

CDDH-SCR(2022)R2 Addendum

10/03/2023

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

DRAFTING GROUP ON HUMAN RIGHTS IN SITUATIONS OF CRISIS

(CDDH-SCR)

**Draft CDDH report
on member States' practice in relation to derogations
from the European Convention on Human Rights in situations of crisis**

as adopted by the CDDH-SCR at its second meeting
11 – 13 October 2022

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1. Introduction

a. The CDDH's terms of reference and working methods used for the present report

1. The Steering Committee for Human Rights (CDDH) terms of reference for 2022–2025 require it to produce a report on member States practice in relation to derogations from the European Convention on Human Rights (the Convention) in situations of crisis. At its 95th meeting (23–26 November 2021), the CDDH established a Drafting Group on Human Rights in Situations of Crisis (CDDH-SCR), and instructed this new Group *inter alia* to prepare this report. The CDDH appointed Mr Jan SOB CZAK (Poland) as chairperson of the CDDH-SCR.

2. At its 1st meeting (8–10 March 2022), the CDDH-SCR held an exchange of views with Ms Ana GOMEZ, Directorate of Legal Advice and Public International Law (DLAPIL), Ms Rachael KONDAK and Mr Hasan BAKIRCI, Registry of the European Court of Human Rights; and Dr Veronika BÍLKOVÁ, member of the European Commission for Democracy through Law (Venice Commission). This exchange of views focused mainly on issues relating to Council of Europe standards relating to emergency measures, states of emergency, and derogations.¹ The Group then examined and adopted a questionnaire to member States, which can be found in [Appendix I](#), and a preliminary structure for the present report.² The Group appointed Ms Cordelia EHRICH (Switzerland) as its rapporteur to prepare the first draft of the report, and Dr Vahagn PILIPOSYAN (Armenia) as its Vice-chairperson.

3. A total of 28 member States replied to the CDDH-SCR questionnaire: Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Slovak Republic, Spain, Switzerland, Türkiye, and the United Kingdom. A compilation of these replies can be found in document CDDH-SCR(2022)05. The CDDH thanks all those who submitted replies.

4. The CDDH-SCR held its 2nd meeting on 11–13 October 2022, at which it examined the draft report presented by the rapporteur and adopted it for transmission to the CDDH. The CDDH [...]

b. The scope and purpose of the report

5. The CDDH has prepared a report that describes national practice in relation to derogations from the Convention in situations of crisis. In fact, since the Convention permits derogations only “in time of war or other public emergency threatening the life of the nation”, the CDDH takes the approach that all permissible derogations will have occurred in a “situation of crisis”. Further to discussions at the 95th CDDH meeting (23–26 November 2021) and the 1st CDDH-SCR meeting, the report also briefly examines derogations from other international human rights treaties, notably from the perspective of whether States derogate from both the Convention and the International Covenant on Civil and Political Rights (ICCPR), or only one of the two.

6. The present report is not limited to derogations relating to measures taken in response to the Covid-19 pandemic. Whilst the CDDH terms of reference were drafted and adopted

¹ See doc. CDDH-SCR(2022)01 for the presentations of the invited speakers and the meeting report (CDDH-SCR(2022)R1, §8–11) for details of the ensuing discussion with members of the Group.

² For the preliminary structure, see CDDH-SCR(2022)R1 Appendix IV.

during the pandemic, and other elements of the terms of reference specifically mention it,³ the present report is about derogations in general – derogations made in any “situation of crisis”. That said, it is an objective fact that a large number of derogations were notified relating to the pandemic, mainly during its early months. This situation was without precedent: never before had so many Parties derogated from the Convention, all for more or less the same reason.

7. The report distinguishes between derogations, in the sense of an international legal act under Article 15 of the Convention, and the domestic measures that necessitated the derogation. It is not a report either on emergency measures or on exceptional domestic legal regimes (“state of emergency” etc.) under which emergency measures may be introduced. It will, however, examine the relationship between derogations and states of emergency.

8. Finally, the report is not intended as either a monitoring or a standard-setting exercise. Whilst it will examine the provisions of the Convention, their interpretation and application by the European Court of Human Rights (the Court), and recommendations of other bodies (notably those of the Council of Europe), the report will not evaluate national practice by reference to these standards, nor will it seek to set new standards. Equally, whilst it will be interesting to compare certain aspects of national practice, the report will not seek to identify examples of good practice.

2. Derogations under Article 15 of the Convention

a. The content of Article 15

9. Article 15 of the Convention reads as follows:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

10. The Convention permits Parties to derogate in two sets of circumstances: (i) war, and (ii) other public emergency threatening the life of the nation.

11. The Court has not had occasion to interpret the meaning of “war” in the context of Article 15. In particular, it has not had to determine whether the expression “other public emergency threatening the life of the nation” implies that a “war” must also threaten the life of the nation in order to justify a derogation.⁴

³ The CDDH is also instructed to prepare a draft non-binding legal instrument on the effective protection of human rights in situations of crises based on lessons learnt from the Covid-19 pandemic.

⁴ The UN Human Rights Committee has observed that the ICCPR “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”: see “General Comment No. 29 on states of emergency (article 4)”, §3.

