



LEGAL ANALYSIS

of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights

November 2022

The analysis was prepared within the framework of the project “Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine” which is implemented by the Council of Europe’s Division of Co-operation Programmes

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Abbreviations and acronyms

Convention	European Convention on Human Rights
Court	European Court of Human Rights
Covenant	International Covenant on Civil and Political Rights
Geneva Conventions	The Four Geneva Conventions and their three additional protocols
Convention IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
HRCComm	Human Rights Committee
IHL	International Humanitarian Law
Vienna Convention	Vienna Convention on the Law of Treaties

EXECUTIVE SUMMARY

The present legal analysis of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights was commissioned in view of clarifying Ukraine's derogation from the Convention and the Covenant, and it was carried out to answer practical questions posed by the Ukrainian judiciary. It proposed the following two-tiered model of making a proper judicial analysis of this derogation with reference to the Court's case-law and the Human Rights Committee's recommendations.

The legal analysis was prepared by Mr Lilian Apostol¹ on request of the project "Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine", which is financed by the Human Rights Trust Fund and implemented by the Council of Europe's Division of Co-operation Programmes.

First, the legal analysis illustrated how to answer the question of whether the derogation has been declared validly. It found that, despite mentioning certain non-derogable rights in its derogation notifications, Ukraine has complied with the key conditions established by the human rights treaties for making a valid derogation. Ukraine derogated in June 2015, on the basis of the international armed conflict ongoing on its territory. This was and remains an emergency affecting the life of the nation, triggering, therefore, a valid derogation. This derogation has not suspended the application of human rights but installed a specific derogatory regime to restrict derogable rights in view of the necessity to overcome this emergency.

Second, the legal analysis, elaborated on the principles of legality, necessity, non-discrimination, proportionality, and fairness, required to validly apply such a derogation in practice while examining individual cases. In this context, it was noted that the derogation could not disregard non-derogable rights or other obligations under international law emerging during the armed conflict. From this perspective, the legal analysis concluded that certain questions needed further research because they are exceedingly complex and far-reaching for the limited scope of the present document.

In the end, the legal analysis proposed a set of recommendations for implementing the derogation in practice, as well as two questions for future research.

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1. INTRODUCTION

1. Following the needs of the Ukrainian judiciary, the Project “Ensuring the effective implementation of the right to a fair trial (Article 6 of the ECHR) in Ukraine”, which is financed by the Human Rights Trust Fund and implemented by the Council of Europe’s Division of Co-operation Programmes, commissioned the present legal analysis in view of clarifying Ukraine’s declarations derogating from the Convention.

2. The Ukrainian judges enquired whether this derogation had been validly declared and, as a result, suspended the application of certain Convention rights given the seriousness of the situation in Ukraine. If the answer is positive, should they apply new legal standards and what those standards might be. If the derogation has not rendered the Convention provisions inoperative, should they abide by its legal framework as before the derogation, and to what extent; could the human rights standards and judicial proceedings be adjusted to the exceptional situation faced by Ukraine.

3. Seeking answers to these questions, the legal analysis has extended the scope of the research and assessed the derogation from a larger perspective. It reflected on the applicability of two legal regimes, under the Covenant and the Convention, without which the analysis would have been partial and impractical. The Ukrainian judges are equally bound by two human rights instruments and must not prioritise.

4. The questions asked by the judges also implied the need for further research in other transversal branches of international law. Researching in these branches would have broadened the scope of the legal analysis and could make it too abstract. On the other hand, not mentioning such questions would have made the study unusable because the judges would have encountered them anyway. Hence, the questions related to other branches of international law were formulated only and were left for future research.

5. The present legal analysis, instead of restating legal standards, focused on resolving the questions concerning the practical application of the derogation. Ukrainian judges needed guidance in resolving such questions. Therefore, the study modelled an assessment of Ukraine’s derogations from the perspectives of the Court’s case-law and the HRCComm’s recommendations. It, however, did not wish to speculate on the future decisions of these human rights bodies, presenting this assessment as recommendatory.

6. Therefore, the document’s structure followed this model of assessment for easy understanding of analysis. It first clarified the scope of a derogation in general and compared it to other forms of human rights restrictions. Then, it overviewed Ukraine’s derogation identifying its specific characters for more focused analysis. Next, it explained and recommended the methodology of assessment and application of the derogation in judicial practice, continuing to illustrate this assessment in the following chapters. Unanswered questions needing further research were briefly mentioned in a chapter before conclusions and recommendations.

2. DEROGATION AND OTHER HUMAN RIGHTS RESTRICTIONS

7. Derogation is one of the forms of human rights restrictions coexisting with exceptions, limitations² and reservations³. The first two restrict human rights in regular times, while the third establishes specific applicability restrictions at the time of accession to a human rights treaty⁴. All these forms apply different restriction methods, but they have one element in

² Venice Commission, ‘Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.’, 19 June 2020, paras 38–40, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)014-e).

³ UN, ‘Vienna Convention on the Law of Treaties’ (1969), art. 2 (d), <http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm>.

⁴ See for reservations in times of an armed conflict OHCHR, ed., *International Legal Protection of Human Rights in Armed Conflict*, HR/PUB/11/01 (New York: United Nations, 2011), 53 et seq.

common. None of them suspends or ceases the enjoyment of human rights, nor do they displace each other.

8. Derogation is the most severe form of human rights restriction intended to face a public emergency. It has been erroneously regarded as a means of suspending human rights, but it simply introduces another legal restriction regime. This regime could be implemented in combination with exceptions, limitations, and, only hypothetically, reservations.⁵ However, questions have been raised concerning the necessity to institute a derogation regime and its compatibility with other legal regimes applicable in the time of emergency.

9. The first question is whether derogation would be necessary considering that exceptions and limitations of human rights could be sufficient to address emergencies.⁶ Another question is whether a derogation regime would concur with or, otherwise, yield to these exceptions and limitations and other branches of international law applicable in times of emergency. A reflection on these questions explains better the legal nature of derogation.

10. There is no consensus as to whether derogation is necessary. Most scholars argue that human rights treaties already ensure a balanced application of human rights in times of emergencies. Some of them referred to the recent wave of derogations due to COVID-19 and contended that those treaties allowed limiting the rights to fight the pandemic, which arguably did not require a derogation.⁷ The Court, however, considered that states retained large discretion to derogate in time of the pandemic, which was indeed an emergency warranting a derogation⁸.

11. Notwithstanding these arguments, it could be argued that human rights law has gradually abandoned the concept of derogation. Only the Convention, the Covenant, and the American Convention⁹ had previously adopted this concept, whereas two other modern human rights instruments had dropped it. Instead of a derogation, the Banjul Charter¹⁰ and the EU Charter¹¹ provided broad limitation or exception clauses applicable during the emergencies.

12. The second question relates to the concurrence between the derogation and other human rights restrictions. This question is being resolved by the principle of harmonious application, according to which none of these restrictions could be construed to conflict with each other and the derogation. It compels to consider applying them all drawing a balance between the derogations and other human rights restrictions.

13. The best example to illustrate this principle is the freedom of thought, religion, and conscience, provided by Article 9 of the Convention and Article 18 of the Covenant. This right is derogable under the Convention but non-derogable under the Covenant. This double feature does not mean that this freedom could not be restricted if a necessity arises. The

⁵ Reservations have limited durability in time and space and they could be proposed only at the moment of accession or ratification. They cannot be reinitiated in time of a public emergency arising long after the reservations have expired.

⁶ Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.', para. 38 et seq.

⁷ Vassilis P. Tzevelekos and Kanstantsin Dzehtsiarou, 'Normal as Usual? Human Rights in Times of Covid-19', *European Convention on Human Rights Law Review* 1, no. 2 (18 November 2020): 141–49, <https://doi.org/10.1163/26663236-00102001>; Natasha Holcroft-Emmess, 'Coronavirus: States Derogating to Suspend Human Rights Obligations', *OxHRH Blog* (blog), 27 March 2020, <http://ohrh.law.ox.ac.uk/coronavirus-states-derogating-to-suspend-human-rights-obligations/>; Kanstantsin Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights', *Strasbourg Observers* (blog), 27 March 2020, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>.

⁸ *Terheş v. Romania* (dec.), No. 49933/20 (ECtHR 13 April 2021).

⁹ 'American Convention on Human Rights', N° 17955 § (1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm#:~:text=The%20Inter%2DAmerican%20Commission%20on,the%20field%20of%20human%20rights.&text=The%20Commission%20shall%20represent%20all,the%20Organization%20of%20American%20States.>

¹⁰ 'African Charter on Human and Peoples' Rights', OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) § (1981), <https://www.achpr.org/legalinstruments/detail?id=49>.

¹¹ 'Charter of Fundamental Rights of the European Union', 326 OJ C § (2012), http://data.europa.eu/eli/treaty/char_2012/oj/eng.

HRCComm explained that the non-derogatory regime means continuous application of the restrictions inherent to this right.¹²

14. Another example is the right to life that features non-derogatory status and an exception, also inherent to the right itself. Article 15 (2) of the Convention declares the right to life as non-derogable but only in part. It excepts the ‘deaths resulting from lawful acts of war’ from the absolute prohibition. This means that the right to life could be subjected to two regimes, non-derogable and derogable, which the Court qualifies as another exception to the principle of absolute necessity¹³. The concurrence of these seemingly conflicting regimes of non-derogability, derogability, and exception, could be observed only during an armed conflict when the rules of humanitarian law also come into play.

15. The prohibition of forced labour, under Article 4 (2) of the Convention, is the last example of concurrence between the derogation and exception regimes. According to Article 15 (2) of the Convention, a derogation from that provision is hypothetically possible but not necessary. The provision already includes an exception referring to an emergency¹⁴, which supersedes any derogation supposedly declared under the general clauses in Article 15 of the Convention.

16. These examples illustrate that derogation from human rights treaties is not a clear-cut solution to a public emergency. It is applicable in parallel with other human rights restrictions—exceptions and limitations—but does not supersede or suspend any of them. Sometimes derogation could be effectively replaced by other human rights restrictions. For these reasons, it has been argued that derogation might not be needed at all.

17. Applying derogation when the emergency is an armed conflict may be even more problematic. This type of emergency demands the application of the IHL regime, which installs its own system of protection and restriction of human rights. Allegedly, this system makes the restrictions from human rights treaties, including the derogation, unfeasible or inapplicable. Whether this is true remains the subject of dispute.

In the context of Ukraine’s derogation, these are the key questions to address.

3. OVERVIEW OF UKRAINE’S DEROGATION

18. Ukraine filed derogation notices from the Convention and the Covenant, mentioning both treaties on each notification. The notices are really duplicates deposited to the UN Secretary General and the Secretary General of the Council of Europe.

¹² “...Conceptually, the qualification ... as a non-derogable [right] does not mean that no limitations or restrictions would ever be justified. The reference ... to ... a provision that includes a specific clause on restrictions in its paragraph ..., demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom of thought, religion, and conscience ... must justify their actions by referring to the requirements specified in [the] ... paragraph [providing those restriction clauses]...” Human Rights Committee, ‘General Comment No. 33 Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’, 25 June 2009, para. 7, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/432/66/PDF/G0943266.pdf?OpenElement>.

¹³ ‘...as regards Article 2, any deprivation of life will not be in contravention of the article if it results from the use of force which is no more than absolutely necessary in the circumstances set out in Article 2 § 2 (a)-(c) ... Article 15 § 2 adds the additional exception that the right to life will not be violated if the death results from a lawful act of war.’ ECtHR, *Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency*, 2022, para. 39, https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

¹⁴ “forced or compulsory labour” shall not include: ... (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; ...Council of Europe, ‘Convention for the Protection of Human Rights and Fundamental Freedoms’, Pub. L. No. (ETS No. 005) (1950), art. 4 (3), <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=005>.

19. The first derogation notification from the Convention and its Additional Protocols was sent in June 2015¹⁵ and amended in November 2015¹⁶, June 2016¹⁷ and February 2017¹⁸. It was partially withdrawn in December 2019¹⁹ and updated in April 2021²⁰. Eventually, it was superseded in March 2022²¹ and extended in June²² and September 2022²³.

20. The derogation from the Covenant followed the same pattern. In June 2015²⁴ Ukraine notified about its derogation, then updated it in November 2015²⁵, July 2016²⁶, January 2017²⁷,

¹⁵ Council of Europe, 'Notification - JJ7979C Tr./005-185 - Ukraine - Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 10 June 2015), <https://rm.coe.int/09000016804896cf>.

¹⁶ Council of Europe, 'Notification - JJ8034C Tr./005-186 - Ukraine - Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms -ETS No. 5)' (Council of Europe, 5 November 2015), <https://rm.coe.int/090000168048955f>.

¹⁷ Council of Europe, 'Notification - JJ8172C Tr./005-190 - Ukraine – Declaration Related to the Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)', 1 July 2016, <https://rm.coe.int/0900001680694a09>.

¹⁸ Council of Europe, 'Notification - JJ8318C Tr./005-205 - Ukraine – Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)', 2 February 2017, <https://rm.coe.int/09000016806ef9eb>.

¹⁹ 'Notification - JJ8991C Tr./005-224 - Ukraine – Communication and Partial Withdrawal of Derogation Related to the Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)', 20 December 2019, <https://rm.coe.int/09000016809952f7>.

²⁰ 'Notification - JJ9221C Tr./005-278 – Ukraine – Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 26 April 2021), <https://rm.coe.int/0900001680a24259>.

