive obligations.⁸⁸ With regard to the scope of those obligations, ECtHR states that, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, they must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.⁸⁹

Considering the COVID-19 crisis and very limited resources of vaccines, states should make priorities. For example, WHO's Strategic Advisory Group of Experts (SAGE) has provided recommendations about which populations within a country should be prioritized first. These include frontline health and care workers at high risk of infection, older adults, and those people at high risk of death because of underlying conditions like heart disease and diabetes. In the second phase of the roll-out, as more doses are produced, vaccines should go to groups less at risk of being infected or of suffering badly.⁹⁰

Before the official immunisation plan, the President of the Republic of Serbia announced that military and police officers will be among the priorities, that caused dissatisfaction of some part of the public. After that, in January 2021, the Operative Immunization Plan in the Republic of Serbia was adopted.⁹¹ According to it, the first phase of vaccination includes employees in health care institutions and homes for elderlies, as well as some categories of the elderlies. The second phase includes other categories of elderlies that are not included in the first phase, persons who have some chronic diseases and employees in the public and local institutions and services (e.g. police officers, teachers, professors etc.). In the third phase are migrants and asylum seekers in reception and asylum centres, habitants of informal settlements, homeless people and very poor citizens, as well as the prisoners over 50 years. Only after several days upon the beginning of vaccination, the highest public officials called for all citizens, regardless if they are in any priority group, to come on vaccination stands and to take vaccines. This announcement made big crowds and that practice was stopped after several days.⁹²

At the end of April 2020, the Government of Serbia passed the Decree on the Establishment of a Temporary Register and the Manner of Payment of One-Time Financial Assistance to all Adult Citizens of the Republic of Serbia in Order to Reduce the Negative Effects Caused by the COVID-19 Pandemic.⁹³ The Decree stipulated that the right to a one-time financial assistance in the amount of 100 euros in dinar equivalent has all adult citizens of the Republic of Serbia who, on the day the Decree enters into force (24 April 2020), have a residence in the territory of the Republic of Serbia with a valid identity card.

This measure of the state was sharply criticized by the professional public from the standpoint of protection of economic and social rights of citizens and maximum use of resources available to the state. Namely, this measure did not identify the categories of the population that needed financial assistance, often in a larger amount than prescribed, but the state's financial means were evenly distributed to everyone, even those who did not need assistance. On the other hand, conditioning the financial assistance with the possession of an identity card made it impossible for legally invisible persons (without personal documents) to receive this assistance. Finally, it was not explained why the children were excluded from the possibility of obtaining financial assistance, i.e. their parents or guardians on the basis of the duty to take care of them.

⁸⁵ Read more at: Jean-François, Akandji-Kombe, *Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights*, Council of Europe, 2007, pp. 5 and further (available at: rm.coe.int/168007ff4d).

⁸⁶ According to the Serbian Constitution (Article 21), measures that the state may introduce in order to achieve full equality of persons or groups of persons who are essentially in an unequal position with other citizens shall not be considered as discrimination.

⁸⁷ Jean-François, Akandji-Kombe, *op. cit.*, p. 16.

⁸⁸ States have positive obligations in respect of a large number of human rights. In this chapter, the focus and examples will be related to the state's obligations in the fields of exercising economic and social rights and the prohibition of ill-treatment.

⁸⁹ Case of *Milanović v. Serbia*, ECtHR, App. no. 44614/07, 14 December 2010, § 84.

⁹⁰ WHO SAGE Roadmap For Prioritizing Uses Of COVID-19 Vaccines In The Context Of Limited Supply, 13 November 2020 (available at: www.who.int/publications/m/item/who-sage-roadmap-for-prioritizing-uses-of-covid-19-vaccines-in-the-context-of-limited-supply).

⁹¹ Operative Immunization Plan Against COVID-19 in the Republic of Serbia is available at: www.batut.org.rs/download/aktuelno/operativniPlan.pdf.

⁹² Read at: nova.rs/vesti/drustvo/kad-drzava-planira-ili-kako-je-propao-plan-za-vakcinaciju/.

⁹³ Official Gazette of the Republic of Serbia, no. 60/20.

Committee on Economic, Social and Cultural Rights stressed that COVID-19 pandemic has deep negative impacts on the enjoyment of economic, social and cultural rights, especially the right to health of the most vulnerable groups and states has an obligation to take measures to prevent, or at least to mitigate, these impacts. The Committee stressed that the elderly and those with bad health conditions are particularly vulnerable to serious health consequences if infected by the coronavirus and that other groups are at greater risk of contagion such those in residential care facilities or communal living arrangements, prisoners and persons in detention facilities, as well as residents of informal settlements or other areas lacking adequate access to water, soap or sanitizer.⁹⁴

According to the results of the survey on attitudes of CSO dealing with Roma protection issues, the largest number of them (95%) agree that some Roma citizens were at additional risk of greater vulnerability due to the measures introduced during the state of emergency.⁹⁵ Due to the restriction of freedom of movement, access to work and sources of income of those who collect secondary raw materials and work in the informal economy or have seasonal jobs was significantly limited. In that way, many families were left without financial means for living, without being targeted by state systemic measures for supporting citizens and economy. Recognition of the right to social assistance was impossible or significantly difficult, because the centres for social work suspended field visits, and they did not receive any special instructions from the competent ministry on the implementation of this procedure in the new situation.

According to the data, 86% of respondents (representatives of Roma population) found themselves in a much more difficult financial situation compared to the period before the coronavirus.⁹⁶ After pointing the problems by CSOs, some local self-government units independently or with the support of the Serbian Red Cross undertook certain activities in order to provide access to some of the basic services, food and disinfectants.



Good practice example of cooperation CSO with Protector of Citizens

Upon receiving information about the state in Roma settlements from A11 – Initiative for Economic and Social Rights, the Protector of Citizens together with representatives of that CSO visited 10 Roma settlements. The objective of the field visits was primarily to use direct work in the field to determine what are the hygienic conditions in the settlements, especially during epidemics duration period, access to water and electricity, as well as needs of the population to secure additional assistance measures in the form of packages and social benefits. In his report, Protector of Citizens pointed out very poor hygienic conditions in informal Roma settlements, lack of health protective equipment, insufficient financial resources and inadequate conditions of providing distant education for Roma children.⁹⁷

Besides Roma who lives in informal settlements, homeless people also were left without adequate and timely implemented positive measures of state aid. In the period of eight months (March - November 2020) Shelter for Adults and the Elderly in Belgrade denied receiving 43 new beneficiaries who needed temporary accommodation, referred to them by the centres for social work in Belgrade.⁹⁸



CSO Activity: Upon interventions of CSOs, Shelter for Adults and the Elderly in Belgrade admitted several new beneficiaries and established an isolation block with only nine beds. After that, a group of CSOs jointly asked from the City of Belgrade, as the founder of for Shelter for Adults and the Elderly, urgent help to the homeless people in the time of pandemic, as well systematic approach in resolving the problem of insufficient accommodation capacities. Additionally, they called on citizens to donate clothes, blankets, sleeping bags, food, hygiene products and money (through a special bank account) for homeless people.⁹⁹

Regarding the specific position of persons deprived of their liberty in the context of positive state obligations, least it should be monitored the following: treatment of those persons by public officials, protection of persons deprived of liberty from the other individuals, procedural guarantees in cases of violations of rights of persons deprived of liberty, and detention conditions.

The obligation of professional conduct of public officials toward persons deprived of their liberty and procedural guarantees are connected with state duty to organise its legal system so as to strictly supervise the action of law enforcement agencies and permit effective control of them.¹⁰⁰ It means obligation to provide suitable training for members of the police and security services, as well as supervision of police and security force operations in order to minimise, to the greatest extent, possible use of force.

⁹⁴ Committee on Economic, Social and Cultural Rights: *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, 17 April 2020, E/C.12/2020/1 (available at: undocs.org/E/C.12/2020/1).

⁹⁵ United Nations Human Rights Team and the Social Inclusion and Poverty Reduction Unit of the Government of the Republic of Serbia: *Impact of the COVID-19 on Vulnerable Groups and Groups at Risk – Causes, Outcomes and Recommendations*, Belgrade, 2020, p. 8, (available at: serbia.un.org/en/104823-impact-covid19-vulnerable-groups-and-groups-risk-causes-outcomes-and-recommendations).

⁹⁶ Result of Ipsos Strategic Marketing survey related to the impact of COVID-19 epidemic on the work of collectors of secondary raw materials, conducted in the period June/July 2020 (read more in: Sarita Bradaš et al., *The impact of the COVID-19 epidemic on the position and rights of workers in Serbia, with particular reference to frontline and informal economy workers and multiply affected worker categories*, Centre for Democracy Foundation, Belgrade, 2020, p. 43 (available at: www.centaronline.org/userfiles/files/publikacije/cdf-the-impact-of-the-covid-19-epidemic-on-the-position-and-rights-of-worker.pdf).

⁹⁷ Special Report of the Protector of Citizens with Recommendations: *Conditions in Roma Settlements in the Situation of Emergency Status and Implementation of Protection Measures Due to Coronavirus Epidemics (COVID-19)*, 19 May 2020 (available at: ombudsman.rs/index.php/izvestaji/posebnii-izvestaji/6656-special-report-of-the-protector-of-citiyens-with-recommendations).

