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The Impact of COVID-19 Response (Closing Entry Points and Suspension of Asylum Applications) On the Rights of Illegal Immigrants and Asylum Seekers in the European Union  
Assessing the Legality of Invoking Article 15 ECHR

Masters Thesis

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## **DECLARATION OF AUTHENTICITY**

I herewith declare that this research is my own work, and any other sources adapted have been fully and specifically acknowledged. Thus, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person except where due reference is made by correct citation. I understand that if at any time it is shown that I have significantly misrepresented material presented, this thesis may be disqualified.



## ABSTRACT

The research examines the legality of the adoption of the derogation clause, i.e., Article 15 ECHR, by EU Member States in response to COVID-19 pandemic. Focus of the thesis will be on the impact of the COVID-19 measures on refugees and asylum seekers, adopted by the EU Member States, to close the entry points and suspend asylum applications. Due to the epidemic, very few migrants were able to cross the sea, transit routes in the inner Europe were blocked, leaving asylum seekers stuck in the disastrous camps along the EU external borders. This act of depriving the migrants their right to seek and enjoy asylum which is guaranteed to them by Article 18 Article of the Charter of Fundamental Rights of the European Union has sent a contradictory message to the rest of the world as the EU prides itself to be a “guardian” of human rights. As the pandemic is a threat to public health, Member States adopted the derogation clause. Article 15(1) of the Convention provides that, “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...” The Article goes on to place limitations to the application of the derogation clause by stating that derogation is only permissible, “... 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.” The paper discusses the Member States’ obligations under international law which have been infringed by the adoption of the derogation clause. The necessity of the measures adopted and their proportionality to the current pandemic situation will be examined. The research aims to establish that alternative measures could have been established, like conducting tests and/or quarantine etc, which would not infringe the States obligations under international and EU law.

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# CHAPTER ONE

## 1. INTRODUCTION

### 1.1. Background of the Study

Since early 2020, Europe, like the rest of the world, has seen the spread of the COVID-19 pandemic, also known as Corona virus pandemic.<sup>1</sup> In response, all Member States of the Union took measures intended at curbing the spread of the virus. These measures include restrictions on travel both within and outside the EU, requirements to put on face masks, and mandate to close educational and cultural facilities as well as businesses which did not qualify as essential services.<sup>2</sup> Additionally, some EU Member States have closed their borders, suspended the lodging of asylum applications and reception centers limited and/or shut down freedom of movement for both entry and exit.<sup>3</sup> As a result, most of these measures disproportionately affected the rights of refugees and asylum seekers. In the EU, the right to seek and enjoy asylum is guaranteed by Article 18 of the Charter of Fundamental Rights.<sup>4</sup> The principle of *non-refoulement*<sup>5</sup> prohibits States from transferring anyone to a country or territory where their life and freedom would be threatened, hence it is one of the most crucial limitations on States under international law on the rights of States to control entry into their territories and expel aliens as an expression of their sovereignty. Countries like Hungary, Greece and Cyprus banned entry to asylum applications, while Malta and Italy declared their ports unsafe.<sup>6</sup>

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<sup>1</sup> European Commission: Coronavirus response. Accessed on 31/05/2021 from [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_en)

<sup>2</sup> KOPP, Karl. Refugee Policies: Human Rights Shutdown. Development and Cooperation Newsletter, 12<sup>th</sup> June 2020. Accessed on 31/05/2021 from <https://www.dandc.eu/en/article/eu-uses-measures-against-coronavirus-pretext-curtail-rights-asylum-seekers>

<sup>3</sup> Ibidem

<sup>4</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

<sup>5</sup> GILLARD, Emanuela-Chiara. There's no place like home: States' obligations in relation to transfers of persons. *International Review of the Red Cross*. Volume 90, Number 871, September 2008

<sup>6</sup> Human Rights Watch. European Union: Events of 2020. Accessed on 23/02/2021 from <https://www.hrw.org/world-report/2021/country-chapters/european-union>

The outbreak of COVID 19 pandemic has suddenly caused a rift among receiving states, members of various Human Rights associations and the international community at large, as concerns accelerated on the potential impact of the Pandemic on irregular migrants and asylum seekers being held at overcrowded temporary accommodation centres, detention centres, and hotspots, mainly at sea ports and land borders situated all along the Turkey-Greece, Serbia-Hungary, and Libya-Italy travel routes to Europe. The pandemic has forced, and continue to, at the time of writing of this research, states receiving asylum seekers to restrict cross boarder movement to “curb” the spread of the virus. By default, asylum seekers who use irregular entry via sea or land borders as their route to international protection became the natural victim of the Pandemic. Thereby, the Pandemic has adversely affected the right to asylum in the EU.

## 1.2. Problem Statement

The COVID-19 crisis sparked uncertainties to refugees and asylum seekers to Europe as interim measures have been put in place to curb the spread of the pandemic within the Union. Among these measures are, closure of external borders and suspension of asylum applications.<sup>7</sup> The legal basis for these measures is Article 15 of the European Convention of Human Rights (ECHR).<sup>8</sup> However, this decision has negatively impacted refugees and asylum seekers as these measures directly interfere with their other *non-derogable* rights, like the right to life and the freedom of human treatment as provided for by Article 2 and 3 ECHR respectively.<sup>9</sup> While the focus in Europe during these measures was on the novel corona virus, the Mediterranean has witnessed an increasing number of deaths of the vulnerable groups due to lack of reception,<sup>10</sup> while others are being sent back to Libyan torture camps,<sup>11</sup> where their right to life is threatened, and an act which is against the principle of *non-refoulement*. Unrestricted violence against refugees and pushbacks

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<sup>7</sup> Ibidem

<sup>8</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

<sup>9</sup> Human Rights Watch. European Union..., 2020

<sup>10</sup> EuroMed Rights. Input for the Special Rapporteur’s report on pushback practices and their impact on the human rights of migrants and refugees, with a focus on pushbacks from Cyprus to Lebanon and Turkey [online] [cit. on 13<sup>th</sup> September 2020]. Accessible at

[https://www.ohchr.org/Documents/Issues/Migration/pushback/Joint\\_KISA\\_EuroMed%20Rights\\_Submission.pdf](https://www.ohchr.org/Documents/Issues/Migration/pushback/Joint_KISA_EuroMed%20Rights_Submission.pdf)

<sup>11</sup> Ibidem

that violate international law have been documented in the waters between Cyprus and Syria and along land borders.<sup>12</sup> Another notable concerning neglect of EU fundamental principles is the case of Moria camp in Greece, whereby doctors went to the extent of signing an appeal to the European Commission, arguing that it is impossible to protect people from COVID-19 in the camps hence they should be evacuated.<sup>13</sup> As Moria is the largest refugee camp in Europe, the situation unveiled by the pandemic is serves as a symbol of a disastrous European refugee policy.

### **1.3. Research Questions**

#### **1.3.1. The main research question is:**

What is the impact of extending the adoption of Article 15 ECHR on refugees and asylum seekers?

#### **1.3.2. The sub-research questions will be:**

- i. What is the role of EU in the protection of human rights of refugees and asylum seekers within the Union and beyond its external borders amidst the COVID-19 pandemic?
- ii. Can the human rights affected by adopting Article 15 be derogated from?
- iii. What suggestions can be given to reform EU refugee policy to ensure human rights for refugees and asylum seekers during the crisis?

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<sup>12</sup> *ibidem*

<sup>13</sup> DIMITROPOULOS, Stav. In an Overcrowded Greek Refugee Camp, Fighting Covid-19 Before it Arrives: Cramped conditions and limited access to running water place Greece's Moria camp at high risk for a coronavirus outbreak, 14 May 2020. [cit. 22/09/2020]. Accessible at <https://reliefweb.int/report/greece/overcrowded-greek-refugee-camp-fighting-covid-19-it-arrives>

## **1.4. Research Objectives**

The primary aim of this thesis is as follows:

To indicate that the adoption of Article 15 ECHR infringes fundamental rights of refugees and asylum seekers and measures to close borders should not be applied to those seeking international protection.

To create recommendations for EU COVID-19 policy that is of a more human rights approach to refugees and asylum seekers.

## **1.5. Justification of the Study**

The current research contributes to the recognition of the rights of refugees and asylum seekers as essential to European Union law. The measures to seal off Europe during the lockdown period, leaving refugees and asylum seekers' lives susceptible to endangerment is a reflection that fundamental European principles are being neglected. Corona virus epidemic is still a threat which makes it uncertain on when the world will be back to functioning normal. This uncertainty therefore calls for a change in how the EU is applying its measures on refugees and asylum seekers in order to accommodate the group in the human rights protection policy.

The research focuses on the predicaments facing this vulnerable group as a result of being denied access to enter the EU and seek international protection and calls for a more human rights approach. The study outlines the crucial roles that EU institutions and Member States have to play in taking steps in order to ensure human rights for all, including refugees and asylum seekers.

Finally, it will recommend human rights approaches which should be considered and taken to ensure the EU protection of human rights. The study recommends a more human rights approach, like that taken by countries such as Germany and Sweden, which accepted lodging of new asylum applications, and they did not ban entry into the countries to make asylum applications. Luxemburg automatically extended the status of people who had already launched their applications for asylum. Basing on international standards and EU guidelines, there should be an exemption to

boarder closures so as to allow international protection claims. While restrictions introduced at boarders following the COVID-19 pandemic are in the interest of public health, more lenient and human rights friendly approaches should have been considered. These include health checks at entry points and/or quarantine of newly arrived persons as per the European Commission recommendation.

## **1.6. Delimitation of the study**

The study was mainly focussed on the measures taken at external borders, i.e., at land boarders and sea ports. The states of main focus of the research thus were Greece, Italy, Cyprus, and Malta. There will also be research on how the measures were applied in internal borders, i.e., France, Hungary etc. The research was limited to measures applied in relation to illegal immigrants and asylum seekers who sought international protection within the EU.

## CHAPTER TWO: LITERATURE REVIEW

### 2.1. Introduction

States may be faced with major disturbances, wars, natural disasters among other crises which are considered to be exceptional dangers. These crises may be threatening to the safety, security and general welfare of the population and states may be forced to take measures such as "state of emergency" in order to curb and tackle these situations.<sup>14</sup> At international law level, the International Covenant on Civil and Political Rights (hereinafter ICCPR)<sup>15</sup> addressed these situations by providing a derogation clause in its Article 4. The provision gives states the right to derogate from their obligations, limited to a certain extent, during emergency circumstances by stipulating that, the state may take measures which interfere with the enjoyment of some of the rights protected by the ICCPR.<sup>16</sup> "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, color, sex, language, religion or social origin".<sup>17</sup> The second paragraph of the same article places limitations to the applicability of the clause by stating that derogation from certain rights considered as fundamental human rights, also known as peremptory norms is not permissible.<sup>18</sup> Lastly, the third paragraph of the ICCPR provides some procedural requirements when adopting the derogation clause. It stipulates that, "Any state party to the present Covenant availing itself of the right of derogation shall immediately inform other states parties to the present covenants through the intermediary of the Secretary-General of the United Nations, of

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<sup>14</sup> European Parliament: States of emergency in response to the coronavirus crisis: Situation in certain Member States II [cit. on 15<sup>th</sup> September 2020]. Accessible at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651914/EPRS\\_BRI\(2020\)651914\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651914/EPRS_BRI(2020)651914_EN.pdf)

<sup>15</sup> International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>16</sup> *ibidem*, Art 4(1)

<sup>17</sup> *ibidem*

<sup>18</sup> *ibidem*, Art 4(2)

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".<sup>19</sup>

As discussed in Chapter One, at EU regional level, Art. 15 of the ECHR gives governments of the State parties the possibility to derogate from their obligation to secure certain rights and freedoms under the Convention. It has also been established that, the derogation is afforded in well-defined exceptional circumstances, subject to specific procedures and conditions such as temporary, limited and supervised manner.<sup>20</sup> The Article presents three conditions for a valid derogation, i.e., 1) there must be a "war or other public emergency threatening the life of the nation"; 2) the derogation must go no further than is "strictly required by the exigencies of the situation"; and, 3) the derogation must not be "inconsistent with [the states'] other obligations under international law."<sup>21</sup> Furthermore, the second paragraph of the article provides that derogation from certain specified rights is not permissible, such as the right to life except resulting from lawful acts of war, torture, degrading treatment or punishment, slavery, servitude, and the right not to be subjected to retrospective criminal penalties.<sup>22</sup> The last requirement of this article is provided in paragraph three which stipulates the procedural requirements which is to send the notification of the derogation to the Secretary General of the Council of Europe.<sup>23</sup> The emergency must be actual or imminent, as clarified by the report of the Commission in Greek case<sup>24</sup> when it noted that "with regard to the actual or imminent character of the emergency, it imposes a limitation in time, that is to say, the legitimacy of a derogation undertaken at a certain date depends upon there being a public emergency, actual or imminent at that date".<sup>25</sup>

The importance of adhering to these criteria was emphasized at both international and regional level. The UN General Assembly (herein after UNGA) is one such example, as stipulated in United

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<sup>19</sup> *ibidem*, Art 4(3)

<sup>20</sup> COUNCIL OF EUROPE, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 128 (2d ed. 1998).

