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## Committee on Legal Affairs and Human Rights

# State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights

## Information Note

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1. This submission is presented by Mr Raphaël Comte, rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on states of emergency and derogations under article 15 of the European Convention on Human Rights (the Convention).[1]

2. Derogation from the Convention does not affect its territorial or personal scope; a State cannot derogate to exclude either a particular territory or a particular category of persons entirely from the scope of Convention protection.[2] Derogation instead acts on the material scope of the Convention, by permitting certain limitations on the extent to which rights must be secured. Those rights, even where affected by the derogation, remain justiciable. Individuals claiming to be victims of violations on account of derogating measures thus retain the rights to an effective domestic remedy under Article 13 and to bring an application to the Court under Article 34. In any litigation under Article 34, the Court is competent to decide on the lawfulness of the derogation.

3. The judicial supervision of derogations is necessary to preserve the rule of law, protect non-derogable rights and prevent arbitrariness. As a former Council of Europe Commissioner for Human Rights has noted, "[i]t is precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of subsidiarity in the protection of Convention rights."[3]

4. When examining cases involving derogations, the Court will first consider whether the impugned act would violate a Convention right. Should this be the case, it will then consider whether the derogation satisfied the requirements of Article 15.[4] In particular, it will consider whether a 'war or other public emergency threatening the life of the nation' exists; the measures taken were 'strictly required by the exigencies of the situation'; the derogation is not inconsistent with other international legal obligations; it does not concern non-derogable rights; and the notification requirement has been met. If these requirements are satisfied, the derogation will be valid and the State will not have violated its obligations.

[1] Once declassified, this Information Note will be submitted as a response to the call made by the Joint Committee on Human Rights of the United Kingdom Parliament.
[2] A derogation may, however, quite properly be limited to a particular territory. Ukraine has derogated only in respect of its 'anti-terrorist operations' in specified parts of the Donetsk and Luhansk oblasts, and not for the totality of its territory.
[3] See "Opinion 1/2002 of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights", CommDH(2002)7, 28 August 2002, para. 9.
[4] See *A. v. United Kingdom*, 3455/05, 19 February 2009, para. 161.

5. Although several States parties have been involved in extra-territorial armed conflicts, none has made a derogation in respect of them.[5] The Court has thus not had to interpret the meaning of 'war' within Article 15, and has not determined, for example, whether such a 'war' must 'threaten the life of the nation' in the same way that an 'other public emergency' must do.

6. The Court has stated that the expression 'public emergency threatening the life of the nation' should be given its "natural and customary meaning" in accordance with a four-part test: (i) an exceptional situation of crisis or emergency; (ii) affecting the whole population (although not necessarily all of the territory[6]) of the State; (iii) constituting a threat to the organised life of the community of which the State is composed; (iv) for which the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[7] Although the threat must be imminent, the authorities need not wait, for example, for an actual terrorist attack before a derogation can be justified.[8] The emergency situation may be protracted, as in the case of terrorism in Northern Ireland, for which the Court found the UK's derogation, lasting many years, to be acceptable. On the other hand, the Court has made clear that derogations are valid only within the territorial area for which they have been specified and only until the emergency to which they relate has ended.[9]

7. The Court has recognised that "[b]y 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. In this matter Article 15(1) leaves those authorities a wide margin of appreciation."[10] On this basis, the Court has, with one exception, consistently deferred to national authorities' assessment of whether or not a 'public emergency threatening the life of the nation' exists.[11]

8. The Court has shown less deference on the question of necessity, recalling that "the States do not enjoy an unlimited power in this respect. The Court, which (…) is responsible for ensuring the observance of the States' engagements, is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."[12] In the case of *Aksoy v. Turkey*, for example, the Court, having found Turkey's derogation to be justified by the threat of terrorist activity in the south-eastern part of the country, "was not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist activities for fourteen days or more in incommunicado detention without access to a judge or other judicial officer."[13] In *A. v. United Kingdom*, the Court found that a "significant difference in the potential impact of detention without charge on a national or a non-national" had rendered "the derogating measures (…) disproportionate in that they had discriminated unjustifiably".[14]