⁹⁸ Read more at: www.a11initiative.org/en/the-city-of-belgrade-must-urgently-provide-protection-to-the-homeless-during-the-pandemic/.
⁹⁹ *Ibid.*

¹⁰⁰ Jean-François, Akandji-Kombe, *op. cit.*, p. 23.

During the state of emergency in Serbia, one video appeared in the media and on social networks, showing a police officer slapping a citizen during arrest, although he did not resist.

Soon after, the Sector for Internal Control of MoI filed a criminal complaint the First Basic Public Prosecutor's Office in Belgrade against the police officer for suspicion that he committed the crime of ill-treatment and torture.¹⁰¹ Additionally, disciplinary proceedings were initiated against this police officer due to serious violations of official duty, and he was temporarily removed from work until the end of the proceedings. The Protector of Citizens also initiated a procedure in which he determined that the conduct of the police officer during the arrest was unprofessional and humiliating, recommending that police officers be trained on applicable human rights standards relating to the prohibition of torture, inhuman and degrading treatment or punishment.¹⁰²

However, the First Basic Public Prosecutor's Office in Belgrade rejected the criminal complaint. In the explanation of its decision, competent prosecutor stated that the citizen said that he does not feel ill-treated or tortured and concluded that there is no subjective element of a crime of ill-treatment and torture. Considering that such rejection decision on criminal complaint is unfounded, the Belgrade Centre for Human Rights submitted an initiative to the Higher Public Prosecutor's Office in Belgrade to issue a mandatory instruction to the first instance public prosecutor to re-open the pre-investigation procedure.¹⁰³



Monitoring advice

Note: Even in a state of emergency the excessive use of force is not allowed, and control mechanisms should conduct effective investigations into allegations of torture and other forms of ill-treatment. Human rights defenders should not give up and in ill-treatment cases they should use all available legal remedies for proving the illegalities and shortcomings in work of law enforcement officers.

From the example given above, we can conclude that the state effectively undertook first steps of control and fulfilled its positive procedural obligations immediately after the violation of right occurred. All necessary actions were carried out: a criminal complaint was filed, disciplinary proceedings were initiated, the police officer was temporarily removed from work, the Protector of Citizens conducted the procedure on his own initiative in which it determined violations and sent recommendations. Unfortunately, the rejection of the criminal complaint diminished all previously undertaken positive work of the competent authorities. Even though the misuse of force was video recorded and publicly available, the investigation by the public prosecutor was not conducted. However, the Belgrade Centre for Human Rights has requested that the pre-investigation procedure be reopened, so there is hope that this case of police ill-treatment will not go unpunished.

There is also a positive obligation of the state to protect individuals, especially those deprived of their liberty, in cases where the competent authorities know or ought to know at the relevant time of the existence of a real and immediate risk to the life or human dignity from the criminal acts or other conduct of a third party. This obligation is for the first time set in ECtHR case *Osman*

¹⁰¹ Article 137 of the Serbian Criminal Code.

¹⁰² Protector of Citizens' findings are available at: www.ombudsman.rs/index.php/2012-02-07-14-03-33/6697-p-lici-s-i-sluzb-ni-n-z-ni-i-p-niz-v-uc-p-s-up-priv-d-nj.

¹⁰³ Read more at: www.bgcentar.org.rs/prvo-osnovno-javno-tuzilastvo-u-beogradu-odbacilo-krivicnu-prijavu-protiv-policijskog-sluzbenika-koji-udarao-gradanina-na-sedistu-sluzbenog-automobila-za-vreme-vanrednog-stanja/.

v. the United Kingdom,¹⁰⁴ in which it considered the fulfilment of a state's positive obligation under Article 2 of ECHR (protection of the right to life). According to the so-called *Osman test*, there should be answered on three questions: (1) was the victim threatened in a real and immediate way, (2) did the authorities know, or they ought to know this, and (3) did they take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The responsibility of the state for non-fulfilment of a positive obligation will exist if the measures from point 3 have not been taken but the competent authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk of serious human rights violations.

The above-mentioned state duty and criterion of responsibility extend to cases of domestic violence,¹⁰⁵ cases where specific measures need to be taken to protect a person from himself or herself,¹⁰⁶ and cases of deaths arising from industrial, environmental and natural disasters. States have an obligation to take preventive operational measures to safeguard individuals from specific threats to life arising from dangerous situations, in the context of both private and public activities, if the state authorities knew or reasonably ought to have known about the threat.¹⁰⁷

Starting from early April 2020, about 140 beneficiaries of the Gerontology Centre in Niš became infected with the coronavirus, and more than 50 of them died as a result of the infection. About 40 employees spent a month and a half in quarantine, locked in the premises of the Centre with beneficiaries. Officials announced that the spread of coronavirus among beneficiaries was the result of the unprofessional attitude of the management and a whole series of irregularities (visits and outings of beneficiaries were allowed contrary to the prohibition of movement, and there were indications that the symptoms of the disease were initially concealed). Shortly afterwards, the director of the Centre was arrested and detained on suspicion of committing a serious criminal offence against human health, and the indictment against him was filed in October 2020.¹⁰⁸

The state's obligations to monitor dangerous activities and take preventive measures to safeguard lives of individuals during the COVID-19 pandemic relate, *inter alia*, to the adequate protection of doctors and other medical and non-medical staff who work in COVID-19 medical divisions.

The Union of Doctors and Pharmacists of Serbia announced several times that more than 70 doctors died from COVID-19 in 2020 due to the poor work organization. According to the Union, the main reasons for the increased mortality rate of doctors from COVID-19 are the insufficient number of healthcare workers, the lack of equipment in the "first wave" of the pandemic, inadequate equipment, the wrong testing protocol in the "green zones" and the poorly organized rotation of healthcare workers in the "red zones".¹⁰⁹

There is no official information on whether the competent state authorities are checking these allegations of human rights violations of doctors. One CSO initiative on this issue was rejected by the Protector of Citizens, who stated that "the conditions for initiating the control procedure over the work of the Ministry of Health have not been met."¹¹⁰

¹⁰⁴ Case of *Osman v. the United Kingdom*, ECtHR, App. no. 23452/94, 28 October 1998, § 116.

¹⁰⁵ Case of *Talpis v. Italy*, ECtHR, App. no. 41237/14, 2 March 2017, §§ 99-131.

¹⁰⁶ Case of *Fernandes de Oliveira v. Portugal*, ECtHR [GC], App. no. 78103/14, 31 January 2019, §§ 110-115. Persons with mental disabilities are considered to constitute a particularly vulnerable group who require protection from self-harm. Case of *Renolde v. France*, ECtHR, App. no. 5608/05, 16 October 2008, § 84.

¹⁰⁷ Biljana Braithwaite et al. (eds.), *op. cit.*, pp. 21-22.

¹⁰⁸ Read more at: insajder.net/sr/sajt/vazno/17894/ and rs.n1info.com/vesti/a656302-optuznica-protiv-bivseg-direktora-gerontoloskog-centra-nis/.

¹⁰⁹ One of the announcements of the Union of Doctors and Pharmacists of Serbia is available at: www.sindikatlfs.rs/panic-o-greskama-vise-od-70-mrtvih-doktora-rezultat-katastrofalne-organizacije/.

¹¹⁰ Read more at: www.bgcentar.org.rs/bgcentar/eng-lat/protector-of-citizens-refuses-to-establish-errors-and-omissions-that-may-have-resulted-in-the-high-mortality-rate-among-doctors-and-other-health-professionals-in-serbia/.

Finally, the state has a duty to provide persons deprived of their liberty with adequate detention conditions, and if do not do so, they may be qualified as inhuman and degrading (e.g. overcrowded detention facilities, unhygienic and unhealthy conditions in prisons, psychiatric institutions, asylum centres, etc.).

The provision of adequate material conditions of detention that respect human dignity is one particular aspect of the state's duty to adapt the prison environment to the physical condition of individuals, and firstly this applies to all persons suffering from serious illness or infirmity. This not entitle the person concerned to be released in every case, but rather such release is called for only as a last resort, where no other possibility exists.¹¹¹

At the end of 2020, the Protector of Citizens recommended immediate relocation of prisoners from IV Pavilion of the Penitentiary Institution in Sremska Mitrovica to the other pavilions or other correctional institution. The reason for this laid down in overcrowding and very bad material and hygienic conditions that were lasting for many years. This problem came to the fore during the COVID-19 pandemic crisis, as bad hygienic conditions and overcrowding create increased risk for transmission of infection.¹¹²

As close personal contact encourages the spread of COVID-19, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) called the states to take efforts to resort to alternatives to deprivation of liberty, particularly in situations of overcrowding. According to CPT, national authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation, reassess the need to continue involuntary placement of psychiatric patients, discharge or release to community care, wherever appropriate, residents of social care homes, and refrain, to the maximum extent possible, from detaining migrants.¹¹³ The UN High Commissioner for Human Rights also stressed the need to reduce detainee numbers, suggesting releasing those particularly vulnerable to coronavirus as well as low-risk offenders.¹¹⁴ Similar advices were also issued to the states by UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).¹¹⁵

The European Parliamentary Research Service published a report in June 2020 that outlined initiatives in EU Member States to compensate for the negative impact of COVID-19 measures on detainees.¹¹⁶ These ranged from extra phone credit for prisoners and introduced more phone calls (for example in Belgium, France and Spain), to more flexibility in allowing prisoners to receive food parcels and spend more time outdoors (for example in Czechia).