²¹ 'Notification - JJ9325C Tr./005-287- Corrigendum – Ukraine – Derogation Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).' (Council of Europe, 2 March 2022), <https://rm.coe.int/1680a5b0b0>; 'Notification - JJ9334C Tr./005-289 - Ukraine - Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms' (Council of Europe, 24 March 2022), <https://rm.coe.int/0900001680a5ef58>.

²² 'Notification - JJ9370C Tr./005-294 – Ukraine – Communication Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 7 June 2022), <https://rm.coe.int/0900001680a6ccc2>; 'Notification - JJ9373C Tr./005-295 – Ukraine – Communication Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 21 June 2022), <https://rm.coe.int/0900001680a6f9f1>.

²³ Council of Europe, 'Notification – JJ9398C Tr./005-298 – Ukraine – Communication Related to the Derogation to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)' (Council of Europe, 12 September 2022), <https://rm.coe.int/0900001680a8076b>.

²⁴ 'Ukraine: Notification C.N.416.2015 under Article 4(3) ICCPR' (United Nations, 5 June 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.416.2015-Eng.pdf>.

²⁵ 'Ukraine: Notification C.N.656.2015 under Article 4(3) ICCPR' (United Nations, 27 November 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.656.2015-Eng.pdf>.

²⁶ 'Ukraine: Notification C.N.502.2016 under Article 4(3) ICCPR' (United Nations, 6 July 2016), <https://treaties.un.org/doc/Publication/CN/2016/CN.502.2016-Eng.pdf>.

²⁷ 'Ukraine: Notification C.N.612.2019 under Article 4(3) ICCPR' (United Nations, 23 January 2017), <https://treaties.un.org/doc/Publication/CN/2019/CN.612.2019-Eng.pdf>.

and November 2019²⁸. In March 2022, Ukraine submitted another notification²⁹, updating³⁰ and extending it in March³¹, April³², June³³ and August 2022³⁴.

21. All these notifications referred to one ground for the derogation, what Ukraine was continuously calling the 'armed aggression of the Russian Federation'. In the 2015³⁵ and the 2022³⁶ notifications Ukraine relied on the necessity to restore the territorial integrity.

22. In 2022 the gist of the derogation noticeably shifted. The notifications from 2015 to 2021 referred to a range of special measures adopted within the framework called as 'special anti-terrorist operation' aiming at '[ensuring] the vital interests of the society and the State in response to the armed aggression of the Russian Federation' and '[restoring] the territorial integrity of Ukraine'. From 2022 onwards, all notifications were based on martial laws '[authorising] to implement and conduct measures and authority necessary to defend Ukraine, protect public safety and interests of the state'.

23. The territorial scope of the derogation also diverged in time. From 2015 to 2021, Ukraine limited its territorial applicability to 'temporarily occupied territories in Donetsk and Luhansk regions' and the 'annexed and temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol'. From 2022, the territorial scope of the derogation was enlarged to include what Ukraine referred to as 'a state of emergency rule in separate regions [...] and martial law on the entire territory [...]'].

24. The shift in the notifications was due to the significant development of the armed conflict in February 2022. It did not go without consequences for the perception of the derogation. The OSCE study, for example, split the notifications as made before and after March 2022 and regarded them as two or even many derogations. This distinction was seen as more appropriate for the purposes of that analysis, which aimed at assessing the human rights violations and breaches of humanitarian law after 25 February 2022.³⁷

²⁸ 'Ukraine: Notification C.N.618.2019 under Article 4(3) ICCPR' (United Nations, 26 November 2019), <https://treaties.un.org/doc/Publication/CN/2019/CN.618.2019-Eng.pdf>.

²⁹ 'Ukraine: Notification C.N.64.2022 under Article 4(3) ICCPR' (United Nations, 1 March 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.64.2022-Eng.pdf>; 'Ukraine: Notification C.N.65.2022 under Article 4(3) ICCPR (Amended)' (United Nations, 1 March 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.65.2022-Eng.pdf>.

³⁰ 'Ukraine: Notification C.N.78.2022. under Article 4(3) ICCPR' (United Nations, 16 March 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.78.2022-Eng.pdf>.

³¹ 'Ukraine: Notification C.N.89.2022. under Article 4(3) ICCPR' (United Nations, 28 March 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.89.2022-Eng.pdf>.

³² 'Ukraine: Notification C.N.115.2022. under Article 4(3) ICCPR' (United Nations, 29 April 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.115.2022-Eng.pdf>.

³³ 'Ukraine: Notification C.N.145.2022. under Article 4(3) ICCPR' (United Nations, 9 June 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.145.2022-Eng.pdf>; 'Ukraine: Notification C.N.159.2022 under Article 4(3) ICCPR' (United Nations, 20 June 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.159.2022-Eng.pdf>.

³⁴ 'Ukraine: Notification C.N.269.2022. under Article 4(3) ICCPR' (United Nations, 19 August 2022), <https://treaties.un.org/doc/Publication/CN/2022/CN.269.2022-Eng.pdf>.

³⁵ Council of Europe, 'JJ7979C Tr./005-185'.

³⁶ 'JJ9325C Tr./005-287'.

³⁷ '...Ukraine has derogated from its obligations under the ICCPR and the ECHR at several instances since 2014. The older derogations (2015-2019) relate to the situation in the Autonomous Republic of Crimea and the City of Sevastopol and in the Donetsk and Luhansk regions. The recent derogations (2022) have been made following the Russian attack against Ukraine and the introduction, for a period of 30 days, of a state of emergency in most regions of Ukraine (23 February) and of martial law on the entire territory of Ukraine (24 February, extended for another 30 days from 26 March). The recent derogations concern a broad range of human rights, namely those granted by Articles 2(3), 3, 8(3), 9, 12-14, 17, 19-22, 24-27 of the ICCPR, Articles 4(3), 5-6, 8-11 and 13-14 of the ECHR, Article 1-3 of the Additional Protocol to the ECHR and Article 2 of Protocol 4 to the ECHR.' Wolfgang Benedek, Veronika Bílková, and Marco Sassöli, 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022' (OSCE, 13 April 2022), 50, <https://www.osce.org/files/f/documents/f/a/515868.pdf>.

25. Indeed, the content of the June 2015³⁸ and March 2022³⁹ notifications could imply that they were two independent derogations. However, this distinction is virtual because all notifications retain common elements warranting their classification as one continuous process. Ukraine finds itself in the state of continuous derogation since 2015, for the following reasons.

26. The ground for the derogation has not changed since 2015 but only worsened with the full-scale military invasion of Ukraine in 2022. Ukraine continued to refer to the same ground as it did in the first notification in June 2015. Since that notification, Ukraine has informed only about changing derogatory measures and extending territorial applicability. Moreover, Ukraine has not yet withdrawn its derogation in full (the withdrawal of 2019⁴⁰ was partial and superseded in 2022).

27. It is important to observe the derogation as one process in order to understand how it applies in time and space, as well as in relation to specific rights and freedoms. In doing so, the Ukrainian would identify the concrete notification applicable to the case at hand, depending on the time, space, and nature of the alleged violation. For example, if the case refers to an instantaneous violation in the past, say from March 2017, the judges may wish to look at the notifications from June 2015, November 2015, July 2016, and February 2017. If a violation continues, the March 2022 notification could be applicable along with the previous notifications.

28. Figure 1 listed the derogation notices and the elements important for their assessment. The column “category” marked a conventional description of the notifications. The last column “effected in Ukraine” referred to the dates when the emergency laws entered in force in Ukraine.

Figure 1. Derogation notifications

Notice	Deposited	Treaty	Depository	Category	Effected in Ukraine
C.N.416.2015	05/06/2015	Covenant	UN	1st Notification	21/05/2015
JJ7979C Tr./005-185	10/06/2015	Convention	Council of Europe	1st Notification	21/05/2015
JJ8034C Tr./005-186	05/11/2015	Convention	Council of Europe	Updated	03/11/2015
C.N.656.2015	27/11/2015	Covenant	UN	Updated	24/11/2015
JJ8172C Tr./005-190	01/07/2016	Convention	Council of Europe	Updated	30/06/2016
C.N.502.2016	06/07/2016	Covenant	UN	Updated	06/07/2016
C.N.612.2019	23/01/2017	Covenant	UN	Updated	20/01/2017
JJ8318C Tr./005-205	03/02/2017	Convention	Council of Europe	Updated	02/02/2017
C.N.618.2019	26/11/2019	Covenant	UN	Partial withdrawal	26/11/2019
JJ8991C Tr./005-224	20/12/2019	Convention	Council of Europe	Partial withdrawal	03/12/2019
JJ9221C Tr./005-278	26/04/2021	Convention	Council of Europe	New measures	22/04/2021
C.N.65.2022	01/03/2022	Covenant	UN	2nd Notification	24/02/2022
JJ9325C Tr./005-287	02/03/2022	Convention	Council of Europe	2nd Notification	24/02/2022

³⁸ Council of Europe, ‘JJ7979C Tr./005-185’; ‘C.N.416.2015’.

³⁹ ‘JJ9325C Tr./005-287’; ‘C.N.65.2022’, 1 March 2022.

⁴⁰ ‘C.N.618.2019’; ‘JJ8991C Tr./005-224’; ‘C.N.618.2019’.

C.N.78.2022	16/03/2022	Covenant	UN	New measures	08/03/2022
JJ9334C Tr./005-289	24/03/2022	Convention	Council of Europe	New measures	08/03/2022
C.N.89.2022	28/03/2022	Covenant	UN	Extension	26/03/2022
C.N.115.2022	29/04/2022	Covenant	UN	Extension	25/04/2022
JJ9370C Tr./005-294	07/06/2022	Convention	Council of Europe	Extension	25/05/2022
C.N.145.2022	09/06/2022	Covenant	UN	Extension	25/05/2022
C.N.159.2022	20/06/2022	Covenant	UN	New measures	01/05/2022
JJ9373C Tr./005-295	21/06/2022	Convention	Council of Europe	New measures	01/05/2022
C.N.269.2022	19/08/2022	Covenant	UN	Extension	23/08/2022
JJ9398C Tr./005-298	12/09/2022	Convention	Council of Europe	Extension	23/08/2022

4. METHODOLOGY

29. It seemed not to be a straightforward process to identify the relevant standards in order to assess Ukraine's derogation from a legal perspective. Ukraine derogated not only from the Convention but also from the Covenant, as well as from other international legal instruments⁴¹ containing similar human rights safeguards⁴². Its derogation was triggered by an armed conflict, bringing the legal regime of IHL into play. Moreover, a validity of derogation is assessed in different ways by the Court and the HRCComm.

30. The Court follows the structure of Article 15 of the Convention⁴³ and applies a three-tiered test with underlying conditions under each layer. The Court,

- a. assesses whether a State has validly derogated under Article 15 (1), checking
 - i. whether there has been war or other public emergency threatening the life of the nation, therefore enough to substantiate making a derogation;
 - ii. whether the derogatory measures have not gone beyond the extent strictly required by the exigencies of the given emergency;
 - iii. whether these measures have been consistent with other obligations under international law;
- b. makes sure that rights from which the State has derogated are not included in Article 15 (2), i.e. that the rights are not intangible;
- c. verifies if the derogating State has complied with the specific notification requirements, under Article 15 (3).

⁴¹ 'Notification – JJ9359C Tr./024-123, Tr./030-152, Tr./051-23, Tr./062-74, Tr./070-35, Tr./073-46, Tr./077-12, Tr./082-15, Tr./085-43, Tr./086-60, Tr./090-69, Tr./092-58, Tr./097-48, Tr./098-65, Tr./099-83, Tr./105-101, Tr./112-113, Tr./141-127, Tr./156-42, Tr./160-45, Tr./167-72, Tr./173-194, Tr./182-112, Tr./185-121, Tr./189-64, Tr./191-73, Tr./192-25, Tr./196-88, Tr./197-80, Tr./198-102, Tr./201-85, Tr./202-26, Tr./209-48, Tr./211-49, Tr./212-28, Tr./217-50 – Ukraine – Declaration Related to the European Convention on Extradition (ETS No. 24) and Other Treaties Concerning International Cooperation within the Council of Europe.' (Council of Europe, 13 May 2022), <https://rm.coe.int/0900001680a67ed5>.

⁴² For example, Article 15 of the Convention on Cybercrime ([ETS No. 185](#)) requires to set up such procedural powers compatible with the European Convention and ICCPR requiring 'adequate protection of human rights and liberties' and respect of the proportionality principle. Article 12 of the Council of Europe Convention on the Prevention of Terrorism ([ETS no. 196](#)) also requires respect of the European Convention and ICCPR while implementing and applying criminalisation policing against terrorism.

⁴³ ECtHR, *Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency*.

31. The HRCComm, under Article 4 of the Covenant⁴⁴, scrutinise whether the derogating State has

- a. officially proclaimed a state of emergency;
- b. formally notified the UN Secretary-General;
- c. applied the derogating measure(s) in strict compliance with the necessity and proportionality requirements;
- d. complied with other international obligations;
- e. applied the derogating measure(s) in non-discriminatory manner; and
- f. respected the prohibition on derogating from certain non-derogable rights.⁴⁵

32. In the presence of these concurrent ways of assessing a derogation, it was therefore challenging to collect all relevant legal standards and evaluate the derogation in an all-inclusive manner. Moreover, such an evaluation should be not only accurate in theory but also useful in practice. But, in practice, the Ukrainian judges are bound to apply the derogation regimes of the Convention and the Covenant jointly. The parallel application of the IHL regime does not make their job easier.

