COMPLIANCE WITH THE STANDARDS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN TIMES OF WAR

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The adoption of the European Convention in 1950 was partly a response to the grave violations of human rights that had occurred during and before the Second World War. It was hoped that its operation would alert States Parties to significant shortcomings in the observance of human rights so that they could then act to forestall any recurrence of even more serious violations of them.

Sadly, this hope has not been entirely fulfilled. However, there can be no doubt that the drafters were conscious of the relevance of the guarantee being established by the European Convention in times of war.

This is clear from the terms of Article 15, which specifically refers to war as a basis for derogating from the obligations generally arising under the guaranteed rights and freedoms, including the possibility of deaths being occasioned by lawful acts of war.

Moreover, Protocol No. 6 made an exception for the use of the death penalty in time of war or of imminent threat of war, although this exception to the abolition of this penalty was subsequently revoked by Protocol No. 13.

Furthermore, not only does the European Convention retain its relevance in times of war but the assessment of the appropriateness of its application has also become a major feature of the workload of the European Court of Human Rights, with it being estimated in 2021 that some 15% of the individual applications to it arose out of inter-State conflicts.

However, the resulting case law is not entirely clear or satisfactory and the current aggression by Russia will undoubtedly give rise to a need both to revisit the conclusions reached

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in some decisions and to address some situations which have yet to be given significant consideration by the European Court.

The potential relevance of the standards of the European Convention in times of war might be best considered in two sets of circumstances:

- those that might be seen as being in some way connected to the conduct of hostilities, even if not actually required for that purpose; and
- those that result from the existence of the conflict, whether to facilitate its conduct, to prevent this being undermined or to secure the life and well-being of those who are not participating in the hostilities.

As regards the first set of circumstances, there are two aspects to the case law of the European Court; one relating to the time when hostilities are seen as "active" and the other when that is no longer the case.

The concept of an active phase to hostilities that was developed in *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021 related to a conflict that was seen as having a duration of just five days. This was then followed by an occupation phase after the cessation of hostilities, with the conclusion of a ceasefire agreement of 12 August 2008. Such a neat beginning and end is not, of course, a feature of all conflicts and the appropriateness of this concept seems far from compelling when a conflict that is prolonged and virtually all-encompassing in its impact on a High Contracting Party that is the object of an unprovoked attack.

Where the hostilities are seen as active, the majority of the European Court in *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021 attached decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area but also excludes any form of "State agent authority and control" over individuals.

As a result, it considered that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations which it was required to examine in this case during the active phase of hostilities in the context of an international armed conflict.

The European Court's reasoning in this respect was seen by it as supported by the practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they have engaged in an international armed conflict outside their own territory, suggesting that they do not regard themselves as exercising jurisdiction within the meaning of Article 1 of the Convention.

This conclusion was also influenced by the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict).

The emphasis on the extraterritorial nature of the conflict is problematic in this case since this was not the situation in which the other party to it – i.e., the applicant State – found itself in and so, despite placing reliance on the admissibility decision in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001, the European Court ignored the point of distinction made in that case that the European Convention was a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.

It is hard to understand the view of the European Court that the European Court can have no relevance to the devastation caused by one High Contracting State to lives and property of those living in another High Contracting State.

Furthermore, the point about the practice of non-derogation is also questionable given the express terms of paragraph 2 of Article 15 providing for the possibility of a derogation from Article 2 in respect of deaths resulting from lawful acts of war. The implication of this provision is that, without a derogation, even such deaths would be inconsistent with the right to life under Article 2.

Moreover, by effectively legitimizing the practice of non-derogation, the European Court might be seen as having undermined the role of the derogation procedure in enabling other Contracting Parties to determine whether the measures taken have led to violations of Convention rights and freedoms.

Nonetheless, the absence of derogations relating to the use of force in the course of armed conflict is concerning.

Only Armenia and Ukraine have notified the Secretary General of the Council of Europe of derogations from provisions of the European Convention as a result of conflicts in which they have come involved.

However, although these deal with the imposition of martial law and the mobilization of the armed forces, they did not or do not make any derogation regarding Article 2 in respect of deaths resulting from lawful acts of war.

