



**THE AIRE CENTRE**

Advice on Individual Rights in Europe

# COVID-19 and the Impact on Human Rights



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*This document is a brief overview of the implications of the fight against COVID-19 for the protection of human rights, with a focus on the Western Balkans. The course and development of the COVID-19 pandemic, and the corresponding government responses, have been unpredictable and remain subject to review and frequent change. Therefore, given the fluid nature of the ongoing situation, this document aims to raise awareness of possible issues relating to the COVID-19 pandemic and human rights rather than serve as a catalogue of measures and comprehensive analysis of the disease's impact on the human rights situation in the Western Balkans.*

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# Introduction

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The COVID-19 pandemic is already one of the gravest crises since the Second World War. The health and lives of many millions of people are at stake and governments around the world have taken urgent measures to tackle the challenges and limit the risks we all face. Across Europe, following the example of China and other Asian countries, public health responses seeking to prevent the spread of COVID-19 have included the enforcement of quarantines as well as measures to restrict movement called ‘lockdowns’ and ‘social distancing’. These measures may require people to remain at home in all circumstances or other than for necessary trips for food, medical care and other specified exceptions. They include the closure of schools and universities and of almost all public spaces and businesses until such time as measures are lifted. Countries have mandated and enforced these measures with varying strictness, but in many countries, it seems the approach remains broadly the same.

The measures that Governments now take to confront COVID-19 will not only constitute an attempt to contain a harmful epidemic, they also have the potential to impact longer-lasting human rights norms in the field of public health and to condition the effectiveness of human rights law to protect the rights of individuals in emergency situations for the foreseeable future. These developments may signal a transformative change in the relationship between the rights of individuals and the rights of the public in general. Perhaps most crucially, in the course of prioritising the protection of rights such as life and health, these measures may even undermine the wider status of human rights protection as a cornerstone of European societies. This worrying possibility is particularly acute in the Western Balkans, where democratic public institutions are sometimes still fragile<sup>1</sup> and public watchdog organisations struggle to make their voices heard.

## Lockdown measures and interferences with ECHR rights

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Both the lockdown and quarantine measures adopted by most European States, including those in the Western Balkans, constitute interferences with many of the rights protected by the European Convention on Human Rights (ECHR).

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<sup>1</sup> Albania for example has been faced with the absence of a Constitutional Court and Supreme Court since 2018, after the dismissal of almost all judges of both institutions following the implementation of judicial reform in the country.



*“Lockdown” is a term taken from American prison practices. It describes the situation where prisoners are deprived of their normal freedoms such as recreation and association in response to a temporary emergency within the prison. In the COVID-19 context, the term is used - by analogy- to describe restrictions on freedom of movement and contact in families and groups which are imposed **as general measures on the population at large** with the aim of limiting the spread of the virus. These measures apply to everyone irrespective of whether they have been identified as suspected carriers of the virus or as victims of it. There are exceptions to the application of the measures which are specified in the relevant laws, regulations or government guidance. Lockdown is thus, typically, a restriction on freedom of movement and on the enjoyment of family life, social life and economic life.*

*Quarantine is the term which is used to describe measures taken against specific individuals or members of whole designated groups **who have been identified as suffering from the virus or who are suspected of being actual or possible carriers of it**. People in quarantine are typically confined to a specified location and not permitted to leave it **for any reason** until the risk they pose to others has passed. Quarantine typically goes further than the restrictions involved in “lockdown” and may constitute a deprivation or restriction of liberty depending on a whole range of factors<sup>2</sup>. The judgment of the European Court of Human Rights (the Court) in the case of *De Tommaso v. Italy* has recently explained the difference between the two measures, but the specifics of each scenario will require scrutiny in order to determine which rule is applicable. In circumstances where public health is at stake, not only restrictions on liberty of movement but also deprivations of liberty are permissible, although only if they are carried out in accordance with a procedure prescribed by law and are necessary and proportionate. Article 5 § 1 (e) of the ECHR deals exactly with such situations and the Court has had the possibility to elaborate on its position in this regard<sup>3</sup>. The Court has been vigilant in monitoring whether measures taken for legitimate reasons fall within the permitted exceptions of Article 5 § 1 and observe their procedural safeguards<sup>4</sup>.*

Government public health measures now mean most European citizens are effectively confined into their own homes. This is a clear interference with their right to freedom of movement under the ECHR, which includes the right

<sup>2</sup> The Court has underlined that in order to distinguish whether the concrete situation concerns a deprivation of liberty, protected by Article 5 § 1 or mere restrictions on liberty of movement, protected by Article 2 of Protocol 4, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see among many authorities *Nada v. Switzerland*, Grand Chamber judgment of 12 September 2012, no. 10593/08, § 225; *Austin and Others v. the United Kingdom*, Grand Chamber judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09, § 57 etc. The Court has also held, the requirement to take account of the “type” and “manner of implementation” of the measure in question enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (see, *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09 and *Austin and Others*, cited above, § 59).