<sup>21</sup> *ibidem*

<sup>22</sup> ICCPR Art. 4

<sup>23</sup> *ibidem*

<sup>24</sup> AGREST, Jeffrey. Human Rights and Preventive Detention.: The Greek Case. *Social Research*. Vol. 38, No. 2, The Current Status of Human Rights—Essays in Honor of Erich Hula (SUMMER 1971), pp. 298-319

<sup>25</sup> *ibidem*

Nations General Assembly, (2005), Para. 3.<sup>26</sup> At regional level, notable examples include Art. 15 ECHR and also Art. 27 Inter-American Convention on Human Rights (hereinafter IACHR)<sup>27</sup>, with both Articles containing the same provisions, though some regional variations exist.

Focus of this Chapter will be on the conditions set out in Art. 15 and the customary law and scholarly views on the derogation clause. This will come in handy in Chapter three, as the researcher assesses the restrictions taken by EU states and the legality of the adoption of this article in relation to the Corona Virus crisis. The procedural and substantive conditions that govern the use of the provision are:

- i) the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation
- ii) a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation
- iii) any derogations may not be inconsistent with the State's other obligations under international law
- iv) certain Convention rights do not allow of any derogation
- v) lastly, on a procedural level, the State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed.

## 2.2. Substantive requirements

### 2.2.1. The right of derogation can be invoked only in time of war or other public emergency threatening the life of the nation.<sup>28</sup>

This is the first precondition that have to be met before a State invokes the derogation provision to determine the necessity of the derogation. It is also enshrined in Art. 4(1) ICCPR<sup>29</sup> which provides

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<sup>26</sup> UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly, 24 October 2005, A/RES/60/1*

<sup>27</sup> ECHR, *supranote 8*

<sup>28</sup> European Court of Human Rights. *Guide on Article 15 of the European Convention on Human Rights: Derogation in time of emergency.* Council of Europe/European Court of Human Rights, 2020

<sup>29</sup> ICCPR

that States may take measures to derogate from the Covenant in time of war or public emergency which threatens the life of the nation. The first question thus would be to enquire circumstances that justify a derogation, i.e., what circumstances constitute a public emergency threatening the life of the nation?<sup>30</sup> The ECHR is rather vague on the interpretation of these circumstances. The Court has not been required to interpret the meaning of ‘war’ as referred to in Art. 15(1).<sup>31</sup> The most controversial part is to establish what circumstances constitute a public emergency threatening the life of the nation.<sup>32</sup> Customary law defines the phrase as , “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” (Lawless v. Ireland (no. 3), para. 28).<sup>33</sup> Another acceptable definition among many scholars is that public emergency is whereby the well-being of the community in terms of the physical well-being of the population is at stake.<sup>34</sup> This interpretation is probably convincing, especially when considered from the perspective of accommodating individual and community interests. According to a Steven Greer , generally, any substantial violence or unrest short of war is most likely to fall within the scope of a “public emergency threatening the life of the nation”.<sup>35</sup> There are a number of case law which demonstrate a derogation in time of war or other public emergency threatening the life of the nation. With respect to States practice under ECHR, we can identify certain claims made by governments to support derogation.

The famous Lawless case, which was the first case to be decided by the European Court of Human Rights is one typical example where derogation clause was invoked. The case concerns an alleged violation of the ECHR for the Protection of Human Rights and Fundamental Freedoms by the Government of Ireland.<sup>36</sup> The Court (ECtHR) is an adjunct of the Council of Europe and was established by the Convention for the Protection of Human Rights and Fundamental Freedoms.

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<sup>30</sup> BURCHILL, Richard. When Does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism. Yearbook of New Zealand Jurisprudence, Vol 9, 2005.

<sup>31</sup> ECtHR. Guide on Art. 15

<sup>32</sup> BURCHILL. When Does an Emergency..., 2005

<sup>33</sup> Lawless v Ireland (No 3), Lawless v Ireland, Judgment on Merits, App no 332/57 (A/3), [1961] ECHR 2

<sup>34</sup> European Commission. Annex of the Commission Implementing Decision on the Special Measure ‘EU COVID-19 Solidarity Programme for the Eastern Partnership for 2020’ [online] [cit. on 13<sup>th</sup> September 2020]. Accessible at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/c2020\\_3048\\_annex.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/c2020_3048_annex.pdf)

<sup>35</sup> GREER, Steven. Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law? Oxford: Human Rights Law Review, 2015, 0, 1–37

<sup>36</sup> Lawless v Ireland

The Lawless case emerged as a result of the Irish Government's bid to end violent acts which were being committed by the outlawed Irish Republican Army in their effort to end the British sovereignty over Northern Ireland.<sup>37</sup> Even though the Court found that the detention of Lawless was contrary to Article 5, para i(c), of the Convention, the fourth and final issue was whether the detention was justifiable on the ground that the Government of Ireland had properly exercised its right under Art. 15 of the ECHR to take measures in derogation of its obligations under the Convention.<sup>38</sup> The Court therefore had to determine whether Ireland had complied with the conditions set forth in Art. 15 which govern the use of the right to derogation. On the first condition that there need to be a public emergency, the Court interpreted the phrase "public emergency threatening the life of the nation" to refer to a crisis which threatens the organized life of the community.<sup>39</sup> It held that such a situation existed when the government of Ireland exercised its right of derogation. The Court found a number of factors relevant, which are, the existence of the secret army engaged in unconstitutional activities and using violence as a means to an end, secondly, the fact that the IRA was operating outside State territory jeopardized the Republic of Ireland's relations with its neighbour and lastly, the steady and alarming increase in terrorist activities. Thus, the Court decided that these activities posed a threat to the life of the Irish Republic hence Ireland was justified in invoking Art. 15. According to Rosalyn Higgins, large scale of terrorism or civil war which affects large segments of the population might be regarded as justifying derogations.<sup>40</sup> She goes on to say "war or other public emergency" adds a connotation of violence to the provision and therefore would seem to support this interpretation.<sup>41</sup>

Another notable case law whereby a State exercised its right to derogate is the Greek case of 1967.<sup>42</sup> In this case, the Commission had required that the emergency invoked for the purpose of Art. 15 must affect the whole nation. The claims put forward by the government of Greece were

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<sup>37</sup> *ibidem*

<sup>38</sup> ECtHR. Guide on Art. 15

<sup>39</sup> *ibidem*; *Lawless v Ireland*

<sup>40</sup> HIGGINS, Rosalyn. M.A., LL.B. (Cantab.), J.S.D. (Yale), *Derogations under Human Rights Treaties, British Yearbook of International Law*, Volume 48, Issue 1, 1976, Pages 281–319

<sup>41</sup> *ibidem*

<sup>42</sup> ZEIDY, Mohamed M. *The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations*. San Diego Int'l L.J., [VOL. 4: 277, 2003]

based primarily on considerations of power.<sup>43</sup> The Government's main argument was that a Communist takeover posed a danger and the crisis of constitutional government as evidenced by a rapid succession of governments, by corruption, by strikes, and by an ailing economy.<sup>44</sup> Greece's third argument was that violent demonstrations caused a crisis to public order.<sup>45</sup>

### **2.2.2. A State may take measures derogating from its Convention obligations only to the extent strictly required by the situation**

After establishing that the first condition of Art. 15 have been satisfied, the next question to be asked is whether the measures, which are the subject of the application, were "strictly required by the exigencies of the situation."<sup>46</sup> This second condition appears to be the most crucial requirement to be examined, because it reflects the core of the derogation clause, which in reality, views the machinery of the Strasbourg organs in balancing and assessing the situation, circumstances and measures taken by states during emergencies.<sup>47</sup> In determining the "strictly required" character of the derogations, there are three factors that must be examined. These are, (i) The necessity of the derogations to cope with the threat. (ii) The proportionality of the measures in view of the threat. (iii) The duration of the derogations.<sup>48</sup> Furthermore, as established by the *Brannigan & McBride v. United Kingdom* judgment, additional elements or factors to give appropriate weight to on top of the aforementioned three include the nature of the rights affected by the derogation and the circumstances that led to the derogation itself.<sup>49</sup>

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<sup>43</sup> European Commission of Human Rights. The Greek Case : Report of the Commission : Application No. 3321/67-Denmark v. Greece, Application No. 3322/67-Norway v. Greece, Application No. 3323/67-Sweden v. Greece, Application No. 3344/67-Netherlands v. Greece. Strasbourg :The Commission, 1970.

<sup>44</sup> *ibidem*

<sup>45</sup> *ibidem*

<sup>46</sup> ECHR, Art 15(2)

<sup>47</sup> GREER, Steven. The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights. Human rights files No. 17, Council of Europe Publishing F-67075 Strasbourg Cedex, 2000.

<sup>48</sup> European Court of Human Rights. Factsheet: Derogation in time of emergency. [online] [cit. on 13th September 2020]. Accessible at [https://www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf)

<sup>49</sup> *Brannigan and McBride v. The United Kingdom*, 5/1992/350/423-424 , Council of Europe: European Court of Human Rights, 22 April 1993

### **i. The Doctrine of State Necessity**

This doctrine is found in principles of the law of state responsibility as one of the acceptable legal justifications excluding state responsibility for breach of its international obligation.<sup>50</sup> The doctrine of necessity, arguably, rendered a general principle of international law. The preconditions of acceptability of such a plea are that it should apply in "exceptional circumstances" and as a final resort after exhausting less severe cause of action.<sup>51</sup> The ILC Draft on State Responsibility contains the strict requirements for the application and invocation of the Doctrine of State Necessity.<sup>52</sup> In order to prevent the possibility of States abusing this right, it is not out rightly accepted in international law as an excuse unless it is "absolutely of an exceptional nature" and thus the reason why it must be subjected to very strict conditions and be monitored.

### **ii. The Doctrine of Proportionality**

The Convention is rather silent regarding the word "proportionality" as there is no express reference to it in its provisions.<sup>53</sup> However, as scholarly view observed, notable among others, Professor Higgins, "derogations to human rights obligations are acceptable only if events make them necessary and if they are proportionate to the danger that those events represent."<sup>54</sup> The implementation of this principle, that is, assessing whether the measures of derogation were strictly required by the exigencies of the situation, was one of the vital issues raised in the Strasbourg cases, by which European organs have always "declared themselves to be competent to check the fulfillment of this substantive issue", i.e., conditions of derogation.<sup>55</sup> If found that a state had a chance to adopt alternative measures which are less prejudicial to individual rights, it is to be found in violation of the Principle of Proportionality.<sup>56</sup> Therefore, a state must prove that the measures were taken as last resort and it had no other alternative way to deal with the emergency.