Finally, the resort to the jurisdictional escape route not only allowed the European Court to avoid dealing with the situation of the alleged victims of acts and omissions by the respondent State but it also meant that it did not have to consider the very legitimacy of its resort to the use of force.

Although this is primarily a matter for the application of the United Nations Charter, it is well-established that the European Convention "should so far as possible be interpreted in harmony with other rules of international law of which it forms part.

Insofar as a Contracting State is acting in a manner contrary to its obligations under international law as regards the use of force, it is difficult to see the justification for concluding that consequences thereby produced which are inconsistent with rights and freedoms under the European Convention cannot be a matter that does not entail responsibility under that instrument.

In this connection, in revisiting its case law, the European Court might therefore find it appropriate to follow the lead of the United Nations Human Rights Committee in its General comment No. 36 Article 6: right to life.

In this it concluded that "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant" and that "States parties that fail to take all reasonable measures to settle their international disputes

by peaceful means might fall short of complying with their positive obligation to ensure the right to life".

As regards conduct outside the active phase of hostilities (insofar as that notion is a realistic one in all cases), the relevance of the rights and freedoms of the European Convention has not been put into question, with no jurisdictional obstacle being raised in *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021.

Thus, it found violations of Articles 2 and 8 of the European Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in territories that came under the effective control of Russia, even though these acts were not attributable to its soldiers.

Equally, the European Court found a violation of Article 3 as regards the conditions in which civilians had been detained and the infliction on them of humiliating treatment.

Furthermore, the detention of the civilians purportedly for their own safety was found by the European Court to in fact amount to arbitrary detention not only because the reason was disputed but also because they had not been informed of the reasons for their arrest and detention.

This deprivation of liberty was, however, distinguished from the readiness in *Hassan v. United Kingdom* [GC], no. 29750/09, 16 September 2014 to regard the arrest of a combatant as not amounting to a violation of Article 5, notwithstanding that it did not come within any of the categories authorized by paragraph 1 of that provision.

In the Court's view, 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, Article 5 could be interpreted as permitting the exercise of such broad powers.

This conclusion again dispensed with the need for a derogation but, in doing so, the European Court did still expect some protection against arbitrariness, albeit in a watered-down

form of Article 5(4), namely, with the "competent body" providing sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.

In the Georgian case, the European Court was also prepared to consider that the ill-treatment of prisoners of war should be regarded as a violation of Article 3, even though this is something also regulated by international humanitarian law.

In addition, the inability of persons to return to their homes was seen as a violation of Article 2 of Protocol No. 4 and, following several other cases involving armed conflict, there was found to be a violation of Article 2 in its procedural aspect in respect of deaths occurring both in the active and occupation phases as the investigations carried out by the Russian authorities were neither prompt nor effective nor independent, as required by that provision.

In all cases, there is going to be a need to substantiate beyond reasonable doubt any allegations of violation of rights and freedoms under the European Convention.

Thus, in the Georgian case, the European Court was not so satisfied as regards claims about the looting and destruction of public schools and libraries, as well as the intimidation of ethnic Georgian pupils and teachers. If these claims had reached the required standard of proof, there would have been a violation of the right to education under Article 2 of Protocol No. 1.

Finally, it should be noted that, for the purpose of establishing the facts, including whether some destruction of houses might have been attributable to attacks carried out in error by Georgia, the European Court asked both parties to produce their military "combat reports" regarding the armed conflict.

While Georgia complied with this request, Russia refused to do so on the grounds that the documents in question constituted a "State secret," despite the practical arrangements proposed by the Court to submit non-confidential extracts. Nor did they submit any practical proposals of their own to the Court that would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information.

As a result, the European Court considered that Russia had fallen short of its obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case, as required under Article 38 of the Convention.

There is no case law of the European Court concerned with the adoption of measures during a war that involve exceptional restrictions on rights and freedoms with a view to facilitating its conduct, preventing this being undermined or securing the life and well-being of those who are not participating in the hostilities.

However, there is a well-developed body of case law concerning the taking of measures in response to an emergency situation pursuant to a derogation under Article 15 of the European Convention which provide useful guidance as to the acceptability of any additional restrictions on rights and freedoms that are adopted in the course of a war.