<sup>3</sup> The leading judgment on this topic so far is *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00, see especially §§ 41-56.

<sup>4</sup> See Article 5 § 2 to 5 § 5 of the ECHR and the pertinent case law.

to leave a Council of Europe country, enter one's own country and to move freely around the territory of a country one has legally entered. These rights can only be restricted where such restrictions are procedurally lawful, serve a legitimate purpose and are proportionate. Measures taken must comply with all those elements for the restrictions to be permitted under Articles 2 & 3 of Protocol 4 ECHR.

Travel bans might have the effect of denying people the right to seek and obtain asylum or of violating the absolute prohibition on *refoulement*. This is quite different from saying that proportionate controls in the interests of public health cannot be imposed on travel and movements across borders. However, the situation of several Albanian nationals who were not allowed to enter their own state and found themselves locked for days in the international border between Albania and Greece in conditions they alleged to be inhuman, is a source of concern on how these restrictions are applied and what effects they might have in practice<sup>5</sup>.

When applied in practice for more than a few days these measures interfere not only with freedom of movement or the right to liberty but also with a whole range of other rights guaranteed by the ECHR, including in particular the right to respect for private and family life. Lockdown denies individuals the possibility of visiting their families and developing other personal relationships and aspects of their identity through the range of activities they would normally enjoy. These interferences will cause exaggerated hardship for children separated from one or both parents, whose ability to visit and spend time together can be seriously impaired, and for older people, whose access to care and important family and other contacts may be restricted. Similarly, for people and families living in different countries, personal contact and care may be significantly interrupted for a considerable time.

Rights to freedom of religion and worship are also clearly restricted. Individuals are not allowed to visit their places of worship nor to gather in groups to exercise their religious rites or to be visited in their homes by those providing pastoral care. Freedom of expression and the right to obtain and impart information are also restricted, with these restrictions having to take into account the specific importance of the right to information in a pandemic situation where the protection of health is at stake<sup>6</sup>. States have taken a variety of measures to combat the spread of “false” or “harmful” information, or information that may cause panic and social unrest during the pandemic. In some cases, breach of these measures is punishable by prison terms of up

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5 See <https://www.albaniandailynews.com/index.php?idm=41148&mod=2>. “Nearly 40 Albanians stuck at border with Greece”, by E. Halili, Albanian Daily news, April 7, 2020.

6 See related to this right, under Article 10, the case of *Youth Initiative for Human Rights v. Serbia*, judgment of 25 June 2013, no. 48135/06 and under Article 8, *Guerra and Others v. Italy*, judgment of 19 February 1998, no. 14967/89.

to 5 years<sup>7</sup>. Whilst it is important to limit the spread of disinformation during a pandemic, any measures taken must still be proportionate. Otherwise, States risk impinging on the essential functions served by journalism during a public-health emergency, including to ensure government accountability and facilitate the exchange of useful information. While the internet might currently be the only way for individuals to exercise, albeit not fully, these fundamental rights for democratic societies, crucial freedoms such as the rights of association and to protest still cannot be fully realised via the internet.

Our children currently cannot go to school and pursue their education normally. While one might say that the establishment of remote schooling via the internet at very short notice is a remarkable achievement and laudable replacement, given the situation, it is clear that even when assuming that anyone can have access to schooling online, children may still be unable to meet their teachers and their friends even virtually and engage in education collaboratively, which is an important element in any education system. Children from disadvantaged families, and other vulnerable children, will suffer in particular as a consequence of these measures.

Elections would have to be postponed in order to avoid mass gatherings of people, and this would logically restrict the right to vote and be elected, fundamental aspects of our democracies.