9. The Court has also declined to accept arguments concerning consistency of derogations with other obligations under international law. In the case of *Brannigan & McBride v. United Kingdom*, the applicant argued that the absence of official proclamation of the public emergency, as required for derogation under Article 4 of the International Covenant on Civil and Political Rights (ICCPR), rendered the Convention derogation invalid as being inconsistent with the UK's other obligations under international law.[15] The Court rejected this argument on the basis that the government's announcement to parliament of a derogation in circumstances of public emergency satisfied the requirement. In *Marshall v. United Kingdom*, the Court rejected as unfounded the applicant's argument that a UN Human Rights Committee finding that the UK's derogating measures were "excessive" made them inconsistent with its other obligations under international law.[16]

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[5] See *Hassan v. United Kingdom*, 29750/09, 16 September 2014 (GC), para. 101.
[6] See e.g. *Aksoy v. Turkey*, 21987/93, 18 December 1996, para. 70.
[7] See *Lawless v. Ireland (No. 3)*, 332/57, 1 July 1961, para. 28; *Denmark, Norway, Sweden & the Netherlands v. Greece (the Greek case)*, 3321/76 & otrs, Commission report of 5 November 1969, para. 153.
[8] See *A. v. United Kingdom*, op. cit., paras 176-177.
[9] See respectively *Sadak v. Turkey*, 25142/94 & 27099/95, 8 April 2004; and *de Becker v. Belgium*, 214/56, 9 June 1958 (Commission).
[10] See e.g. *Ireland v. United Kingdom*, 5310/71, 18 January 1978, para. 207.
[11] The exception concerns the European Commission on Human Rights' rejection of the claim by the Greek "Colonel's regime" that a state of emergency existed that justified its having taken certain measures following the 1967 military coup that had brought it to power: see the "Greek case", 3321/67 & otrs, 5 November 1969.
[12] See e.g. *Ireland v. United Kingdom*, op. cit., para. 207.
[13] Op. cit., paras 78 & 84. In other cases, the Court has found shorter periods of detention without judicial control to be proportionate derogating measures, especially where other safeguards existed: see e.g. *Brannigan & McBride v. United Kingdom*, 14553/89 and 14554/89, 25 May 1993, paras 55-66.
[14] Op. cit., paras 186 & 190.
[15] Op. cit., para. 73.
[16] 4157/98, 10 July 2001.

10. Some rights cannot be subject to derogation. Article 15(2) contains a list of such rights, in particular Articles 2 (right to life), except in respect of deaths resulting from lawful acts of war, 3 (prohibition of torture or inhuman or degrading treatment or punishment), 4(1) (prohibition of slavery or servitude) and 7 (no punishment without law). This list should not, however, be considered exhaustive. The UN Human Rights Committee has noted that "the category of peremptory norms [of international law] extends beyond the list of non-derogable provisions as given in article 4, paragraph 2 [ICCPR]. States parties may in no circumstances invoke article 4 (…) as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial, including the presumption of innocence." Furthermore, "[t]he provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."[17] Thus, for example, "[t]he procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights…, including [the right to life and the prohibition on torture]."[18] The same approach should be taken in relation to derogations from the Convention, to ensure consistency with other obligations under international law.

11. The conceptual overlap between the issues of proportionality, consistency with other obligations under international law and non-derogability is apparent in the Court's jurisprudence. In *Aksoy v. Turkey*, for example, addressing the question of whether the derogating measure was 'strictly required by the exigencies of the situation', the Court "could not accept that it was necessary to hold a [terrorist] suspect for fourteen days without judicial intervention. This period was exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture." It can be seen that the finding on proportionality evokes arbitrary deprivation of liberty, prohibited as a peremptory norm of international law (see above), and the procedural guarantees implicit in the prohibition on torture contained in Article 3 of the Convention, which is defined as a non-derogable right in Article 15, being also a peremptory norm.

12. Although the Court has not examined derogations made in the context of war, it has considered how the Convention should apply in situations of armed conflict. Its starting point has been the long-established jurisprudence of the International Court of Justice holding that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation".[19] The fact of armed conflict alone displaces neither international human rights law, nor States' obligations under human rights treaties such as the Convention.