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<sup>50</sup> ZEIDY. The ECHR and States of Emergency..., 2003

<sup>51</sup> *ibidem*

<sup>52</sup> *ibidem*

<sup>53</sup> *ibidem*

<sup>54</sup> HIGGINS. Derogations under..., 1976

<sup>55</sup> Strasbourg :The Commission, 1970

<sup>56</sup> ZEIDY. The ECHR and States of Emergency..., 2003

Even if a State establishes that there has been a war or a public emergency threatening the life of the nation, it does not however, enjoy unlimited power in this respect. The Court is empowered to rule on whether the measures taken do not exceed the “extent strictly required by the exigencies” of the crisis.<sup>57</sup> This was established in the *Lawless* case when the Court stated that, “It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency.”<sup>58</sup> By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.<sup>59</sup> In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation.” As established in *Brannigan and McBride v. the United Kingdom*, para. 43<sup>60</sup>, the Court will then appropriately weigh factors such as, the nature of the rights affected by the derogation, the circumstances leading to the situation and the duration of the emergency. The assessing will include but not limited to, whether ordinary laws would have been sufficient to meet the danger caused by the public emergency (*Lawless v. Ireland (no. 3)*, para. 36, whether the measures are a genuine response to an emergency situation (*Brannigan and McBride v. the United Kingdom*, para. 51); whether the measures were used for the purpose for which they were granted (*Lawless v. Ireland (no. 3)*, para 38), whether the need for the derogation was kept under review; the importance of the right at stake, and the broader purpose of judicial control over interferences with that right; the proportionality of the measures and whether they involved any unjustifiable discrimination.<sup>61</sup> Referring back to the *Lawless* case, one of the Applicant’s arguments was that, even if the situation in Northern Ireland in 1957 could justify the derogation from Convention obligations, the bringing into operation and the enforcement of Part II of the Offences against the State (Amendment) Act 1940 were disproportionate to the strict requirements of the situation.<sup>62</sup> On the other hand, the Government of Ireland maintained that the objected measures were, in the

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<sup>57</sup> HIGGINS, Rosalyn. M.A., LL.B. (Cantab.), J.S.D. (Yale), *Derogations under Human Rights Treaties*, *British Yearbook of International Law*, Volume 48, Issue 1, 1976, Pages 281–319

<sup>58</sup> *Lawless case*;

<sup>59</sup> *ibidem*

<sup>60</sup> *Brannigan and McBride v. the United Kingdom*

<sup>61</sup> ECtHR, Guide on Article 15

<sup>62</sup> *Lawless case*; MOWBRAY, Alastair. *Cases, Materials and Commentary on the European Convention on Human Rights*. Oxford University Press. 2<sup>nd</sup> Edition, 2007

circumstance, strictly required by the exigencies of the situation in accordance with Art. 15(1) of the ECHR.<sup>63</sup> The Irish Government argued that, the powers that were applied in Northern Ireland during the period between August 1971 and March 1975, which allowed extrajudicial deprivation of liberty, had exceeded the "extent strictly required" by the exigencies of the situation.<sup>64</sup>

In the case *Aksoy v. Turkey* 18 December 1996 (judgment)<sup>65</sup>, the applicant had been held for at least fourteen days without being brought before a judge or other judicial officer. The Turkish Government sought to justify this measure by the particular demands of police investigations in a vast region in the grips of a terrorist organisation receiving outside support. While not presenting any detailed arguments against the validity of the Turkish derogation as a whole, the applicant, for his part, cast doubt on the need, in south-eastern Turkey, to hold suspects in custody for fourteen days or more without any judicial supervision.<sup>66</sup> In his view, the judges in that part of Turkey would not run any risk if they were able and obliged to review the lawfulness of detention at more frequent intervals.

In another case, *A. and Others v. the United Kingdom* of 19 February 2009<sup>67</sup>, the House of Lords had ruled, at last instance, in a judgment of 16 December 2004, on the applicants' action in the domestic courts challenging the fundamental legality of the derogation notified in November 2001 under Article 15 of the Convention. It held that there was an emergency threatening the life of the nation but that the detention scheme did not rationally address the threat to security and was therefore disproportionate.<sup>68</sup> It found, in particular, that there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al-Qaeda and that the detention scheme in question discriminated unjustifiably against foreign nationals. It therefore made a declaration of incompatibility under the Human Rights Act and quashed the derogation order.<sup>69</sup>

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<sup>63</sup> *ibidem*

<sup>64</sup> *ibidem*

<sup>65</sup> *Aksoy v. Turkey*, 100/1995/606/694, Council of Europe: European Court of Human Rights, 18 December 1996

<sup>66</sup> ECtHR. Derogation in time of emergency

<sup>67</sup> *A and Others v. United Kingdom*, Application no. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009

<sup>68</sup> *ibidem*

<sup>69</sup> *ibidem*

Other notable cases are the *Şahin Alpay v. Turkey*<sup>70</sup> and *Mehmet Hasan Altan v. Turkey*<sup>71</sup>, judgements of 20 March 2018 which concerned complaints by two journalists who had been arrested and detained following the attempted military coup of 15 July 2016. The Turkish Government submitted that in availing itself of its right to make a derogation from the Convention, Turkey had not breached the provisions of the Convention.<sup>72</sup> In that context, they noted that there had been a public emergency threatening the life of the nation on account of the risks caused by the attempted military coup and that the measures taken by the national authorities in response to the emergency had been strictly required by the exigencies of the situation.<sup>73</sup>

The last example on this section will be the case of *Pişkin v. Turkey*<sup>74</sup>, whereby the dismissal of the applicant, who was working as an expert at the Ankara Development Agency, on the grounds that he had links with a terrorist organisation, in the wake of the declaration of a state of emergency in Turkey following the failed military coup of 15 July 2016, as well as the subsequent judicial review of that measure.<sup>75</sup> The applicant complained that neither the procedure leading to his dismissal nor the subsequent judicial proceedings had complied with the guarantees of a fair trial.<sup>76</sup> He also complained that he had been branded a “terrorist” and “traitor

### **2.2.3. Derogations cannot be incompatible with other obligations in international law**

Another substantive requirement of application of Art. 15 ECHR is that the derogation should not violate and be inconsistent with the State’s other obligations under international law.<sup>77</sup> The Principle of Consistency first appears and is made reference to in the *travaux préparatoires* of the UN Covenant on Civil and Political Rights (hereinafter UNCCPR). The World Jewish Congress, at the 1949 Commission’s fifth session, made a proposition that "whatever restrictions on the

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<sup>70</sup> *Sahin v. Turkey*, Application no. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005

<sup>71</sup> *Mehmet Hasan Altan v Turkey* (13237/17) [2018] ECHR 251

<sup>72</sup> SCHEININ, Martin. Turkey’s Derogation from the ECHR – What to Expect? *European Journal of International Law*, 2016

<sup>73</sup> *ibidem*

<sup>74</sup> *CASE OF PISKIN v. TURKEY* (European Court of Human Rights) Application no. 33399/18

<sup>75</sup> *ibidem*

<sup>76</sup> *ibidem*

<sup>77</sup> ECHR, Art. 15

exercise of human rights permitted by the Covenant, it should be indicated that these do not invalidate obligations resulting from other international conventions or precedents."<sup>78</sup> The subject was however not addressed until 1950, when the Commission held its sixth session.<sup>79</sup> Quite a number of countries made proposals pointing to the consistency of derogation with international law and international agreements. For one, there was a paragraph proposed by the U.S which stated that any derogation to human rights should be compatible with international law and international agreements.<sup>80</sup> A similar proposal was made by the Belgian delegation.<sup>81</sup> Both the aforementioned proposals were still placed in para. 2 of the derogation article. It was not until the U.K made a similar proposal in the Commission's eighth session, that the requirement for consistency with international law was moved to para. 1.<sup>82</sup> One of the reasons that brought about this change was to keep the derogation clause of the Covenant in "line with Article 15 of the ECHR", and the second reason being to connect it directly to the exercise of the right to derogation.<sup>83</sup> This means that a State could not invoke Art. 15 to release itself from its other obligations under international law if the measures "go beyond those 'strictly required by the exigencies of the situation' in their legitimacy." The precedence of States obligations under international law is expressly stipulated by Art. 103 of the U.N Charter, which provides that, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".<sup>84</sup> One could therefore deduce that the reference to the U.N Charter is another regulated obligation under international law. Art. 53 of the ECHR also reads, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any high contracting party or under any other agreement to which it is a party",<sup>85</sup> which entails the barring of inconsistency with international obligations.

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<sup>78</sup> *Draft International Covenant on Human rights and measures of implementation: future work of the Commission on Human Rights*, 4 December 1950, A/RES/421

<sup>79</sup> HARTMAN, Joan. Working Paper for the Committee of Experts on the Article 4 Derogation Provision. *Human Rights Quarterly*, Vol. 7, No. 1 (Feb., 1985), pp. 89-131

<sup>80</sup> *ibidem*

<sup>81</sup> *ibidem*

<sup>82</sup> *ibidem*

<sup>83</sup> ZEIDY. *The ECHR and States of Emergency...*, 2003

<sup>84</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>85</sup> ECHR, Art. 53

ICCPR recognizes and protects the right to life of all human beings.<sup>86</sup> The right to life is recognized as forming part of *jus cogens*<sup>87</sup> and entailing, obligations *erga omnes* toward the international community as a whole.<sup>88</sup> No derogation is permitted from the right to life, even in situations of public emergencies that threaten the life of the nation.<sup>89</sup> The right to life must be respected and ensured without distinction of any kind or any status.<sup>90</sup>

As a general rule, States have the sovereign right to regulate entry into their own territories.<sup>91</sup> Nevertheless, the 2005 International Health Regulations (“IHR”)<sup>92</sup>, which are binding on all WHO Member States (i.e., practically all States in the world), impose limitations on the sovereign right of States to adopt “additional health measures” (including entry regulations) in response to disease.<sup>93</sup> The IHR were adopted under Article 21 of the WHO Constitution, and Article 22 provides in relevant part that “Regulations adopted pursuant to Article 21 shall come into force for all Members.”

Moreover, WHO refers to the IHR as a “binding instrument of international law.”<sup>94</sup> EU Member States are parties to the United Nation’s Charter<sup>95</sup>, the Constitution of the World Health Organization (“WHO”), and the 2005 International Health Regulations (“IHR”).<sup>96</sup> Just as the United Nations Charter provides the legal framework for international cooperation, the WHO Constitution and the IHR establish a framework of rights and obligations during public health events. IHR is the legal framework of WHO in order to prevent the disease epidemics from spreading globally.<sup>97</sup> The purpose of the IHR is to protect individuals from the global spread of

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<sup>86</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [“ICCPR”], Art.6.

<sup>87</sup> The Vienna Convention on the Law of Treaties, in force Jan. 27, 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969), [“VCLT”] Art.53.

<sup>88</sup> RIBERO, A.V. Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. E/ CN.4/1987/35 (1987).

<sup>89</sup> Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; *Camargo v. Colombia*, communication No. 45/1979, para. 13.1.

<sup>90</sup> ICCPR

<sup>91</sup> BESSON, Samantha. Sovereignty. Max Planck Encyclopedia of Public International Law [MPEPIL]

<sup>92</sup> World Health Organization. International Health Regulations (2005), 2nd edn. Geneva: World Health Organization, 2008.

<sup>93</sup> *ibidem*

<sup>94</sup> *ibidem*

<sup>95</sup> UN Charter

<sup>96</sup> *ibidem*

<sup>97</sup> WTO Agreements & Public Health, Executive Summary, World Trade Organization / World Health Organization, 2002, p. 13.

disease,<sup>98</sup> prevent needless measures that result in economic harm, and encourage countries to report new and unknown risks to authorities.<sup>99</sup> As a party to the IHR, Member States are not only bound by the terms of the treaty, but also bound not to frustrate the object and purpose.<sup>100</sup>

Article 43 of the IHR specifies State Parties are not precluded from implementing additional health measures. However, additional measures must achieve the same or greater health protection and shall not be more restrictive of international traffic.<sup>101</sup> State parties to the IHR may not implement additional measures as mere precaution. Rather, they must be grounded in the best scientific evidence available.<sup>102</sup> Member States breached its obligations under the IHR because it failed to ensure the regulations were justified and reflected the best available scientific data.<sup>103</sup>

In addition, IHR demands that health measures be implemented with full respect for the dignity, human rights, and fundamental freedoms of persons.<sup>104</sup> Travel bans during past outbreaks have been found to have limited public health effectiveness,<sup>105</sup> as the prevention of disease is inseparably linked to international cooperation and basic rights protection,<sup>106</sup> especially related to the freedom of movement. Several different international instruments express the aspect of freedom of movement known as the right to leave.<sup>107</sup> This right of freedom of movement and right to leave are explicitly provided in ICCPR<sup>108</sup>, UDHR<sup>109</sup> and several other international instruments.<sup>110</sup>

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<sup>98</sup> International Health Regulations (2005)—3rd ed., Art. 43.

<sup>99</sup> *ibidem*

<sup>100</sup> Vienna Convention on the Law of Treaties, 1115 U.N.T.S. 331 (1969), Art. 18.

<sup>101</sup> International Health Regulations, Art. 43.1.

<sup>102</sup> *Do not violate the International Health Regulations during the COVID-19 outbreak*, The Lancet Vol. 395 February 29, 2020.

<sup>103</sup> International Health Regulations, Art. 43.

<sup>104</sup> *IHR*, Art.3.

<sup>105</sup> ERRETT, N.A rrett *et al.*, J. Emerg. Manag. 8, 7 (2020).

<sup>106</sup> Human Rights Watch, Human Rights Dimensions of COVID-19 Response (2020).

<sup>107</sup> CHETAİL, Vincent. Freedom of Movement and Transnational Migrations: A Human Rights Perspective, in Migration and International Legal Norms 47 (T. Alexander Aleinikoff et al. eds., 2003).