33. To overcome these challenges, a method was required, that would also serve as a model for Ukrainian judges to analyse and apply the derogation. This method is as follows.

4.1. Two-tiered assessment

34. It was argued that each human rights treaty 'employs a two-stage inquiry to evaluate the legality of a state's derogation from general human rights standards', similar to the evaluation of legal regimes applicable to armed conflicts (i.e. *jus ad bellum* and *just in bello*). Such an assessment seeks to evaluate a derogation through 'the norms regulating a state's initiation of a state of emergency and norms regulating a state's conduct within emergencies'.⁴⁶

35. Despite the different structure of their arguments, both the Court and the HRCComm use the same two-tiered approach. They examine, first, whether the derogation was validly declared, and, second, whether the authorities complied with human rights obligations while applying the derogation in a specific case. It is therefore judicious to recommend this two-tiered assessment for use in national judicial practice, but with the following clarification.

36. The dichotomy between *jus ad bellum* and *jus in bello* was referred to only by analogy. In IHL, this distinction has its own reasons aiming to distinguish the legality of the beginning of an armed conflict from the legality of conducting such an armed conflict.⁴⁷ The arguments between these two are unrelated and cannot be used interchangeably to justify the legality of one action or another.⁴⁸

⁴⁴ Human Rights Committee, 'General Comment No. 29: Article 4: Derogations during a State of Emergency', 31 August 2001,

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/444/70/PDF/G0144470.pdf?OpenElement>.

⁴⁵ For the recent use of this six-layered test for assessing the validity of derogations see Human Rights Committee, 'Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (CCPR/C/128/2)', 24 April 2020,

<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

⁴⁶ Evan J Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law', *Human Rights Quarterly* 34 (2012): 46–47.

⁴⁷ '...the most important principle for IHL is the absolute separation between *jus ad bellum* ("the right to wage war") and *jus in bello* ("the law applicable in war"). ... while aggression itself is unlawful [under *jus ad bellum*], both the first shot fired in an armed conflict and subsequent shots fired as between and against combatants of the parties to a conflict are lawful and governed by identical limitations under *jus in bello*.' Marco Sassòli and Patrick Nagler, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Principles of International Law (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2019), para. 3.10. 3.11.

⁴⁸ "...Justifications underlying the resort to violence are wholly irrelevant. ... arguments concerning *jus ad bellum* cannot be used to interpret IHL [*jus in bello*]. Benedek, Bilková, and Sassòli, 'Report On Violations Of International

37. On the contrary, the arguments justifying the declaration of emergency are often used to evaluate the proportionality of conducting emergency measures. In other words, the legality of starting a derogation reflects on the legality of conducting that derogation. The arguments on both levels are interconnected.

4.2. Method to assess and apply derogation

38. Drawing inspiration from the Court's and the HRCComm's jurisprudence the following method was developed. Instead of cataloguing the legal principles, this method proposes an algorithm of questions classified in two-tiered reasoning. The Ukrainian judges may wish to use this algorithm when analysing and, most importantly, applying the derogation in individual cases:

1st tier: How the derogation has been declared

- i. Whether there has been an emergency triggering a derogation
- ii. Whether it has been officially declared
- iii. Whether it has complied with non-derogatory clauses
- iv. Whether it has been limited
 1. in time, and
 2. in space
- v. Whether it has complied with the notification requirements

2nd tier: How the derogation has been applied

- vi. Whether the implementation of derogatory measure(s) has complied with the principles of
 1. legality,
 2. necessity,
 3. proportionality, and
 4. non-discrimination
- vii. Whether the minimum standards of fairness have been respected while interfering into rights and whether the remedies for the alleged violation are available
- viii. Whether other relevant international obligations have been respected

39. The below assessment followed this two-tiered algorithm.

5. HOW THE DEROGATION HAS BEEN DECLARED

40. An answer to this level-question would make clear whether Ukraine has made a valid derogation. It includes sub-questions pertaining to emergency, officiality, material, temporal, and spatial scopes of derogation, as well as its formal notification requirements.

5.1. Whether there has been an emergency triggering a derogation

41. Derogations are associated with a 'state of emergency' but not every emergency requires a derogation. An occurrence must be one of exceptional nature that threatens the life of the nation in order to trigger a derogation. In fact, the later requirement is fundamental for the derogation to be valid, which goes along with another not less important condition of legality.

42. Human rights treaties defined the grounds for declaring emergencies in several ways, listing war⁴⁹, public danger⁵⁰ or simply public emergencies⁵¹. States' practices to classify an event worth declaring a derogation also vary. It is therefore difficult to draw a list of the events that could substantiate a derogation, but they have two features in common. An event must be both exceptional⁵² and threaten the life of nation⁵³ to qualify as an emergency triggering a derogation.⁵⁴

43. Obviously, a derogation in time of armed conflicts must meet these conditions. But the difficulty of judging the compatibility of such a derogation arises from the necessity to determine whether the armed conflict exists. The human rights treaties are less accustomed to making such an assessment, and they rely on IHL to do its classification of armed conflicts. However, this interdisciplinary assessment raises certain challenges.

44. On the one hand, according to IHL, an armed conflict should no longer be officially declared or recognised in order to exist. It is fact that must pass a specific threshold to be classified either as an international or a non-international armed conflict, involving slightly different rules of the Geneva Conventions. From this perspective, the classification of an armed conflict under IHL is irrelevant for the application of human rights treaties and therefore has little significance for making a derogation.⁵⁵

45. On the other hand, according to human rights treaties, armed conflicts should threaten the life of the nation to trigger a valid derogation.⁵⁶ Following this line of reasoning, the

⁴⁹ 'In time of war or other public emergency threatening the life of the nation ...' Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15 (1).

⁵⁰ '...In time of war, public danger, or other emergency that threatens the independence or security of a State Party...' OAS, American Convention on Human Rights, art. 27 (1).

⁵¹ 'In time of public emergency which threatens the life of the nation...' UN, 'International Covenant on Civil and Political Rights', Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) § (1966), art. 4 (1), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁵² 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 (24 January 1968).

⁵³ On what constitutes an emergency "threatening the life of the nation" see *Lawless v. Ireland* (no. 3), No. 332/57 (ECtHR 1 July 1961); or conversely the case of *Dareskizb Ltd v. Armenia*, No. 61737/08 (ECtHR 21 September 2021) where the Court did not find that post-election violence constituted a public emergency "threatening the life of the nation".

⁵⁴ Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.', para. 20.

⁵⁵ ... Most IHL rules regulating conduct can only be invoked if an armed conflict exists and the conduct to be regulated has the requisite link, or nexus, to that conflict. Otherwise, only peacetime law, in particular IHRL, applies. Although IHRL is more restrictive and provides better protection to individuals from abuse, its application is less realistic in situations of armed violence, and it is traditionally considered to apply only to States and not to armed non-State actors. ... the increasing influence of IHRL also contributed significantly to this convergence because the classification of a conflict as an IAC or NIAC is technically irrelevant for the application of IHRL. ... As a result of this merger, the distinction between IACs and NIACs arguably remains only relevant for three issues in IHL. Sassòli and Nagler, *International Humanitarian Law*, para. 3.02, 3.08, 3.09.

⁵⁶ '...The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation...' Human Rights Committee, 'General Comment No. 29', para. 3; *Lawless* (3) paragraph 28.

classification of an armed conflict and the IHL threshold criteria are relevant to evaluating whether the conflict fulfils this condition. For example, according to IHL, an official declaration of war, even without violence, is enough to pass the threshold and start an armed conflict.⁵⁷ From the perspective of human rights treaties, however, a war without violence could hardly be considered as an emergency needing a derogation.

46. These complexities could explain why states do not rush to derogate from human rights treaties solely because they are involved in an armed conflict⁵⁸. First, not all conflicts threaten the life of the nation and states seem reluctant to acknowledge the existence of an armed conflict, especially a non-international armed conflict, causing the so-called derogation gap⁵⁹. Second, it is still unsafe to consider that a derogation could ease the burden on states to protect human rights during an armed conflict. On the contrary, it was contended that a derogation could undermine this protection in the times when human rights are needed the most.⁶⁰

47. At first glance, all these complexities could seem irrelevant to the Ukrainian judges, since Ukraine did derogate and acknowledge the existence of an armed conflict on its territory. However, the Ukrainian judges will be the first to consider whether the armed conflict met the fundamental conditions to trigger the derogation. Furthermore, applying derogatory measures in accordance with the principles of legality and proportionality necessitates an examination of the character and seriousness of the armed conflict; otherwise, an emergency which cannot trigger a valid derogation cannot justify derogatory measures.

48. Last but not least, the derogation clauses of the Covenant and the Convention do not contain terminology referring to an armed conflict. Yet, this does not mean that these clauses are inapplicable. The HRCComm extended the interpretation of Article 4 (1) of the Covenant and included armed conflicts as emergencies⁶¹, whilst the Court did not contest the semantic connection between the word 'war' in Article 15 (1) of the Convention and the expression 'armed conflict'⁶², though scholars still dispute the relation between these two terms.⁶³

Ukraine's derogation

49. Ukraine derogated on the grounds of what it called the 'armed aggression' effected by the Russian Federation. In the 2015 notification, Ukraine referred to 'annexation and temporary occupation by the Russian Federation of the integral part of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – as a result of armed aggression against Ukraine'.⁶⁴ Next notifications, while keeping this language, contended that the Russian Federation exercised 'overall effective control over certain districts of the Donetsk and

⁵⁷ Sassòli and Nagler, *International Humanitarian Law*, para. 6.12.

⁵⁸ Hassan v. the United Kingdom [GC], No. 29750/09 (ECtHR 16 September 2014).

⁵⁹ Derogation may also lead straight into what may be termed the derogation gap: when a state lawfully derogates from provisions of a human rights treaty but at the same time does not recognize the existence of an armed conflict and thus denies the application of humanitarian law, neither law applies. Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge, United Kingdom: Cambridge University Press, 2015), sec. 10.3.

⁶⁰ '...Derogation remains a paradox for the way it allows the suspension of rights precisely in times when they are most needed.' Oberleitner, para. 10.1.

⁶¹ Human Rights Committee, 'General Comment No. 29', para. 3.

⁶² "The Court has not been required to interpret the meaning of "war" in Article 15 § 1; in any case, any substantial violence or unrest short of war is likely to fall within the scope of the second limb of Article 15 § 1, a "public emergency threatening the life of the nation". ECtHR, *Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency*, para. 8.

⁶³ '...the European Convention on Human Rights (1950) refers not only to derogations in "time of war or other public emergency", (footnote) but also, rather ambiguously, to a valid derogation to the right to life being permitted for "lawful acts of war". (...) Some commentators here read "war" in this last phrase in a wider sense, beyond War in the technical sense, as covering armed conflicts where the laws of war apply. (...) Others restrict "war" here to inter-state conflict of a certain intensity (war in the material sense), (...) or simply refer to international armed conflicts. (...) An examination of the records of the drafting reveals little.' Andrew Clapham, *War*, Clarendon Law Series (Oxford, New York: Oxford University Press, 2021), chap. 1.5.

⁶⁴ Council of Europe, 'JJ7979C Tr./005-185'.

Luhansk oblasts of Ukraine⁶⁵. The language did not change in the notifications from 2019 and 2021⁶⁶. The 2022 notifications kept the same semantic meaning, naming 'military aggression of the Russian Federation against Ukraine' as grounds for derogation⁶⁷.

50. The vocabulary used in all these notifications is less relevant for determining the validity of the derogation. In legal terms of IHL, the situation in Ukraine is classified as an armed conflict and military occupation of international character⁶⁸ and scholars agree with this classification⁶⁹. What matters for the derogation is whether the armed conflict exists and whether it affects the nation as a whole. The answers to these questions are positive.

51. The armed conflict in Ukraine exists and has continued since 2014 affecting the nation as a whole. Though it started as regional conflict in the Crimea and Eastern parts of Ukraine, it still affected the whole nation.⁷⁰ After February 2022, this threat posed by the armed conflict to the life of the nation could no longer be disputed. It is also indisputable that this armed conflict represents an exceptional situation.

52. Therefore, the first two conditions to trigger a valid derogation are fulfilled. The emergency in Ukraine is an armed conflict, i.e. an exceptional situation threatening the life of the nation, allowing Ukraine to derogate under Article 4 of the Covenant and Article 15 of the Convention.

5.2. Whether a derogation has been officially declared

53. The second condition for the validity of a derogation is the official declaration of the state of emergency by law. Only the Covenant stipulates this condition expressly in its derogation clauses⁷¹, but in time this requirement became customary. The Venice Commission supported this view⁷².

54. This condition is important not only for making a valid declaration but also for implementing the derogation in practice. It says that the state of emergency should be officially declared⁷³ by national law or by an official statement⁷⁴. In the end, this condition sets up the basis for the legality of the authorities' conduct during the derogation period. That is why it is important.

55. The procedure for declaring a derogation does not matter, though the Venice Commission recommends using constitutional emergency powers instead of extra-constitutional forms of

⁶⁵ Council of Europe, 'JJ8172C Tr./005-190'.

⁶⁶ '...the Russian Federation is committing a crime of aggression against Ukraine and is temporarily occupying a part of its territory by the armed formations of the Russian Federation,...' 'JJ8991C Tr./005-224'; 'JJ9221C Tr./005-278'.

⁶⁷ 'JJ9325C Tr./005-287'.