In Belgium, measures to reduce number of detainees include suspension of detention, early release and suspension of sentences and the number of prisoners fell from around 10.900 to 9.635. Italy also took steps to reduce its prison population and brought new legislation that allows the extension of 'special leaves' from prison and for detainees with sentences of up to 18 months to serve the sentence in home-custody until the end of 2020, monitored via electronic bracelets, with the exceptions apply to those who are subject to specific surveillance regimes, who have perpetrated severe offenses, who do not have a home to stay in, or are detained for specific crimes - such as terrorism.¹¹⁷ In Czechia whenever possible, courts had to postpone the start of new custodial sentences. In Ireland, to alleviate overcrowding, approximately 400 low-risk prisoners (around 9% of the prison population) were granted temporary release on a case-by-case basis, in a period less than a month. Of a total of 800 prisoners in Cyprus, 114 were granted early release and 10 were released by the decision of the Prison Board. In Austria, prison sentences not exceeding three years could be postponed for the duration of the health measures and the number of prisoners was reduced by about 500.



CSO Activity: Due to overcrowding and poor material conditions in larger prisons in Serbia, in November 2020 the Belgrade Centre for Human Rights submitted an initiative to the Government and the members of the National Assembly to reduce the prison population through the adoption of the law on amnesty. The Centre proposed that certain categories of convicts be released earlier from prison – no longer than three months before the regular expiration of their sentences, which would significantly relieve the capacity of institutions for the execution of criminal sanctions and provide better conditions for the application of hygienic and protective measures against COVID-19.¹¹⁸ By now, nothing was done according to this initiative.

¹¹¹ Jean-François, Akandji-Kombe, *op. cit.*, pp. 30-31.

¹¹² Read more at: www.ombudsman.rs/index.php/2012-02-07-14-03-33/6927-z-sh-i-ni-gr-d-n-svi-sud-ni-lici-u-pz-sr-s-i-r-vic-b-zb-di-i-s-sh-u-s-l-du-s-pr-pisi.

¹¹³ CPT: *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, CPT/Inf(2020)13, 20 March 2020 (available at: rm.coe.int/16809cfa4b).

¹¹⁴ UN High Commissioner for Human Rights' statement: *Urgent action needed to prevent COVID-19 "rampaging through places of detention"*, 25 March 2020 (available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e).

¹¹⁵ *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Disease (COVID-19) Pandemic*, CAT/OP/10, 7 April 2020 (available at: undocs.org/CAT/OP/10).

¹¹⁶ European Parliament: *Coronavirus and prisons in the EU – Member-State measures to reduce spread of the virus*, PE 651.976, June 2020, (available at: [www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS_BRI\(2020\)651976_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651976/EPRS_BRI(2020)651976_EN.pdf)).

¹¹⁷ European Union Agency for Fundamental Rights: *Coronavirus pandemic in the EU – Fundamental Rights Implications: Focus on Social Rights*, Bulletin no. 6, p. 28 (available at: fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-november_en.pdf).

¹¹⁸ Read more at: www.bgcentar.org.rs/inicijativa-za-donosenje-zakona-o-amnestiji-u-hitnom-postupku/.

III CONTROL AND OVERSIGHT MECHANISMS FOR THE PROTECTION OF HUMAN RIGHTS IN THE TIME OF CRISIS

A. Parliamentary Oversight

As a general rule, parliament, as a legislative body, declares a state of emergency and prescribes measures of derogation from human rights. Respecting of this rule is very important because parliament decisions are always made by a majority vote (simple, qualified or absolute) with prior discussion, in which different opinions can be expressed on draft decisions and proposals. In this way, crisis management can be considered transparent.

A recent example from Croatia illustrates the importance of a democratic discussion in the time of crisis. Namely, 35 members of the Parliament of the Republic of Croatia argued that the amendments adopted in April 2020 to the Rules of Procedure of the Parliament to apply during the COVID-19 pandemics (which included the possibility to shorten time for discussion and breaks, limited the number of MPs present in the Parliament and suspended the right to reply) disproportionately prevented MPs from performing their functions. The Constitutional Court of Croatia concluded that the measures had a legitimate aim, but that the restrictions on representatives' exercise of their rights and duties were not objectively and reasonably justified.¹¹⁹

Bearing in mind that in certain emergency situations MPs cannot meet, there are some exceptions when decisions on the state of emergency and derogating measures can be imposed and ruled by other state authorities instead of the parliament. In such situations, the parliament should meet as soon as possible and review - confirm or revoke - decisions prior made by the executive. Parliament should also have the power to revoke the state of emergency and change or revoke derogating measures if consider that human rights standards are not met, and after abolishing the state of emergency parliament should have power to launch a more substantive, detailed inquiry into the measures imposed by the executive in order to identify abuses and to recommend how things could have been done differently.¹²⁰

The dissolution of parliament should not be a response to an emergency and where a legislature's mandate is due to end during an emergency, it should be extended until feasible to arrange elections.¹²¹

Unlike the above-mentioned case from the Republic of Croatia, in the Republic of Serbia, there was no democratic parliamentary debate during the almost entire duration of the state of emergency. The reason for not holding parliamentary sessions was solely the assessment of the Speaker of the National Assembly that that body "is unable to meet". Based on this conclusion, the President of the Republic, the Prime Minister and the Speaker of the National Assembly declared a state of emergency instead of MPs.¹²² Soon after the declaration of the state of emergency, on 23 March 2020, eight opposition MPs submitted a request to the Speaker of the National Assembly for an emergency session of that body,¹²³ but this did not happen.

Regarding this concentration of power in the hands of the one MP, Serbian Constitutional Court stated that "there is no constitutional or another legal criterion on the basis of which it could question the notification of the Speaker of the National Assembly that the parliament was unable to meet" as well as "that none of the legal texts stipulates the obligation of the Speaker of the National Assembly to convene this body in order to declare a state of emergency before independently assessing whether the National Assembly is able to meet".¹²⁴

Serbian National Assembly met for the first time on 28 April 2020, i.e. 43 days after the declaration of the state of emergency. On that occasion, the parliament confirmed the decision on declaration of the state of emergency and all measures of derogation from human rights.

The main question that remained was whether it was possible to organize a parliamentary session earlier, given the fact that even criminal trials were held via video conference.¹²⁵

Parliaments all over the world had to adapt their work to the pandemic. Some of the parliaments held plenary and committee sessions with a minimum quorum that reflected parliamentary groups, while a number of them provided for the possibility of remote sessions and voting via video conference, using *Skype*, *Zoom* and similar platforms.¹²⁶

¹¹⁹ Decision is available at: [sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12586080035A65C/\\$FILE/U-I-4208-2020.pdf](http://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12586080035A65C/$FILE/U-I-4208-2020.pdf).

¹²⁰ Biljana Braithwaite et al. (eds.), *op. cit.*, pp. 160-161.

¹²¹ *Ibid.*, p. 161. According to the Serbian Constitution (Article 109), the National Assembly may not be dissolved during the state of war and emergency, and in case of declaration of the state of war or emergency, its full competence shall be reestablished and last until the end of the state of war, that is, emergency.

¹²² It is determined in the Decision of the Constitutional Court of the Republic of Serbia, no. IUo-42/2020, p. 9 (available at: www.ustavni.sud.rs/Storage/Global/Documents/Misc/1%0%A3%0%BE-42-2020.pdf).

¹²³ The request is available at: dostajebilo.rs/blog/2020/03/23/osam-poslanika-potpisalo-zahtev-za-sednicu-skupstine-i-vracanje-srbije-ustavni-okvir/.

¹²⁴ Decision of the Constitutional Court of the Republic of Serbia, no. IUo-42/2020, pp. 9-10.

¹²⁵ Read: *supra*, p. 14.

¹²⁶ Read more at: www.ipu.org/country-compilation-parliamentary-responses-pandemic.

B. Judiciary Control

In the time of crisis, judiciary can be faced with the inability to function at full capacity, which usually requires prioritization in the work of courts and prosecutors' offices.

During the state of emergency in Serbia, according to the Conclusion of the High Judicial Council of 18 March 2020,¹²⁷ the only trials held were those for which no delay was possible.

In criminal matters, that were the following cases: in which detention has been ordered or requested, for criminal offenses of Illegal trade, domestic violence, failure to act pursuant to health regulations during epidemic and transmission of a contagious disease, for criminal offenses committed during the state of emergency and in connection with the state of emergency, against juvenile perpetrators and cases where the juvenile is a victim of a criminal offense against sexual freedom, and in which there is a risk of a statute of limitations.

In the civil matter, cases that were considered not to suffer delays were those in which courts have been asked to decide on interim measures (on determining, extending, or revoking), on measures of protection against domestic violence, to ban the distribution of the press and information in the media, to confine an individual in a psychiatric institution, and cases of execution related to family relationships.