<sup>108</sup> *ICCPR*, Art.12, .

<sup>109</sup> Article 13, Universal Declaration of Human Rights (UDHR), G.A. Res. 217 A (III) of 10 Dec. 1948; Richard B. Lillich, *Civil Rights in Human Rights in International Law: Legal and Policy Issues* 115, 149-52 (Thomas Meron ed., 1984) (1983).

<sup>110</sup> G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live,( Art. 5).

**i. Member States Has Certain Obligations Regarding Article 2, 3, 42 and 43 of IHR**

Article 2 requires the maintenance of the balance between “prevent, protect against, control and provide a public health response to the international spread of disease” and to avoid “unnecessary interference with international traffic and trade”.<sup>111</sup>

Article 3 requires the principles that will be used in the implementations of the Regulations must be “with full respect for the dignity, human rights and fundamental freedoms of persons”.<sup>112</sup> It can be reached that international law principles of necessity, legitimacy and proportionality should be reflected in the implementations of the health measures in order to oversee the limitations and the derogations of rights and freedoms.<sup>113</sup> Article 42 requires that additional measures must be taken in a non-discriminatory manner.<sup>114</sup> As a connection between the Articles 3 and 42, it is widely accepted in an international agreement that the states “condemn racial discrimination“ and should take measures to eliminate racism.<sup>115</sup>

State parties can implement additional health measures as a response to PHEIC.<sup>116</sup> The additional measures may achieve the same or greater levels of health protection than the WHO recommendations under the condition that these measures are otherwise consistent with the IHR.<sup>117</sup> Such measures are required to be based on scientific principles and evidence, where the scientific evidence is insufficient the other relevant intergovernmental organizations and the guidance or

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<sup>111</sup> IHR, Art. 2; FOSTER, C. “Justified Border Closures Do Not Violate the IHR 2005”, *EJIL: Talk!*, June 11 2020, p. 2.

<sup>112</sup> IHR, Art. 3.

<sup>113</sup> HABIBI, Roojin et al., “Do not violate the International Health Regulations during the COVID-19 outbreak,” *The Lancet*, Vol. 395, No. 10225 (13 February 2020), p. 664

<sup>114</sup> IHR, Art. 42.

<sup>115</sup> General Assembly of the United Nations, “International Convention on the Elimination of All Forms of Racial Discrimination”, Dec 21 1965.

<sup>116</sup> TEJPAN, A ; HOFFMAN, S. “Canada’s Violation of International Law During the 2014-16 Ebola Outbreak”, *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 54, 2016, p.373.

<sup>117</sup> IHR, Art. 43(1).

advice from the WHO.<sup>118</sup> States should not be more invasive to persons or more restrictive of international traffic than reasonably available alternatives.<sup>119</sup> Moreover, public health rationales and scientific information must be provided to WHO if a significant interference with international traffic occurs.<sup>120</sup>

Under the IHR, it is binding on all World Health Organization (WHO) member states<sup>121</sup> to ensure that the health measures are not more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives.<sup>122</sup> Both instruments, IHR and Sanitary and Phytosanitary Measures (SPS) Agreements, require measures not to be more restrictive than required to achieve the appropriate level of health protection.<sup>123</sup> Both instruments also require that parties base their determinations to adopt such measures on scientific principles and scientific evidence.<sup>124</sup> Furthermore, when it comes to the scientific basis for measures, many have argued<sup>125</sup> that travel restrictions are not effective in preventing the spread of disease, because at best, they delay the introduction of a disease rather than preventing it.<sup>126</sup>

#### **2.2.4. Non-derogable or intangible rights**

The second part of Art. 15 is the most important in relation to the current research. It embodies the principle of non *derogability* of fundamental rights.<sup>127</sup> This principle is considered to be one of the most significant principles in regulating human rights in times of emergency contained in the derogation clause. Art. 15(2) ECHR prohibits derogation of certain specific rights even in time of

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<sup>118</sup> IHR, Art. 43(2); GOSTIN, L.O et al. “Has Global Health Law Risen to Meet the Covid19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats.” *The Journal of Law, Medicine & Ethics*, 48, 2020.

<sup>119</sup> IHR, Art 43(1).

<sup>120</sup> Ibidem, Art. 43(3).

<sup>121</sup> WHO, “International Health Regulations, WHA 58.3” (World Health Organization, Geneva, ed. 2, 2005).

<sup>122</sup> International Health Regulations, 2005, [“IHR”], Art. 43.

<sup>123</sup> Sanitary and Phytosanitary Measures, 1995 [“SPS Agreement”], Art.5.6.

<sup>124</sup> *SPS Agreement*, Article 43(2); Article 2.2.

<sup>125</sup> World Health Organization Updated WHO recommendations for international traffic in relation to COVID-19 outbreak; Tejpar ALI, Hoffman SJ. Canada’s Violation of International Law during the 2014–16 Ebola Outbreak; World Health Organization Novel coronavirus (2019-nCoV) situation report – 39.

<sup>126</sup> Ibidem

<sup>127</sup> ECHR

war and public emergency and it establishes a clear limitation on the rights of states to take such measure which derogates from human rights standards. States are prohibited to take measures which will result in deprivation of life with the exception of death resulting from lawful acts of war (Art. 2),<sup>128</sup> torture or inhuman or degrading treatment or punishment (Art. 3)<sup>129</sup> among other peremptory norms. With regard to this research, focus will be on Art. 2 and Art. 3.

### **i. Article 2 (right to life)**

Article 2(1) of the European Convention of Human Rights provides that:

*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*<sup>130</sup>

Article 2 of the ECHR ranks as one of the most fundamental provisions in the Convention, one which in peace time, admits of no derogation under Article 15. Together with Article 3, it protects one of the basic values of the democratic societies making up the Council of Europe (Giuliani and Gaggio v. Italy [GC], para. 174)<sup>131</sup>, therefore, its provisions must be strictly construed (McCann and Others v. the United Kingdom, § 147)<sup>132</sup>. Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 130)<sup>133</sup>, delimited by a list of exceptions (Boso v. Italy (dec.))<sup>134</sup>.

In McCann and Others v. the United Kingdom case of 27 September 1995, three members of the Provisional IRA, suspected of having a remote-control device to detonate a bomb, were shot dead in a street in Gibraltar by SAS (Special Air Service) soldiers.<sup>135</sup> The applicants, who were heirs of

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<sup>128</sup> Ibidem

<sup>129</sup> Ibidem

<sup>130</sup> ECHR, Art. 2(1)

<sup>131</sup> Giuliani and Gaggio v Italy [2011] ECHR 513

<sup>132</sup> McCann and Others v UK (App.No. 18984/91); [1995] ECHR 18984/91

<sup>133</sup> Centre For Legal Resources On Behalf of Valentin Câmpeanu v. Romania. ECHR 222 (2014)

<sup>134</sup> Boso v. Italy 50490/99, Eur. Ct. H.R. 846 (2002)

<sup>135</sup> McCann and Others v UK (App.No. 18984/91); [1995] ECHR 18984/91

the deceased, argued that the use of lethal force by the security services constituted a violation of Article 2 of the Convention.

The right to life is also enshrined in Article 2 of the Charter of Fundamental Rights which provides that, “Everyone has the right to life”<sup>136</sup> and also under Article 3 of the Universal Declaration of Human Rights, which stipulates that, “Everyone has the right to life, liberty and security of person.”<sup>137</sup> From the above Member States have breached their international obligations by depriving the migrants their inherent right to life.

**ii. Article 3 (prohibition of torture and inhuman or degrading punishment or treatment)**

The Court’s jurisprudence on Article 3 was first established in 1989 in the *Soering v United Kingdom* case, concerning an extradition against the United Kingdom involving a German national accused of a capital offence in the United States.<sup>138</sup> The Court found there would be a breach of Article 3 if he were to be extradited. Two years later, the Court confirmed in two separate Judgements that the expulsion of an asylum-seeker may also give rise to an issue under Article 3. This was reaffirmed in *Chahal v. United Kingdom*<sup>139</sup> which found that the deportation of Mr Chahal, a rejected asylum-seeker, would give rise to a violation of Article 3. The Court ruled that, “ ... the expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country”<sup>140</sup>. Prohibition of torture is also enshrined in Article 4 of the Charter of Fundamental Rights of the European Union, which

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<sup>136</sup> Charter of Fundamental Rights, Art 2

<sup>137</sup> UDHR, Art. 3

<sup>138</sup> *Soering v United Kingdom* 161 Eur. Ct. H.R. (ser. A) (1989)

<sup>139</sup> *Chahal v UK* [1996] 23 EHRR 413

<sup>140</sup> *Ibidem*

provides that: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.<sup>141</sup>

### **a. Right to seek asylum and principle of non-refoulement as a jus cogens norm**

The only international instrument which explicitly recognises the right to asylum when someone fears prosecution in the home state is the UDHR, however it is not a legally binding instrument.<sup>142</sup> On the contrary, other international human rights and international humanitarian law instruments such as the International Convention Relating to Status of Refugees 1951<sup>143</sup> (hereinafter the Refugee Convention) lack explicit recognition of the right to asylum. Nevertheless, there is explicit recognition of the right to seek asylum at regional level, enshrined in legally binding human rights instruments including the American Convention on Human Rights 1969 (ACHR)<sup>144</sup>, the African Charter on Human Rights<sup>145</sup>, and the Charter of the Fundamental Rights of the European Union 2000 (CFREU)<sup>146</sup>. It is worth noting that some of these regional instruments put conditions on the application of the right to seek asylum provision, for example, Art. 22(7) of the ACHR and Art. 12(3) of the ACHPR both places a balance on the right against the domestic law of the party state concerned and international law. This is also the case with the CRFEU, which, in its Art. 18, aligns the right with the scope of the Refugee Convention. The case-law of the ECtHR give acknowledgement that the Party States have an uncontested right to control the entry of aliens at the borders<sup>147</sup>, supporting the argument that access to international protection is balanced against conditionalities and qualification established under international law. An asylum seeker therefore must establish the existence of persecution in the home state or the state of the

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<sup>141</sup> Charter of Fundamental Rights, (n4)

<sup>142</sup> *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

<sup>143</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

<sup>144</sup> American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969

<sup>145</sup> African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

<sup>146</sup> Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

<sup>147</sup> BIGO, Didier. Immigration controls and free movement in Europe. *International Review of the Red Cross*. Volume 91 Number 875, 2009

previous residence.<sup>148</sup> The right to seek asylum procedures is derived from the principle of *non-refoulement*.<sup>149</sup>

Art. 33 of the Refugee Convention prohibits party states from expelling a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>150</sup> Prohibition of torture and expulsion of aliens enshrined under various international humanitarian law and international human rights instruments has also been interpreted in a way to recognise the principle of *non-refoulement*. The absoluteness of the principle of *non-refoulement* is further vindicated by Article 19(1) of the Protocol against the Smuggling of Migrants which specifically enshrines that, “nothing in this Protocol shall affect the responsibilities of States in relation to the Refugee Convention and the principle of *non-refoulement* as contained therein”<sup>151</sup>. Therefore, the universal recognition of the principle of *non-refoulement* makes it a *jus cogen* norm. This proves that it is a principle of international law from which nation-states cannot derogate from thereby entitling asylum seekers their right to seek asylum

## 2.3. Procedural Requirements

### 2.3.1. State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed

On procedural level, as stipulated by Art. 15(3) of the ECHR, a State exercising a right of derogation have a duty to notify the Secretary General of the Council of Europe.<sup>152</sup> The notice must refer to the measures that the State has taken, the reasons justifying adopting such measures and the date on which they cease to apply. Given the emergency situation in the country, Ukraine notified the Secretary General of the Council of Europe on the 5<sup>th</sup> of June 2015 that the authorities

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<sup>148</sup> PHILLIPS, Janet. Asylum seekers and refugees: what are the facts? Parliament of Australia, Department of Parliamentary Services. Parliamentary Library, 2011

<sup>149</sup> ARENILLA, Shirley. Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. Anuario Mexicano de Derecho Internacional, Volume 15, Issue 1, 2015, Pages 283-322

<sup>150</sup> Refugee Convention, Art. 33

<sup>151</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

<sup>152</sup> ECHR, Art. 15(3)

of Ukraine had decided to derogate from some of its Convention obligations by invoking Art. 15 of the ECHR.<sup>153</sup> This is a typical example of a State fulfilling the procedural requirement of the derogation clause. Case law where a State argued the non-applicability of Art. 15 in the absence of a formal and public notice of derogation is the 1983 *Cyprus v Turkey* case.<sup>154</sup> The case concerned the situation existing in Northern Cyprus since the conducting of military operations in this region by Turkey in July and August 1974. The Cypriot Government had argued that Turkey continued to occupy 40% of the territory of the Republic of Cyprus and alleged violations by Turkey of certain Convention provisions.<sup>155</sup>

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<sup>153</sup> See the news release published on the Secretary General's website on 10 June 2015. See also the Ukrainian Government's declarations related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 4 November 2015, 30 June 2016 and 2 February 2017. See, more recently: Communication and partial withdrawal of a derogation registered by the Secretariat General on 3 December 2019.