⁶⁸ 'International Armed Conflict in Ukraine | Rulac', accessed 3 November 2022, <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine>; 'Military Occupation of Ukraine by Russia | Rulac', accessed 3 November 2022, <https://www.rulac.org/browse/conflicts/military-occupation-of-ukraine>.

⁶⁹ Benedek, Bílková, and Sassòli, 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022'; Marko Milanovic, 'Ukraine Derogates from the ICCPR and the ECHR, Files Fourth Interstate Application against Russia', *EJIL: Talk!* (blog), 5 October 2015, <https://www.ejiltalk.org/ukraine-derogates-from-the-iccpr-and-the-echr-files-fourth-interstate-application-against-russia/>.

⁷⁰ 'a crisis which concerns only a particular region of the State can amount to a public emergency threatening "the life of the nation"' ECtHR, *Ireland v. the United Kingdom*, No. 5310/71 (18 January 1978); *Aksoy v. Turkey*, No. 21987/93 (ECtHR 18 December 1996).

⁷¹ '...the existence of which is officially proclaimed...' UN, International Covenant on Civil and Political Rights, art. 4 (1).

⁷² Venice Commission, 'Opinion on the Protection of Human Rights in Emergency Situations, Opinion No. 359/2005', 4 April 2006, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)015-e); Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.'

⁷³ 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (UN Commission on Human Rights, 28 September 1984), para. 42, <https://www.refworld.org/docid/4672bc122.html>; Human Rights Committee, 'General Comment No. 29', para. 2.

⁷⁴ Home Secretary's statement to the House of Commons on the derogation was "well in keeping with the notion of an official proclamation" *Brannigan and McBride v. the United Kingdom*, No. 14553/89, 14554/89 (ECtHR 26 May 1993).

declarations.⁷⁵ For the Court and the HRComm, however, it matters less how or by whom the state of emergency was declared. Once the official proclamation of emergency had been conducted under the law⁷⁶, these bodies would be concerned only with the quality of that law and the implementation of the derogating measures. The quality of emergency laws has always been evaluated jointly with the merits of the cases, while assessing the legality of derogatory measures.⁷⁷

56. The principle of legality is the cornerstone of the Convention and the Covenant requiring that any restriction on human rights must have a legal basis. The legal basis means that there must be a legislation complying with the requirements of quality, accessibility, clarity, and foreseeability.

57. Yet in times of emergency, these requirements are often at risk because the authorities may find themselves unprepared to draft qualitative legal provisions. In this case, it would be for domestic courts to fill the legal gaps while applying the derogation to individual cases. In this sense, the condition to declare a derogation officially is connected with the question of the legality of derogatory measures

Ukraine's derogation

58. Declaring the derogation and the state of emergency, Ukraine relied on national laws. A resolution of the Verkhovna Rada of Ukraine was mentioned in the June 2015⁷⁸ notification. Later in 2016, Ukraine notified about amendments to a number of national laws implementing specific derogatory measures⁷⁹. In 2018, new law was adopted⁸⁰ updating the derogation regime. Since February 2022, Ukraine has relied on martial law⁸¹ declaring an emergency and imposing derogatory measures.

59. The derogation therefore complied with the second condition.

5.3. Whether the derogation has complied with non-derogatory clauses

60. The answer to this question is not as straightforward as it might appear at first glance. Human rights treaties prohibit a derogation from some rights, therefore allowing a derogation from others. But it does not mean that 'everything which is not forbidden is allowed'. The state is not relieved of its duties to respect, protect, and fulfil human rights, even if it has derogated from some of them. The derogable rights continue to apply under a different legal regime, while the non-derogable rights remain under their legal regime as if no derogation has been

⁷⁵ Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.', sec. D. Declaration of state of emergency.

⁷⁶ 'Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Article 15 cannot apply.' *Cyprus v. Turkey*, No. 6780/74, 6950/75 (European Commission of Human Rights 10 July 1976).

⁷⁷ *Mehmet Hasan Altan v. Turkey*, No. 13237/17 (ECtHR 20 March 2018); *Baş v. Turkey*, No. 66448/17 (ECtHR 3 March 2020); *Pişkin v. Turkey*, No. 33399/18 (ECtHR 15 December 2020).

⁷⁸ Verkhovna Rada of Ukraine approved the Resolution Council of Europe, 'JJ7979C Tr./005-185'.

⁷⁹ Law of Ukraine "On Amendments to the Law of Ukraine 'On Combating Terrorism' regarding the preventive detention of persons, involved in terrorist activities in the anti-terrorist operation area for a period exceeding 72 hours" of 12 August 2014, the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation under martial law, in state of emergency or in the anti-terrorist operation area" of 12 August 2014, the Law of Ukraine "On Administering Justice and Conducting Criminal Proceedings in Connection with the Anti-terrorist Operation" of 12 August 2014 and the Law of Ukraine "On Military and Civil Administrations" of 3 February 2015 'C.N.502.2016'.

⁸⁰ " on January 18, 2018, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On the peculiarities of State policy on ensuring state sovereignty of Ukraine over temporarily occupied territories in Donetsk and Luhansk regions" 'JJ8991C Tr./005-224'.

⁸¹ 'Decree of the President of Ukraine as of 24.02.2022 N° 64/2022 "On the imposition of martial law in Ukraine" entered into force simultaneously with the entry into force of the Law of Ukraine "On Approval of the Decree of the President of Ukraine" On the imposition of martial law in Ukraine', adopted on 24.02.2022. This Law was immediately promulgated via the mass media and entered into force on the day of its publication on February 24, 2022." 'JJ9325C Tr./005-287'.

declared. Yet, it could still be confusing to determine the scope of a derogation for the following reasons.

61. Firstly, human rights treaties do not share the same list of non-derogable rights. Secondly, the human rights bodies have extended that list by interpretation and included peremptory norms of international law into the category of non-derogable rights. Thirdly, these peremptory norms of international law are still difficult to define. And, finally, in time of an armed conflict, the scope of the derogation is determined by the parallel applicability of IHL, which also contains absolute prohibitions and non-derogatory clauses.

62. The list of non-derogable rights varies from treaty to treaty; therefore, the scope of the treaties' derogation clauses also differs. Article 15 of the Convention and Article 2 of Protocol No. 13 to the Convention specify the non-derogable rights on which the most human rights treaties agree. However, Article 4 (2) of the Covenant is silent about the *ne bis in idem* prohibition, which is non-derogable according to Article 4 (3) of Protocol No. 7 to the Convention. The Covenant, on the other hand, adds the freedom of thought, conscience, and religion (Article 18 of the Covenant) as a non-derogable right, which is otherwise derogable under the Convention (Article 9 of the Convention). The American Convention provides for an even more extensive list of non-derogable rights⁸², which are normally derogable under the Convention and the Covenant.

63. The human rights bodies have extended the list of non-derogable rights by interpretation. The HRCComm, for example, has included the peremptory norms of international law and certain elements of international crimes into the category of non-derogable rights. Despite not being expressly mentioned in the Covenant's derogation clauses, these rights have been attributed to international customary law and are prohibited from being derogated from.⁸³ The Court has agreed with such an extensive interpretation⁸⁴, although there has been no case-law to date indicating that it might have attributed other rights to the category of non-derogable⁸⁵.

64. The rights making part of peremptory norms do not allow a derogation either. The Vienna Convention defines them as non-derogable⁸⁶, however this description is insufficient to establish their meaning and features. Peremptory rights have never been defined solely with reference to the derogation clauses⁸⁷, which contain no all-inclusive categorisation of non-derogable rights. Some other peremptory rights could be found in other branches or sources of international law, such as IHL.

65. IHL contains a number of peremptory norms and absolute prohibitions. A derogation due to an armed conflict cannot disregard these rules simply because they were not included in the derogatory clauses of human rights treaties. The legal regime of the derogation continues

⁸² "...The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights." OAS, American Convention on Human Rights, art. 27 (2).

⁸³ Human Rights Committee, 'General Comment No. 29', paras 7–16.

⁸⁴ The case involved discriminatory derogation aimed at detaining only foreign nationals suspected of terrorism. *A. and Others v. the United Kingdom* [GC], No. 3455/05 (ECtHR 19 February 2009).

⁸⁵ ECtHR, *Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency*, paras 35–40.

⁸⁶ "...a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted..." UN, Vienna Convention on the Law of Treaties, art. 53.

⁸⁷ "...the international consensus regarding the number of jus cogens norms, their scope and their utility as a mechanism for norm conflict resolution, remain disputed. ... It also remains unclear if and to what extent peremptory norms can provide protection beyond what is also guaranteed by ordinary customary and/or treaty law. ..." Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, First edition, Oxford Handbooks (Oxford, United Kingdom; New York, NY: Oxford University Press, 2013), chap. 23 Jus Cogens and Obligations Erga Omnes by Erika De Wet.

to operate concurrently with the IHL regime and must take into account the rules and prohibitions applicable in armed conflicts.

66. With these considerations in mind, the scope of derogation has been defined in two ways.

67. First, under the Covenant the states are formally required to notify the list of rights from which they derogate.⁸⁸ Even if there is no such a requirement under the Convention, the list of derogable rights is implied in the context of each individual case unless objected.⁸⁹ As a result, the list of derogable rights is defined with reference to the concrete derogation rather than in an abstract manner.

68. Second, the different regimes of derogability and non-derogability between the treaties should be reconciled. If non-derogability does not take over the derogability, then the right is subjected to its ordinary exceptions or limitations. This process entails merging the derogation regime with the limitation clauses. The same merging technique is applied in relation to certain rights falling under the concurrent regime of IHL prohibitions.

69. In the end, Figure 2 makes an inventory of all non-derogable rights under the Convention and the Covenant, including the rights declared non-derogable by interpretation. Its purpose is to determine the rights from which Ukraine has properly derogated.

Figure 2. Indicative list of non-derogable rights

Non-derogable rights	Covenant	Convention
Right to life	Article 6	Article 2, except the lawful war deaths
Prohibition of torture	Article 7	Article 3
Prohibition of slavery and servitude	Article 8, §§ 1, 2	Article 4 § 1
Prohibition of imprisonment because of inability to fulfil a contractual obligation	Article 11	Article 1 Protocol no. 4
Prohibition of criminal punishment without law	Article 15	Article 7
Right of recognition as a person before the law	Article 16	Article 8 (derogable)
Freedom of thought, conscience, and religion	Article 18	Article 9 (derogable)
Prohibition of the death penalty	Article 6 of the 2nd Protocol	Article 2 Protocol no. 13
Fair trial guarantees	Article 14	Article 6
Non-discrimination	Article 26	Article 14
Ne bis in idem	Article 14 (7)	Article 4 Protocol no. 7
Child indiscriminatory registration	Article 24	Article 8 + Article 14
Effective Remedy	Article 2 (3)	Article 13
Prohibition of war propaganda	Article 20	No correspondent provision in the Convention; Article 10 does not protect such propaganda.

⁸⁸ 'The notification shall contain sufficient information to permit the State parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain : (a) The provisions of the Covenant from which it has derogated; ...' 'The Siracusa Principles'; Human Rights Committee, 'General Comment No. 29', para. 6.

⁸⁹ "The Court has accepted that this formal condition was observed even where the notice of derogation did not explicitly mention which Articles of the Convention were concerned, in cases where the parties had not raised any objections in that regard." ECtHR, *Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency*, para. 46.

Ukraine's derogation

70. Ukraine has derogated from a list of rights at various points in time. It updated that list, withdrew one right, and eventually submitted a new list. Before arguing on the validity of this list, two additional factors must be taken into account.

71. Firstly, some rights are considered non-derogable, even if not expressly specified by the Convention and the Covenant. Therefore, even if Ukraine declared a derogation from these rights, it would be disregarded as void. Secondly, some rights do not require a notice of derogation because they contain their own derogatory clauses. Thus, if Ukraine did derogate from such rights, the derogation was unnecessary.

72. The first example is the right to a fair trial under Article 14 of the Covenant and Article 6 of the Convention. Ukraine declared a derogation from this right twice, even though it is non-derogable according to the HRC⁹⁰ and customary law.⁹¹ The derogation from Article 6 of the Convention had no effect in the *Khlebiuk*⁹² and in the *Tsezar*⁹³ cases, for which reason Ukraine withdrew this derogation in its notification of November 2019⁹⁴. However, the same derogation came back in March 2022.

73. Another example is the right to *ne bis in idem*, provided by Article 14 (7) of the Covenant, from which Ukraine also derogated twice. This right is non-derogable under Article 4 (3) of Protocol no. 7 to the Convention, which would invalidate the derogation under the Covenant. Moreover, this right is an integral part of the fair trial guarantees under the Covenant, and it is non-derogable by the HRC⁹⁵ interpretation.

74. The right to an effective remedy, under Article 2 (3) of the Covenant and Article 13 of the Convention, has been classified as non-derogable because 'it constitutes a treaty obligation inherent to the Covenant as a whole'⁹⁶. Under the Convention, the right to remedy is essential for the protection of all other substantive rights, including those non-derogable. Nevertheless, Ukraine continues to derogate from this right.

75. According to the HRC⁹⁷, Article 20 of the Covenant (prohibition of war propaganda and hate speech) is non-derogable⁹⁷. Ukraine derogated from this right in March 2022⁹⁸. In the same derogation notification, Ukraine referred to Articles 24 (the right to have children registered) and 26 (equality before the law) of the Covenant. These rights are also non-derogable according to the HRC⁹⁹. Since all these derogations are invalid under the Covenant, the Court can consider them null under the Convention.