Thus, it is clear that such measures will only be admissible if the derogation complies with the requirements specified in Article 15, namely, the procedural ones relating to informing the Secretary General and the substantive ones regarding the existence of a war or state of emergency threatening the life of the nation and its inapplicability to any rights that are non-derogable (i.e., those specified in paragraph 2 of Article 15 and Article 2 of Protocol No. 13).

Moreover, the measures taken must be no more than ones strictly required by the exigencies of the situation and must not be inconsistent with other obligations under international law.

In order to comply with the requirement in paragraph 3 of Article 15 about keeping the Secretary General fully informed of the measures taken and the reasons therefor, a High Contracting Party must notify the Secretary General of the measures in question without unavoidable delay and must furnish sufficient information concerning them to enable the other High Contracting Parties and the European Court to appreciate the nature and extent of the derogation from the provisions of the European Convention which the measures involve.

Although some delay in the submitting the information may be regarded as acceptable, a lapse of three and four months after the adoption of the measures concerned was not considered consistent with the requirements of Article 15 by the former European Commission of Human

Rights in respectively, *Greece v. United Kingdom* (Rep.), no. 176/56, 26 September 1958 and *The Greek Case* (Rep.), no. 3321/67, 5 November 1969.

However, delays of one and twelve days in respectively *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019 and *Lawless v. Ireland (No.3)*, no. 332/57, 1 July 1961 were not considered problematic by the European Court, albeit without commenting specifically on the issue of the length of time elapsing.

Another procedural requirement for the making of a derogation that is not mentioned in Article 15 stems from the specification in that provision that it must not be "inconsistent with its other obligations under international law".

Account must, therefore, be taken of the stipulation regarding a public emergency Article 4 of the International Covenant on Civil and Political Rights that its existence is “officially proclaimed”.

However, in *Brannigan and McBride v. United Kingdom* [P]no. 14553/89, 26 May 1993 the European Court considered sufficient for this purpose a statement by a minister to the legislature explaining in detail the reasons underlying the Government’s decision to derogate and announcing that steps were being taken to give notice of derogation under both Article 15 of the European Convention of the European Convention and Article 4 of the International Covenant.

The substantive requirements in Article 15 of the European Convention are fourfold:

- the existence of a war or a state of emergency threatening the life of the nation;
- the measures only affect derogable rights; and
- the measures taken being both no more than is strictly required by the exigencies of the situation and not inconsistent with other obligations under international law.

The notion of an emergency was elaborated by the European Court in *Lawless v. Ireland (No.3),* no. 332/57, 1 July 1961 as being “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 concerned”, and this has been maintained ever since.

Nonetheless, the European Court made it clear in *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009 that the particular situation does not need to be so grave as to entail a threat to the institutions of government or a community's existence.

In addition, as a number of Turkish cases such as *Aksoy v. Turkey*, no. 21987/93, 18 December 1996 have illustrated, the threat may be limited to part of a State's territory.

States enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. This means that it is not conclusive that all States must take the same view of a possible threat as the European Court has accepted in *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009 that it was for each Government, as the guardian of their own people's safety, to make their own assessment based on the facts known to them.

So far, the only circumstances in which the European Court has so far accepted that an emergency did exist are ones involving terrorist activity within and outside a State's territory (in respect of Ireland, Turkey and the United Kingdom) and the consequences of an attempted coup (in respect of Turkey but not Greece).

The European Court has not so far had to consider whether any armed conflict involving a High Contracting Party should be viewed as a war that threatens the life of the nation.

It might be open to question whether it would take this view of all military actions outside a State's territory since the threat to the life of the nation might seem less compelling.

However, there can be little doubt that a military intervention by one High Contracting Party into another one would be characterized by the European Court as either a war or a state of emergency threatening the life of the nation.

The non-derogable rights that must not be affected by any measures taken in response to a war are the right to life (subject to the qualification about lawful acts of war) and the prohibitions on torture and inhuman and degrading treatment or punishment, slavery or servitude, retrospective offences and penalties and double jeopardy.

The existence of a war or of an emergency is not, however, enough to justify the taking of exceptional measures.

Restrictions on rights and freedoms pursuant to a derogation under Article 15 will only be admissible if it can also be shown that they are strictly required by the exigencies of the situation.