States should ensure that courts continue to operate as much as possible during the crisis to enable individuals to challenge alleged violations of their human rights, which can be violated by arbitrary and improper application of the laws. Whether the derogating measures were subject to safeguards, e. g. whether a judicial control of the measures was practicable, will be also examined by ECtHR when assessing whether the state has gone beyond what is strictly required.¹²⁸

Judiciary oversight should be done by regular courts (criminal courts, misdemeanour courts, administrative courts, etc.), that are authorized to control the application of laws and other regulations towards citizens, but not to put them out of force, which is the exclusive competence of the Constitutional Court.

According to Article 63 of the Law on the Constitutional Court of Serbia,¹²⁹ if during the procedure before the court of general or special jurisdiction the issue of compliance of law or other general act with the Constitution, generally accepted rules of the international law, ratified international treaties or law, is raised, the court shall, if it finds that the issue has grounds, adjourn the procedure and initiate procedure for assessing the constitutionality or legality of that act before the Constitutional Court.

This authorization of regular courts to initiate proceedings before the Constitutional Court to review the constitutionality of laws and other regulations is extremely rarely used in practice.

Particularly significant legal instruments before the judiciary during a crisis are *interim measures*, which may be requested in order to temporarily suspend the implementation of a decision of a state authority if there is a serious risk of irreparable human rights violations.

The Serbian Law on Administrative Disputes¹³⁰ (Article 23) authorizes the plaintiff to request the Administrative Court to suspend the execution of the final administrative act until a court decision is made, if the execution of that administrative act would cause him irreparable damage and the suspension is not contrary to the public interest, nor does it cause irreparable damage to the opposing party or to the third party.

Exceptionally, a party to an administrative proceeding may request the Administrative Court to suspend the execution of an administrative act even before filing a lawsuit: (1) in case of urgency, (2) when the appeal that has been filed has no suspensive effect.

In both cases, the Administrative Court shall issue a decision within five days of receiving the request.

C. Constitutional Court Oversight

When human rights regulations are enacted in an emergency procedure, without a prior public discussion, and sometimes outside the parliament, which is typical for the time of crisis, there is an increased risk of systemic violations of human rights of citizens arising from those regulations. Therefore, the primary role of the Constitutional Court at that time is to *monitor the constitutionality of the adopted regulations and their compliance with human rights standards*, especially in the case of declaring a state of emergency that may lead to an imbalance between the highest state authorities in favour of the executive. Decisions of local authorities may also be subjected to this kind of oversight.

The Constitutional Court can exercise the above-mentioned competence on the basis of initiatives originating from citizens and proposals of state authorities and officials authorized to initiate procedures for the assessment of constitutionality (e.g. MPs). Nevertheless, the Constitutional Court can itself, i.e. without anyone's initiative, initiate a procedure if it deems particular regulation contrary to the Constitution, generally accepted rules of the international law and ratified international treaties.¹³¹

Another important competence of the Constitutional Court is deciding on *individual constitutional complaints of citizens*. Addressing the Constitutional Court on this basis is allowed only to citizens whose rights have been violated, and it is necessary that all other legal remedies (before the administrative bodies and regular courts) have been previously exhausted (Constitutional Court is the last national instance for the protection of human rights).¹³² The latter condition can therefore prevent access to constitutional protection for weeks or months, sometimes even years, until proceedings before administrative bodies and courts are completed. Nevertheless, preventing systemic human rights violations in times of crisis will also often depend on the timeliness of the Constitutional Court's work.

¹²⁷ Available at: vss.sud.rs/sr-lat/saop%20A1tenja/va%20BEno-saop%20A1tenje-0.
¹²⁸ *Brannigan and McBride v. the United Kingdom*, §§ 61-65; *Aksoy v. Turkey*, §§ 79-84.
¹²⁹ *Official Gazette of the Republic of Serbia*, nos. 109/07, 99/11, 18/13, 40/15 and 103/15.

¹³⁰ *Official Gazette of the Republic of Serbia*, no. 111/09.
¹³¹ Article 168 of the Constitution of the Republic of Serbia.
¹³² Article 170 of the Constitution of the Republic of Serbia.

During the state of emergency in Serbia (15 March - 6 May), 66 initiatives were submitted to the Constitutional Court to initiate the procedure of assessing the constitutionality of regulations on declaring the state of emergency and measures of derogation from human rights. The first decision was issued at the end of May 2020, and it referred to the question that the state of emergency was declared in a procedure that was contrary to the Serbian Constitution.¹³³ The next decision was issued in mid-October, and that was the only decision in 2020 that referred to the constitutionality of derogating measures from human rights during the COVID-19 pandemic.¹³⁴ The Constitutional Court's decision on initiatives that referred to the issue of the constitutionality of the so-called *Skype trials*¹³⁵ was not published until the end of 2020.

D. Independent Institutions Oversight

During the crisis, when human rights can be subjected to derogations, independent institutions, such as the Ombudsperson, the Commissioner for Information of Public Importance and Personal Data Protection and the Commissioner for the Protection of Equality, should carry out intensified activities. By doing so, they become more visible to the public and citizens begin to address them more often and initiate their work and actions. In addition to the citizens, they are often approached by civil society organizations, which are their natural allies and partners both during crises and in regular circumstances. Human rights defenders can initiate formal proceedings before independent institutions by filing complaints and appeals, or in less formal procedure they can inform them about potential illegalities and thus initiate *ex officio* actions.

The *Protector of Citizens (Ombudsperson)* is an independent state institution, responsible for the protection and promotion of human rights and liberties. The Protector of Citizens controls whether state administration bodies treat citizens in accordance with law, other regulations and in compliance with the principles of good administration. The administrative authorities have a legal obligation to cooperate with the Protector of Citizens, to enable access to all facilities and data, regardless of the degree of confidentiality, when it is of importance to the initiated proceedings.

The Protector of Citizens initiates control proceedings over the work of administrative authorities following the citizens' complaint or on his or her own initiative. If the Protector of Citizens determines that irregularities existed in the work of the administrative authority, he shall deliver a recommendation to the administrative authority on steps to be undertaken in order to rectify the noted irregularity.

The Protector of Citizens also has certain competencies in the normative sphere: to propose laws which fall within his or her mandate, to launch initiatives with the Serbian Government or National Assembly for the amendment of laws or other regulations or general acts if he or she deems that violations of citizens' rights are a result of deficiencies of such regulations, to launch initiatives for new laws, other regulations and general acts if he or she considers it significant for exercising and protecting citizens' rights, to give his or her opinion to the Government and National Assembly on draft laws and regulations if they concern the issues relevant for the protection of citizens' rights, and to initiate proceedings before the Constitutional Court for the assessment of constitutionality and legality of laws, other regulations and general acts.

At the same time, the Protector of Citizens performs the tasks of the National Mechanisms of the Prevention of Torture (NPM) in terms of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).¹³⁶ NPM mandate is to regularly visit closed institutions in order to examine the treatment of persons deprived of

¹³³ Decision of the Constitutional Court of the Republic of Serbia, no. IUo-42/2020.

¹³⁴ Decision of the Constitutional Court of the Republic of Serbia, no. IUo-45/2020.

¹³⁵ Read: *supra*, p. 14.

¹³⁶ OPCAT is available at: www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

liberty and to make recommendations to the competent authorities with the aim of improving the treatment and the conditions of persons deprived of liberty, as well as to submit proposals and observations concerning existing or draft legislation. In order to enable NPM to fulfil its mandate, authorities should allow it access to all places of detention, as well as their installations, facilities and information. NPM has the liberty to choose the places to visit and the persons to interview. While conducting this duty, the Protector of Citizens usually involve specialized CSOs in the monitoring process.

Despite the fact that it is obliged to cooperate, in October 2020 the Ministry of Labour, Employment, Veterans and Social Affairs forbade the National Mechanism for Prevention of Torture to visit three social welfare homes, contrary to OPCAT and the Law on the Protector of Citizens, under the excuse that the visits were not safe for the beneficiaries. As a result, beneficiaries of social welfare homes remained without the possibility for adequate protection of their rights and prevention of torture and other forms of ill-treatment.¹³⁷

Unlike the situation with NPM, the Ministry allowed members and deputy members of electoral committee to enter social welfare institutions with the aim of enabling beneficiaries of institutions for adults and the elderly to vote.¹³⁸ Without questioning the importance of the right to vote, it is worth noticing that the prohibition of torture and other forms of ill-treatment is a non-derogable right and that it must be respected even in the time of crisis. As it created special instructions for the election procedure, the Ministry should have, in cooperation with NPM, specified the manner of conducting the monitoring visits of social welfare institutions, which would meet two requirements - health safety of beneficiaries and realization of the preventive role of NPM.

¹³⁷ Statements of the Protector of Citizens are available at: www.ombudsman.rs/index.php/2011-12-25-10-17-15/2011-12-26-10-05-05/6808-1-18 and www.ombudsman.rs/index.php/2011-12-25-10-17-15/2011-12-26-10-05-05/6847-z-sh-i-ni-u-gr-d-n-u-b-vlj-nju-p-sl-v-np-n-guc-n-s-v-riv-nj-nd-u-us-n-v-s-ci-ln-z-sh-i-d-s-g-ip.

¹³⁸ Ministry Instruction for Conducting Elections in the Social Welfare Institutions is available at: www.minrzs.gov.rs/sites/default/files/2020-06/2020.06.18.%20Instrukcija%20026.pdf.