13. The Court has noted that "a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention".[20] From this perspective, it has observed that "[t]he practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts."[21] The implication is that state practice has established an agreement between the parties not to derogate from the Convention in relation to international armed conflicts, at least with respect to Article 5.[22]

14. The rights most likely to be affected in the case of armed conflict are the right to life (Article 2), the prohibition of torture or inhuman or degrading treatment or punishment (Article 3) and the right to liberty and security (Article 5). As noted above, Articles 2, "except in respect of deaths resulting from lawful acts of war", and 3 are non-derogable, as are the fundamental provisions of Article 5 that protect against arbitrary detention and underpin the procedural guarantees protecting other non-derogable rights. A derogation in circumstances of armed conflict could not apply to these provisions and would have no effect on judicial examination of complaints relating to them.

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[17] See "General Comment no. 29: Article 4 ICCPR: derogations during a State of Emergency", paras 11 & 15.
[18] See "General Comment no. 35 on Article 9 of the ICCPR (liberty and security of person)", para. 67.
[19] See *Advisory Opinion on the legality of the threat of use of nuclear weapons*, 8 July 1996, para 25; also *Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory*, 9 July 2004, para 106.
[20] According to Article 31 of the Vienna Convention on the Law of Treaties, treaties shall be interpreted "in their context", which includes "any subsequent practice in the application of the treaty which establishes the agreement of the parties concerning its interpretation."
[21] *Hassan*, op. cit., para. 101.
[22] See also Sir Daniel Bethlehem QC: "The absence of derogations by Contracting Parties in the case of international armed conflicts or of extra-territorial non-international armed conflicts or of Article 2 is compelling evidence, in my view, of a uniform practice, a common understanding, by the Contacting Parties that derogations are not required in such cases", in "When is an act of war unlawful?", *The Right to Life under Article 2 of the European Convention on Human Rights: Seminar in honour of Michael O'Boyle*, Wolf Legal Publishers, 2015.

15. In the case of *Hassan*, the Court, having found that the established practice of states was not to derogate from Article 5 in time of armed conflict and that absent a derogation, both international human rights law and international humanitarian law applied, proceeded to determine, for the first time, how these two branches of law coexisted in practice. It concluded that "the grounds of permitted deprivations of liberty set out in [Article 5 of the Convention] should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under [international humanitarian law]. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (…) It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers."[23] In other words, the circumstances of armed conflict meant that measures of detention that would violate Convention rights in peacetime could, by reference to international humanitarian law, be considered lawful even without the responsible state having derogated from the Convention.

16. The Court in *Hassan* identified the common, fundamental principle governing how the two branches of law combined to regulate detention. "As with the grounds of permitted detention already set out in [Article 5 of the Convention], deprivation of liberty pursuant to powers under international humanitarian law must be 'lawful' to preclude a violation of Article 5(1). This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5(1), which is to protect the individual from arbitrariness."[24]

17. The Court has also acknowledged that the procedural guarantees contained in the Article 2 right to life are to be applied in accordance with the particular circumstances of armed conflict or peacekeeping. In *Al-Skeini v. United Kingdom*, it noted the "practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, inter alia, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. (…) [T]he Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators."[25]

18. This being the case, the Convention right most likely to be at risk of being violated during overseas armed conflict and in respect to which there may appear to be some interest in derogating is the substantive limb of the right to life in Article 2 – notably as regards deliberate targeting of enemy combatants, which is permissible under international humanitarian law but prohibited under Article 2. Some commentators have noted that as regards the issue of states' obligation to protect against incidental loss of civilian life, the Court's approach is already similar to that taken under international humanitarian law.[26] The issue of protection of the right to life in armed conflicts is expected to be further addressed in the forthcoming Court judgment in the case of *Georgia v. Russia (no. 2)*.

[23] Op. cit., para. 104.
[24] Ibid. para. 105
[25] *Al-Skeini v. United Kingdom*, 55721/07, 7 July 2011 (GC), para. 168. See also *Jaloud v. the Netherlands*, 47708/08, 20 November 2014 (GC), para. 226.
[26] See e.g. Ovey, "Application of the ECHR during International Armed Conflicts", in *UK and European Human Rights: A Strained Relationship?*, ed. Ziegler et al, Hart Publishing, 2015, pp. 225-248.