This means that it must be demonstrated that the particular situation cannot be effectively addressed by measures that would be permissible restrictions on rights and freedoms in situations not amounting to an emergency.

In this connection, it should also be recalled that, even where there is no derogation, the European Court is ready, as it made clear in *Brogan and Others v. United Kingdom* [P], no. 11209/84, 29 November 1988, to make some allowance for the difficulties being faced by a State when judging whether a particular restriction is necessary in a democratic society.

In doing so, the European Court will determine the significance to be attached to those circumstances and ascertain whether, in the particular circumstances, the balance struck complied with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose.

Where there has been a state of emergency, it has been possible to disregard the full application of the requirements of Article 5 by allowing a longer delay in first bringing someone apprehended before a court (as in *Brannigan and McBride v. United Kingdom* [P] no. 14553/89, 26 May 1993) or even detention without trial for a prolonged period (as in *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978).

The imposition of additional restrictions on the rights to respect for one's home, to worship, to freedom of expression and to freedom of peaceful assembly and association were not considered justified in *The Greek Case* (Rep.), no. 3321/67, 5 November 1969. However, this reflected the absence of any compelling evidence in support of such restrictions and it does not mean that they might not be appropriate in some cases.

At the same time, there is much emphasis by the European Court on the existence of adequate safeguards against abuse of emergency powers, with particular importance being attached, for example in *Brannigan and McBride v. United Kingdom* [P], no. 14553/89, 26 May 1993 and *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, to the continuing availability of the habeas corpus remedy where the situation meant that it was not feasible to bring suspects before a court within the timeframe envisaged by Article 5(3).

Furthermore, although some delay in the conduct of proceedings – whether for the purpose of a speedy challenge to the lawfulness of detention under Article 5(4) or trial within a reasonable time under Article 6(1) – it is doubtful whether extensive delays would ever be considered to strictly required by the exigencies of a war or other emergency.

Moreover, as was made clear in *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009, there should not be any application of measures that entail the differential treatment of persons in a similar situation where this does not have an objective and rational justification.

All measures taken in derogation from rights under the European Convention must be consistent with a High Contracting Party's other obligations under international law.

So far, the European Court has not had occasion to consider the impact of the United Nations Human Rights Committee's view in its General Comment No. 29 States of Emergency (Article 4), that Article 9(4) is non-derogable for the application of Article 15 of the European Convention on its own previous conclusion in *Ireland v. United Kingdom* [P], no. 5310/71, 18 January 1978 that a derogation with respect to Article 5(4) was admissible.

However, in view of the constant recognition by the European Court that a High Contracting Party's obligations must be observed when making a derogation under Article 15 and the clear view now taken by the United Nations Human Rights Committee regarding Article 9(4) of the International Covenant, it can be expected that the European Court would not consider admissible a derogation affecting obligations under Article 5(4) of the European Convention.

Any measures in derogation from rights and freedoms under the European Convention must be lawful, as the European Court has made clear in *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018.

In that case, the national constitutional court had concluded that the guarantees of the right to liberty and security in the constitution would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence. As a result, a measure allowing such a possibility could not be authorised by the constitutional provision that allowed measures of derogation from constitutional rights in the event of war, general mobilisation, a state of siege or a state of emergency.

The European Court held that there was no reason for it to depart from that ruling and thus concluded that a measure of derogation involving a deprivation of liberty could not be strictly required by the exigencies of the situation where it was not "lawful" and has not been effected "in accordance with a procedure prescribed by law".

As was confirmed in *Barseghyan v. Armenia*, no. 17804/09, 21 September 2021, a derogation can only be invoked with respect to any territory to which it is explicitly named as applying.

Finally, it should be recalled that even where there is a war or other emergency, the fact that there has been no derogation or the one that has been submitted is inapplicable to a particular situation will mean that such a situation cannot be invoked to justify a restriction on a right or freedom that would not be possible in more normal times. This can be seen in the case of *Communaute genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, 15 March 2022, in which a blanket lengthy ban on public events – restricting the right to freedom of peaceful assembly under Article 11 – could not be justified by reference to the threat posed by COVID-19 to society and to public health as Switzerland, unlike some other States, had not submitted any derogation under Article 15.