The Protector of Citizens conducted a lot of activities during the recent state of emergency period that were initiated by complaints or by own initiative, as well as NPM visits.

Many important initiatives were conducted with certain delays. For example, 23 days after the entry into force of the prohibition of movement, Serbian Ombudsperson required from the municipalities to allow divorced parents to see their children during the ban of movement, if it is in line with the court decision on meeting children with a parent with whom a child is not living.¹³⁹ Furthermore, 43 days after the prohibition of movement, the Protector of Citizens issued the initiative to amend Decree on Measures During the State of Emergency in a way that the prohibition of movement do not relate to the victims of domestic violence who leave their flats in order to protect themselves.¹⁴⁰ In this initiative, the Protector relayed on much earlier published Statement of UN Special Rapporteur on violence against women from 27 March 2020.¹⁴¹ Instead of conducting control proceedings, the Protector of Citizens very often asked the competent ministries to conduct oversight instead of him and to inform him about its findings, which is not direct independent external oversight but rather an act of cooperation and request for inspection.

With the focus on measures to combat coronavirus, during the state of emergency, NPM team visited the following closed institutions: the County Jail in Belgrade, the Penitentiary Institution in Belgrade, the Penitentiary Institution in Belgrade – Padinska Skela, the Mol's Shelter for Foreigners in Padinska Skela, the Penitentiary Institution in Sremska Mitrovica,¹⁴² the Reception Centre in Obrenovac, the Asylum Centre in Krnjača and the Reception Centre in Adaševci.¹⁴³

Those visits had a few shortcomings that could have affected their quality. Firstly, it is indicative that although NPM team was checking the epidemiological conditions and healthcare protective measures in closed institutions, medical doctors were not engaged in the visits, which is a general practice in NPM's work. Besides the exclusion of the medical doctors, in the majority of visits representatives of the CSOs, with which NPM cooperates, were also not been engaged, which is also a regular practice. And the last point is that visits to the three very big institutions (Penitentiary Institution in Belgrade, Penitentiary Institution in Belgrade – Padinska Skela and Shelter for Foreigners in Padinska Skela) were conducted on the same day, by a small NPM team composed of only two members.

NPM team did not visit any psychiatric institution during the 2020 state of emergency, as well as private social institutions, such as homes for the elderly, under the excuse that NPM has no mandate to control private institutions,¹⁴⁴ even though Article 4 of OPCAT stipulates the opposite.

During the state of emergency, the Protector of Citizens rarely used his competencies in the normative sphere even though CSOs and representatives of the professional community, such as law professors,¹⁴⁵ attorneys at law and bar associations,¹⁴⁶ indicated shortcomings of a number of derogating measures and their negative impact on the enjoyment of human rights.

The Commissioner for Information of Public Importance and Personal Data Protection¹⁴⁷ is competent to monitor the respect of the right to access information of public importance and the right to protection of personal data. In times of crisis, these two rights are of great importance, but there may also be some justifiable reasons for their restrictions.

The following competencies of the Commissioner for Information of Public Importance and Personal Data Protection are particularly significant in times of crisis:

A) in the area of free access to public information:

- to initiate the preparation or amendment of regulations related to the right to access information of public importance;
- to consider appeals against the decisions of public authorities that violate the right of free access to information of public importance;

B) in the area of personal data protection:

- to supervise and ensure the protection of personal data;
- to provide an opinion to the National Assembly, Government, other public authorities and organizations, on the statutory and other measures relating to processing data;
- to handle complaints of the data subjects;
- to perform inspection supervision and file motions to initiate misdemeanour proceedings.

Shortly after the declaration of a state of emergency in Serbia, the Commissioner for Information of Public Importance and Personal Data Protection informed the public that the right to access to information of public importance has not been suspended, that the exercise of this right should be adjusted to new circumstances and that information related to public health are a priority and should be made available to citizens as soon as possible, no later than 48 hours after being requested.¹⁴⁸ Five days later, the Commissioner welcomed the adoption of the Decree on the Application of Deadlines in Administrative Proceedings during the State of Emergency, announcing that the institution itself would apply it in its work.¹⁴⁹ Given that this Decree prescribed that the deadlines in administrative proceedings that expire during the state of emergency, and refer to undertaking administrative actions, completion of administrative proceedings and deciding on submitted legal remedies, shall be considered expired after 30 days from the termination of the state of emergency, it can be concluded that during two-month state of emergency the right to access to information of public importance was not adequately protected because the authorities were not obliged to provide citizens with the requested information, even those that were related to the epidemiological situation and public health.

¹³⁹ Statement of the Protector of Citizens is available at: www.ombudsman.rs/index.php/2011-12-25-10-17-15/2011-12-26-10-05-05/6569-z-sh-i-ni-gr-d-n-ni-d-zv-lj-n-ds-up-nj-d-z-c-nih-pr-v-d-d-drz-v-licn-dn-s-s-r-di-lj-s-i-n-zivi.

¹⁴⁰ Read more at: www.ombudsman.rs/index.php/2011-12-25-10-17-15/2011-12-26-10-05-05/6588-z-sh-i-ni-gr-d-n-upu-i-inici-ivu-pr-ds-dnici-vl-d-r-publi-srbi.

¹⁴¹ Available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25749&LangID=E.

¹⁴² Thematic report: *Application of CPT principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, available at: npm.rs/attachments/article/916/Report.pdf.

¹⁴³ Special report on the activities of the Protector of Citizens during the COVID-19 state of emergency, available at: www.ombudsman.org.rs/attachments/article/192/Report%20on%20Protector%20of%20Citizens%20activities%20during%20COVID-19%20pandemic.pdf.

¹⁴⁴ Statement of the Protector of Citizens is available at: www.ombudsman.rs/index.php/2011-12-25-10-17-15/2011-12-26-10-05-05/6575-z-sh-i-ni-gr-d-n-p-r-nu-p-s-up-n-r-l-u-us-n-v-s-ci-ln-z-sh-i-i-d-vi-z-s-sh-dr-slih-i-s-rih-i-inis-rs-vu-z-r-d-z-p-shlj-v-nj-b-r-c-i-s-ci-ln-pi-nj.

¹⁴⁵ Read more, e.g., at: www.cepris.org/licni-stavovi/ilic-virus-neznanja-nikad-ne-spava/ and www.danas.rs/drustvo/vladavina-prava/neustavna-naredba-o-zabrani-kretanja/.

¹⁴⁶ Read more at: aks.org.rs/aks/wp-content/uploads/2020/04/saop%C5%A1tenje-UO-AKS-02.04.2020.pdf and aks.org.rs/aks/wp-content/uploads/2020/03/saop%C5%A1tenje-povodom-skype-sudjenja.pdf.

¹⁴⁷ More about the Commissioner for Information of Public Importance and Personal Data Protection of the Republic of Serbia is available at: www.poverenik.rs/en/o-nama/authority.html.

¹⁴⁸ The Commissioner's statement from 20 March 2020, available at: www.poverenik.rs/sr-yu/saopstenja.html. In the statement dated 19 March 2020, UN experts stated that governments must promote and protect access and free flow of information during a pandemic, underlying the importance of providing true and reliable information about the coronavirus and the importance of combating false information that can lead to health concerns, panic and disorder. Read more at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729.

¹⁴⁹ The Commissioner's statement from 25 March 2020, available at: www.poverenik.rs/sr-yu/saopstenja.html.

One case of endangered personal data protection from the Western Balkan region occurred in March 2020 in Montenegro, when the National Coordination Body for Transmissible Disease made a decision to publish a list of names and other personal data (addresses, ID numbers, etc.) of persons in self-isolation. This decision was adopted upon the positive opinion of the relevant national authority – the Agency for the Protection of Personal Data and Free Access to Information, and the list was published on the official website of the Montenegrin Government. After publishing these personal data, the special website for calculating the distance from the person on the list has appeared.¹⁵⁰

In the same time in Serbia, the Commissioner called on respect the right to privacy of persons infected by COVID-19 after frequent complaints of parents of school-aged children which indicated that teachers via Viber and other electronic means of communication had required information about the health status of children and members of their families, justifying it with the request of school administrations and the Ministry of Education.¹⁵¹



CSO Activity: In mid-April 2020, the Share Foundation accidentally discovered the page containing access information for the COVID-19 Information System of the Ministry of Health. This information system is a centralized software for collecting, analysing and storing data on all persons monitored for the purpose of controlling and suppressing the COVID-19 pandemic in Serbia. It contains records on cured, deceased and tested persons, as well as on persons currently being treated, in self-isolation or put in temporary hospitals, including their location data, and data on persons who are possible disease-carriers due to their contact with other infected persons. The username and password to access that system were publicly available on a health institution's web page for eight days. After discovering the matter, above-mentioned CSO informed the competent authorities. By being aware of the risk of misuse arising with the accessibility of citizens' sensitive data, Share Foundation notified the public about the incident after making sure that further unauthorized access to the system was prevented.