COVID-19 disproportionately poses a higher risk to those living in close proximity. The current state of scientific knowledge further suggests that it disproportionately affects older people and those with pre-existing health conditions. The risk is therefore especially acute in places of detention<sup>8</sup>, in residential institutions for people with disabilities<sup>9</sup> and in nursing facilities or homes for older people<sup>10</sup>. The task of the States regarding these specific situations is particularly difficult, in view of the vulnerability of the persons involved and especially in facilities under the control of the authorities<sup>11</sup>.

Governments may also oblige people to take medical tests and examinations<sup>12</sup>. The question of the presence or absence of informed

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7 See <https://www.coe.int/en/web/belgrade/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>.

8 See for example *Mouisel v. France*, judgment of 14 November 2002, no. 67263/01; *Mozer v. the Republic of Moldova and Russia*, Grand Chamber judgment of 23 February 2016, no. 11138/10.

9 See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Grand Chamber judgment of 17 July 2014, no. 47848/08.

10 See for example *Watts v. the United Kingdom*, judgment of 4 May 2010, no. 53586/09.

11 *Ibid.* § 93.

12 The ECHR bodies have concluded that relatively minor medical tests might be proportionate (see *Acmanne and Others v. Belgium*, Commission decision of 10 December 1984, no. 10435/83; *Boffa and Others v. San Marino*, Commission decision of 15 January 1998, no. 26536/95; *Salveti v. Italy*, decision of 9 July 2002, no.

consent in such cases will be relevant to whether this is in compliance with the ECHR and has already been considered by the Court in several cases<sup>13</sup>. In some cases individuals will subsequently be isolated under very strict regimes with the intention of protecting others<sup>14</sup>. In addition, for those undergoing medical testing or treatment, the storage and publication of medical data and obligatory treatments and isolation measures for persons showing signs of viral infection raise further issues under Article 8 of the ECHR<sup>15</sup>.

Lockdowns can be a catalyst for more numerous incidents of domestic violence for obvious reasons that include increased stress, cramped and difficult living conditions and breakdowns in community support mechanisms<sup>16</sup>. The current crisis can also further limit the ability of women to escape abuse, due to fears of the disease or of spreading it to others, and can place victims in an environment without appropriate access to services, such as safe shelters away from abusers that do not possess suitable facilities and can thwart accountability for perpetrators of abuse.

Strict restrictions on movement and the closure of schools could also have a disproportionate impact on women in other ways. Globally women perform roughly 2.5 times more unpaid care and domestic work than men and are more likely to face additional care-giving responsibilities when schools and kindergartens are closed, making it harder for women to maintain paid employment. Women are disproportionately more likely to work in the informal sector and service industries and so be economically harmed by lockdown and quarantine measures, by social distancing and by economic slowdown. Where women have the ability to work from home, online work and education requires internet access. Even when women have access to the internet, gender disparities may make them less able to use it for reasons including cost, socialisation, and family pressures.

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42197/98) or when authorised by court order (*X v. Austria*, Commission decision of 19 February 2013, no. 19010/07; *Peters v. the Netherlands*, Commission decision). However, in recent cases the Court has found violations of Article 3 ECHR. See for example *Dvořáček v. the Czech Republic*, judgment of 6 November 2014, no. 12927/13 and especially *R.S. v. Hungary*, judgment of 2 July 2019, no. 65290/14.

13 See *Dvořáček v. the Czech Republic*, mentioned above, *Elberte v. Latvia*, judgment of 13 January 2015, no. 61243/08; *Altuğ and Others v. Turkey*, judgment of 30 June 2015, no. 32086/07.

14 See *Enhorn v. Sweden*, mentioned above.

15 See *Avilkina and Others v. Russia*, judgment of 6 June 2013, no. 1585/09; *Radu v. the Republic of Moldova*, judgment of 15 April 2014, no. 50073/07; *L.H. v. Latvia*, judgment of 29 April 2014, no. 52019/07; *Y.Y. v. Russia*, judgment of 23 February 2016, no. 40378/06. See also the decision of the Agency for the Protection Personal Data of Bosnia and Hercegovina of 24 March 2020: <https://www.lexology.com/library/detail.aspx?g=7242898e-6c80-49ce-8da2-d9b815887519>.

16 The number of domestic violence cases in China tripled in February in comparison to last year and an anti-domestic violence non-profit in central Hubei province in China, has reported that 90% of all reported instances of domestic violence are related to COVID-19. In the United States, the National Domestic Violence Hotline has also reported growing numbers of callers, with abusers using COVID-19 as a means of further isolating victims from friends and family.