<sup>154</sup> ECtHR, *Derogation in time of emergency*

<sup>155</sup> *Ibidem*

## CHAPTER THREE: ARTICLE 15 ECHR IN RELATION TO THE COVID-19 CRISIS

### 3.1. Introduction

The previous chapter discussed the requirements and preconditions of adopting Art. 15 of the ECHR. The purpose of this chapter is to introduce the research methodology used to explore the current use and legality of Art. 15 in relation to the COVID-19 pandemic on immigrants and asylum seekers. This chapter will focus on the current research, how states adopted the derogation clause, and if all the requirements were met during the state of emergency called in response to the COVID-19 pandemic. The aim of this chapter is to assess the legality of the measures taken in response to the pandemic by analyzing whether the derogation clause was adopted properly. The methodology used in the current research is secondary research. The researcher relied heavily on text from books, articles, news and newspaper articles that had been documenting the development of COVID-19 and the response of the EU.

As will be fully discussed in this chapter, the rights of migrants, regardless of their legal status to seek and enjoy asylum, right to life, health, prohibition of non-degrading and inhumane treatment and also the principle of *non-refoulement* have all been compromised by the adoption of Art. 15 ECHR.<sup>156</sup> The right to seek and enjoy asylum is guaranteed by Art. 18 of the Charter of Fundamental Rights.<sup>157</sup> The principle of *non-refoulement* prohibits States from transferring anyone to a country or territory where their life and freedom would be threatened, hence it is one of the most crucial limitations on States under international law on the rights of States to control entry into their territories and expel aliens as an expression of their sovereignty.<sup>158</sup> The main issue is that the restrictions were applied in a discriminatory manner, which goes against the conditions set forth in Art. 15. For instance, in Greece, a nationwide lockdown which was implemented in March

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<sup>156</sup> LEBRET, Audrey. COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015

<sup>157</sup> CRFEU, Art. 18

<sup>158</sup> Goodwin-Gill, G. The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement, *International Journal of Refugee Law*, Volume 23, Issue 3, October 2011, Pages 443–457, <https://doi.org/10.1093/ijrl/eer018>

2020, in response to the outbreak of the Corona virus pandemic, was eased in May for the general population.<sup>159</sup> On the other hand, the government maintained discriminatory restrictions of thousands of migrants and asylum seekers confined in camps on the islands and mainland in abysmal conditions amid the COVID-19 crisis.<sup>160</sup> It also failed to take measures to alleviate the overcrowdings in camps or to improve the sanitation in the camps thereby jeopardizing the health of these vulnerable communities.<sup>161</sup> A new law was put in place, which limited asylum seekers' access to protection and unaccompanied children were often held in police custody or detention,<sup>162</sup> subjecting them to inhumane and degrading treatment, which is a *non-derogable* right therefore the adoption of Art. 15 in this case is illegal. The sea ports of entry also witnessed the sending back of boats with immigrants, in the Mediterranean and people were dying in the middle of the sea.<sup>163</sup> This action doesn't only violate the right to life, but also goes against the principle of *non-refoulement*. Therefore, these measures taken violates the migrants and asylum seekers' rights under the Convention, as well as states obligations under international law as the actions are also not compatible with the derogation requirements under ICCPR and UDHR.

### **3.2. Is the COVID-19 Crisis a public emergency threatening the life of the nation?**

As this is the first precondition set out in Art. 15(1) of the ECHR, the research will first establish whether the pandemic can be classified as a public emergency threatening the life of the nation. As mentioned in the previous chapter, the Court is rather vague as to the interpretation of situations which can be fit under this classification. Following customary law definition, established in the *Lawless* case, a public emergency is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.<sup>164</sup> In this regard, it is safe to conclude that the pandemic indeed falls in the

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<sup>159</sup> KONDILIS, Elias, et al. The impact of the COVID-19 pandemic on refugees and asylum seekers in Greece: A retrospective analysis of national surveillance data from 2020. *EClinicalMedicine* 37 (2021) 100958

<sup>160</sup> Human Rights Watch. Greece Events of 2020: World Report 2021. [online] [cit. on 9th June 2021]. Accessible at <https://www.hrw.org/world-report/2021/country-chapters/greece>

<sup>161</sup> *Ibidem*

<sup>162</sup> *Ibidem*

<sup>163</sup> *Ibidem*

<sup>164</sup> *Lawless v Ireland* (No 3), *Lawless v Ireland*, Judgment on Merits, App no 332/57 (A/3), [1961] ECHR 2

scope of a public emergency threatening the life of the nation, as its spread poses a threat to health and life, which was witnessed during 2020 across the world<sup>165</sup>, and also 2021, although there have been established vaccine and other ways to manage the spread now. Another acceptable definition among many scholars is that public emergency is whereby the well-being of the community in terms of the physical well-being of the population is at stake<sup>166</sup>, and as Steven Greer put it, generally, any substantial violence or unrest short of war is most likely to fall within the scope of a “public emergency threatening the life of the nation”.<sup>167</sup> As mentioned above, the pandemic was a foreseeable threat at the time the measures were invoked and Art. 15 was adopted, and continues to be a threat to the physical well-being of the population to date as no cure have been found yet. Having concluded that the coronavirus pandemic falls within crisis allowed for derogation, the research moves to the other precondition of Art. 15(1) ECHR, that is, to establish the necessity of the measures taken and if so, how proportionate the measures are in relation to the current crisis.

### **3.3. Were the measures taken to derogate from Convention obligations only to the extent strictly required by the situation?**

This other condition set out in Art. 15(1) ECHR seems to be the most crucial requirement, as it reflects the core of the derogation clause, which in reality, views the machinery of the Strasbourg organs in balancing and assessing the situation, circumstances and measures taken by states during emergencies.<sup>168</sup> In determining the “strictly required” character of the derogations taken to curb the coronavirus pandemic, the research will examine three factors. These are, (i) The necessity of the measures taken to cope with the threat to public health posed by the pandemic in relation to illegal migrants and asylum seekers. (ii) The proportionality of the measures that were being applied to the illegal immigrants and asylum seeker in view of the threat posed by the pandemic.

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<sup>165</sup> World Health Organization. Coronavirus disease (COVID-19) pandemic. [online] [cit. on 9th June 2021]. Accessible at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

<sup>166</sup> European Commission. Annex of the Commission Implementing Decision on the Special Measure ‘EU COVID-19 Solidarity Programme for the Eastern Partnership for 2020’ [online] [cit. on 13<sup>th</sup> September 2020]. Accessible at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/c2020\\_3048\\_annex.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/c2020_3048_annex.pdf)

<sup>167</sup> GREER, Steven. Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law? Oxford: Human Rights Law Review, 2015, 0, 1–37

<sup>168</sup> GREER, Steven. The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights. Human rights files No. 17, Council of Europe Publishing F-67075 Strasbourg Cedex, 2000.

(iii) The duration of the derogations, which is the most problematic point here, since most states put measures for an indefinite period as the virus was and is still new, and there is no knowledge yet, of when the world will return to a covid free zone.<sup>169</sup> Furthermore, as established by the *Brannigan & McBride v. United Kingdom* judgment,<sup>170</sup> an additional element which is the most crucial factor to give appropriate weight to on top of the aforementioned three is the nature of the rights affected by the derogation.

### **3.3.1. The necessity of the measures taken to cope with the threat to public health posed by the pandemic in relation to illegal migrants and asylum seekers**

Necessity in a democratic society in derogations from human rights standards in emergencies involves two conflicting interests; the interest that other states have in the derogating state respecting fundamental human rights obligations or the interest of those under the jurisdiction of the state to have their human rights respected, and the interest of the derogating state in safeguarding the life of the nation or the whole society.<sup>171</sup> The strict requirements for the application or invocation of the Doctrine of State Necessity are to be found in ILC Draft on State Responsibility.<sup>172</sup> In the thirty-second meeting, Professor Roberto Ago, the former special rapporteur on state responsibility, submitted a draft article on this topic to the Commission.<sup>173</sup> Article 33 of the draft focused on the Doctrine of State Necessity and set out specific conditions for a valid plea of necessity.<sup>174</sup> Among those conditions, that "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril .... "<sup>175</sup> The latter condition is reflected through the language of the derogation clause. Moreover, the Principle of

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<sup>169</sup> European Court of Human Rights. Factsheet: Derogation in time of emergency. [online] [cit. on 13th September 2020]. Accessible at [https://www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf)

<sup>170</sup> *Brannigan and McBride v United Kingdom*, Decision on merits, App No 14553/89, App No 14554/89, A/258-B, IHRL 2592 (ECHR 1993), 25th May 1993, European Court of Human Rights [ECHR]

<sup>171</sup> ORAA, *supra* note 1, at 222-23. Sir Hersch Lauterpacht stated: "It is axiomatic that the natural rights of the individual find a necessary limit in the natural rights of other persons." Hartman, *supra* note 4, at 11.

<sup>172</sup> Current Developments: The Thirty-Second Session of the International Law Commission, 74 AM. J. INT'L L. 961 (Stephen Schwebel ed., 1980).

<sup>173</sup> *ibidem* page ninehundred and sixty two

<sup>174</sup> *ibidem*

<sup>175</sup> *ibidem*

Proportionality must be fulfilled, and the derogation should cease or terminate once the threat or danger has ended (the Principle of Temporariness).<sup>176</sup>

Given their impact on fundamental rights and freedoms and on the normal functioning of democracy, emergency measures need to be carefully examined, matched with adequate legal safeguards, and subject to close democratic scrutiny.<sup>177</sup>

### **3.3.2. The proportionality of the measures taken to cope with the threat to public health posed by the pandemic in relation to illegal migrants and asylum seekers**

The doctrine of proportionality implies that the measures taken in derogating from states obligations must be appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.<sup>178</sup> The research found that the measures taken to curb the coronavirus pandemic were not proportionate as they were discriminatory towards the illegal immigrants and asylum seekers. One notable instance of such discriminatory application is on the entry regulations put in place which includes distinction on the basis of nationality between asylum seekers, refugees and citizens.<sup>179</sup>

Some Member States entry regulations are discriminatory in nature as it includes distinction on basis of nationality between refugees and asylum seekers and the citizens<sup>180</sup> which is not only a violation of treaty obligations under ICCPR but also in violation of customary international law and a rule of *jus cogens*;<sup>181</sup> right to life.<sup>182</sup> In Greece, a nationwide lockdown which was implemented in March 2020 was eased for the general population in May, but discriminatory

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<sup>176</sup> ZEIDY, Mohamed M. The ECHR and States of Emergency

<sup>177</sup> European Parliament. States of emergency in response to the coronavirus crisis: Situation in certain Member States II. [online] [cit. on 9th June 2021]. Accessible at

[https://www.europarl.europa.eu/thinktank/cs/document.html?reference=EPRS\\_BR!%282020%29651914](https://www.europarl.europa.eu/thinktank/cs/document.html?reference=EPRS_BR!%282020%29651914)

<sup>178</sup> OHCHR. EMERGENCY MEASURES AND COVID-19: GUIDANCE. . [online] [cit. on 9th June 2021]. Accessible at [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_Covid19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_Covid19.pdf)

<sup>179</sup> Human Rights Watch. Greece Events of 2020

<sup>180</sup> Ibidem

<sup>181</sup> *VCLT* Art.53.