12. The Court has stated that the expression “public emergency threatening the life of the nation” should be given its “natural and customary meaning” in accordance with a four-part test: i) an exceptional situation of crisis or emergency; ii) affecting the whole population (although not necessarily all of the territory⁵) of the State; iii) constituting an actual or imminent threat to the continuance of the organised life of the community of which the State is composed; iv) for which the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.⁶

13. The Court has repeatedly stated that it falls to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency.⁷ Although the threat must be imminent, the authorities need not wait, for example, for a terrorist attack to strike before derogation can be justified.⁸ The emergency situation may be protracted, as in the case of terrorism in Northern Ireland, for which the Court found the United Kingdom’s derogation, lasting many years, to be acceptable. On the other hand, the Court has made clear that derogations are valid only within the territorial area for which they have been specified and only until the emergency to which they relate has ended.⁹

14. The Court has further stated that “By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, Contracting Parties do not enjoy unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation”.¹⁰

15. A derogation is only effective in relation to measures that are “strictly required by the exigencies of the situation”. This implies a requirement of proportionality between the emergency situation and the measures taken in response. It can be noted that the Court has found to be disproportionate measures for which a State had sought to derogate that were unjustifiably discriminatory, with the implication that the disproportionality of the relevant measures invalidated the derogation.¹¹

b. Non-derogable rights

16. Article 15(2) lists certain ECHR provisions from which derogation is not permitted, namely the right to life under Article 2 (except in respect of deaths resulting from lawful acts of war), the prohibition on torture and inhuman and degrading treatment and punishment under Article 3, the prohibition of slavery and servitude under Article 4 (but not the prohibition on

⁵ See e.g. *Aksoy v. Turkey*, App. No. 21987/93, judgment of 18 December 1996, §70.

⁶ See *Lawless v. Ireland (No. 3)*, App. No. 332/57, judgment of 1 July 1961, §28; *Denmark, Norway, Sweden and the Netherlands v. Greece (the Greek case)*, Application No. 3321/67 and others, Commission report of 5 November 1969, §153.

⁷ *A. & otrs v. United Kingdom*, App. No. 3455/05, Grand Chamber judgment of 19 February 2009, §173.

⁸ *A. & otrs v. United Kingdom*, op. cit., §176-177.

⁹ See respectively *Sadak v. Turkey*, App. Nos. 25142/94 and 27099/95, judgment of 8 April 2004, §39; and *Barseghyan v. Armenia*, App. no. 17804/09, judgment of 21 September 2021, §36.

¹⁰ *Brannigan and McBride v. the United Kingdom*, Apps. Nos. 14553/89 & 14554/89, judgment of 26 May 1993, §43.

¹¹ *A. & otrs v. United Kingdom*, op. cit., §186 and 190.

forced or compulsory labour under Article 4(2)), and the prohibition on punishment without law under Article 7.

17. In addition, certain provisions of additional protocols to the ECHR are also explicitly non-derogable. These include the abolition of the death penalty in time of peace (Protocol no. 6, Article 1; see Article 3); the right not to be tried or punished twice (*ne bis in idem*) (Protocol no. 7, Article 4; see paragraph 3); and the abolition of the death penalty in all circumstances (Protocol no. 13, Article 1; see Article 2).

18. Article 15(1) states that a derogation must be consistent with the State's "other obligations under international law". The UN Human Rights Committee has observed that the circumstances motivating a derogation cannot justify violations of humanitarian law or peremptory norms of international law, which extend beyond the list of non-derogable provisions set out in the ICCPR.¹² It has also noted that "[t]he provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights".¹³

c. Procedural requirements

19. Article 15(3) sets out procedural requirements. The derogating State must inform the Secretary General of the Council of Europe of the relevant measures with respect to which it has derogated, and the reasons why those measures have been taken. It must also inform the Secretary General when those measures have been lifted and the restrictions on ECHR rights no longer apply.

20. Whilst Article 15(3) does not stipulate a timeframe for informing the Secretary General, the jurisprudence of the Court and of the former European Commission of Human Rights requires notification "without any unavoidable delay".¹⁴ Delays of three and four months have been found to be excessive, but 12 days to be acceptable.¹⁵ Whilst it is clear that the Court cannot apply Article 15 in the complete absence of due notification of derogation,¹⁶ the consequences of unduly delayed notification are less clear. In *Greece v. United Kingdom*, having found that a three-month delay in notification did not invalidate the derogation, the Commission stated that it was "not to be understood as having expressed the view that in no circumstances whatsoever may a failure to comply with paragraph 3 of Article 15 attract the sanction of nullity or some other sanction". In the "*Greek case*", the applicant States argued that a four-month delay in notification should "strike with nullity" the derogations; whilst the Commission agreed that the requirements of Article 15(3) had not been met, it did not directly answer the question of whether the derogation should be nullified.

21. The practice of the Council of Europe's Treaty Office is also relevant to application of the procedural requirements of Article 15. The Treaty Office accepts notification of derogations directly from a Ministry of Foreign Affairs or via the Permanent Representation in Strasbourg. It considers the date of notification of a derogation to be that on which it was registered on behalf of the Secretary General, even if the derogation itself indicates an earlier starting date. A copy of the derogation and its cover letter is sent to the permanent representations of all

¹² The list of non-derogable rights under Article 4 ICCPR includes those listed in Article 15 of the Convention, along with Article 18 ICCPR (similar though not identical to the right to freedom of thought, conscience and religion under Article 9 of the Convention and the right to education under Article 2 of the first Protocol to the Convention), as well as certain other rights not set forth in the Convention.

¹³ See "General Comment No. 29", §11 and 15.

¹⁴ *Greece v. United Kingdom*, App. No. 176/56, European Commission of Human Rights, 26 September 1958, §158.

¹⁵ *Greece v. United Kingdom*, op. cit.; "*Greek case*", App. No. 3321/67 et al., European Commission of Human Rights, 5 November 1969, §81; *Lawless v. Ireland (No. 3)*, App. no. 332/57, judgment of 1 July 1961, §47.

¹⁶ *Cyprus v. Turkey*, App. No. 8007/77, European Commission of Human Rights, 4 October 1983, §66-68.

member States and to the Presidents of the Court and the Parliamentary Assembly, and is published on the Treaty Office website. A notification of withdrawal of a derogation takes effect on the date indicated on the notification, or on the date of registration if no date is indicated. A notification of withdrawal is circulated and published in the same way as a notification of derogation.