In the Western Balkans certain marginalised populations, such as the LGBT community, could face discrimination in accessing health care. This discrimination could also affect access to COVID-19 testing and treatment which can consequently make marginalised populations particularly at risk of suffering serious illness or death as a result of COVID-19. Furthermore, in countries where healthcare is not free at the point of delivery people may avoid medical care or the purchase of prescription medication because of the cost, resulting in their condition worsening. In an epidemic, avoidance of medical care not only harms those with the illness but can also lead to the increased spread of COVID-19 as people who have not been adequately treated may spread the disease<sup>17</sup>.

Under the ICESCR<sup>18</sup>, the right to health provides that States must create conditions that “would assure to all, medical service and medical attention in the event of sickness.” The European Social Charter provides for a specific right to protection of health<sup>19</sup> and for a right to social and medical assistance<sup>20</sup>. All Western Balkan countries are party to both these treaties.

In Italy, one of the European states which at one point experienced the largest and most serious outbreak of COVID-19, lockdown measures have had the effect of stalling operations to assist migrants and asylum seekers. Migrants and asylum seekers are also vulnerable as their health is often already compromised, with tuberculosis the most common disease found in migrants and asylum seekers by Italian doctors at points of entry. Repatriation flights have also halted under the lockdown in Italy, leaving repatriation centres dangerously overcrowded and susceptible to outbreaks of the disease. This raises the issue of the expediency of these measures in the fight against the pandemic and of restricting, or even the fully denying, the right to migration and asylum, which has been contested in the recent past. Even prior to the COVID-19 outbreak conditions of detention and the removal of migrants to their countries of origin raised ECHR issues under multiple Convention articles.

As far as procedural rights are concerned, the right of access to court and the right to a public hearing could be impaired in the current situation in which most of the judicial institutions in the Western Balkans region seem to have difficulties in operating and might be obliged to restrict access to the public for the foreseeable future. The closure of courts intensifies the risk of unduly prolonged pre-trial detention periods, or restrictions on rights such as to a fair and public hearing, to have witnesses examined or to obtain a

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<sup>17</sup> See *Enhorn v. Sweden*, mentioned above, especially §§ 44-45.

<sup>18</sup> International Covenant on Economic, Social and Cultural Rights. United Nations, Treaty Series, vol. 993, p. 3.

<sup>19</sup> Article 11 of the European Social Charter.

<sup>20</sup> Article 13 of the European Social Charter. See also Part I § 13 and Article 7 § 9, and Article 19 and 30. See also Article 3 of the ECHR and Biomedicine - the Oviedo Convention.



court decision within a reasonable time. A creative use of simple available technology could go a long way towards ameliorating this. Indeed, in the current legal environment the effectiveness of all remedies for human rights violations have been profoundly challenged.

## The fight against the COVID-19 pandemic and the protection of ECHR rights

The Court has underlined that to protect the right to life under the ECHR “...[P]ositive obligations under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake. This is the case, for example, in the health-care sector as regards the acts or omissions of health professionals<sup>21</sup>”. It has also emphasised that States are “required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients’ lives”<sup>22</sup> especially “where patients’ capacity to look after themselves is limited”<sup>23</sup>.

The question remains, however, under the principle laid down in *Osman v. United Kingdom*, whether States have taken/are taking all steps they could reasonably have been expected to take to prevent a harm of which they knew or ought to have known<sup>24</sup>.

States have a general obligation under the ECHR to take adequate measures to protect individuals from the spread of the COVID-19 pandemic and from being avoidably infected and suffering its consequences. In view of the importance of the protection of life and the protection of individuals from inhuman or degrading treatment<sup>25</sup>, States are fully justified in taking proportionate measures to lock down parts or the entirety of their populations with the aim of slowing the pandemic and thereby protecting the basic rights guaranteed by the ECHR. Without the right to life, all other rights, including those mentioned above, are always limited.

<sup>21</sup> See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, mentioned above, § 130; *Dodov v. Bulgaria*, judgment of 17 January 2008, no. 59548/00, §§ 70, 79-83 and 87 and *Vo v. France*, Grand Chamber judgment of 8 July 2004, no. 53924/00, §§ 8990.

<sup>22</sup> See *Calvelli and Ciglio v. Italy*, Grand Chamber judgment of 17 January 2002, no. 32967/96, § 49. In this case the Court accepted that the positive it had developed in its earlier case law concerning the positive obligations under Article 2 ECHR are applicable in “public health sphere too”. See for the earlier case law on positive obligations *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36 and *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94, § 116.