<sup>182</sup> Gormley, The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *Jus Cogens* in The Right of Life in International Law 120, 122 (B. Ramcharan, cd. 1985).

restrictions were maintained on thousands of migrants and asylum seekers both in the mainland and those living in camps on the islands.<sup>183</sup>

Another notable form of breach of the proportionality principle is proved by the difference in treatment of school going age kids on the basis of nationality during the second wave period of the COVID-19 pandemic. Reports pointed out that as of early October, children living in migrant camps on the Greek mainland were unable to attend school, the Government justifying the restrictions under the guise of lockdown due to Covid-19 cases in these facilities.<sup>184</sup> This was also the case on the Aegean islands of Lesbos and Samos, whereby only around 50 of more than 4,000 school-age migrant and refugee children on were enrolled in schools, according to humanitarian agencies.<sup>185</sup> Unaccompanied children who traveled on to France after spending a year or more in Italy, regularly told Human Rights Watch that lack of access to education and other poor reception conditions were factors in their decisions to leave.<sup>186</sup>

Even in France, there were reports of discrimination in treatment of unaccompanied migrant children, who were being denied access to basic rights and care to which they are entitled to.<sup>187</sup> One such report came from the French National Human Rights Consultative Commission (CNCDDH) and the French Ombudsperson.<sup>188</sup> Some of the basic rights which the Child protection authorities in different regions of the country failed to provide are shelter and other essential services even during the Covid-19 pandemic, putting them at further risk.<sup>189</sup> Unaccompanied children camped in a park in Paris in July, for at least a month, before the authorities gave them shelter in a gymnasium, and they had to wait for a long while after, to be placed in permanent accommodation.<sup>190</sup> On the 30<sup>th</sup> of March 2020, France was ordered by the ECtHR to provide food and housing until the end of the COVID-19 lockdown, to a Guinean boy

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<sup>183</sup> Human Rights Watch. Greece Events of 2020

<sup>184</sup> Human Rights Watch. Greece: Stop Denying Refugee Children an Education, JULY 29, 2021. [online] [cit. on 9th June 2021]. Accessible at <https://www.hrw.org/node/379328/printable/print>

<sup>185</sup> Ibidem

<sup>186</sup> World Report 2021: Events of 2020

<sup>187</sup> World Report 2021 : France Events of 2020. [online] [cit. on 9th June 2021]. Accessible at <https://www.hrw.org/world-report/2021/country-chapters/france>

<sup>188</sup> Ibidem

<sup>189</sup> World Report 2021: Events of 2020

<sup>190</sup> Human Rights Watch. Unaccompanied Migrant Children Sleeping Outside in Paris: Authorities Should Urgently Protect Them, Give Them Shelter. [online] [cit. on 9th June 2021]. Accessible at <https://www.hrw.org/news/2020/07/24/unaccompanied-migrant-children-sleeping-outside-paris>

who had ended up on the streets after authorities had refused to recognize him as a child.<sup>191</sup> The Court also ruled in July 2020 that the French Government had violated the rights of three asylum seekers when it deprived their entitled material and financial support, which forced them to live in the streets in “inhuman and degrading living conditions.”<sup>192</sup>

Another measure put in place which was discriminatory and was not adopted to the extent strictly required by the situation is the maltreatment of NGOs that were providing assistance to migrants and aid workers, in states such as Greece, Italy, Malta and Cyprus.<sup>193</sup> In Calais, reports emerged that such humanitarian NGOs faced continued harassment and abuse by police against migrants and aid workers.<sup>194</sup> The discriminatory treatment went as far as the interior minister prohibiting food distribution by NGOs not contracted by the State, from September and such treatment continued through December.<sup>195</sup> According to the French Ombudsperson, the measures constitutes discriminatory based on nationality since this was targeted on migrants and asylum seekers.<sup>196</sup> The Greece-Turkey border crisis of March 2020 also witnessed a devastatingly concerning series of attacks against people working for international and NGOs including UNHCR, aid workers and journalists, after provocative comments were made by government officials targeting NGOs working with refugees.<sup>197</sup> These reckless comments sparked angry mob attacks in areas such as Lesbos, whereby NGO facilities and vehicles were destroyed.<sup>198</sup> As a result, some of these NGOs suspended operations and evacuated their volunteers back to Athens.<sup>199</sup>

After declaring the Italian ports as “unsafe” due to the Covid-19 pandemic, the authorities allowed, often unjustified delays, nongovernmental organizations to disembark rescued people, then began impounding ships citing technical or administrative grounds.<sup>200</sup> One notable example of such a

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<sup>191</sup> World Report 2021 : France Events of 2020

<sup>192</sup> Ibidem

<sup>193</sup> BRADBY, Hannah et al. Policy Makers', NGO, and Healthcare Workers' Accounts of Migrants' and Refugees' Healthcare Access Across Europe—Human Rights and Citizenship Based Claims. *Frontiers in Sociology Journal*, Vol. 5, 2020

<sup>194</sup> World Report 2021 : France Events of 2020

<sup>195</sup> Ibidem

<sup>196</sup> Ibidem

<sup>197</sup> ADAR, Sinem et al. The Refugee Drama in Syria, Turkey, and Greece: Why a Comprehensive Approach Is Needed. *Stiftung Wissenschaft und Politik* [online] [cit. on 10<sup>th</sup> June 2021]. Accessible at <https://www.swp-berlin.org/publikation/the-refugee-drama-in-syria-turkey-and-greece>

<sup>198</sup> Ibidem

<sup>199</sup> Ibidem

<sup>200</sup> Human Rights Watch. World Report 2021: Italy Events of 2020. *World Report 2021*. [online] [cit. on 10th June 2021]. Accessible at <https://www.hrw.org/world-report/2021/country-chapters/italy>

disproportionate measure is when an airplane deployed by Sea Watch, a rescue group, to spot boats in distress in the Mediterranean, in September 2020, was grounded by the Italian government.<sup>201</sup> The authorities went further and impounded the rescue ship operated by the NGO with Médecins Sans Frontières.<sup>202</sup>

These measures which clearly are not necessary to the extent required by the situation, were noted with concern by the UN special rapporteur on the situation of human rights defenders called on Italy in October 2020, to end the criminalization of humanitarian rescuers.<sup>203</sup> The special rapporteur also highlighted the open cases against Carola Rackete, the captain of a Sea Watch ship, and 10 crew members of the Iuventa rescue ship.<sup>204</sup>

In addition, another clear form of discriminatory measure which is not proportionate is entry restrictions applied for citizens and migrants and refugees, where discrimination based on nationality was applied. When the pandemic was in its early stages, the EU governments organized charter flights to bring back hundreds of thousands of their citizens from all around the world.<sup>205</sup> On the contrary, there were no such airlifts available to refugees' family members, or to thousands of people who were desperate in war-torn Libya,<sup>206</sup> or at the very least, thousands of asylum seekers detained in miserable camps on the Greek islands. This caused even more suffering for asylum seekers stuck in countries such as Lebanon, internally displaced people in Syria, Somali refugees in Kenya, thousands of Eritrean refugees in Ethiopian exile as family members could not join, because of the stringent entry measures put in place, those refugees who have been accepted by European governments.

To conclude on the adoption of disproportionate measures, as the Human Rights Watch put it, "European governments' actions to close their ports to people rescued at sea puts lives at risk and

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<sup>201</sup> Ibidem

<sup>202</sup> Ibidem

<sup>203</sup> OHCHR. Italy: UN expert condemns 'criminalization' of those saving lives in the Mediterranean. [online] [cit. on 10th June 2021]. Accessible at

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26361&LangID=E>

<sup>204</sup> Ibidem

<sup>205</sup> European Parliament. Repatriation of EU citizens during the COVID-19 crisis The role of the EU Civil Protection Mechanism. European Parliamentary Research Service. [online] [cit. on 10th June 2021]. Accessible at

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649359/EPRS\\_BRI\(2020\)649359\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649359/EPRS_BRI(2020)649359_EN.pdf)

<sup>206</sup> Amnesty International. Libya: 'NO ONE WILL LOOK FOR YOU' FORCIBLY RETURNED FROM SEA TO ABUSIVE DETENTION IN LIBYA. [online] [cit. on 10th June 2021]. Accessible at

<https://www.amnesty.org/download/Documents/MDE1944392021ENGLISH.pdf>

cannot be justified on public health grounds”.<sup>207</sup> The imperative to protect the right to health in a pandemic can be met without blocking life-saving rescue.<sup>208</sup>

### 3.4. *Non-derogable* rights as stipulated by Art. 15(2) ECHR

Art. 15(2) ECHR provides that, “No derogation from Article 2....., or from Article 3 ....”<sup>209</sup>

#### 3.4.1. Right to seek and enjoy asylum

Article 18 of the Charter of Fundamental Rights provides that:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).<sup>210</sup>

Indeed, asylum, as an institution of international law, has a long history. It was first recognised as an individual right in Article 14 of the 1948 Universal Declaration of Human Rights<sup>211</sup>, which states that *everyone has the right to seek and to enjoy in other countries asylum from persecution*.

As a first response to the corona virus pandemic, many migrants and many refugees were stranded at sea on boats and no states wanted to or were willing to receive them.<sup>212</sup> Even though states have the right to manage their borders and also the right to manage the public health emergency situations, this however, should not be at the expense of human rights. Asylum procedures have to

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<sup>207</sup> Human Rights Watch. EU/Italy: Port Closures Cut Migrant and Refugee Lifeline: States Should Allow Rescue Boats to Land, While Protecting Health. <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline>

<sup>208</sup> Ibidem

<sup>209</sup> ECHR, Art. 15(2)

<sup>210</sup> Charter of Fundamental Rights, (n4)

<sup>211</sup> UDHR, (n5)

<sup>212</sup> Human Rights Watch. EU/Italy: Port Closures Cut Migrant and Refugee Lifeline

be open and in place even during the pandemic situation, as in COVID and it can't be justified to not process the requests for protection. It is clear, states cannot derogate.

Greece, like many other Member States of the European Union, jumped at the opportunity to invoke Article 15 of the Convention in response to the pandemic, where states can derogate in a state of emergency.<sup>213</sup> However, the derogation clause goes on to place some limitations to its applicability, that is, Article 2, right to life, and Article 3, prohibition of torture. Article 3 of the Convention is often used for the refugee and migrant situation because if States do not accept the processing of asylum seekers or fail to process those requests, a situation of *refoulement* will be created and that can be within the remit of Article 3.<sup>214</sup>

### 3.4.2. Right to Life

This right protects individuals from arbitrarily and intentionally being deprived of their inherent right to life. The Greek authorities, by sending back migrants and asylum seekers, through the dangerous sea routes they used, were putting the lives of these vulnerable individuals at risk. There were reports of deaths of the returned migrants in the boats in the middle of the Mediterranean Sea, which is a serious violation of their Convention right to life.<sup>215</sup> Given that the derogation clause was adopted in peace time, and also the availability of lesser strict measures which would achieve the same goal of protection of public health safety, and its application in a discriminatory manner, it is not justified to adopt such measures.

Taking the treatment of the migrants and asylum seekers into consideration, i.e., being sent back to their home countries, camps and dangerous sea routes where their life is foreseeably at risk, Greece breached both obligations of Article 2.

The Court has also found the allegations of persons suffering from serious illnesses to fall under Article 2 of the Convention when the circumstances potentially engaged the responsibility of the

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<sup>213</sup> Human Rights Watch. Greece Events of 2020

<sup>214</sup> OCHR. The principle of non-refoulement under international human rights law. [online] [cit. on 10th June 2021]. Accessible at <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

<sup>215</sup> Human Rights Watch. Greece Events of 2020

State (L.C.B. v. the United Kingdom, para. 36-41<sup>216</sup>, concerning an applicant suffering from leukaemia; G.N. and Others v. Italy<sup>217</sup>, concerning applicants suffering from a potentially life-threatening disease, hepatitis.). As such, given the negligent treatment of migrants and asylum seekers by the Respondent at the land and sea borders, at the refugee camps like Moria camp and inland Greece, these vulnerable individuals were exposed to the Corona virus without any protection and were at high risk of contracting the virus and mass spreading it.<sup>218</sup> This is a breach of the right to life of these individuals as the government maintained its policy of blocking asylum seekers who arrive on the Aegean islands from moving to the mainland. The containment policy trapped thousands in overcrowded and abysmal conditions with limited access to protection, health care, adequate water, sanitation, and hygiene products to limit the spread of Covid-19.<sup>219</sup>

### **3.4.3. Prohibition of torture and inhumane or degrading treatment and the principle of *non-refoulement***

After Turkey announced in February 2020 that it would no longer stop asylum seekers and migrants from leaving its territory to get to the European Union, there was an attempt by thousands of people to cross overland and by sea in March.<sup>220</sup> In response, under the pretext of curbing Covid-19, Greece violently pushed back people attempting to enter its territory, barred the lodging of asylum claims for anyone crossing the border irregularly, prosecuting and arbitrarily detaining people for irregular entry.<sup>221</sup> This response is a clear violation of the migrants' Article 3 rights under the Convention.