22. Article 15 requires the derogating State to indicate the relevant measures and the reasons for taking them. The notification must furnish sufficient information to enable the other High Contracting Parties and the Court to appreciate the nature and extent of the derogation.¹⁷ The derogating State is not, however, required to indicate the specific Convention rights that would be affected. Of course, this does not mean that the affected rights cannot be indicated, and some States have done this in their notifications, although practice in this respect varies significantly (as will be seen below). The Treaty Office notes that the practice of referring only to ‘obligations’ generally is not objectionable as such. It strongly recommends, however, that States, for reasons of legal certainty, specify precisely which provisions they intend to derogate from and the extent of the derogation.¹⁸ In a recent judgment, the Court used language which could be read as suggesting that it would have been willing to hear argument on the validity of a notice of derogation that did not specify the rights affected, had any of the parties raised the matter.¹⁹

d. Recommendations of Council of Europe bodies concerning derogations

23. Several Council of Europe bodies have made general recommendations concerning derogations, including the Committee of Ministers, the Parliamentary Assembly, the Secretary General,²⁰ the Commissioner for Human Rights, the European Commission for Democracy through Law (Venice Commission), and the Director of Legal Advice and Public International Law.

24. As the Committee of Ministers has noted, in terms since repeated by the Secretary General, “the possibility for states to [derogate] is an important feature of the system, permitting the continued application of the Convention and its supervisory machinery even in the most critical times.”²¹

25. The Venice Commission has indicated “benchmarks” on application of the principle of legality in emergency situations.²² These include clarification that the requirement of being “strictly required by the exigencies of the situation” applies to the duration, circumstance and scope of a derogation. The Venice Commission benchmarks also indicate that the scope of a derogation should be subject to parliamentary control and judicial review – a point also made earlier by a previous Commissioner for Human Rights.²³

¹⁷ *Greece v. UK*, op. cit.

¹⁸ See also *Memorandum on COVID-19 – Derogations under Article 15 of the European Convention on Human Rights*, JJ011/2020 AG/gd, 16 March 2020.

¹⁹ *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, judgment of 20 March 2018, §89.

²⁰ *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member states*, SG/Inf(2020)11, 7 April 2020.

²¹ Committee of Ministers’ Reply to Parliamentary Assembly Recommendation 2125 (2018).

²² *Compilation of Venice Commission Opinions and Reports on States of Emergency*, CDL-PL(2020)003, 16 April 2020.

²³ *Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles on certain aspects of the UK 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights*, CommDH (2002)7/28, August 2002, §9.

26. In the view of the Venice Commission, “Derogation is not always necessary. As indicated above, the ECHR provides for the possibility to restrict several rights on account of protection of health... Other rights contain more general grounds for restriction, and the European Court of Human Rights ... takes account of the context when interpreting the extent of rights. Refraining from making a derogation may convey the message that a crisis may be handled without resorting to exceptional powers; on the other hand, a derogation may give a clear indication that certain exceptional measures are truly exceptional and do not “make the law”.”²⁴

27. Similar points have been made by the Director of Legal Advice and Public International Law with respect to derogations relating to measures taken against Covid-19: “the use of the usual restriction clauses related to the protection of health should in many cases be sufficient to justify the adopted measures under the Convention. However, exceptionally specific national measures may require derogations from the obligations under the Convention.”²⁵

28. The Parliamentary Assembly has expressed the concern that “protracted states of emergency and derogations have the effect of normalising lower standards and habituating populations to greater interference with their rights.” On this basis, the Assembly recommended that member States “take a cautious, progressive approach to emergency measures, adopting those that require derogation only as a last resort, when strictly required because other, less restrictive options prove inadequate”.²⁶ The accompanying report further develops this graduated response to emergency situations, recommending that States “(i) exhaust the possibilities offered by ordinary law, (ii) before having recourse to emergency measures that are nevertheless still compatible with Convention requirements, and (iii) only as a last resort introducing particularly restrictive measures that require derogation from the Convention. Each successive step involves acceptance of progressively greater interference with protected rights and, in the case of a derogation, acceptance of standards that fall below the generally recognised European minimum level.”²⁷ This step-by-step approach is intended to ensure that derogation only occurs when strictly required.

29. As to the withdrawal of derogations, the Committee of Ministers, in its 2002 Guidelines on human rights and the fight against terrorism, noted that “The circumstances which led to the adoption of ... derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist” (Guideline XV). Again, this relates to the need to ensure that a derogation does not go beyond the extent strictly required.

3. National procedures for deciding whether to derogate from the ECHR

a. Member States with an established procedure

30. Of the member States that responded to the questionnaire, only four indicated an established procedure for “considering whether or not to derogate from obligations under the European Convention on Human Rights or other international human rights treaties”: Finland, Latvia, Spain, and Türkiye.

31. In Finland, the Emergency Powers Act, whose purpose is to protect public and national interests in emergencies, allows for derogations to human rights treaties binding on Finland only in relation to the most serious military crises threatening the existence of the state. In

²⁴ *Reflections on respect for democracy, human rights and the rule of law during states of emergency*, CDL-AD(2020)014, 19 June 2020.

²⁵ *Memorandum on COVID-19 – Derogations under Article 15 of the European Convention on Human Rights*.

²⁶ Resolution 2338(2020), *The impact of the Covid-19 pandemic on human rights and the rule of law*.

²⁷ Report of the Committee on Legal Affairs and Human Rights, *The impact of the Covid-19 pandemic on human rights and the rule of law*, doc. 15139, 16 September 2020.

other emergency situations, the state is required to act within the restrictions permitted by those treaties. The use of this Act is based on “strong and transparent parliamentary control”: the Government must submit to Parliament decrees concerning the use of powers under the Emergency Powers Act. The parliamentary Constitutional Law Committee has stressed the need for compliance with human rights obligations when applying the above legislation, and thus requires the Government to carry out a human rights impact assessment. A derogation is only possible following a declaration of an emergency by the Government, jointly with the President. The final decision to derogate is taken by the plenary session of the Government, on a proposal by the Ministry for Foreign Affairs; decisions to renew/ extend or to withdraw a derogation are taken in the same way. The Government launched a comprehensive reform of the Emergency Powers Act in February 2022, which presumably will examine also the provisions on derogations.