<sup>23</sup> See *Dodov*, cited above, § 81.

<sup>24</sup> *Osman v. the United Kingdom*, mentioned above, § 116.

<sup>25</sup> See amongst other cases *Paposhvili v. Belgium*, judgment of 13 December 2016, no. 41738/10.

The undoubtedly legitimate aim of protecting people from COVID-19 a priori justifies the measures which have affected our lives in recent days<sup>26</sup>. Several European States have taken legislative and judicial measures in response to the situation and in accordance with national and international law<sup>27</sup>. To be ECHR compliant such measures must be adopted by laws that have the requisite “quality of law”, they must be precise and ascertainable so that an individual may regulate his conduct if need be with legal advice, and must be proportionate to the legitimate aim pursued.

The ECHR, under Article 15, provides for the possibility that in a time of war, or other public emergency that threatens the life of the nation, any State may take measures to derogate from the protections under the Convention<sup>28</sup>. In the COVID-19 pandemic, as in other emergency situations where States have considered it necessary to have recourse to derogation measures<sup>29</sup>, the Strasbourg bodies have taken into account the responsibilities of European governments to protect the life of the nation and lives of their citizens<sup>30</sup>. However, even in the context of the current situation, a number of Contracting States<sup>31</sup> have found it necessary to make a derogation under Article 15.

A derogation under Article 15 does not give States total discretion over their actions<sup>32</sup>. It does not absolve them entirely from their obligations under the ECHR nor from the duty to protect, as much as they reasonably can in the situation, the rights and freedoms mentioned above. Article 15 provides that a State may derogate from its obligations under a particular Article only to the extent strictly required by the exigencies of the situation, and only if the measures it takes are not inconsistent with its other obligations under international law<sup>33</sup>.

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26 See Commission on Human Rights, Resolution 2003/29, “Access to medications in the context of pandemics such as HIV/AIDS, tuberculosis and malaria”, Thomaïs Douraki “La Convention européenne des droits de l’homme et le droit à la liberté de certains malades et marginaux”, Paris, LGDJ, 1986, Yamin, “Not Just a Tragedy: Access to Medications as a Right Under International Law”, 21 Boston University International Law Journal (2003), 22 April 2003, M. Afroukh, “L’émergence d’un droit à la sécurité des personnes dans la jurisprudence de la Cour EDH”, RDP 2015/1 p. 139.

27 In Italy, measures have been based in the provisions of the Italian Constitution, and Government orders and decrees have been adopted by law and enacted with the legitimate aim of protecting public health from the COVID-19 Pandemic. On March 22, 2020, the French Conseil d’État accepted an application by the Union of Young Doctors and ordered the PM to adopt total lockdown measures. See for example <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-22-mars-2020-demande-de-confinement-total>.

28 See also Article 4 of ICCPR.

29 See for example cases *Lawless v. Ireland* (no. 3), judgment of 1 July 1961, no. 332/57; *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71.

30 See *Klass and Others v Germany*, judgment of 6 September 1978, no. 5029/71, *Brogan and Others v. United Kingdom*, judgment of 29 November 1988, nos. 11209/84, 11234/84, 11266/84, 11386/85 etc.

31 The Contracting States that have used this possibility until 24 April 2020 are Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino and Serbia. See at <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>.

32 See the report of the European Commission of Human Rights on the case of *Denmark, Norway, Sweden and the Netherlands v. Greece* (“The Greek Case”) 5 November 1969.

33 On the proportionality of measures see, in addition to *Lawless v. Ireland* and *Ireland v. UK*, both mentioned

On April 7, 2020, the Secretary General of the Council of Europe issued a toolkit for governments across Europe on respecting human rights, democracy and the rule of law during the COVID-19 crisis<sup>34</sup>.

In this situation the PACE Resolution 1536 (2007) on HIV/Aids in Europe could provide helpful guidance in handling the COVID-19 pandemic. The Resolution states that:

*“9. While emphasising that the HIV/Aids pandemic is an emergency at the medical, social and economic level, the Assembly calls upon parliaments and governments of the Council of Europe to:  
9.1. ensure that their laws, policies and practices respect human rights in the context of HIV/Aids, in particular the right to education, work, privacy, protection and access to prevention, treatment, care and support;”*

These and other documents provide useful tools for the Western Balkan States in dealing with the situation whilst observing their international commitments and national standards.