Article 3 of the ECHR provides that:

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<sup>216</sup> LCB v United Kingdom, Judgment, Merits, App No 23413/94, Case No 14/1997/798/1001, [1998] ECHR 49, ECHR 1998

<sup>217</sup> G.N and others v. Italy, 1 December 2009, no. 43134/05 (second section) ECHR 2009/7

<sup>218</sup> Council of Europe. Migration During a Pandemic: Covid-19 Response, Refugees, Migrants and Asylum Seekers. Retrieved from <https://www.coe.int/en/web/portal/covid-19-migrants-refugees-and-asylum> on 28/02/2021

<sup>219</sup> Human Rights Watch. Greece Events of 2020

<sup>220</sup> ADAR, Sinem et al. The Refugee Drama in Syria, Turkey, and Greece: Why a Comprehensive Approach Is Needed. Stiftung Wissenschaft und Politik [online] [cit. on 10<sup>th</sup> June 2021]. Accessible at <https://www.swp-berlin.org/publikation/the-refugee-drama-in-syria-turkey-and-greece>

<sup>221</sup> Human Rights Watch. Greece Events of 2020

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*<sup>222</sup>

It is significant that the Court considers that Article 3 of the ECHR can be used by those in need of international refugee protection.<sup>223</sup> Article 3 has been interpreted by the Court as providing an effective means of protection against all forms of return to places where there is a risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment.<sup>224</sup> In many respects, the scope of protection provided by Article 3 is wider than that provided by the 1951 Convention<sup>225</sup>, though in others it is more limited.

The European Commission has recommended that, “Any restrictions in the field of asylum, return and resettlement must be proportional, implemented in a non-discriminatory way and take into account the principle of *non-refoulement* and obligations under international law.”<sup>226</sup> It is clear from international standards and EU guidance that there should be an exemption to border closures to allow claims for international protection.<sup>227</sup> Restrictions at borders imposed in the interests of public health must not result in denying an effective opportunity to seek asylum or in *refoulement*, in violation of states’ obligations under international law. In order to ensure that restrictions on rights involved in border closures respect such international law obligations, measures other than blanket closure of the borders, such as health checks at the borders and/or possible quarantine of newly arrived persons for 2 weeks as suggested by the European Commission guidelines, should have been considered first in response to COVID-19.<sup>228</sup>

Cyprus has carried out a number of summary pushbacks and collective expulsions of Syrians, Palestinians and Lebanese to Lebanon and Turkey.<sup>229</sup> Syrians face serious access barriers to meaningful protection in both countries, as well as a risk of *refoulement* to Syria.<sup>230</sup> The UN and

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<sup>222</sup> ECHR, Art. 3

<sup>223</sup> UNHCR Manual on Refugee Protection and the ECHR Part 2.1 – Fact Sheet on Article 3

<sup>224</sup> Ibidem

<sup>225</sup> Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

<sup>226</sup> Babiska, K. The COVID-19 Measures Impact on the Rights of Migrants and Refugees in the EU. *OpinioJuris*, 2020

<sup>227</sup> OECD. The impact of COVID-19 in the migration area in EU and OECD countries. April 2021. [online] [cit. on 10<sup>th</sup> June 2021]. Accessible at <https://www.oecd.org/migration/mig/00-eu-emn-covid19-umbrella-inform-en.pdf>

<sup>228</sup> European Commission. COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, April 2020. [online] [cit. on 10<sup>th</sup> June 2021]. Accessible at <https://ec.europa.eu/info/sites/default/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf>

<sup>229</sup> World Report 2021: Events of 2020

<sup>230</sup> Ibidem

human rights organisations have documented how refugee returnees have been arrested, detained, tortured and/or forcibly disappeared upon return to Syria.<sup>231</sup> Summary pushback practices from Cypriot sea and land borders thus constitute potentially chain *refoulement*.<sup>232</sup>

Article 3 of the ECHR prohibits “torture, inhuman or degrading treatment or punishment” of anyone, irrespective of their immigration status.<sup>233</sup> The application of Article 3 of the ECHR is not limited to cases involving inflicted ill-treatment. The Court has also considered that harsh medical conditions can lead to the protection of Article 3 in the case of *D. v. United Kingdom*.<sup>234</sup> In that respect, noting that the majority of reception centres were in the first place not well suited or equipped to allow for special measures in order to contain COVID-19. In many cases the centres are in the long-term overcrowded, and it may be very difficult for asylum seekers, and especially the most vulnerable, to access kitchens and bathrooms safely due to these being shared with other residents.<sup>235</sup> People in such camps have to queue to access toilets or to get food, have no access to health care and suffer from insecure conditions, all in all having serious negative impact on people’s mental health.<sup>236</sup> Those already facing extreme hardship, including shortage of food, water and healthcare (which is for instance the case of asylum seekers in reception in Greece) were at a grave risk of violation of their right to health under COVID-19 measures.<sup>237</sup> The negligence suffered by these vulnerable individuals, and being detained, is an inhuman treatment therefore breach of Article 3 obligations under the Convention.

The Cyprus’s Government has been using the pandemic to justify discriminatory policies and severe human rights violations. The Interior Minister closed all reception centres, turned them into detention centres and moved detainees to decentralised detention facilities that have already been declared inappropriate for extended detention by the European Court of Human Rights.<sup>238</sup> For example, in the Pournara camp, which was set up as a first reception emergency centre for around 350 people for a maximum of 72 hours, as of 24 January 2021, there were more than a thousand people who have been locked there, some for almost a year in precarious, inhumane and degrading

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<sup>231</sup> Ibidem

<sup>232</sup> Ibidem

<sup>233</sup> ECHR, Art. 3

<sup>234</sup> *D. v the United Kingdom* (App no 30240/96) ECHR 2 May 1997

<sup>235</sup> HRW: World Report 2021

<sup>236</sup> World Report 2021: Greece Events 2020

<sup>237</sup> Ibidem

<sup>238</sup> World Report 2021: Events of 2020

conditions with no access to basic facilities.<sup>239</sup> These also include families with children and unaccompanied minors, despite provisions of national law prohibiting the detention of unaccompanied minors.<sup>240</sup> In May 2020, the Government prolonged for an indefinite period arbitrary detention in the Pournara camp under the pretext of scabies.<sup>241</sup> Many NGOs, including KISA, raised serious doubts as to the truthfulness of the infection which, in any case, would be the direct result of the government policies which created the conditions for the onset of the disease.<sup>242</sup> In a general climate of criminalisation of solidarity, the Government has also prohibited KISA and other NGOs to access to Pournara, thus violating the law and asylum seekers' right to access human rights NGOs.<sup>243</sup> The Interior Minister has been stigmatising migrants, refugees and CSOs and fomenting hate speech, xenophobic and anti-migrant and refugee discourses.<sup>244</sup> During the COVID-19 crisis, the Interior Minister also banned any new entry in the country whether by sea, air or land.<sup>245</sup> When the Cypriot police did grant access to territory, they brought new arrivals to the quarantine section of the Pournara camp.<sup>246</sup> There was no vulnerability screening prior to the transfer and UNHCR or any NGOs did not have access to the quarantine section.<sup>247</sup> Moreover, migrants were not included in the Government's health protection measures and were prevented from accessing healthcare and essential services.<sup>248</sup>

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<sup>239</sup> Ibidem

<sup>240</sup> Ibidem

<sup>241</sup> KISA. The government prolongs the arbitrary detention at Pournara camp under the pretext of scabies, May 22 2020. [cit. on 22th June 2021]. Accessible at <https://kisa.org.cy/the-government-prolongs-the-arbitrary-detention-at-pournara-camp-under-the-pretext-of-scabies/>

<sup>242</sup> Ibidem

<sup>243</sup> Ibidem

<sup>244</sup> Ibidem

<sup>245</sup> Ibidem

<sup>246</sup> Ibidem

<sup>247</sup> Ibidem

<sup>248</sup> ICESR, Art. 11

### 3.5. Member States violated its treaty obligations under ICESCR

Article 11 provides the right of everyone to an adequate standard of living for himself and his family.<sup>249</sup> The right to the highest attainable standard of living comprises the provision of adequate food and water<sup>250</sup> clothing, shelter with adequate facilities of medical treatment.<sup>251</sup> Article 12<sup>252</sup> recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>253</sup> The situation in Moria camp amid COVID-19 crisis goes against these set standards of living of international law. The treatment of people at the camps, i.e no food, no social distance, detaining, no sanitation violated this. Therefore, it is in violation of the rights provided within the Convention and also under customary international law<sup>254</sup> to which MS are responsible.

The conditions of living for these vulnerable societies proves that Greece violated its other obligations under international law. According to *Guardian*, at the time of writing, there was only one water tap for every 1300 people inside the camp, and also one toilet for 167 people, and one shower for 242 people.<sup>255</sup> Considering the number of people who were inhabiting the camp, this was a violation of the right to an adequate standard of living which everyone is entitled to. Hundreds of refugees joined forces in an attempt to raise awareness of the threat posed by COVID-19 in the camp but there was little to no progress.<sup>256</sup> Also, a campaign in the form of a Europe wide letter-writing as an attempt to persuade Member States to accept more refugees from the Greek camps was made, but as predictable, it was to no avail as it yield slow to no results.<sup>257</sup>

Another medical expert, Deen Mohammad Alizadah, an Afghanistan pharmacist among the 100-plus-member Moria Corona Awareness Team reported that the conditions at Moria posed health

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<sup>249</sup> HRC General comment No 4 (1991) UN Doc E/I 992/23, ¶ 1.

<sup>250</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary* (Engel 2nd edn 2005) [“Nowak”], 182.

<sup>251</sup> *Ibidem*, 154.

<sup>252</sup> *ICESCR*, Art.12.

<sup>253</sup> HRC General Comment No 14 (2000) UN Doc E/C. 12/2000/4, ¶ 2.

<sup>254</sup> Eleanor D. Kinney, “*The International Human Right to Health: What does this mean for our Nation and World?*”.

<sup>255</sup> DIMITROPOULOS, Stav. In an Overcrowded Greek Refugee Camp, Fighting Covid-19 Before it Arrives:

<sup>256</sup> *Ibidem*

<sup>257</sup> *Ibidem*

risks among the inhabitants.<sup>258</sup> He reported that there were cases of a lot of people coughing and running fevers, both symptoms of the Coronavirus, but there was no adequate medical facilities as sick people had to wait long hours to be attended to at an in-camp clinic.<sup>259</sup> Alizadah also reported that if someone in the camp were to have COVID-19 symptoms, they were supposed to be sent outside the camp for testing but instead, the best they got close to treatment was antibiotics and paracetamol then send away by the doctors inside the camp.

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<sup>258</sup> Ibidem

<sup>259</sup> Ibidem

## CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION

### 4.1. INTRODUCTION

From the above research, it can be concluded that the unfolding events, in the Mediterranean Sea, land borders and internal receiving states, raise alarming concern that most EU countries will use the COVID-19 pandemic as an excuse to avoid their international law obligations. These such obligations include, responding to boats in distress at sea, to coordinate rescue operations within their search and rescue area, and ensure timely disembarkation in a safe port.<sup>260</sup> These events of maltreatment of migrants and asylum seekers is a disappointment to the rest of the international community, as the EU presents itself as the forefathers of human rights, yet when faced with a crisis which they should have put their words in action, they turned their back on the most vulnerable community. As Judith Sunderland, associate Europe and Central Asia director at Human Rights Watch put it, “The COVID-19 pandemic reminds us all of the value of life, and how much we are collectively willing to do to protect the most vulnerable among us.”<sup>261</sup>

It appears hypocrisy on the EU’s part, to show concern on the health and life of their citizens, while turning their back and putting other communities who were seeking refuge lives at risk by exposing them to unhealthy and dismal living conditions in overcrowded camps, and putting their lives at risk by sending them back on the dangerous sea routes where their lives were at risk. The researcher agrees with Sunderland who said that, “Now is the time to show that same resolve to save lives at sea and bring people to safety in Europe, where authorities can and should take reasonable, fair measures to protect the lives of the people rescued along with general public health.”<sup>262</sup> She went on to say that, “Pandemics don’t eliminate the reasons why people risk their lives at sea, and we should not allow this pandemic to eliminate our values. The world is mounting

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<sup>260</sup> Council of Europe. A distress call for human rights: The widening gap in migrant protection in the Mediterranean. [online] [cit. on 19<sup>th</sup> June 2021]. Accessible at <https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protectio/1680a1abcd>

<sup>261</sup> Human Rights Watch. EU/Italy: Port Closures Cut Migrant and Refugee Lifeline: States Should Allow Rescue Boats to Land, While Protecting Health, 2020. [online] [cit. on 10<sup>th</sup> June 2021]. Accessible at <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline>

<sup>262</sup> Ibidem

an unprecedented response to the life-threatening COVID-19 pandemic. How can we turn our backs at the same time on people who are facing life-threatening risks at sea?”<sup>263</sup>

The researcher recommends that a more human rights approach should have been taken, to protect the right to life of the migrants and asylum seekers. Also, the fact that these migrants were seeking protection, and the objective foreseeability of the threat to life when sending back the migrants, the Court should rule that the act by the authorities in the land and sea ports was an intentional deprivation of life.

