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16 March 2020

## **MEMORANDUM**

### **For the attention of all Permanent Representatives**

#### **Subject: COVID-19 – Derogations under Article 15 of the European Convention on Human Rights**

Due to the rapid spread of COVID-19, governments of member States are taking measures to contain the spread of the disease and counter the related health threats. This may include the declaration of a state of emergency and the restriction of certain rights and freedoms. The question has arisen as to whether such measures require a “derogation in time of emergency” as provided for in Article 15 of the European Convention on Human Rights (ETS No.5) (the Convention).

At the outset, it should be noted that only the European Court of Human Rights is competent to interpret the Convention. This Memorandum intends to provide practical guidance based on the [Court's case-law](#).

Many of the rights and freedoms guaranteed by the Convention and its Protocols refer explicitly to “the protection of health” as a valid restriction ground. Restrictions on freedom of movement for the protection of health are for instance allowed under Articles 8 to 11 of the Convention and Article 2 (3) of Protocol 4 to the Convention (ETS No. 46).

Therefore, “the protection of health” may be invoked as a legitimate ground for limiting several of the rights in order to allow a High Contracting Party to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be in accordance with law, necessary in a democratic society and specifically aimed at preventing disease or providing care for the sick people.

In view of the above, the use of the usual restriction clauses related to the protection of health should in many cases be sufficient to justify the adopted measures under the Convention. However, exceptionally specific national measures may require derogations from the obligations under the Convention.

Under Article 15 of the Convention, the High Contracting Parties may derogate from obligations under the Convention “in time of war or other public emergency threatening the life of the nation.” On 11 March 2020, the World Health Organization (WHO) characterised COVID-19 as pandemic. Due to the alarming levels of spread and severity of the disease, it would appear justified to speak of a public emergency threatening the life of the nation. According to the European Court of Human Rights, the situation must be such that normal measures permitted under the Convention will not be adequate to address that situation.

Unlike Article 4 of the International Covenant on Civil and Political Rights (ICCPR), the Convention does not contain an express provision demanding that the state of emergency be officially proclaimed. Some formal and public act of derogation is however necessary.

Article 15 of the Convention allows States Parties to derogate, in exceptional circumstances, and in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention and only for such time as is strictly required by the exigencies of the situation. Some rights, however, do not allow any derogation by Article 15: the right to life, except in the context of lawful acts of war (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of slavery and servitude (Article 4 (1) of the Convention), and the rule of “no punishment without law” (Article 7 of the Convention). Similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention.

When an emergency situation pertains and a High Contracting Party wishes to use its power of derogation, it is imperative for the state in question to make a formal derogation under Article 15 of the Convention indicating the rights and the territory to which the derogation applies.

Moreover, in case of such derogation, the third paragraph of Article 15 of the Convention requires that the High Contracting Party concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore, as well as of the moment these measures have ceased to operate.

You will find enclosed a note setting out the procedure followed by the Treaty Office regarding the registration of derogations under Article 15 of the Convention.

The Treaty Office (Ms Ana Gomez, [ana.gomez@coe.int](mailto:ana.gomez@coe.int) ; [treaty.office@coe.int](mailto:treaty.office@coe.int) ) remains at your disposal for any further information on this matter.

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Encl.

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