32. In Latvia, Article 8 of the Law on Emergency Situation and State of Exception allows the Cabinet of Ministers, when declaring an emergency situation, to stipulate the “complete or partial suspension of execution of the liabilities laid down in international agreements, if execution thereof may have a negative impact on the ability to prevent or overcome a threat to national security”. This allows the Government to derogate from treaty obligations in these exceptional circumstances. The final decision falls to the Ministry responsible for execution of the treaty obligations in question. For the ECHR (and the ICCPR), this is the Ministry of Foreign Affairs, which makes an assessment of the need to derogate based on the scope and nature of the measures taken by the Cabinet, in the light of the caselaw of the European Court of Human Rights on application of the relevant ECHR provisions (and decisions of the United Nations Human Rights Committee in relation to the ICCPR). Although the Law on Emergency Situation and State of Execution does not *expressis verbis* stipulate that a derogation is possible only if a special regime has been implemented, the Law on the Management of the Spread of Covid-19 Infection introduced this requirement. The Latvian reply noted that this reflects the position under the Article 4 of the ICCPR, which requires that a state of emergency has been declared before a derogation can be made. A derogation is notified for a limited period of time, usually corresponding to that for which the emergency measures are in force. These measures are under constant review, and any change in the measures would trigger a review of the derogation; if the measures are withdrawn, so would be the derogation. The decision on whether or not to renew/ extend, or withdraw a derogation is also taken by the Ministry of Foreign Affairs, on the basis of the measures adopted by the Cabinet of Ministers.

33. In Spain, Article 37 of Law 25/2014 on Treaties and other international agreements allows for the “suspension” of a treaty in accordance with the rules of the treaty itself or the general rules of international law. The decision to suspend is taken by the Council of Ministers, on a proposal of the Minister of Foreign Affairs and Cooperation, in coordination with the ministry responsible for the subject matter of the treaty (in the case of the ECHR, that is the Ministry of Foreign Affairs and Cooperation itself). On duly justified grounds of urgency, the decision may be taken by the Minister of Foreign Affairs and Cooperation, where appropriate in coordination with the ministry competent for the subject matter of the treaty. The Ministry of Foreign Affairs and Cooperation shall immediately seek the approval of the Council of Ministers. In the case of the most important treaties, like the ECHR, the decision must be ratified by Parliament. If Parliament does not approve this ratification, the Government shall revoke the decision to suspend the treaty. Whilst the governmental procedure for deciding on “suspension” of a treaty does not include a human rights impact assessment, Parliament would have the opportunity to do so when considering whether to ratify the decision, and the Ombudsperson would be able to assess the human rights impact of the suspension of a treaty such as the ECHR. Renewal or extension of the “suspension” would imply the same procedure as the initial decision to suspend. Suspension could be revoked (the derogation withdrawn) by decision of the government: since this decision would be “favourable” to the treaty, it would be sufficient for parliament to be informed.

34. In Türkiye, the President may declare a State of Emergency in accordance with the conditions and procedure set out in Article 119 of the Constitution and State of Emergency Law No. 2935 of 25 March 1983. Once this process has been completed, the suspension of the rights and obligations set out in the ICCPR and the ECHR shall be reviewed by the competent authorities who decide on the declaration of the State of Emergency. If the decision for suspension is taken, the notification of suspension will be transmitted by the Ministry of Foreign Affairs to the Secretary General of the Council of Europe / the Secretary General of the United Nations in accordance with the provisions of the relevant treaty.

35. Three other member States – the Netherlands, Poland, and the United Kingdom – provided information on domestic procedures for giving effect to restrictions on protected rights going beyond those permitted by the rights themselves. Whilst not relating directly to derogation from the ECHR, this information is nevertheless illustrative of procedures that would have consequences for, or be consequences of, a decision to derogation.

36. In the Netherlands, Article 103 of the Constitution allows for derogation (*afwijken*) from certain fundamental rights, meaning imposition by the legislator of restrictions that are more far-reaching than those possible on the basis of the rights themselves. Such derogations are only possible following the declaration of a state of emergency under the Coordinated Act Exceptional Situations. This declaration is done by royal decree, followed by notification to the States General (parliament). The state of emergency may be ended either by a royal decree or by a decision of the States General. This system has been in place since 1996 but has never been used; the Dutch reply indicates that there appear to be no examples of the Netherlands ever having seriously considered derogating from the ECHR.

37. In Poland, provisions at constitutional, legislative, and government ordinance level establish rules and procedures for *inter alia* executing, terminating, and changing the scope of applicability of international treaties. A minister responsible for the area covered by a treaty may submit to the Council of Ministers a request to suspend the application of an international treaty in accordance with its provisions or general international law. This request must be approved by the Council of Ministers and submitted for decision to the President (if the treaty had been ratified), on the basis of prior statutory consent by Parliament (if Parliament had given consent to ratification of the treaty – which notably covers treaties concerning human rights, including the ECHR). During the Covid-19 pandemic, the Ministry of Foreign Affairs considered the possibility of applying an *ad hoc* procedure based exclusively on Article 15 ECHR, which has the status of “universally binding legal act” in Poland. This *ad hoc* procedure would have allowed the Council of Ministers to decide on whether to derogate, following an initiative by the minister responsible for the relevant restrictions. When consulted by the Government Agent, however, the various ministries responsible for Covid-19-related measures considered that there was no urgent need to derogate from the ECHR. According to general rules applicable in the context of the decision-making process, a decision about the suspension of the ECHR should involve a human rights impact assessment. Moreover, the Ministry of Foreign Affairs called upon the ministries competent for the relevant measures to analyse the compatibility with the ECHR of the Covid-19 restrictions imposed.