## **4.2. Recommended proportional and more human rights approach towards immigrants and asylum seekers to curb the spread of the pandemic**

The EU Member States regulations are clearly against international law, defeating the essential aim and purpose of IHR as other reasonable alternatives were available that could have been adopted instead of such strict travel restrictions.

### **4.2.1. WHO Recommendations**

The WHO’s recommendations urged the observance of social distancing and wearing face coverings in areas with reported COVID-19 cases.<sup>264</sup> The best available scientific data on the virus showed it has a 7 to 14 day incubation period.<sup>265</sup> Based on this data the WHO issued recommendations for anyone with symptoms to self-quarantine for 14 days.<sup>266</sup> Travel and trade restrictions were not recommended.<sup>267</sup> “The best scientific evidence manifestly demonstrates that the harms of travel restrictions outweigh their benefits.” (quoting *Canada’s Violation of*

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<sup>263</sup> Ibidem

<sup>264</sup> World Health Organization. Mask use in the context of COVID-19: Interim Guidance, 1 December 2020. [online] [cit. on 10th June 2021]. Accessible at [https://apps.who.int/iris/bitstream/handle/10665/337199/WHO-2019-nCov-IPC\\_Masks-2020.5-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/337199/WHO-2019-nCov-IPC_Masks-2020.5-eng.pdf?sequence=1&isAllowed=y)

<sup>265</sup> Qin, Jing et al. Estimation of incubation period distribution of COVID-19 using disease onset forward time: A novel cross-sectional and forward follow-up study. *Science Advances*, Vol. 6, no. 33, eabc1202 DOI: 10.1126/sciadv.abc1202

<sup>266</sup> WHO, Mask use in the context of COVID-19

<sup>267</sup> Ibidem

*International Law During the 2014-16 Ebola Outbreak*)<sup>268</sup> Numerous studies show travel restrictions do not reduce the number of affected individuals.<sup>269</sup> States cannot implement additional health measures exclusively as a precaution. They must instead ground their decision-making in “scientific principles”, “scientific evidence”, and “advice from WHO.”<sup>270</sup> The Director-General’s recommendations epitomize the best scientific standards available. They are based on the advice of the Emergency Committee, scientific principles, all available scientific evidence and information, and the activities undertaken by other relevant intergovernmental organizations and international bodies.<sup>271</sup>

Also, community based health measures such as social distancing and contact tracing, which are less restrictive than travel bans, must be preferred to avoid unnecessary interference.<sup>272</sup> Travel bans or border closures are known to hide discrimination or incite xenophobia such as in the example of COVID-19 and China.<sup>273</sup> COVID-19 is a virus caused disease and it has been found that large-scale travel restrictions can only delay a virus caused disease but cannot avert it.<sup>274</sup> COVID19 outbreak which is first spotted in China was also a disease that can be transmitted from human-to-human<sup>275</sup> and the WHO technical guidance suggested many other measures for COVID-

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<sup>268</sup> *Canada’s Violation of International Law During the 2014-16 Ebola Outbreak*, The Canadian Yearbook of International Law Vol. 54 (2016).

<sup>269</sup> BROWNSTEIN, John S et al. *Empirical Evidence for the Effect of Airline Travel on Inter-Regional Influenza Spread in the United States* (2006); GERMANN, Timothy C et al. *Mitigation Strategies for Pandemic Influenza in the United States* (2006); BAJARDI, Paolo et al, *Human Mobility Networks, Travel Restrictions, and the Global Spread of 2009 H1N1 Pandemic* (2011).

<sup>270</sup> *Ibid* p 10.

<sup>271</sup> International Health Regulations, Art. 17.

<sup>272</sup> IHR, Art. 2; B. M. Meier & R. Habibi & Y. T. Yang, “Travel restrictions violate international law”, *Science*, 367, Mar 27 2020, p.1436. in N. M. Ferguson et. al., “Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand”, *Imperial College London* (Mar 16 2020); J. Hellewell et al., “Feasibility of controlling COVID-19 outbreaks by isolation of cases and contacts”, *Lancet Global Health*, 8, i. 4 , Feb 28 2020.

<sup>273</sup> C. Foster, “Justified Border Closures Do Not Violate the IHR 2005”, *EJIL: Talk!*, (June 11 2020): 3 ; Human Rights Watch, “Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide”, May 12 2020, online: <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide>.

<sup>274</sup> MATEUS, A et al., “Effectiveness of travel restrictions in the rapid containment of human influenza: a systematic review”, *Bull World Health Organ*, 92, 2014, p.868.

<sup>275</sup> WHO, “Mission summary: WHO Field Visit to Wuhan, China 20-21 January 2020”, Jan 22 2020, online: <https://www.who.int/china/news/detail/22-01-2020-field-visit-wuhan-china-jan-2020>.

19 outbreak such as risk communication, surveillance, patient management and screening at ports of entry and exit rather than travel restrictions.<sup>276</sup>

First, according to WHO, history shows that travel restrictions, contrary to popular belief, are not actually very productive in stemming the spread of disease. As WHO has noted: Travel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact.<sup>277</sup>

WHO has repeatedly issued recommendations to States not to impose travel restrictions during public health emergencies of international concern (“PHEICs”), such as Ebola, zika, Kivu Ebola, COVID-19<sup>278</sup>. Some commentators, including the head legal counsel of WHO from 2005-2016, have expressly taken the position that many States adopting travel restrictions in response to COVID-19 are in violation of the IHR.<sup>279</sup>

#### **4.2.2 Measures should abide by EU and international obligations to respect the right to seek asylum and the principle of *non-refoulement***

Under international law, public health measures must be proportionate, nondiscriminatory, and based on available scientific evidence. It may be reasonable to subject those who arrive to a period of isolation or quarantine. But the pandemic cannot justify blanket bans on disembarkation, which risk the rights to health of those on board. The bans also infringe on international duties to provide access to asylum and not to return anyone to a place where they face a risk of torture or other

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<sup>276</sup> ROOJIN, Habibi et al., “Do not violate the International Health Regulations during the COVID-19 outbreak,” *The Lancet*, Vol. 395, No. 10225 (13 February 2020), p. 664;

<sup>277</sup> WHO, “Updated WHO recommendations for international traffic in relation to COVID-19 outbreak” (29 February 2020).

<sup>278</sup> For H1N1 and polio, on the day the WHO Director-General declared a PHEIC, he did not say anything about travel restrictions (H1N1, polio). For Ebola, zika, Kivu Ebola, and COVID-19, on the day the WHO Director-General declared a PHEIC, he and/or the Emergency Committee recommended against travel restrictions, stating “[t]here should be no general ban on international travel or trade” (Ebola), “[t]he Committee found no public health justification for restrictions on travel or trade” (zika), “[n]o country should close its borders or place any restrictions on travel and trade” (Kivu Ebola), and “[t]he Committee does not recommend any travel or trade restriction based on the current information available” (COVID-19).

<sup>279</sup> MEIER, Benjamin M. “Travel restrictions violate international law,” *Science*, Vol. 367, No. 6485, p. 1436.

prohibited ill-treatment, and provide assistance to boats in distress at sea by carrying out search and rescue operations, and stop endangering lives by using manoeuvres such as the highspeed circling of vessels. Even before the pandemic, the EU did what it could to turn away people seeking asylum and often left them to die at sea. People have been suffering in the hotspots on Greek islands for years. While public attention in Europe focuses on the novel coronavirus, people keep dying in the Mediterranean Sea or are sent back to Libyan torture camps.

EU countries should put in place systems to ensure that these fundamental obligations coexist alongside public health measures. People arriving by sea, whether quarantined or not, should be placed in facilities that can guarantee social distancing, appropriate health monitoring, and access to care. Because of the high risk of transmission of the virus in detention facilities, the authorities should use alternatives to detention as much as possible. Therefore, it can be induced that the EU Border States may be provisionally entitled to exercise a certain degree of discretion with regard to asylum seekers accessing international protection during the Pandemic. However, as the right to seek asylum is drawn from the principle of *non-refoulement*, universally recognised under international human rights law and the EU human rights law, the Border States cannot derogate the right to seek asylum.

A careful examination of the right to seek asylum shows that the right exists due to *non-derogable* nature of the principle of *non-refoulement*. Therefore, a state can only be allowed to emplace health check and quarantines to regulate safe access to the right to seek asylum. Therefore, it is concluded that the impact of COVID-19 on the right to seek asylum is temporary, procedural, and insignificant *per se*. However, a review of the EU Border States IEA with transit states and their ability to evade responsibility arising from international law shows that the COVID-19 may pursue the Border States to protect public health by externalising asylum control through IEA. Accordingly, COVID-19 is highly likely to boost informal extraterritorial governance of asylum and irregular migration. Thereby, COVID-19 is highly likely to have a cumulative effect, in confluence with IEA, to obsolete further the right to seek asylum.

### **4.2.3. The EU should conduct a transparent, thorough, and impartial investigation into allegations of brutalities by authorities towards immigrants and asylum seekers**

As discussed in the research, there have been concerning reports of brutal treatment towards the immigrants and asylum seekers. In Greece, the police beat up immigrants who were coming through the Greek-Turkish land borders. Brutality had also been reported in the mainland. In Cyprus, the coast guards were reported to be involved in acts that put the lives and safety of migrants and asylum seekers at risk. These actions have also been reported in Hungary, France among other party states. The EU should not treat these allegations lightly, and any officer involved in these illegal acts should be subjected to disciplinary sanctions and, if applicable, criminal prosecution.

## **4.3. CONCLUSION**

In conclusion, it is safe to say the research proved that the adoption of Article 15 ECHR, in respect to measures put in place towards immigrants and asylum seekers was and is illegal. The research acknowledges that the first condition set out in the first paragraph was met. The requirement stipulates that the derogation clause can only be adopted and justified in the existence of either war or public emergency threatening the life of the nation. Taking the generally acceptable among scholars and customary law, which is, generally, any substantial violence or unrest short of war is most likely to fall within the scope of a “public emergency threatening the life of the nation, the Covid-19 pandemic does fit within this scope.

However, in that same paragraph, that is of Article 15(1) ECHR, the provision stipulates that that such derogation can only be adopted only to the extent strictly required by the situation and that is one of the requirements that has been infringed by stringent measures taken towards illegal immigrants and asylum seekers. The measures and events discussed in Chapter three of this research shows that the measures put in place were not necessary, for example, sending back rescued boats, instead of taking less stringent measures like quarantine, evacuating overcrowding centres, testing upon arrival among other available alternatives. The other, which is the main issue with such measures were that they were applied in a discriminatory manner, as citizens

were given better treatment compared to that which illegal immigrants and asylum seekers received.

Still on the first paragraph of the derogation clause, states are not to take measures which are inconsistent with their other obligations under international law. The events that unfolded during the Covid-19 crisis clearly shows concerning breach of international law on several accounts. Firstly, states are required to rescue boats within their search and rescue area, but to the contrary, sea states declared their ports unsafe, and engaged in disembarking of boats in distress, criminalizing NGOs that engaged in rescue activities. Unaccompanied children were left homeless, without food and were deprived of their education rights, which is clearly against international law and also against the fundamental principles which the EU claims to stand for.

Moving on to the second paragraph, i.e. Art. 15(2), no derogation is permissible where *jus cogens* norms are at stake. With respect to measures taken by the Member States towards immigrants, right to life enshrined in Art. 2 and prohibition of torture, inhumane and degrading treatment enshrined in Art. 3 are at stake. By forcing illegal immigrants back to their countries, where their right to life is threatened is a clear violation of Article 2. Also, these people use dangerous sea routes and by sending them back on the same route in their boats put their lives at risks. Reports already surfaced of deaths in the Mediterranean as a result of being sent back by the external border controls. The conditions in which the immigrants and asylum seekers were subjected to, that is over crowdedness, no sanitation and no practical way of social distance in the camps in Greece is a form of subjecting these vulnerable people to inhumane and degrading treatment. Also, sending back immigrants has been classified as a form of torture, which they would foreseeably be subjected to once they return to their countries, which is also a breach of Article 3.

Hence, even though there was a public emergency which called for measures to be put in place to protect the population, derogation from Articles 2 and 3 is not permissible and is unjustified hence the involved states are in breach of their EU and international obligations and the adoption of Article 15 was illegal.

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