While the normal functioning of parliaments has been disrupted across Europe, measures have been taken to adapt. In the United Kingdom, for example, when sitting, Parliament will perform its functions electronically through a partly online virtual parliament. The European Parliament has already temporarily instituted electronic voting and moved meetings to videoconferencing.<sup>35</sup> Such actions demonstrate that COVID-19 need not prevent parliaments from performing their constitutional role and scrutinising legislation. Responding to acute disasters or pandemics, as in the case of COVID-19, is a quintessentially executive matter and to require Parliamentary legislation in the face of a pandemic with exponential growth rates increasing daily might not be realistic. The question remains, however, whether the executives already have in place legislative framework which authorises them to take executive orders and to what extent and how the executive respects that framework. Therefore, the role of the national parliaments in assuring that these extraordinary restrictive measures respect the principles of legality and proportionality remains crucial also in these circumstances.

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above, the cases of *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, nos. 14553/89; 14554/89; *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93 and more recently *Şahin Alpay v. Turkey* and *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, nos. 16538/17; 13237/17.

34 Available at <https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>.

35 See UK Parliamentary Joint Committee on Human Rights: “COVID-19 response scrutinised to ensure human rights are upheld - 19 March 2020” See at <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/145641/covid19-response-scrutinised-to-ensure-human-rights-are-upheld/>.

Finally, even if restrictive public-health measures are instituted in accordance with the necessary legislative oversight they may still lead to disproportionate and unnecessary restrictions on individual human rights if the administrative bodies charged with the execution of such measures act with unnecessary harshness and oppressive zeal. In such situations the role of the ombudsman institution might be of crucial importance for guiding administrative bodies in their difficult work in these exceptional circumstances and in ensuring that they perform their roles in compliance with the required standards during the current crisis.

## Conclusion

Although it will be difficult, Governments have a clear responsibility to determine the impact of these quarantine, lockdown and social distancing measures upon the whole range of different ECHR rights. This necessary task can be approached from two perspectives.

The first priority in the midst of the enormous challenge facing Western Balkans States is the protection of people's lives and health. This priority is related to States' obligations under the ECHR to take all measures reasonably expected of them to take protective measures and offer services, especially assistance, to people who are in heightened medical danger from the pandemic. At the same time, States are under a burden to carefully assess their interference with the rights and freedoms of their citizens and to limit their impact only to the extent required and for only as long as required by the COVID-19 emergency situation<sup>36</sup>.

Secondly, there is also a clear procedural obligation for States to respect national legislative procedures applicable to emergency situations so that every measure can undergo the scrutiny of democratically elected bodies and the courts. Oversight by national judicial authorities of a restrictive measure is the best guarantee of its efficiency and proportionality in any given situation<sup>37</sup>.

When the emergency is over, a third perspective might gain increasing importance. Each and every crisis, of whatever nature, is followed by the "lessons learned" stage. Then, debates will no doubt take place concerning the positive obligations doctrine under the ECHR, especially under Articles 2, 3 and 8. Questions will be asked whether Governments took all the precautionary measures they could have been expected to take against the

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<sup>36</sup> Their international obligations and the possibility of justifying their measures through the derogation procedure provided under Article 15 of the ECHR and Article 4 of the ICCPR, with derogation strictly permitted only to the level that the situation requires.

<sup>37</sup> See the decision of the Constitutional Court of Kosovo no. 01/15 of 23 March 2020 and the decision of the Constitutional Court of Bosnia and Hercegovina no. AP 1217/20 of 22 April 2020.



spread of the COVID-19 pandemic in their territory and whether, reasonably, they should and could have done more, especially with their knowledge of the COVID-19 situation in China at the beginning of the year.

For the time being, and in view of the urgency of the situation, State obligations under the ECHR concern the legality, the necessity and the proportionality of the restrictions that have been adopted, including positive measures for protecting particularly vulnerable people. There is a clear need to strike a balance between *collective protection* and the *protection of individual rights*, and in striking this balance the latter should not be sacrificed unreasonably. The ECHR and all the tools referring to the case-law of the Strasbourg Court provide an excellent guide in this difficult situation and adherence to the ECHR can help ensure that we never, whatever the challenges faced by humanity, undermine our collective purpose to respect and protect human rights.