76. In some notifications, Ukraine made a self-contradictory declaration concerning the rights that did not require a derogation. For example, the derogation from prohibiting war propaganda and hate speech (Article 20 of the Covenant) runs contrary to the scope of these rights. Derogating from these prohibitions does not make sense. It implies that Ukraine would allow propaganda and hate speech during the emergency, which is not the scope of its derogation.

77. Another example of a redundant derogation is the declaration on derogation from the restrictions on the political activity of aliens under Article 16 of the Convention. This derogation is meaningless because that provision is not a right but a restriction. Derogating from it implies that such a restriction is no longer active during the emergency period; therefore, the political activity of aliens is permitted. Moreover, Article 16 is an inherent exception to the rights

⁹⁰ Human Rights Committee, 'General Comment No. 29', para. 16.

⁹¹ ICRC, 'Rule 100. Fair Trial Guarantees', in *Customary IHL*, n.d., https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100.

⁹² *Khlebiuk v. Ukraine*, No. 2945/16 (ECtHR 25 July 2017).

⁹³ *Tsezar and Others v. Ukraine*, No. 73590/14, 73593/14, 73820/14 et al. (ECtHR 13 February 2018).

⁹⁴ 'JJ8991C Tr./005-224'; 'C.N.618.2019'.

⁹⁵ Human Rights Committee, 'General Comment No. 29', para. 16.

⁹⁶ Human Rights Committee, para. 14.

⁹⁷ Human Rights Committee, para. 13 (e).

⁹⁸ 'C.N.65.2022', 1 March 2022.

⁹⁹ Human Rights Committee, 'General Comment No. 29', para. 8.

declared by Articles 10, 11, and 14 of the Convention, which normally do not require a separate derogation, like in the case of the rights discussed below.

78. Article 4 (3) of the Convention and Article 2 (3) of the Covenant declare exceptions from prohibition of the forced labour allowing conscription and compulsory work in times of armed conflicts and emergencies. A derogation from these exceptions is not needed, because they are already applicable to the type of emergency faced by Ukraine.

79. The same could be argued for the derogation from Article 8 of the Convention and Article 17 of the Covenant. Even if a derogation from these provisions is legally possible, their limitation clauses already contain the grounds for restricting the right to privacy for the purposes of 'national security' and 'public safety'. These clauses, by definition, include the possibility of restricting privacy in times of armed conflict, making the derogation futile.

80. All these considerations do not invalidate Ukraine's derogation as a whole. It remains valid, but only in that part of the rights for which the derogation is allowed. The non-derogable rights, even if derogated from, continue to apply as usual. Furthermore, a mistaken derogation from them does not mean a violation of these rights. It only means that derogation cannot be used in interfering with these rights.

81. The same consideration is applicable to the rights from which a derogation is unnecessary and meaningless. Regardless of that derogation, the restrictions inherent to these rights continue to apply as usual. The derogation does not have effects over them.

82. To make the above arguments easily comprehensible, Figure 3 listed and explained the legal status of all rights from which Ukraine had derogated.

Figure 3. The status of the rights from which Ukraine derogated

Rights	Article	Status
Covenant		
Remedy	2 (3)	Non-derogable
Non-discrimination (gender)	3	Non-derogable
Prohibition of forced labour	8 (3)	Not necessary
Liberty and Security	9	-
Freedom of movement	12	-
Appeal against an expulsion order	13	-
Fair trial	14	Non-derogable
Privacy	17	-
Recognition as a person before the law	16	-
Freedom of expression	19	-
Prohibition of war propaganda	20	Non-derogable
Freedom of assemblies	21	-
Freedom of association	22	-
Child indiscriminatory registration	24	Not necessary
Free election and participation in public administration	25	-
Non-discrimination	26	Non-derogable
Minorities cultural rights	27	-
Convention		

Prohibition of slavery and forced labour (exceptions)	4 (3)	Not necessary
Liberty and security	5	-
Fair trial	6	Non-derogable
Respect for private and family life	8	-
Freedom of thought, conscience, and religion	9	-
Freedom of expression	10	-
Freedom of assembly and association	11	-
Effective remedy	13	Non-derogable
Prohibition of discrimination	14	Non-derogable
Restrictions on political activity of aliens	16	Not necessary
Protection of property	Protocol 1 Article 1	-
Education	Protocol 1 Article 2	-
Free elections	Protocol 1 Article 3	-
Freedom of movement	Protocol 4 Article 2	-

5.4. Whether the derogation has been limited in time

83. Any derogation must be temporary, and the derogation during an armed conflict is no exception. The Covenant and the Convention do not expressly impose such a requirement, though they imply it in the derogation clauses. The clauses require the states to notify the start and end of the derogation period under Article 4 (3) of the Covenant and Article 15 (3) of the Convention. The Siracusa Principles recommend that the notifications contain ‘the effective date of the imposition of the state of emergency and the period for which it has been proclaimed’¹⁰⁰. The HRCComm demands that ‘the measures derogating from the provisions of the Covenant must be [...] temporary [in] nature’ and limited in duration¹⁰¹.

84. The Court, on the other hand, has not imposed strict requirement for the temporariness of the derogation under the Convention. It accepted that ‘it [was] possible for a public emergency to continue for many years, ... although the question of the proportionality of the response [could] be linked to the duration of the emergency’.¹⁰² Therefore, the temporariness requirement under the Convention is closely linked with the test of proportionality, but the rule of thumb is that the derogation period lasts as long as the emergency continues. If the emergency ends, the derogation becomes invalid.

85. Defining the temporal scope of the derogation in times of armed conflicts is, however, more problematic than in other emergency situations. It is relatively easy to identify the moment when an armed conflict begins (*dies ad quo*) but it is almost impossible to determine when it ends (*dies ad quem*).

86. To define this temporal scope, one needs to call on the humanitarian law that does not offer clear-cut solutions. Humanitarian law defines the beginning of an international armed conflict as the moment when force is used or a territory is occupied. However, determining the end of an armed conflict is subject to various interpretations. The references are being made either to the end of military operations or hostilities, the conclusion of ceasefire agreements, or armistices. In the case of occupation, which by definition is a continuing situation, determining the end of the conflict seems speculative.¹⁰³

¹⁰⁰ ‘The Siracusa Principles’, para. 45(c).

¹⁰¹ Human Rights Committee, ‘General Comment No. 29’, paras 2, 4.

¹⁰² *A. and Others v. the United Kingdom [GC]* paragraph 178.

¹⁰³ ‘... IHL begins to apply as soon as the conditions for the existence of an armed conflict ... are fulfilled. ... When IHL ceases to apply is much more difficult to define. One difficulty that arises in practice is that armed conflicts seldom end with the total defeat of one side or genuine peace given that international society outlaws the use of

87. As a result, in times of armed conflict, the termination of a derogation can only be defined relative to the day of its formal withdrawal.

88. Another element to be determined is the start and end of derogatory measures. They retain their own temporal scopes, which could differ from the beginning and ending of an emergency or from the days of giving or withdrawing the derogation notifications. A derogatory measure applied in an individual case could hypothetically start and end outside of the derogation period. In other words, the determination of the derogation's temporal scope in individual cases should be differentiated from the determination of the overall period of the validity of the derogation.¹⁰⁴

Ukraine's derogation

89. The day from which Ukraine's derogation began could be determined with reference to the emergency decrees adopted in 2015 and 2022, as well as the days of the amendments to laws introducing certain derogatory measures (§ 58 above).

90. It is worth recalling that the derogation should be viewed as a continuing process. It started in 2015 and has not yet ended, despite the 2019 partial withdrawal¹⁰⁵ and the March 2022 renewal¹⁰⁶. The derogation retains one ground, which is the continuing armed conflict. It is impossible to determine the end of the derogation since the emergency situation is continuous and Ukraine has not yet withdrawn its derogation.

91. It is however possible to determine the periods when the derogation affected the rights from which Ukraine derogated. These derogatory rights retain their specific periods of application, which are determined by the emergency measures interfering with these rights and the days of notification. Figure 4 proposes a method of determining these periods. It should be noted, however, that the non-derogatory rights, from which Ukraine decided to derogate (Figure 3), have no such periods.

92. The valid derogations were arranged in chronological order as shown in Figure 4. It does not absolve the duty to determine the derogation period in individual cases. These could vary in relation to the days when they affected the rights of an individual.

Figure 4. Chronology of introducing derogatory measures in relation to derogatory rights

Notice	Notification date	Covenant (Articles)	Convention (Articles)	Effect date
C.N.416.2015 5	05/06/2015	9 and 17 2 (3) and 14 non-derogable	-	21/05/2015
JJ7979C Tr./005-185	10/06/2015	-	5 and 8 6 and 13 non-derogable	21/05/2015
JJ8034C Tr./005-186	05/11/2015	-	-	03/11/2015

force and often stops conflicts before total defeat or peace. Most frequently, contemporary armed conflicts result in unstable cease-fires, continue at a lower intensity or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later. ... For occupied territories, IHL of military occupation continues to apply beyond the general close of military operations until the termination of the occupation (...) or, according to the wording of Convention IV, for one year beyond the general close of military operations with the exception of some rules that remain applicable as long as the occupying power exercises the functions of government.' Sassòli and Nagler, *International Humanitarian Law*, para. 6.54, 6.55, 6.58.

¹⁰⁴ For example, the Türkiye's 2016 derogation was not legally valid in the applicant case, since his detention had been ordered on the basis of legislation predating the state of emergency. Still the emergency was considered as a contextual factor to interpret and apply Article 5 of the Convention in that case. *Alparslan Altan v. Turkey*, No. 12778/17 (ECtHR 16 April 2019).

¹⁰⁵ 'JJ8991C Tr./005-224'; 'C.N.618.2019'.

¹⁰⁶ 'C.N.65.2022', 1 March 2022; 'JJ9325C Tr./005-287'.

C.N.656.2015	27/11/2015	-	-	24/11/2015
JJ8172C Tr./005-190	01/07/2016	-	-	30/06/2016
C.N.502.2016	06/07/2016	-	-	06/07/2016
C.N.612.2019	23/01/2017	-	-	20/01/2017
JJ8318C Tr./005-205	03/02/2017	-	-	02/02/2017
C.N.618.2019	26/11/2019	9, 12, 17	-	26/11/2019
JJ8991C Tr./005-224	20/12/2019	-	5, 8, Protocol 4 Article 2	03/12/2019
JJ9221C Tr./005-278	26/04/2021	-	5, 8, Protocol 4 Article 2	22/04/2021
C.N.65.2022	01/03/2022	9, 12, 13, 17, 19, 21, 22, 25, 27 8 (3) and 24, not necessary to derogate 3, 20, 26 non-derogable	-	24/02/2022
JJ9325C Tr./005-287	02/03/2022	-	8, 9, 10, 11, Protocol 1 Articles 1, 2, and 3, Protocol 4 Article 2 4 (3) and 16 not necessary to derogate 14 non-derogable	24/02/2022
C.N.78.2022	16/03/2022	9 2 (3) and 14 non-derogable	-	08/03/2022
JJ9334C Tr./005-289	24/03/2022	-	5 6 and 13 non-derogable	08/03/2022
C.N.89.2022	28/03/2022	-	-	26/03/2022
C.N.115.2022	29/04/2022	-	-	25/04/2022
JJ9370C Tr./005-294	07/06/2022	-	-	25/05/2022
C.N.145.2022	09/06/2022	-	-	25/05/2022
C.N.159.2022	20/06/2022	9 and 16 2 (3) and 14 non-derogable	-	01/05/2022
JJ9373C Tr./005-295	21/06/2022	-	5 and 8 6 and 13 non-derogable	01/05/2022
C.N.269.2022	19/08/2022	-	-	23/08/2022
JJ9398C Tr./005-298	12/09/2022	-	-	23/08/2022

5.5. Whether the derogation has been limited in space

93. The territorial scope of the derogation is another intrinsic requirement for making a valid derogation. In the context of the condition being strictly required by the exigencies of the emergency, the HRCComm referred to the limited geographical coverage of a derogation.¹⁰⁷ The Court does not acknowledge derogations beyond the territory mentioned in the notification.¹⁰⁸

94. The territorial application of a derogation is controversial if the emergency has been caused by an armed conflict. This is because the belligerents fight to capture control over the territories, which eventually could end with one side losing such control and the other side occupying the disputed territory. To a consequential extent, the territorial jurisdiction of the states is questioned, as is their ability to apply human rights to the contested areas.

95. Hence, the belligerent state(s) may choose to submit a derogation and acknowledge their inability to control the territory, shifting the responsibility to protect human rights to another belligerent state(s). But this is not the purpose of the derogation.

96. It is a complex problem to reconcile the territorial application of a derogation with the lack of jurisdiction. In the context of the present analysis, it should be mentioned that a derogation does not exclude the jurisdiction of the states involved in armed conflict. On the contrary, it implies that these states may wish to employ emergency powers to restore their jurisdiction. This is the case of Ukraine's derogation.

Ukraine's derogation

97. The present study does not investigate the questions of territorial and/or de facto jurisdictions over the disputed territories. It should not be construed to acknowledge the legitimacy of the occupation or annexation of these territories. The scope of the study is limited to the evaluation of the territorial scope of Ukraine's derogation and its legal effects.

98. Initially, Ukraine limited the scope of its derogation to the contested territories, - the Crimean Peninsula and the regions in its Eastern part -, which it carefully listed in the notifications after 2015¹⁰⁹. The territorial scope of the derogation was extended in March 2022¹¹⁰ covering, to date, the whole territory of Ukraine. Figure 5 illustrates each notification declaring the territorial scope of the derogation.