38. In the United Kingdom, Articles 14 and 16 of the 1998 Human Rights Act establish a procedure for “designating” a derogation. The designation procedure in fact gives effect in domestic law to a derogation under international law, rather than being a procedure for deciding whether or not to derogate. A Cabinet Minister may designate a derogation either following or in anticipation of a decision to derogate, after the Government has taken the decision to derogate or in anticipation of a proposed derogation. The designation must be approved by a resolution of both chambers of Parliament within 40 days. The designation is then valid for up to five years, unless renewed by Parliament. If the designation ceases to have effect or is not approved by Parliament, the ECHR right concerned is given full effect in domestic law, even if the derogation itself remains in force from the perspective of international

law. Although neither the decision to derogate nor parliamentary approval of the designation of the derogation involve a human rights impact assessment, if the derogation relates to measures that were introduced by legislation, the Government will have produced an analysis of the human rights issues when presenting the draft legislation, which will also be scrutinised by the parliamentary Joint Committee for Human Rights. The parliamentary procedure for designating the derogation may also involve consideration of the human rights impact. A declaration of a state of emergency is not a precondition for derogating; neither does any form of exceptional legal regime establish a requirement to derogate. Renewal or extension of the designation of a derogation also requires parliamentary approval. The designation of a derogation ceases as soon as the Government withdraws the derogation.

b. Member States that have used an *ad hoc* procedure

39. Several States provided information on *ad hoc* procedures for considering whether or not to derogate from the Convention in particular circumstances.

40. In the Czech Republic, at the beginning of the Covid-19 pandemic in spring 2020, there was an exchange of correspondence between the Government Commissioner for Human Rights and the Ministry of Foreign Affairs. The Commissioner considered that it might be advisable for the Czech Republic to derogate from its obligations under the Convention, as that this would give a wider margin of appreciation within which to respond to the pandemic. The Commissioner also observed that other Eastern European countries that had introduced less stringent measures had derogated, and that derogation would give a signal that the measures should be assessed against emergency, rather than normal standards. The Ministry for Foreign Affairs, however, following consultations with other domestic actors, foreign authorities, and relevant international organisations, considered that there were not sufficient reasons to justify a derogation. This was because the measures taken affected rights that could properly be restricted; most other EU member States had come to this conclusion, which was supported by the Council of Europe Secretariat; and it was important for the Czech Republic to be seen to respect fully its international commitments. The Czech authorities noted that the assessment of the human rights impact had been “very light” with “no analytical document” produced. If a derogation had been considered necessary, the final decision would presumably have been taken by the government. In the light of this experience, the Czech reply notes that it would “probably be quite advisable” to review the procedure involved in deciding on whether or not to derogate from the ECHR.

41. In Denmark, in accordance with national practice, the Ministry of Justice is to be consulted on any proposal of measures that may interfere with rights and obligations under the ECHR or other human rights treaties. In its assessment, the Ministry of Justice also considers a possible need for a derogation. In doing so, the Ministry assesses the impact of the proposed measure on relevant rights and obligations, taking into account information on the measure from the relevant authorities and the case-law of the Court. If one day the Ministry of Justice concluded that there is a need to introduce a derogation from the ECHR, it would take the necessary steps to inform the Secretary General in accordance with Article 15 (3).

42. In Estonia, the Ministry of Foreign Affairs and the Government Office, along with the Office of the Chancellor of Justice, examined the question of whether or not to derogate following the declaration of a state of emergency in response to the Covid-19 pandemic. Whilst the Covid measures were considered to be in accordance with the national constitution, the situation was clearly not “ordinary” or “normal”, and the Government considered that additional measures might become necessary if the number of infections continued to increase. In an unprecedented situation with measures applying to the population as a whole, the Estonian government informed the Secretary General of the Council of Europe that there was a “public emergency threatening the life of the nation” and the measures taken in response “may” involve derogation from certain ECHR obligations. The Estonian reply underlined, however,

that this notification did not mean that Estonia definitely would derogate. The final decision to notify had been taken by the Ministry of Foreign Affairs, although the text of the declaration was coordinated with the Government Office and the Office of the Chancellor of Justice. The decision to withdraw the derogation was directly linked to the decision not to extend the state of emergency beyond 18 May 2020. The Estonian authorities have reflected upon the lessons learnt during the Covid-19 emergency, including a review of the procedure for deciding on whether to derogate from the ECHR, but at the time of the reply it was not considered necessary to introduce a specific procedure.

43. In France, whenever emergency measures have been adopted, the Legal Directorate of the Ministry of Europe and Foreign Affairs has studied the proportionality of their impact on ECHR rights, in collaboration with the ministries responsible for adopting the measures – the Ministry of the Interior, the Ministry of Justice, and, in the case of Covid-19-related measures, the ministry responsible for health, as well as the ministry responsible for overseas territories. The measures are evaluated against domestic (notably constitutional) standards, the Convention, as interpreted by the European Court of Human Rights, and other international treaties to which France is a party, notably the ICCPR. Further exchanges then take place with the government's General Secretariat, which, under the Prime Minister, is responsible for coordinating the work of the administration and, if necessary, arbitrating. An inter-ministerial meeting is convened to decide between the different options available for notifying a state of crisis (including article 15 ECHR); this combines the various ministries' areas of expertise and allows a rapid reaction as regards international bodies, in parallel with the adoption of national emergency measures. The process involves a human rights impact assessment, conducted by the Human Rights Sub-Directorate of the Legal Directorate of the Ministry of Europe and Foreign Affairs, based on evaluations undertaken by the ministries responsible for the measures concerned but with further reference to Council of Europe standards, especially those of the ECHR. This assessment may form the basis of advice to have recourse to Article 15 ECHR, should the measures envisaged be likely to go beyond what is permitted by the ECHR. A declaration of a state of emergency does not automatically imply a need to derogate from the Convention: France has declared a state of emergency on all or part of its national territory on seven occasions since it ratified the ECHR, and a state of health emergency once, but it has only derogated from the ECHR twice. The final decision on whether or not to derogate is taken by the Government, responsible to Parliament. The same authorities that were involved in the initial consideration continue to assess the need to prolong the derogation, with the final decision taken by the Government. They take into account the evolution of the public emergency, any incorporation into ordinary law of measures that had been taken to address the emergency, and any change in circumstances that would affect the evaluation of the human rights impact.