The result of the supervision procedure is that the Commissioner issued a public warning to the Institute for Public Health "Dr Milan Jovanović Batut", due to omissions in the management of the system that led to the violation of the Law on Personal Data Protection.¹⁵²

The Commissioner for the Protection of Equality is competent to carry out the procedure based on individuals or group complaints, to issue opinions and recommendations in concrete discrimination cases, to file a lawsuit for protection from discrimination with the competent court with the approval of the discriminated person, to submit misdemeanour notices on account of violations of antidiscrimination regulations, to warn the public of the most frequent, typical and severe cases of discrimination, to monitor the implementation of laws and other regulations, to initiate the passing or amending of regulations for the purpose of implementing and developing protection against discrimination, and to recommend measures to public authorities and other persons aimed at ensuring equality.¹⁵³

¹⁵⁰ More about this case in: Civic Alliance: *Society Testing on the COVID-19 – View on the Epidemic*, Podgorica, 2020. pp. 17-19 (available at: gamn.org/wp-content/uploads/2020/05/GA-Publikacija-Pogled-na-epidemiju-za-sajt.pdf).

¹⁵¹ The Commissioner's statement from 19 March 2020, available at: www.poverenik.rs/sr-yu/saopstenja.html.

¹⁵² Detailed information on this case is available at Share Foundation website: www.sharefoundation.info/en/a-password-pandemic/ and www.sharefoundation.info/sr/informacioni-sistem-covid-19-da-li-su-nasi-licni-podaci-bezbedni/.

¹⁵³ Article 33 of the Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, no. 22/09.

During the state of emergency in Serbia, the Commissioner for Protection of Equality recommended several measures for achieving equality, although some of them could have been issued earlier.

A few days after the state of emergency was declared, the Commissioner warned that the stigmatization of people infected with coronavirus is unacceptable and confusing for citizens.¹⁵⁴ In early April, the Commissioner recommended to the PE "Electric Power Industry of Serbia" to supply electricity to all persons aged 65 and over, given that they were prohibited from moving during the state of emergency, and to take measures necessary to supply electricity to socially vulnerable citizens (members of the Roma national minority, residents of informal settlements, etc.) due to the difficult situation in which they find themselves in the time of the pandemic.¹⁵⁵

In mid-April, the Commissioner sent an initiative to the Ministry of Labour, Employment, Veterans and Social Affairs to allow parents and guardians of children and adults with autism to move, in a limited time frame, near their place of residence, during the general ban on movement, due to maintaining daily routines and habits that are very important to them.¹⁵⁶ In the same act, the Commissioner urged social work centres to be involved in the protection of people with autism in case their parents or guardians become ill from COVID-19. Shortly thereafter, MoI was asked to issue instructions on the conduct of members of MoI towards persons who violate the prohibition of movement due to dementia.¹⁵⁷ Upon the Commissioner's initiative,¹⁵⁸ in mid-April, the Government allowed people with disabilities to leave their apartments more often, accompanied by personal assistants.¹⁵⁹

After a number of citizens and associations addressed the Commissioner, stressing out that negative consequences of the pandemic affected some categories of the population more than other citizens, at the end of April 2020 the Commissioner sent initiative to the Government to amend the Decree on One-Time Financial Assistance, which would include payments without filing an application, for the unemployed, people with disabilities who are beneficiaries of increased care allowance, parents, foster parents, or guardians who are entitled to child allowance, as well as independent artists who in the previous period were completely unable to perform their activities.¹⁶⁰

¹⁵⁴ The Commissioner's warning is available at: ravnopravnost.gov.rs/en/warning-related-to-covid19/.

¹⁵⁵ The Commissioner's recommendation is available at: ravnopravnost.gov.rs/rs/preporuka-mera-za-snabdevanje-elektricom-energijom-starijih-i-socijalno-ugrozenih/.

¹⁵⁶ The Commissioner's initiative is available at: ravnopravnost.gov.rs/en/initiative-to-allow-moving-for-persons-with-autism/.

¹⁵⁷ The Commissioner's initiative is available at: ravnopravnost.gov.rs/rs/inicijativa-mup-povodom-kaznjavanja-osoba-oboelih-od-demencije/.

¹⁵⁸ The Commissioner's initiative is available at: ravnopravnost.gov.rs/rs/inicijativa-vladi-povodom-dozvole-kretanja-neformalnim-negovateljima-i-pruzanja-usluge-pomoc-u-kuci-u-vreme-vanrednog-stanja/.

¹⁵⁹ Decree on Amendments to the Decree on Measures During the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 58/20.

¹⁶⁰ The Commissioner's initiative is available at: ravnopravnost.gov.rs/en/commissioner-sent-initiative-to-the-government-regarding-one-time-financial-assistance/.

CSO Activity: The Standing Conference of Roma Citizens' Associations – Roma League addressed the Commissioner, pointing out the serious problems faced by members of the Roma national minority after the proclamation of the coronavirus pandemic, such as the lack of drinking water for about 5,000 Roma families. They also stated that they consider it necessary to ensure the presence of representatives of Roma associations at the meetings of local emergency headquarters, and that they did not receive a response from the Ministry of Health to the letter they sent regarding the dismissal of 120 health mediators, which were engaged in improving the healthcare of members of the Roma national minority.

After analyzing the situation in which members of the Roma national minority found themselves during the COVID-19 pandemic, the Commissioner indicated to the Government that providing residents of settlements with poor hygiene conditions with full access to clean water must be one of the measures to combat the spread of COVID-19. It was also recommended to the local authorities to include a coordinator for Roma issues in their work, thus providing additional support to vulnerable groups in their territory. Finally, the Commissioner suggested that the Government's Crisis Response Team consider the possibility of re-establishing the work of health mediators due to the extreme importance of their work during the pandemic.¹⁶¹

E. Oversight by International Institutions and Mechanisms

Besides addressing the national controlling institutions, human rights defenders can use different types of legal instruments before the international bodies in order to represent victims of human rights violations in times of crisis, but also to draw the attention of international oversight bodies on the burning issues of human rights. Only a few such mechanisms are shown below.

After exhausting all available and effective legal remedies before the national authorities, individuals can complain to the UN committees about the violation of their rights contained in respective UN human rights treaties, or can lodge applications with ECtHR claiming that violation of ECHR or any of the Protocols to ECHR occurred.¹⁶² In urgent cases, applicants can request for interim measures.¹⁶³

Currently, eight of the human rights treaty bodies within the UN may, under certain conditions, receive and consider individual complaints or communications from individuals:

| | |
|--|--|
| Human Rights Committee (HRC) | may consider individual communications alleging violations of the rights set forth in ICCPR by States Parties to the First Optional Protocol to ICCPR |
| Committee on Elimination of Discrimination against Women (CEDAW) | may consider individual communications alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by States Parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women |

¹⁶¹ The Commissioner's recommendation is available at: ravnopravnost.gov.rs/rs/preporuka-mera-za-unapredenje-polozaja-roma-u-romskim-nasel%d1%98ima/.

¹⁶² Information on how to lodge an application to ECtHR are available at: www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1365511805813_pointer.

¹⁶³ The instructions on submitting the request for interim measure to ECtHR are given in the Annex I.

| | |
|--|--|
| Committee against Torture (CAT) | may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties who have made the necessary declaration under article 22 of the Convention |
| Committee on the Elimination of Racial Discrimination (CERD) | may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States Parties who have made the necessary declaration under article 14 of the Convention |
| Committee on the Rights of Persons with Disabilities (CRPD) | may consider individual communications alleging violations of the Convention on the Rights of Persons with Disabilities by States Parties to the Optional Protocol to the Convention |
| Committee on Enforced Disappearances (CED) | may consider individual communications alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by States Parties who have made the necessary declaration under article 31 of the Convention |
| Committee on Economic, Social and Cultural Rights (CESCR) | may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States Parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights |
| Committee on the Rights of the Child (CRC) | may consider individual communications alleging violations of the Convention on the Rights of the Child or its two first Optional Protocols on the sale of children, child prostitution and child pornography (OPSC), and on the involvement of children in armed conflict (OPAC) by State Parties to the Third Optional Protocol on a communications procedure (OPIC) |

Upon receipt of reliable information on serious, grave or systematic violations by a State party of the conventions they monitor, CAT, CEDAW, CRPD, CED, CESCR and CRC may, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.¹⁶⁴ This mechanism could be of great importance to human rights defenders in times of the crisis.

¹⁶⁴ More about inquiry procedures read at: www.ohchr.org/EN/HRBodies/CESCR/Pages/InquiryProcedure.aspx.

Human rights defenders can also submit information to the Special Procedures of the Human Rights Council.¹⁶⁵ Most Special Procedures receive information on specific allegations of human rights violations and send communications to states, and occasionally to non-state actors, asking for clarification and action.¹⁶⁶ The Special Procedures do not have power or authority to enforce their views or recommendations. The purpose of communications is to draw the attention of governments and others on alleged human rights violations or to ask that the violations are prevented, stopped, investigated, or that remedial action is taken. They can also report to the Human Rights Council on communications sent and replies received, therefore raising public awareness on cases as well as legislative and policies developments they have addressed in a given period.



CSO Activity: After gathering evidence of a large number of cases of police brutality against protesters, from the protests that took place in July 2020 in Belgrade and a few other cities in Serbia, a group of CSOs within in the Platform of Organizations for the Cooperation with UN Human Rights Mechanisms submitted in mid-July 2020 a joint urgent appeal to the UN Special Rapporteur on Torture (SRT).