Figure 5. Territorial scope of the derogation

Notice	Notification date	Territorial application
C.N.416.2015	05/06/2015	Crimea + Eastern Part
JJ7979C Tr./005-185	10/06/2015	Crimea + Eastern Part
JJ8034C Tr./005-186	05/11/2015	Crimea + Eastern Part extended
C.N.656.2015	27/11/2015	Crimea + Eastern Part extended
JJ8172C Tr./005-190	01/07/2016	Crimea + Eastern Part extended
C.N.502.2016	06/07/2016	Crimea + Eastern Part extended
C.N.612.2019	23/01/2017	Crimea + Eastern Part extended
JJ8318C Tr./005-205	03/02/2017	Crimea + Eastern Part extended
C.N.618.2019	26/11/2019	Crimea + Eastern Part extended
JJ8991C Tr./005-224	20/12/2019	Crimea + Eastern Part extended
JJ9221C Tr./005-278	26/04/2021	Crimea + Eastern Part extended
C.N.65.2022	01/03/2022	All territory

¹⁰⁷ Human Rights Committee, 'General Comment No. 29', para. 4.

¹⁰⁸ Sakik and Others v. Turkey, No. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94 (ECtHR 26 November 1997).

¹⁰⁹ Council of Europe, 'JJ8034C Tr./005-186'; 'C.N.416.2015'; 'C.N.612.2019'; Council of Europe, 'JJ8318C Tr./005-205'; 'C.N.502.2016'; Council of Europe, 'JJ8172C Tr./005-190'.

¹¹⁰ 'C.N.65.2022', 1 March 2022; 'JJ9325C Tr./005-287'.

JJ9325C Tr./005-287	02/03/2022	All territory
C.N.78.2022	16/03/2022	All territory
JJ9334C Tr./005-289	24/03/2022	All territory
C.N.89.2022	28/03/2022	All territory
C.N.115.2022	29/04/2022	All territory
JJ9370C Tr./005-294	07/06/2022	All territory
C.N.145.2022	09/06/2022	All territory
C.N.159.2022	20/06/2022	All territory
JJ9373C Tr./005-295	21/06/2022	All territory
C.N.269.2022	19/08/2022	All territory
JJ9398C Tr./005-298	12/09/2022	All territory

99. The territorial scope of the derogation after 2022 raises no questions.

100. The territorial application of the derogation from 2015 to 2022 could be controversial. In this period, Ukraine limited the territorial scope to what it called ‘temporarily occupied territories in Donetsk and Luhansk regions’ and ‘annexed and temporary occupied Autonomous Republic of Crimea and the city of Sevastopol’. This clearly indicates that Ukraine lost its effective control over these territories¹¹¹ and was no longer able to implement any human rights treaty in these areas.

101. It is therefore unclear how Ukraine would have implemented the derogation in those territories. Only individual cases could answer this question and demonstrate whether Ukraine retained jurisdiction over the individuals in those territories. Yet again, this question is separated from the present assessment, because it involves examination of the Ukrainian jurisdiction rather than its derogation.

5.6. Whether the derogation has complied with the notification requirements

102. The notification requirements must be met for a derogation to be valid. Or, in the absence of an official notification, the derogation could be unaccepted¹¹² and the derogatory measures examined as limitations.

103. For the purposes of the present legal analysis, it is enough to remark that Ukraine has complied with the notification requirements.

6. HOW THE DEROGATION HAS BEEN APPLIED

104. Simply declaring a derogation is insufficient to satisfy the obligations set by the human rights treaties. The derogation, no matter how validly declared, must comply with certain core principles and safeguards to ensure that the derogating state does not abuse the derogatory regime. Whatever the emergency, the derogation should be applied in individual circumstances with due regard to the principles of legality, necessity, proportionality, equality, and fairness.

105. The same is true for the derogation in times of armed conflict, which retains its own controversies. Because any armed conflict involves the concurrent application of IHL rules, the derogation must conform to those rules. IHL installs its own protection regime, even if it shares the same principles and standards derived from human rights law.

¹¹¹ Ukraine v. Russia (re Crimea) (dec.) [GC], No. 20958/14 and 38334/18 (ECtHR 16 December 2020).

¹¹² Cyprus v. Turkey, No. 8007/77 (European Commission of Human Rights 4 October 1983).

106. Seeing in this way, the derogation was interpreted as either suspending or even suppressing some human rights in time of armed conflicts.¹¹³ According to some scholars, human rights treaties are less realistic to regulate the conduct of the belligerent parties.¹¹⁴

107. However, the predominant opinion remains that a derogation does not suspend human rights obligations¹¹⁵, but establish specific legal regime of their restriction¹¹⁶. This opinion is endorsed in the present analysis.

108. The specific regime of derogation could only be described with reference to the legal principles and reasoning behind the Court's or HRCComm's jurisprudence. Unlike the assessment of declaring a valid derogation, the regime of applicability cannot be explained in isolation from individual cases. In other words, the question of whether the derogation has been validly applied cannot be analysed in abstract terms but only in relation to a particular problem or set of circumstances.

109. Turning to Ukraine's derogation, the legal analysis concluded that it was validly declared. The questions of how and whether this derogation has been applied without a breach are speculative if not related to an individual case. Such a breach could be caused when the authorities, while implementing derogatory measures, disregarded the principles of legality, necessity, proportionality, equality, and fairness. The breach could be possible if the authorities did not comply with other obligations under international law while applying the derogation.

6.1. Whether the implementation of derogatory measure(s) complied with the following principles

Legality

110. This principle is connected with the second condition to declare a valid derogation, reflecting the idea that even in 'the time of a public emergency the rule of law shall still prevail'¹¹⁷.

111. In brief, this principle states that any derogatory measure should have a legal basis, in law and the law itself should comply with the requirements of quality and legal certainty. While the official declaration of a state of emergency or the adoption of emergency law can ensure the existence of a legal basis, the quality of such laws and their legal certainty must be checked by the authorities, most notably domestic judges, in each individual case.

¹¹³ '...The term derogation is used to refer, generally, to the suspension or suppression of a law under particular circumstances. In International Human Rights Law, certain major treaties contain derogation clauses, which allow a State to suspend or restrict the exercise of certain treaty rights in emergency situations....' Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd ed. (International Committee of the Red Cross, 2011), <https://www.icrc.org/en/document/how-does-law-protect-war-0>; ICRC, 'Derogations | How Does Law Protect in War? - Online Casebook', n.d., <https://casebook.icrc.org/glossary/derogations>.

¹¹⁴ '...Although IHRL is more restrictive and provides better protection to individuals from abuse, its application is less realistic in situations of armed violence, and it is traditionally considered to apply only to States and not to armed non-State actors.' Sassòli, Bouvier, and Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, para. 3.02.

¹¹⁵ '...Derogation is not equivalent to abrogation or abolition of a right. Although drafted to preserve governmental leeway, derogation clauses do not suspend the rule of law. They are rather an expression of it, for they regulate the relationship between the rule and the exception. (...) Indeed, international law leaves no place for a suspension of the rule of law (...) and legal principles of general application remain applicable in cases of derogation.(...) ...' Julian M. Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights', *Essex Human Rights Review* 8, no. 1 (2011): 103–22.

¹¹⁶ 'In General Comment 29, the Human Rights Committee also explained that the power of a State to derogate from some provisions of the ICCPR does not entail a power to suspend completely the application of these provisions. Derogations should, therefore, be seen as a particular form of restriction on human rights rather than as their temporary circumvention.' Martin and Mathias, 'Unilateral Exceptions to International Law'.

¹¹⁷ Derogation is an authorized and limited prerogative to respond adequately to a threat to the life of the nation. The derogating State shall have the burden of justifying its actions under law 'The Siracusa Principles', para. 63.

112. This compatibility check might be problematic for the judges in formal systems where they do not retain the power to invalidate incompatible laws. It is even more problematic in the derogation period, when the emergency laws could be couched in vague terms and adopted overnight. For these reasons, the Venice Commission recommends, for example, that emergency laws be adopted in advance and therefore be foreseeable.¹¹⁸ However, it is still difficult to adopt a law that foresees derogatory measures in an armed conflict.

113. The Court recognised that, even in times of normalcy, it may be difficult to frame laws with precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the circumstances of each case.¹¹⁹ The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are vague and require interpretation and application in practice.¹²⁰

114. For example, the cases that followed the 2016 coup d'état in Türkiye revealed this problem. The derogation placed a burden on the domestic judiciary to check the quality of emergency laws and the legality of the derogatory measures. In one case, an emergency legislative decree did not contain clear wording excluding the possibility of judicial supervision of the derogatory measures, therefore authorising the courts to perform a judicial review in accordance with the requirements of a fair trial.¹²¹ In the same context, the Constitutional Court of Türkiye did not find that pre-trial detention had been “lawful” or effected “in accordance with a procedure prescribed by law” because it was not strictly required by the exigencies of the situation, even if it was prescribed by the emergency law.¹²²

115. At last, the legality principle implies the proper interpretation of law and the principle of legal certainty. For these reasons, an arbitrary interpretation of the legal norms could also run contrary to the principle of legality in applying the derogation.¹²³

Necessity

116. This principle requires that derogatory measures be defined and implemented to the extent necessary to overcome the emergency situation. The principle is thus linked to the purpose of the derogation, which is to assist authorities in restoring normalcy.

117. Both the Court and the HRCComm share almost the same reasoning in recognising this principle as the key element to assessing the derogation measures. They observe the necessity from two perspectives: general and individual, assessing whether the derogation was necessary in general and whether the derogatory measures were required in the given individual case.

118. While acknowledging the States’ wide margin of appreciation in the matters of how to deal with emergencies, the Court scrutinises whether the derogatory measures were “strictly

¹¹⁸ The emergency regime should preferably be laid down in the Constitution, and in more detail in a separate law, preferably an organic or constitutional law. The latter should be adopted by parliament in advance, during normal times, in the ordinary procedure. In order to avoid excesses and time-pressures, even emergency decrees and other emergency measures should, to the extent possible, be drafted in advance. Venice Commission, ‘Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections.’, para. 15.

¹¹⁹ *Goodwin v. the United Kingdom*, No. 17488/90 (ECtHR [GC] 27 March 1996).

¹²⁰ *Gorzelik and Others v. Poland*, No. 44158/98 (ECtHR [GC] 17 February 2004); *Refah Partisi (the Welfare Party) and Others v. Turkey*, No. 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR [GC] 13 February 2003).

¹²¹ *Pişkin*.

¹²² *Mehmet Hasan Altan v. Turkey; Şahin Alpay v. Turkey*, No. 16538/17 (ECtHR 20 March 2018).

¹²³ ‘... The measures complained of in the present case were taken on the basis of legislation which was in force prior to and indeed after the declaration of the state of emergency, and which, moreover, is still applicable. ... in this connection ... an extensive interpretation of the concept of in flagrante delicto can clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, was not adopted in response to the exigencies of the state of emergency, is not only problematic in terms of the principle of legal certainty... negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive. In addition, it has legal consequences reaching far beyond the legal framework of the state of emergency. Accordingly, it is in no way justified by the special circumstances of the state of emergency.’ *Baş v. Turkey* paragraphs 159–160.

required by the exigencies of the crisis"¹²⁴ and the individual interests of human rights protection in particular circumstances.¹²⁵ In this way, it links the assessment of necessity with the evaluation of the proportionality of the derogatory measure interfering with individual rights.

119. The HRCComm conducts a double assessment, evaluating the necessity of a derogation from general¹²⁶ and individual perspectives. In the latter perspective, it shares the Court's reasoning and asks whether the derogation measure was proportional in individual circumstances, despite being required in general.¹²⁷ The OHCHR notes that the requirement of necessity is linked to the proportionality test, underlining that there would be no necessity if less intrusive measures would be available.¹²⁸

120. This later element was better framed by the Siracusa principles. The document recommends to assess first whether the derogation measure was 'strictly necessary to deal with the threat to the life of the nation' and whether the national authorities had assessed 'individually the necessity ... to deal with the specific dangers posed by the emergency'. The primary rule is however that the necessity should be evaluated from objective point of view asking whether the impugned measure was 'directed to an actual, clear, present or imminent danger and not imposed merely because of an apprehension of potential danger'¹²⁹. On the other hand, a derogation measure would be objectively unnecessary, where ordinary measures permissible under the specific limitation clauses of the Covenant would be adequate to deal with the threat to the life of the nation'¹³⁰.

121. All these ways of reasoning are essentially the same, with one minor difference. The Court hardly ever invalidated the States' choices to declare a derogation. It focused on the necessity and proportionality of derogatory measures in the individual cases. As a result, a derogatory measure could be declared unfit for the individual case, even if it was generally required to deal with an emergency. The HRCComm assessed the necessity of derogation from a more general perspective, asking whether the emergency would still require a derogation and whether the derogatory measures were proportional in relation to an individual. Overall, the necessity of a derogation measure is questioned on both general and individual levels.

122. However, in practice, the necessity principle comes down to assessing the proportionality, which is especially observable in the case of a derogation during an armed conflict.

123. It seems obvious that any armed conflict, being a serious emergency, would require a derogation, but this is not always the case. The HRCComm defined necessity as something implied in armed conflicts but required in other emergencies.¹³¹ However, not all armed

¹²⁴ ECtHR, *Ireland v. the United Kingdom* paragraph 207.