44. In Lithuania, following the WHO declaration of a Covid-19 pandemic, the Government, and in particular the Ministries of Foreign Affairs and Justice, considered whether it would be necessary to derogate from the ECHR. This consideration involved an assessment of the human rights impact of the measures introduced and took account of the DLAPIL memorandum of 16 March 2020 and the March 2020 statement of the Spokesperson of the Secretary General of the Council of Europe. On this basis, it was decided that a derogation was not necessary, since none of the measures went beyond the permitted scope of the relevant ECHR articles. Lithuania did not declare a state of emergency, but this was not a conclusive factor in deciding whether or not to derogate.

45. In Switzerland, the Federal Council qualified the Covid-19 pandemic situation as "extraordinary" under the law on epidemics. In accordance with the Federal Constitution, this allowed the Federal Council to take certain measures, including the prohibition of public and private assemblies and the closure of most shops, markets, restaurants, bars, and entertainment venues. The question of whether or not to derogate from the ECHR and the ICCPR was discussed at the technical level between the Federal Departments of Foreign

Affairs and of Justice and the Police. All those involved in these discussions agreed that the measures taken fell within the scope of the restrictions permitted by the ECHR and the ICCPR, and the question of derogation was not examined further. No formal decision was taken, and there was no reflection on the procedure that would have had to be followed in order to derogate.

4. Derogations in practice

a. Situations that have given rise to derogations in the past

46. A table summarising essential information about the various derogations that have been notified by States Parties to the ECHR can be found in document CDDH-SCR(2022)07REV. This table includes both information contained in replies to the questionnaire and information available from the Treaty Office of the Council of Europe.

47. It is possible to group past derogations into broad categories relating to similar situations, based on the description of the reasons for the derogation given in the notification to the Secretary General.²⁸ The following categories are suggested.

48. Derogations related to terrorist threats, which include the following:

- The UK notified derogations with respect to the terrorist threat in Northern Ireland between 1957–2001 and with respect to the threat from persons suspected of involvement in international terrorism between 2001-2005.
- Ireland notified terrorism-related derogations between 1957–1962 and 1976–1977.
- Türkiye derogated between 1990-2002 by notifications referring to threats to national security involving terrorist activities.
- France derogated between 2015–2017.

49. Derogations related to international armed conflict:

- Both Armenia and Azerbaijan derogated from the ECHR in relation to the conflict between them/ Nagorno-Karabakh conflict in September 2020.
- Ukraine derogated following the Russian-supported armed insurrection in eastern Ukraine in 2014 (this was initially described in Ukrainian notifications as an “anti-terrorist operation”, but later as a “joint force operation”), and again following the Russian war of aggression in February 2022.
- The Republic of Moldova also derogated from the ECHR in February 2022 as a result of the Russian war of aggression against Ukraine.

50. Derogations related to (attempted) coup d'états/insurrections:

- Türkiye has notified five derogations relating to (attempted) coup d'états or similar events, between 1963–1964, in 1970, from 1971–1973, from 1980–1987, and from 2016–2018.
- The military junta that came to power in Greece through a coup d'état in 1967 sought to derogate with respect to subsequent repressive measures (as noted above, the European Commission on Human Rights found that this derogation was invalid).
- Georgia derogated from the ECHR for a week in November 2007 on account of an attempted coup d'état.

²⁸ It is recognized that different descriptions may relate to situations that are in some ways factually similar. It is beyond the scope of this report to conduct a separate analysis of these situations, and for present purposes unnecessary to question the descriptions given. Partly because of the difficulty in categorizing all the derogations that have been made, this section is not exhaustive, although it does cover almost all derogations since 1990.

51. Derogations related to outbreaks of violent civil disorder:

- Türkiye has transmitted several notifications of derogations relating to more or less widespread outbreaks of violent civil disorder, covering periods between 1961–1963, 1974–1975, and 1978–1980.
- France (in relation to New Caledonia) in 1985.
- Albania in 1997.
- Armenia in 2008 (in relation to the capital city, Yerevan).²⁹

52. Derogations related to outbreaks of infectious disease:

- 10 States derogated on account of Covid-19 (Albania, Armenia, Estonia, Georgia, Latvia (on three separate occasions), North Macedonia, the Republic of Moldova (twice), Romania, San Marino, and Serbia).
- Georgia derogated in 2006 following an outbreak of H5N1 bird flu.

53. In addition to the basic information requested in the questionnaire, some replies contained interesting information on other, related issues.

54. The Estonian reply stated that the notification to the Secretary General referred to both certain rights that allow for restrictions on public health grounds, and certain rights that do not. The notification covered both types of rights because the Court’s caselaw did not give much guidance on whether health-related restrictions, which had been accepted in individual cases, would be accepted when applied to all individuals, regardless of their personal situation, in the context of a situation affecting the population as a whole. Since the Court retained authority to determine finally whether or not the restrictions were acceptable, Estonia had found it clearer and more transparent to state that the measures taken “may not” comply with certain protected rights and freedoms. The Latvian reply noted that one of the principles taken into account in determining the necessity of a derogation was whether the measure adopted foresaw any individual assessment of the necessity of the restriction. If no such individual assessment was envisaged, e.g., when all forms of public gathering were banned without individual assessment, a derogation from Article 11 of the ECHR and Article 21 of the ICCPR was found necessary.

55. The Greek reply referred to the derogation notified by the military junta following the coup d’état in April 1967. This derogation was examined by the European Commission on Human Rights in the context of a series of inter-state applications known as “the Greek case”. As already indicated, the Commission found that the conditions for application of Article 15 were not met as there was no ‘public emergency threatening the life of the nation’, and so the legislative measures and administrative practices of the military government violated ECHR provisions without any exceptional justification under Article 15.³⁰

56. So far, no derogation has been made in relation to extraterritorial jurisdiction arising from military activities of a Member State outside of its territory. In the case *Hassan v. United Kingdom*, the Grand Chamber of the Court considered that the lack of a formal derogation

²⁹ It should be noted that the Court found that Armenia’s 2008 derogation “failed to satisfy the requirements of Article 15(1)”, since “the Government failed to demonstrate convincingly and to support with evidence their assertion that the opposition demonstrations, which, moreover, were apparently confronted with a heavy-handed police intervention, could be characterised as a public emergency ‘threatening the life of the nation’”: see *Dareskizb Ltd v. Armenia*, App. No. 61737/08, judgment of 21 September 2021, §62.