The SRT was provided with documented examples of police brutality against dozens of protesters, and he was asked to influence the authorities in Serbia to urgently conduct official investigations of those cases, given the lack of reaction of the competent authorities, primarily public prosecutors offices.¹⁶⁷ In September 2020, the Serbian Government sent its response.¹⁶⁸

ANNEX I: INSTRUCTIONS FOR THE USE OF CERTAIN LEGAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS IN THE TIME OF CRISIS BY HUMAN RIGHTS DEFENDERS

A. Complaint and the Initiative to the Protector of Citizens

Pursuant to the Law on the Protector of Citizens,¹⁶⁹ any natural or legal person, domestic or foreign person, who considers that their rights have been violated by an act, action or failure to act of an administrative authority may file a complaint with the Protector of Citizens. In case of violation of child's rights, the complaint may be submitted by his or her parent or guardian, but the children are also authorized to file a complaint on their own. The complaint can be submitted by the legal representative that can be human rights defenders from CSOs. In that case, the complaint should be accompanied by the original power of attorney. The procedure before the Protector of Citizens is free of charge and no taxes should be paid.

The Protector of Citizens is not competent to control the work of the National Assembly, President of Republic, Government of Serbia, Constitutional Court, courts and public prosecution's office.

The complaint can be submitted by post, email (zastitnik@zastitnik.rs), or directly in the Ombudsperson's reception office (16 Deligradska Street, Belgrade). The complaint can be submitted in a free form, but it is advisable to use the complaint form, since it lists all the elements that the complaint should contain.¹⁷⁰

¹⁶⁵ The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. As of September 2020, there are 44 thematic and 11 country mandates. More about Special Procedures is available at: www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx.

¹⁶⁶ The mandates and contacts of Special Procedures are available at: spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en.

¹⁶⁷ Read more at: platforma.org.rs/platforma-obavestila-specijalnog-izvestioca-ujedinjenih-nacija-za-torturu-o-policijskoj-brutalnosti-na-protestima-u-srbiji/.

¹⁶⁸ The Government's response is available at: spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35590.

¹⁶⁹ Official Gazette of the Republic of Serbia, nos. 79/05 and 54/07.

¹⁷⁰ The complaint form is available at: www.ombudsman.org.rs/attachments/051_complaint_template.pdf.

As a general rule, prior to submitting a complaint, a complainant is required to endeavour to protect their rights in appropriate legal proceedings. In exceptional cases, the complaint can be submitted and the Protector of Citizens may initiate proceedings even before available legal remedies have been exhausted, if the complainant would sustain irreparable damage or if the complaint is related to violation of good governance principle, particularly incorrect attitude of administrative authorities towards the complainant, untimely work or other violations of rules of ethical behaviour of administrative authorities' employees. It is desirable in the complaint to propose the application of this exceptional rule and explain what is the risk of irreparable damage, particularly incorrect attitude of administrative authorities towards the complainant, etc.

A complaint may be filed not later than one year from the day of the violation of the right of citizen occurred, or from the date of the last action undertaken by the administrative authority in respect of the violation.



The complaint should be written in a clear, simple and concise manner and should include:

- personal data of the complainant and his or her legal representative;
- name of the administrative authority whose work is the object of complaint;
- description of the violation of rights;
- facts and evidence supporting the complaint;
- information about the legal remedies already exhausted, and
- signature of the complainant or his or her legal representative.

The complaint should be accompanied by copies of decisions, excerpts, reports, certificates, statements, documents and other evidence that confirm or support the allegations of human rights violations.

In addition to complaints, human rights defenders may request the Protector of Citizens to initiate proceedings to control the work of administrative authorities on his or her own initiative. This possibility is particularly important in situations where human rights defenders have no contact nor the power of attorney of the person whose human rights are potentially violated. In this case, it is just enough to describe the problem and put down all available and relevant information (documents, video recordings, etc.). This is a way of informing the Protector of Citizens that something potentially unlawful is happening to the detriment of citizens' rights and that Protector's reaction is expected.

B. Initiative to the Constitutional Court to Assess the Compliance of Derogating Measures with the Constitution and International Law

According to the Serbian Constitution (Article 168), any natural or legal person shall have the right to an initiative to institute a proceeding of assessing the compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties.

Same as a constitutional complaint, the initiative shall be submitted by post or directly to the Registry of the Constitutional Court (15 King Alexander Boulevard, Belgrade). The initiative submitted by email will not be taken into consideration.

The procedure before the Constitutional Court is free of charge and no taxes should be paid.



The initiative for the review of the constitutionality and compliance of measures derogating human rights with generally accepted rules of international law and ratified international treaties (furthermore referred to as: compliance with the Constitution and international law) shall contain:

- the name of the general act whose compliance with the Constitution and international law is being challenged;
- the name and number of the official gazette in which the general act was published;
- designation of the provision of a general act whose compliance with the Constitution and international law is disputed;
- designation of the provisions of the Constitution, ratified international treaty or the content of the generally accepted rule of the international law in respect of which the proceeding is requested;
- the reasons for the challenge and other data of importance for assessing the compliance with the Constitution and international law of the disputed general act;
- proposal or request how to decide;
- information on the applicant of the initiative;
- signature of the applicant of the initiative.^{171 172}

C. Request for Interim Measure to ECtHR

Under the Rule 39 of the Rules of Court,¹⁷³ in exceptional cases, ECtHR may indicate interim measures if considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied. Interim measures are binding on the state concerned and usually consist of requesting a state to refrain from doing something, such as not returning individuals to countries where it is alleged that they would face death or torture.

Requests for interim measures must be submitted with the applicant's consent. If the request is made by a representative, a power of attorney must be completed and sent immediately or within the next few days.

On the first page of the document it should be marked in bold: "Rule 39 – Urgent", after which should provide contact details of the applicant or his or her representative - contact person name, phone number, e-mail, etc.

The content of the request should be reasoned, specific and completed. It is essential that requests be accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions, together with any other material which is considered to substantiate the applicant's allegations. In extradition or deportation cases, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official case reference number. ECtHR must be notified of any change to those details (date and time of removal, address, etc.) as soon as possible. It should be underlined that the applicants in extradition and expulsion cases are expected to pursue domestic avenues that are capable of suspending removal before applying to ECtHR for interim measures. Where it remains open to an applicant to pursue domestic remedies that have suspensive effect, ECtHR will not apply Rule 39 to prevent removal.

¹⁷¹ Article 51 of the Law on the Constitutional Court.

¹⁷² An example of the CSO initiative can be found at: www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2020/03/inicijativa-ne-bis-idem-ingleski.pdf.

¹⁷³ ECtHR: *Rules of Court*, 1 January 2020, Strasbourg, p. 21 (available at: www.echr.coe.int/documents/rules_court_eng.pdf).

Requests for interim measures should normally be received as soon as possible after the final domestic decision has been taken, in order to enable the Court and its Registry to have sufficient time to examine the matter. Once a request for interim measure has been submitted, the applicant or his or her representative is required to follow it up. In particular, it is mandatory that ECtHR is immediately informed of any change in the applicant's administrative status or other circumstances (for example, if the applicant is granted a residence permit or returns to his or her country of origin). The applicant's representative must also inform ECtHR promptly on his or her own initiative of any potential loss of contact with his or her client.

Requests under Rule 39 should be sent via fax or by post. ECtHR has established dedicated fax numbers for sending requests for interim measures (+33 (0)3 90 21 43 50 and +33 (0)3 88 41 39 00) and do not deal with requests sent by e-mail. The request should, where possible, be in one of the official languages of the contracting state parties. It is recommended that any faxes exceeding ten pages be sent in several parts so that they can be received and processed in the best possible conditions.¹⁷⁴

ANNEX II: RECOMMENDATIONS FOR SOURCES FOR RESEARCH AND LEGAL ARGUMENTATION

In this section, the relevant international and regional institutions, bodies and organizations were presented, as well as their main activities, reports, publications, statements and other acts that they issued during the current COVID-19 crisis. Institutions webpages and links to the relevant publications and activities dedicated to COVID-19 are available in footnotes. The list of the institutions and their activities and publications is not exhaustive but is rather starting point for further research and finding legal argumentation for different initiatives and activities of human rights defenders.

UN Human Rights Bodies,¹⁷⁵ supported by the Office of the High Commissioner for Human Rights (OHCHR), conducted very intensive activities during the COVID-19 crisis. UN human rights bodies are divided on: Charter-based bodies (Human Rights Council, Universal Periodic Review, Special Procedures of the Human Rights Council and Human Rights Council Complaint Procedure) and treaty-based bodies that monitor implementation of the core international human rights treaties (CRPD,¹⁷⁶ CESCR,¹⁷⁷ HRC,¹⁷⁸ CEDAW,¹⁷⁹ CAT, SPT,¹⁸⁰ CRC,¹⁸¹ CERD, CED and Committee on Migrant Workers – CMW¹⁸²).

The United Nations Development Program (UNDP) helps to eradicate poverty, reduce inequalities and exclusion, and build resilience so countries can sustain progress. As the UN's development agency, UNDP plays a critical role in helping countries achieve Sustainable Development Goals. The separate section of the UNDP website is dedicated to the COVID-19 pandemic - *Humanity needs leadership and solidarity to defeat the coronavirus*.¹⁸³

¹⁷⁴ *Ibid.*, pp. 57-58.