¹²⁵ *Kavala v. Turkey*, No. 28749/18 (ECtHR 10 December 2019); *Mehmet Hasan Altan v. Turkey* paragraph 93.

¹²⁶ See for example, comments/concluding observations United Kingdom of Great Britain and Northern Ireland (1995), [CCPR/C/79/Add.55](#), paragraph 23 or Israel (1998), [CCPR/C/79/Add.93](#), paragraph 11.

¹²⁷ For example: 'Concerning the State party's derogation under article 4 of the Covenant, the Committee recalls that a fundamental requirement for any measures derogating from the Covenant is that such measures be limited to the extent strictly required by the exigencies of the situation in accordance with the principle of proportionality. The Committee further recalls that the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary.' *Özçelik et al. v. Turkey*, No. CCPR/C/125/D/2980/2017 (Human Rights Committee 26 March 2019).

¹²⁸ Necessary and proportional: derogation measures must be strictly required by the emergency. OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, 48.

¹²⁹ 'The Siracusa Principles', paras 51, 52, 55.

¹³⁰ 'The Siracusa Principles', para. 53.

¹³¹ '...If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.' Human Rights Committee, 'General Comment No. 16 Article 17 (The Right to Respect of Privacy, Family, Home and

conflicts require a derogation, and therefore the necessity of derogatory measures cannot be solely substantiated by the existence of an armed conflict.

124. The necessity should be primarily assessed in relation to an individual and then to general interests. An armed conflict, no matter how serious, could not justify the derogatory measures unless they were necessary in the given case.

125. Last but not least, this necessity in time of a derogation should not be confused with other similar principles, which equally come into play during an armed conflict. This latter principle is military necessity, which allows measures required to achieve a legitimate military goal. Military necessity generally conflicts with the necessity of human rights protection; therefore, IHL strikes the balance between these necessities.¹³² On the contrary, the necessity that follows a derogation strikes a balance between the needs of individual protection and the exigencies of the emergency.

126. The relation between the necessity during a derogation and the military necessity requires further study.

Non-discrimination

127. Article 15 of the Convention, in its final version, was adopted on the basis of the draft Article 4 of the Covenant¹³³ and it does not contain any reference to non-discrimination clause. Article 4 of the Covenant in its final version explicitly requires derogation measures to be implemented in a non-discriminatory manner. The HRCComm interpreted the non-discrimination principle as a peremptory requirement from which no derogation is possible.¹³⁴

128. Though the Convention derogation clauses do not contain a similar provision, the Court has given wide interpretation to Article 15 and included non-discrimination as a condition for the implementation of derogatory measures.¹³⁵ This principle declares that neither an emergency law can contain discrimination provisions nor can a derogation measure be implemented in a discriminatory manner.

129. This principle raises no apparent issues during armed conflicts. It is consistent with the customary rule prohibiting discrimination against protected persons under IHL¹³⁶, which declares that prisoners of war, civilian internees, the wounded and sick and hors de combat should be treated equally by parties to the conflict.¹³⁷ However, both principles contain exceptions applicable in armed conflicts.

130. IHL allows certain adverse distinctions based on different statuses of the protected persons as either prisoners of war or civilians.¹³⁸ In human rights this amounts in differential treatment, which is an exception to the prohibition of discrimination.¹³⁹

Correspondence, and Protection of Honour and Reputation)', 1988, para. 3, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6628&Lang=en.

¹³² ICRC, 'Military Necessity | How Does Law Protect in War? - Online Casebook', n.d., <https://casebook.icrc.org/glossary/military-necessity>; Nils Melzer and Helen Durham, *International Humanitarian Law: A Comprehensive Introduction*, ed. Etienne Kuster (Geneva: International Committee of the Red Cross, 2016), sec. 3. Balancing military necessity and humanity.

¹³³ 'Preparatory Work on Article 15 of the European Convention on Human Rights', 22 May 1956, 10 and Appendix I, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH\(56\)4-EN1675477.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf).

¹³⁴ Human Rights Committee, 'General Comment No. 29', para. 8.

¹³⁵ The case concerned adoption of emergency legislation to detain and expel only foreign citizens suspected of terrorism. *A. and Others v. the United Kingdom [GC]* paragraph 190.

¹³⁶ ICRC, 'Rule 88. Non-Discrimination', n.d., https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule88.

¹³⁷ 'Discrimination (or Adverse Distinction) | How Does Law Protect in War? - Online Casebook', accessed 11 November 2022, <https://casebook.icrc.org/glossary/discrimination-or-adverse-distinction>.

¹³⁸ ICRC, 'Adverse Distinction | How Does Law Protect in War? - Online Casebook', accessed 11 November 2022, <https://casebook.icrc.org/glossary/adverse-distinction>.

¹³⁹ 'The terminology used to describe this varies greatly to include "positive measures", "positive" or "reverse" discrimination, "preferential treatment", "temporary special measures" or "affirmative action". (footnote) This reflects its accepted function as a short term and exceptional means of challenging prejudices against individuals who

131. Both concepts are also challenging to apply in practice, especially in the military-related matters. For example, affirmative action had justified less favourable treatment in employing a woman as chief commando of armed forces¹⁴⁰. Adversely this principle was insufficient to substantiate the refusal to employ a woman as a military engineer¹⁴¹.

132. Applying adverse distinctions in IHL requires consideration of a larger principle of distinction in conducting hostilities¹⁴². It is an extensive and complex topic to explain in the limited space of the present study.

Proportionality

133. It is the key requirement for the application of any derogatory measure and the most difficult to explain in abstract terms. Proportionality depends on individual circumstances, and it is an exercise that a judge should do on a case-by-case basis. The proportionality test has been attributed to judicial reasoning while deciding hard cases and dealing with conflicting legitimate interests.¹⁴³ Therefore, some scholars considered the proportionality as one of the fundamental concepts of justice¹⁴⁴. Neither international courts nor domestic courts could operate without this principle.

134. The concept of proportionality is essential in determining the limits and compatibility of any interference with human rights. In the case of derogations, it is even more required to guarantee that derogating states do not abuse the emergency. The Court gradually instituted this principle in cases involving derogations, acknowledging first that proportionality is implicit in derogation¹⁴⁵, then, that it is required¹⁴⁶ and next that it is inherent to the application of derogation measures¹⁴⁷. The HRCComm has always underlined that the proportionality principle is an inherent condition for the derogatory measures to be valid.¹⁴⁸

would normally suffer discrimination, by favouring members of a disadvantaged group. In this context, the courts tended to treat differential treatment not as a distinct form of discrimination in itself but as an exception to the prohibition of discrimination. In other words, the courts accept that differential treatment has occurred, but that it may be justified in the interests of correcting a pre-existing disadvantage, such as underrepresentation in the workplace of particular groups.' Council of Europe, European Court of Human Rights, and European Union Agency for Fundamental Rights (EU body or agency), *Handbook on European Non-Discrimination Law: 2018 Edition* (LU: Publications Office of the European Union, 2018), 71, <https://data.europa.eu/doi/10.2811/792676>.

¹⁴⁰ *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, No. Case C-273/97 (ECJ 26 October 1999).

¹⁴¹ *Tanja Kreil v Bundesrepublik Deutschland*, No. Case C-285/98 (ECJ 11 January 2000).

¹⁴² ICRC, 'Distinction | How Does Law Protect in War? - Online Casebook', n.d., <https://casebook.icrc.org/glossary/distinction>.

¹⁴³ Tomáš Sobek and Josef Montag, 'Proportionality Test', in *Encyclopedia of Law and Economics*, ed. Alain Marciano and Giovanni Battista Ramello (New York, NY: Springer, 2018), 1–5, https://doi.org/10.1007/978-1-4614-7883-6_721-1.

¹⁴⁴ Luka Anđelković, 'The Elements of Proportionality as a Principle of Human Rights Limitations', *Facta Universitatis, Series: Law and Politics*, no. 0 (13 December 2017): 235–44, <https://doi.org/10.22190/FULP1703235A>.

¹⁴⁵ *Brannigan and McBride v. the United Kingdom* paragraph 54.

¹⁴⁶ Article 15 provides that the State may take measures derogating from its obligations under the Convention only "to the extent strictly required by the exigencies of the situation". As previously stated, the Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention... When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required". ... As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time... *A. and Others v. the United Kingdom [GC]* paragraphs 182, 184.

¹⁴⁷ "...under Article 15 of the Convention, any High Contracting Party has the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures are strictly proportionate to the exigencies of the situation ..." *Mehmet Hasan Altan v. Turkey* paragraph 90.

¹⁴⁸ "...the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be

135. Without going into further detail, which may take some time, the proportionality principle could be outlined as follows. It is a principle fundamental to the application of human rights in any situation, normal or exceptional. It applies universally to any restriction of human rights, including a derogation. Both the Court and the HRCComm defined it as taking measures only to the extent strictly required by the situation, but the principle follows the same logic applicable to any restriction of human rights. It is the balance between the means and the ends.

136. In plain language, proportionality requires that there be a reasonable relationship between a legitimate and necessary aim and the means used to achieve that aim. Furthermore, these means should be appropriate to the individual situation and be non-discriminatory in nature.

137. As with other principles described above, the proportionality of a derogation in time of armed conflicts should not be confused with the proportionality test under IHL. The IHL principle of proportionality is closely related to the way of conducting hostilities seeking 'to limit damage caused by military operations by requiring that the effects of the means and methods of warfare used must not be disproportionate to the military advantage sought'¹⁴⁹. Under IHL the proportionality is limited to specific situations¹⁵⁰ and could relate to the assessment of certain rights and freedoms¹⁵¹. The proportionality of a derogatory measure is universally applicable to all derogated rights.

6.2. Whether the minimum safeguards of fairness have been respected while protecting non-derogable rights and whether the remedies for the alleged violation have been available

138. The fairness principle is a procedural safeguard, allowing no derogation in emergency situations. The HRCComm states that procedural and judicial guarantees, which are essential to give effect to the protected non-derogable rights, may never be subject to measures circumventing the protection of such rights.¹⁵² The Court decided that a derogation did not justify the failure to observe the requirements of a fair trial.¹⁵³

139. These considerations are valid for a derogation in times of an armed conflict. The Siracusa Principles recognise the customary character of the right to a fair trial in times of armed conflict.¹⁵⁴ IHL recognises that fair trial guarantees cannot be suspended nor derogated from.¹⁵⁵

required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality." Human Rights Committee, 'General Comment No. 29', para. 4.

¹⁴⁹ ICRC, 'Proportionality | How Does Law Protect in War? - Online Casebook', n.d., <https://casebook.icrc.org/glossary/proportionality>.

¹⁵⁰ Melzer and Durham, *International Humanitarian Law*, 102.

¹⁵¹ e.g. right to life if the attack was directed against combatants and civilians, the right to property if the attack directed against military objective collaterally damaged private property.

¹⁵² Human Rights Committee, 'General Comment No. 29', para. 3.

¹⁵³ '... even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for an effective judicial review - if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (...). As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where an emergency legislative decree such as the one at issue in the present case does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided (...). In those circumstances, the failure to observe the requirements of a fair trial cannot be justified by the Turkish derogation.' *Pişkin* paragraph 153.

¹⁵⁴ 'The Siracusa Principles', para. 67.

¹⁵⁵ 'A party may suspend communication rights of protected persons in occupied territory and their substantive rights on its own territory if they are definitely suspected of activities hostile to its security and the exercise of such

140. This implies a variety of effects for the judiciary acting during armed conflicts. It might be seen that, without proper adaptation of the procedural rules, the peremptory character of a fair trial could put an excessive burden on the judges. The question remains, however, whether the procedures could be tailored to the demands of the armed conflict without jeopardising the right to a fair trial.

141. This is possible, with two considerations to take into account. First, the right to a fair trial could not be derogated if it served to enforce another substantive peremptory right. Second, the right to a fair trial allows for changes or simplification of judicial proceedings to serve the exigencies of the armed conflict, but only if the very essence of the fair trial guarantee is not impaired.

142. For example, *nulum crimen sine lege* is a non-derogatory right, thereby subjecting all criminal trials during or after the armed conflict to a non-derogatory regime. Civil proceedings, on the other hand, could hypothetically be subjected to derogation (e.g., suspended or postponed). The civil trials used to remedy an alleged breach of a peremptory right are excepted from derogation (e.g., compensation claims in torture cases).

143. Even under non-derogatory regime, judicial proceedings could be simplified. Certain procedural rules and steps could be suspended or de-formalised, while keeping the core fair trial guarantees untouched (e.g. suspending preparatory trials, re-trials after appeals, extraordinary appeals, revisions or appeals on points of law, downgrading the organisation of the courts to two-tiered criminal and one-tiered civil jurisdictions).

144. Again, the derogatory regime of judicial procedures and judicial organisation is a topic for another, more extensive study. In the context of the present analysis, it is sufficient to emphasise that the right to a fair trial and the right to remedy are non-derogatory as long as they are subsidiary to another peremptory right.

6.3. Whether other international obligations have been complied with

145. Application of a derogation in practice requires respect for other international obligations. This condition is common for the Convention and the Covenant derogation clauses, which could be briefly explained as follows.

146. Compliance with international obligations could be viewed from two perspectives. The first perspective covers the question of whether the derogating state complied with other human rights treaty obligations. The second perspective observes whether other international obligations, beyond human rights treaties, were respected. These other international obligations depend on the type of emergency.

147. The human rights bodies have not yet developed an extensive jurisprudence regarding this condition.

148. The HRCComm generally observed that a derogation should comply with other related human rights instruments and 'take into account the developments within international law as to human rights standards applicable in emergency situations'¹⁵⁶.