¹⁷⁵ Read more at: www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

¹⁷⁶ Read: CPRD: *Statement on COVID-19 and the human rights of persons with disabilities*, 9 June 2020 (available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25942&LangID=E) and *COVID-19 and the Rights of Persons with Disabilities: Guidance*, 29 April 2020 (available at: www.ohchr.org/Documents/Issues/Disability/COVID-19_and_The_Rights_of_Persons_with_Disabilities.pdf).

¹⁷⁷ Read: CESCR: *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* (cited above).

¹⁷⁸ Read: HRC: *General Comment No. 29; General Comment No. 35: Article 9 (Liberty and security of person); Statement on derogations from the Covenant in connection with the COVID-19 pandemic* (cited above).

¹⁷⁹ Read: CEDAW: *Guidance Note on CEDAW and COVID-19* (available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9156&Lang=en) and *Call for joint action in the times of the COVID-19 pandemic*, 21 April 2020 (available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9158&Lang=en).

¹⁸⁰ Read SPT: *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Disease (COVID-19) Pandemic* (cited above) and *Advice Provided by the Subcommittee to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland Regarding Compulsory Quarantine for Coronavirus (COVID-19 virus)*, CAT/OP/9, 31 March 2020 (available at: undocs.org/CAT/OP/9).

¹⁸¹ Read: CRC: *COVID-19 Statement*, 8 April 2020 (available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en).

¹⁸² Read: CMW: *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants*, 26 May 2020 (available at: www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf).

¹⁸³ Read more at: www.undp.org/content/undp/en/home/coronavirus.html.

The Council of Europe (CoE) is a regional human rights organisation comprising 47 member states and all of them are state parties to ECHR. CoE dedicated a special section on its webpage to the COVID-19 crisis¹⁸⁴ and developed a coronavirus toolkit¹⁸⁵ to guide governments as they make difficult decisions in the time of the crisis. As a helpful source for interpretation and better understanding of the human rights derogations in time of emergency, it is worth to mention Guide on Article 15 of ECHR.¹⁸⁶

The HUDOC database provides access to the case-law of ECtHR (judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).¹⁸⁷ Searching with keywords will enable users to find a group of documents with similar legal content.¹⁸⁸ For Article 15 of ECHR the key words are: *war, public emergency, threat to the life of the nation, derogation, extent strictly required by situation, international obligations and notification of a derogation*. Also, at HUDOC there are databases of reports CoE monitoring mechanisms (e.g., CPT, ECRI, GREVIO, GRECO, GRETA, etc.).

The Committee for Prevention of Torture (CPT) was set up under the Council of Europe's European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT organises country visits to places of detention, in order to assess how persons deprived of their liberty are treated and after each visit CPT sends a detailed report to the government, with findings, recommendations, comments and requests for information.¹⁸⁹ These reports and responses form part of the ongoing dialogue with the states concerned. Additionally, every year CPT publishes annual reports¹⁹⁰ and occasionally publishes standards and tools on different topics.¹⁹¹ In March 2020, CPT issued a Statement of principles relating to the treatment of persons deprived of liberty in the context of the coronavirus disease (COVID-19) pandemic.¹⁹² During the pandemic, a large number of warnings of human rights violations were issued by the CoE Commissioner for Human Rights.¹⁹³

The European Union (EU) is responding to the outbreak of COVID-19 and its consequences by adopting a wide range of measures in many areas. The list of documents related to the common EU response to the COVID-19 pandemic is available at EUR-Lex.¹⁹⁴ Additionally, the case-law of the Court of Justice of the EU can be useful source.¹⁹⁵

The European Union Agency for Fundamental Rights (FRA) has published many reports and documents researching the impact of the COVID-19 on fundamental rights.¹⁹⁶ As a reliable source for comparative overview can be used country reports for from the project "Coronavirus COVID-19 outbreak in the EU – fundamental rights implications", prepared by FRA's research network – FRANET.¹⁹⁷

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) had a lot of activities related to the COVID-19 pandemic and supported publishing a lot of various publications on that issues.¹⁹⁸

The Association for the Prevention of Torture (APT) is an international non-governmental organisation dedicated to preventing torture. The special section at the APT webpage is about COVID-19.¹⁹⁹ In March 2020, the APT launched an Information Hub gathering information related to COVID-19 and deprivation of liberty. In cooperation with OSCE ODIHR, the APT published Guidance on Monitoring Places of Detention through the COVID-19 Pandemic.²⁰⁰

The Penal Reform International (PRI), a non-governmental organisation working globally to promote criminal justice systems, also has a special webpage dedicated to the COVID – 19.²⁰¹ As a very useful source are its recommendations for urgent and systemic reform to prevent and address human rights violations of people in detention and serving sentences in the community, in the context of COVID-19.²⁰²

In the end, it is worth mentioning that besides international and regional bodies and organizations, a number of local CSOs from Serbia directed their activities during 2020 to the COVID-19 crisis and the state of emergency. Some of them published their findings, conclusions and recommendations, such as the Belgrade Centre for Human Rights,²⁰³ Lawyers' Committee for Human Rights – YUCOM²⁰⁴, Group 484,²⁰⁵ A11 – Initiative for Economic and Social Rights,²⁰⁶ Civil Rights Defenders,²⁰⁷ Mental Disability Rights Initiative of Serbia – MRDI-Serbia,²⁰⁸ Share Foundation,²⁰⁹ Network of Organizations for Children of Serbia – MODS,²¹⁰ and many others.

184 Read more at: www.coe.int/en/web/portal/covid-19.

185 Read: *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 (available at: rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40).

186 Read: Guide on Article 15 of the European Convention on Human Rights - Derogation in Time of Emergency, updated on 31 August 2020 (available at: www.echr.coe.int/documents/Guide_Art_15_ENG.pdf). The guides for the other provisions of ECHR are available at: www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=.

187 See more at: hudoc.echr.coe.int/.

188 List of keywords for search HUDOC is available at: www.echr.coe.int/Documents/HUDOC_Keywords_ENG.pdf.

189 CPT country reports are available at: www.coe.int/en/web/cpt/states.

190 CPT annual reports are available at: www.coe.int/en/web/cpt/annual-reports.

191 CPT standards are available at: www.coe.int/en/web/cpt/standards.

192 CPT statement is cited above.

193 Read more at: www.coe.int/en/web/commissioner/thematic-work/covid-19.

194 Read more at: eurlex.europa.eu/content/news/index.html?locale=en.

195 The official website of the Court of Justice of the EU is at: curia.europa.eu/jcms/jcms/j_6/en/.

196 Read more at: fra.europa.eu/en/themes/covid-19.

197 Read more at: fra.europa.eu/en/country-data/2020/coronavirus-covid-19-outbreak-eu-fundamental-rights-implications-november-2020.

198 The information and publications are available at: www.osce.org/odihr/covid-19.

199 Read more at: www.apr.ch/en/what-we-do/our-work-covid-19.

200 The Guidance is available at: www.osce.org/files/f/documents/7/5/453543.pdf.

201 Read more at: www.penalreform.org/covid-19/.

202 PRI: *Coronavirus – Preventing Harm and Human Rights Violations in Criminal Justice Systems*, 14 July 2020 (available at: cdn.penalreform.org/wp-content/uploads/2020/07/Coronavirus-briefing-July-2020.pdf).

203 Read: BCHR: *Human Rights in Serbia, January-June 2020* (available at: www.bgcenter.org.rs/bgcenter/eng-lat/wp-content/uploads/2014/01/Human-Rights-in-Serbia-I-VI-2020.pdf).

204 Read: YUCOM: *Human Rights and COVID-19 – Analysis of the Changes in Legal Framework during the COVID-19 Epidemic and Impact on Enjoying Human Rights in the Republic of Serbia*, October 2020 (available at: en.yucom.org.rs/wp-content/uploads/2020/11/Yucom_Covid_layout_ENG_all1.pdf).

205 Read: Group 484: *Review – Measure Restricting the Freedom of Movement of Migrants and Asylum Seekers - from the perspective of the European Court of Human Rights, September 2020* (available at: preugovor.org/Policy-Papers/1607/Review--measure-restricting-the-freedom-of.shtml).

206 Read: A11 – Initiative for Economic and Social Rights: *Deprivation of Liberty of Refugees, Asylum Seekers and Migrants in the Republic of Serbia; Analysis of Measures Derogating from Human and Minority Rights During the State of Emergency in the Republic of Serbia Caused by the Epidemic of Infectious Disease COVID-19, March 2020; Human Rights in Serbia During the First Wave of Coronavirus – from Denial of Danger to State of Emergency; Recommendations for Better Protection of Economic and Social Rights During and Immediately After the Crisis Caused by the Pandemic* (all publications are available at: www.a11initiative.org/en/publications/reports/).

207 Biljana Braithwaite et al. (eds.), *COVID-19 and the Impact on Human Rights* (cited above).

208 See more at: www.mdri-s.org/.

209 See more at: www.sharefoundation.info/sr/.

210 See more at: zadecu.org/en/mods/.



**PRACTICAL GUIDE
FOR MONITORING
HUMAN RIGHTS VIOLATIONS
IN THE TIME OF CRISIS**