149. The Court has examined this question on only two occasions. In one case, it was confirmed that the derogation was officially declared within the meaning of Article 4 of the Covenant.¹⁵⁷ In other case, it rejected the argument that the derogating state allegedly breached its obligation to withdraw a derogation under the Covenant.¹⁵⁸ None of these cases has invalidated the derogation made under the Convention.

rights would be prejudicial to its security. However, humane treatment and a fair trial must always be guaranteed.' Sassòli and Nagler, *International Humanitarian Law*, chap. 8.3.

¹⁵⁶ Human Rights Committee, 'General Comment No. 29', para. 10.

¹⁵⁷ Brannigan and McBride v. the United Kingdom paragraphs 67–73.

¹⁵⁸ Marshall v. the United Kingdom (dec.), No. 41571/98 (ECtHR 10 July 2001).

150. On other occasions, the Court examined the problem of compliance with international obligations during armed conflicts without the state(s) having declared a derogation.¹⁵⁹ The cases are, however, relevant to observe how human rights apply in times of an armed conflict and how they concur with the IHL rules, even without a derogation. The Court's reasoning in these cases is extendable to situations when states derogate because of an armed conflict.

7. QUESTIONS NEEDING FURTHER RESEARCH

151. Despite having common features with derogations for other public emergencies, the derogation in time of an armed conflict raises specific questions, triggering problematic application in practice. These questions need to be mentioned but could not be answered in the present legal analysis. If Ukrainian judges express an interest, these topics may be the subject of additional research.

Derogation and jurisdiction

152. The relationship between derogation and jurisdiction in armed conflicts is somehow paradoxical. A derogation does not exclude the jurisdiction of the states involved in armed conflict. On the contrary, states require effective jurisdiction to give effect to the derogation clauses. Still, the states can declare a derogation in the event of an armed conflict to mean that they actually lack the necessary jurisdiction over the territory where they intend to exercise emergency powers.

153. State jurisdiction, particularly during times of armed conflict, is in itself a complex issue. It was split into the concepts of territorial jurisdiction, *de facto*, overall, and effective control. All this terminology brings nothing but a challenge to its application in practice. A territorial sovereign jurisdiction, even if officially recognised by the international community, means little in practise when the belligerent parties fight over the effective control of the territory.

154. Jurisdiction requires factual analysis; it cannot be assessed in an abstract. All the more, such an analysis is independent from the question of derogation. And the jurisprudence of the Convention's and Covenant's bodies appears not to have examined the concepts of derogation and jurisdiction together.

155. The Court has never encountered a situation like Ukraine's derogation. All public emergencies, invoked before the Court involved justifications to fight terrorism (United Kingdom), attempted coups d'état (Türkiye) or other mass disorders (Georgia, Armenia). A large number of recent derogations were related to the COVID-19 pandemic. None of the derogations from the Convention were made during an active armed conflict of international character.

156. How the Court would resolve the question of the jurisdiction and derogation of Ukraine can only be hypothesised. For example, the re-Crimea decision did not offer an answer.¹⁶⁰ In another judgment¹⁶¹ originated from armed conflict in Georgia, none of the States had declared a derogation to the Convention. In that case, the Court's reasoning on the jurisdiction of belligerent states during active hostilities remained contentious and was heavily criticised

¹⁵⁹ *Hassan*; *Georgia v. Russia (II)* [GC], No. 38263/08 (ECtHR 21 January 2021).

¹⁶⁰ ... there is sufficient evidence for the Court to conclude that during the relevant period [from 27 February to 18 March 2014] the [Russian Federation] exercised effective control over Crimea. ... The fact that Ukraine did not avail itself of the right of derogation from its Convention obligations in respect of Crimea regarding that period ... is irrelevant for the above findings concerning the [Russia's] jurisdiction under Article 1 of the Convention... *Ukraine v. Russia (re Crimea) (dec.)* [GC] paragraphs 335, 336.

¹⁶¹ *Georgia v. Russia (II)* [GC].

by some Court judges and scholars.¹⁶² Some of them asked whether this reasoning could be overruled by the current armed conflict in Ukraine.¹⁶³

157. Indeed, the Ukrainian armed conflict and the derogation declared on this basis raise a series of complex questions about jurisdiction. It is enough to say that Ukraine retains no effective control but makes sovereign territorial claims over the contested areas on which it notified its derogation. Since 2022, Ukraine's effective control over portions of its territory has shifted dramatically, rendering derogation ineffective. All these questions need answers.

Derogation and humanitarian law

158. With or without a derogation, armed conflicts continue to raise the dilemma of choosing between two equally applicable legal regimes, IHL and human rights law. This is a complex topic that, in the context of the armed conflict in Ukraine, needs a separate study. Yet, a couple of considerations could be mentioned in the present analysis.

159. According to the Geneva Conventions, IHL starts its application once an armed conflict exists¹⁶⁴, while human rights law is applicable since the accession to a human rights treaty. The Geneva Conventions do not envisage derogation, while a derogation from a human rights treaty is possible. Still, derogation does not suspend application of the human rights treaty but instead institutes a special derogatory regime.

160. Human rights continue to apply in times of an armed conflict, save the derogations¹⁶⁵. In the case of lacking derogations, human rights treaties continue to coexist with the rules of IHL in three ways: '[i]some rights may be exclusively matters of international humanitarian law; [ii] others may be exclusively matters of human rights law; [iii] yet others may be matters of both these branches of international law.'¹⁶⁶ The Court confirmed that in respect of the Convention¹⁶⁷.

161. A valid derogation does not displace IHL¹⁶⁸, which continues to apply along with non-derogable rights under human rights treaties and peremptory norms of international law¹⁶⁹. Still many rights, derogable and non-derogable, intermingle with IHL rules.

162. For example, the rights to life, liberty, privacy, and property have parallel guarantees in human rights and international human rights law, which sometimes differ in purposes. Human rights law cannot justify a loss of life without an absolute necessity, while IHL allows the killing of legitimate targets. Detention is limited by strict human rights guarantees, but indefinite detention is permitted with less judicial oversight in IHL. If a private property is also a military object, IHL permits destroying it, which is unacceptable in human rights law. Many other examples could follow.

¹⁶² Kanstantsin Dzehtsiarou, 'The Judgement of Solomon That Went Wrong: Georgia v. Russia (II) by the European Court of Human Rights', *Völkerrechtsblog*, 26 January 2021, <https://doi.org/10.17176/20210126-191100-0>; Kanstantsin Dzehtsiarou, 'Georgia v. Russia (II)', *American Journal of International Law* 115, no. 2 (April 2021): 288–94, <https://doi.org/10.1017/ajil.2021.7>.

¹⁶³ Anastasiia Moiseieva, 'The ECtHR in Georgia v. Russia – a Farewell to Arms? The Effects of the Court's Judgment on the Conflict in Eastern Ukraine', *EJIL: Talk!* (blog), 24 February 2021, <https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/>.

¹⁶⁴ ICRC, 'Treaties, States Parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949 - 2 - Article 2 : Application of the Convention - Commentary of 2016', n.d., <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>.

¹⁶⁵ '...the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby provisions may be derogated from in a time of national emergency' Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 226 (ICJ 1996).

¹⁶⁶ Human Rights Committee, 'General Comment No. 29', para. 106.

¹⁶⁷ *Hassan* paragraphs 102–104.

¹⁶⁸ "...e]ven when derogating from international human rights law, the rules of international humanitarian law remain in force and provide the bottom-line below which states' actions must never fall." Human Rights Committee, 'General Comment No. 29', para. 11.

¹⁶⁹ Human Rights Committee, para. 12.

163. The analysis of the derogations cannot be accommodated to explain how human rights intermingle with the rules of IHL. This question should be part of a separate research.

8. CONCLUSIONS

164. Ukraine derogated from the Convention and the Covenant in June 2015 on the grounds of an international armed conflict ongoing on its territory since 2014. Since then, more than twenty derogation notifications have been filed, reflecting policy changes and the evolution of the armed conflict. With the substantial alteration of that conflict in February 2022, the derogation was updated to reflect the current realities of the armed confrontation.

165. Despite these developments, Ukraine's derogation should nevertheless be regarded as a continuing process. It allows analysing the notifications in an all-encompassing manner and evaluating the compatibility of the derogation with the relevant international standards.

166. However, it has been an issue to identify common legal standards for such a broad assessment because Ukraine derogated simultaneously from two core human rights treaties. In addition, the derogation implied parallel application of IHL rules and other human rights restrictions, therefore complicating identification of the legal standards. Hence, this derogation has been examined from the perspectives of two key legal questions: first, whether the derogation has been validly declared, and second, how it could be implemented in practice to comply with these legal standards.

167. From the first perspective, it could be safely concluded that Ukraine has validly derogated from the Convention and the Covenant. Despite certain non-derogable rights in its derogation notifications, Ukraine complied with the key conditions established by these human rights treaties for making a valid derogation.

168. First, the derogation has been declared officially following the armed conflict, which is indisputably a public emergency affecting the life of the nation. Second, its territorial application has been specified, initially to the areas outside of the Ukrainian authorities' effective control and then to the whole sovereign territory. Third, the derogation's temporal application does not need to be determined as long as the armed conflict continues. In the end, the derogation complied with the notification requirements, though it indicated erroneously that some rights were being derogated from. This latter aspect is not critical to invalidating the derogation, but it has specific legal consequences.

169. Non-derogable or unnecessarily derogable rights continue to be applied despite the derogation. The derogation does not affect their legal regime, nor does it displace or subdue other legal regimes equally applicable in times of an armed conflict. It does not suspend the application of certain human rights treaties' provisions either. In a nutshell, the derogation imposes an exceptional regime of human rights enjoyment, and it must adhere to certain legal principles.

170. Identifying these principles constituted the second part of the legal analysis. From this perspective, a derogation applicable to an individual case must abide by the principles of legality, necessity, non-discrimination, and proportionality. Minimum fair trial standards and effective remedies must be guaranteed for the whole derogation period, especially if they concern the exercise of rights from which a derogation is not possible. Furthermore, the derogation cannot disregard other obligations under international law, requiring a harmonious application with other legal regimes emerging during the state of emergency.

171. Understanding these principles in abstract terms is one issue, but applying them to concrete circumstances is another. The principles of non-discrimination, necessity, and proportionality intersect with the corresponding IHL principles of distinction, military necessity, and proportional attack. Their harmonious application requires further research and a more specific explanation.

9. RECOMMENDATIONS

172. As a result of the above analysis, it is therefore proposed to follow two sets of recommendations in the Ukrainian context, concerning, first, the practical application of the derogation and, second, other legal questions needing further research.

Application of the derogation in practice

Substantive aspects

173. A judge should be particularly cautious when considering the scope of the derogation. The right in question should be first classified as either derogable or non-derogable under the Convention or the Covenant, neither of which has a priority.

174. If the right is non-derogable under both treaties, then the derogation is not applicable. Often, these rights do not allow for interference and require absolute protection, regardless of the circumstances (e.g., prohibition of torture, slavery, extra-judicial killings, etc.).

175. If the right is non-derogable under the Covenant but derogable under the Convention, the derogation does not apply either. However, an interference with this right could be allowed if it is a restriction inherent to the right in question (e.g., the freedom of religion or conscience; the right to recognition as a person before the law, which corresponds to the right to private life under the Convention).

176. Some rights do not require a derogation because they already include inherent exceptions (e.g., the prohibition on forced labour with exceptions during military service). In this situation, the applicable legal regime is determined by the circumstances. Normally, the exceptions to these rights, rather than the derogation, would be sufficient to justify a restrictive measure. However, there is not much difference between these two legal regimes, and they are both applicable.

177. If the right is derogable, then the derogation could be applied. The judge should investigate and explain whether the derogatory measure has a legal basis. Then he or she should provide legal reasoning as to whether the measure was necessary and whether other, less intrusive measures were available. The judge should determine whether the measure was non-discriminatory in nature before moving on to the proportionality test of the interference.

178. Failing one of these, the derogatory measure would violate the right in question.

179. In the way of reasoning, the judge could reflect on the validity of the derogation as a whole, but this is optional. It is for the Court and the HRCComm to evaluate whether the derogation has been validly declared and whether it has complied with the derogation clauses under Article 15 of the Convention and Article 4 of the Covenant. Still, the national judge could put the arguments about the necessity of the derogation into the context of a case (e.g., the restriction of the right was necessary in the context of the emergency affecting the life of the nation).

Procedural aspects

180. The fairness of the proceedings and the right to an effective remedy should be respected at all costs. It is particularly important when a non-derogable right is at stake.

181. Nevertheless, a simplification of the judicial proceedings is possible, but with the minimum guarantees of fairness kept unchanged.

182. In practice, the procedures could be adjusted to the exigencies of the situation in three ways. Emergency laws could introduce simplified procedures or suspend certain procedural formalities. In the alternative, a large judicial discretion could be given to the judges, allowing them to adjust the procedural rules to the needs of the process.

Questions needing further research

183. How could the derogation be implemented when the state retains no effective control over the portions of the territory on which it has declared the derogation?

184. How to reconcile the derogation and the IHL legal regime in practice, in particular:

- a. the principles of necessity, proportionality, and non-discrimination with the fundamental IHL principles of military necessity, proportionality, and distinction;
- b. the rules on conducting hostilities with the enforcement of certain human rights, such as the right to life, liberty and security, property, privacy, fairness, and other rights intermingling with these rules.

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