³⁰ The Greek reply recalled that Greece had then withdrawn from the Council of Europe in order to avoid a finding by the Committee of Ministers, on the basis of the Commission’s report, that Greece had violated the ECHR, with the subsequent risk of expulsion from the organisation. Greece re-joined the Council of Europe in 1974, following the restoration of democracy.

under Article 15 did not prevent it from taking account of the context and the provisions of humanitarian law when interpreting and applying Article 5. The detention of the applicant's brother appearing to be consistent with the provisions of the Third and Fourth Geneva Conventions, it found that there had been no violation of Article 5(1), even though the reason for his detention did not correspond to any of the grounds permitted under sub-paragraphs (a) to (f). It may, however, be noted that, in a partly dissenting opinion, several Judges argued that a derogation under Article 15 was the only legally available mechanism for the United Kingdom to apply the rules on internment under international humanitarian law without violating Article 5(1).³¹

b. The duration of derogations

57. The duration of past (and ongoing) derogations varies enormously, from a few weeks to several decades.³² It may therefore be more illuminating to consider the length of derogations for each of the categories of situation suggested above.

58. Derogations related to terrorist threats. These have tended to be of longer duration, especially the older ones.

- The UK notified successive derogations between 1957–1984 (27 years), from 1988–2001 (13 years), and again from 2001–2005 (four years).
- Ireland's terrorism-related derogations lasted from 1957–1962 (five years), and again from 1976–1977 (one year).
- Türkiye notified a derogation between 1990–2002 (12 years).
- France derogated between November 2015 and November 2017 (two years).

59. Derogations related to international armed conflict have varied greatly in duration, this depending of course on the duration of the impact of the conflict on the State concerned.

- The Armenian derogation related to the armed conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict lasted until April 2021 (seven months) and the Azerbaijani derogation until December 2020 (three months).
- The Ukrainian derogations of 2015 and 2022 are both still in effect.
- The Republic of Moldova's derogation lasted from March to April 2022 (one month).

60. Derogations related to (attempted) coup d'états/insurrections have varied considerably in duration.

- Türkiye's derogations lasted from 1963–1964 (one year), for three months in 1970, from 1971–1973 (two years), and from 2016–2018 (two years).
- The Georgian derogation of November 2007 lasted for a week.
- The derogation notified by the military junta in Greece in 1967 became redundant in 1970 (three years), following the denunciation of the Convention by Greece (see further paragraph 55 above).

61. Derogations related to outbreaks of violent civil disorder have tended to be relatively brief, until the restoration of order.

- France (in relation to New Caledonia) notified a derogation lasting for four months in 1985.

³¹ *Hassan v. United Kingdom*, App. No. 29750/09, Grand Chamber judgment of 16 September 2014.

³² In accordance with the practice of the Treaty Office, the durations indicated in this section are based on the date of receipt by the Secretary General of a notification of derogation and the date of withdrawal of a derogation indicated in its notification.

- Albania derogated for a duration of four months in 1997.
- Armenia's derogation of 2008 (in relation to the capital city, Yerevan) lasted only 17 days.
- Türkiye's derogations relating to outbreaks of violent civil disorder, covering periods between 1961–1963, 1974–1975, and 1978–1980, by contrast, were of longer duration.

62. All but one of the derogations related to outbreaks of infectious disease concern Covid-19. With one exception, nearly all of the Covid-19-related derogations were quite short, from two to six months, although some States derogated on more than one occasion.

- Albania derogated from March to June 2020 (three months).
- Armenia derogated from March to September 2020 (six months).
- Estonia derogated from March to May 2020 (two months).
- Georgia derogated in late March 2020; in January 2022, Georgia notified the Secretary General that the emergency legislation on which the derogation was based would remain in force until January 2023 (which would make a total of just over two years and nine months).
- Latvia derogated from March to June 2020 (three months) and again from December 2020 to April 2021 (four months) and October to November 2021 (one month).
- North Macedonia derogated from April to June 2020 (almost three months).
- The Republic of Moldova derogated from March to May 2020 (two months) and again in April 2021 (less than one month).
- Romania derogated from March to May 2020 (two months).
- San Marino derogated from April to July 2020 (three months).
- Serbia derogated from April to October 2020 (six months).
- In 2006, following an outbreak of H5N1 bird flu, Georgia derogated for a total of 20 days.

63. As noted above, the Treaty Office considers that a derogation takes effect from the date that the notification is registered by the Secretary General. In the great majority of cases, derogations have been notified within a few weeks or even days after the relevant measures were introduced. There have, however, been some exceptions:

- San Marino's 2020 derogation related to measures introduced between 5 and 20 March but the notification was not registered until 7 July.
- Ukraine's 2015 derogation related to measures introduced on 12 August 2014 but the notification was not registered until 5 June 2015. It can be noted, however, that the Resolution of the Verkhovna Rada of Ukraine No. 462-VIII "On derogation from certain obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms" was only adopted on 21 May 2015.
- Türkiye's 2016–2018 derogation was notified promptly, as were the various decisions to extend it and almost all of the measures to which it related. The decree-law No. 691 of June 2017, and information on decree-laws Nos. 688 of March 2017 and 689 of April 2017, however, were communicated only in December 2017.

c. Derogations with limited territorial scope

64. There have been relatively few derogations to the ECHR with limited territorial scope. This is presumably because the situations that necessitated them could not be confined in space and the measures taken in response were therefore nationwide. Information taken from the Treaty Office website indicates the following examples of derogations with limited territorial scope:

- In Armenia, violent civil disorder in Yerevan led the government to declare a localised state of emergency in March 2008. The Secretary General was notified that this involved derogation from the ECHR.
- In the New Caledonia overseas territory of France, violent civil disorder led to a declaration of a state of emergency in that territory, with derogation from the ECHR, in 1985.
- In Georgia, an outbreak of H5N1 bird flu led to a declaration of a localised state of emergency in the Khelvachauri district in March 2006.
- Türkiye has derogated from the ECHR on several occasions, and most of these have been of limited territorial scope. An attempted coup d'état in 1963 and an insurrection in 1970 both led to declarations of a "state of siege", resulting in derogations from the ECHR that were limited to Istanbul and certain other specific regions of the country. Further derogations, namely in 1971, 1974, and 1990, were also of limited territorial scope. It can also be noted that the territorial scope of Türkiye's 1971 derogation, which lasted until 1973, its 1974 derogation, which continued into 1975, and its 1990 derogation, which was fully withdrawn in 2002, was in each case gradually reduced over time. This was also the case for the 1980 derogation, which was initially nationwide, but of which the territorial scope was gradually reduced until the derogation was fully withdrawn in 1987.
- The United Kingdom also notified a number of derogations with limited territorial scope, all relating to the situation in Northern Ireland, and covering periods between 1957–1984 and 1988–2001.

65. The Court's caselaw indicates that the legal effects of a derogation are strictly limited to the territorial scope indicated in the notification to the Secretary General. In the case of *Barseghyan v. Armenia*, the respondent State argued that the applicant's complaint concerning his arrest and detention in the city of Gyumri fell within the scope of the state of emergency that had been declared in the capital city, Yerevan, and in relation to which Armenia had derogated. The Court recalled that Article 15 permitted derogations "only to the extent strictly required by the exigencies of the situation". On this basis, the Court considered that it would be "working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Armenian territory not explicitly named in the notice of derogation."³³

d. The rights affected by derogations

66. Although the notification to the Secretary General does not always indicate which rights will be affected by the relevant measures, sufficient information is available to make tentative observations. In particular, it may be interesting to note that it is often the same rights that are indicated, even when the underlying situations are quite different.³⁴

67. Article 5 ECHR (right to liberty and security). This article was indicated in notifications of derogation by:

- Armenia, in relation to an outbreak of violent civil disorder in the capital city, Yerevan, in 2008;
- Armenia and Azerbaijan, in relation to the conflict between Armenia and Azerbaijan/ Nagorno Karabakh conflict in 2020;
- Estonia and Georgia, in relation to the Covid-19 pandemic;

³³ Application no. 17804/09, judgment of 21 September 2021.

³⁴ Again, it is beyond the scope of the present report to seek to analyse the reasons for this. Except where the measures unambiguously imply that a specific right will be affected, this section contains only examples where the rights affected were explicitly mentioned in the notification of derogation.

- Türkiye, in relation to the threats to national security involving terrorist activities (1990–2002);
- Ukraine, in relation to its ongoing derogations beginning in 2014 and 2022, both resulting from Russian military aggression;
- the United Kingdom, in relation to terrorist threats in 2001.

68. Article 6 (right to a fair trial) was mentioned by:

- Armenia, in relation to an outbreak of violent civil disorder in the capital city, Yerevan, in 2008;
- Armenia and Azerbaijan, in relation to the conflict between Armenia and Azerbaijan/ Nagorno Karabakh conflict in 2020;
- Estonia and Georgia when derogating in relation to Covid-19;
- Türkiye, in relation to the threats to national security involving terrorist activities (1990–2002);
- Ukraine, in relation to Russian military aggression in 2014 and 2022.

69. Article 8 (right to respect for private and family life) was mentioned in the following notifications:

- Armenia, in relation to an outbreak of violent civil disorder in the capital city, Yerevan, in 2008;
- Albania, Estonia, Georgia, Latvia (first derogation only), and North Macedonia, concerning Covid-19-related derogations;
- Armenia and Azerbaijan, in relation to the conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict in 2020;
- Türkiye, in relation to threats to national security involving terrorist activities (1990–2002);
- Ukraine, in relation to Russian military aggression in 2014 and 2022.

70. Article 10 (freedom of expression) was mentioned in the following notifications:

- Armenia, in relation to an outbreak of violent civil disorder in the capital city, Yerevan, in 2008;
- Armenia and Azerbaijan, in relation to the conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict in 2020;
- Georgia (implicitly, by reference to the corresponding constitutional right), in relation to the derogation notified on the basis of an attempted coup d'état in 2007;
- The Republic of Moldova, in relation to the derogations relating to energy crises in late 2021 and early 2022;
- Türkiye, in relation to the threats to national security involving terrorist activities (1990–2002);
- Ukraine, in relation to the Russian war of aggression in 2022.

71. Article 11 (freedom of assembly and association) was mentioned in the following notifications:

- Armenia, in relation to an outbreak of violent civil disorder in the capital city, Yerevan, in 2008;
- Albania, Estonia, Georgia, Latvia, the Republic of Moldova and North Macedonia, in relation to the Covid-19 pandemic;
- Armenia and Azerbaijan, in relation to the conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict in 2020;
- Georgia (implicitly, by reference to the corresponding constitutional right), in relation to the derogation notified on the basis of an attempted coup d'état in 2007;

- Türkiye, in relation to the threats to national security involving terrorist activities (1990-2002);
- Ukraine, in relation to the Russian war of aggression in 2022.

72. Other rights indicated as being affected include Article 4 by Ukraine's 2022 derogation, Article 13 (right to an effective remedy) by Türkiye's 1990 derogation and the Ukrainian derogations notified in 2015 and 2022, Article 14 (prohibition of discrimination) by Ukraine's 2022 derogation, and Article 16 (restrictions on political activity of aliens) by Ukraine's 2015 derogation.

73. As regards the additional protocols:

- Article 1 of Protocol no. 1 (protection of property) was mentioned in Azerbaijan's 2022 notification, in the notifications of Covid-19-related derogations by Albania, Estonia and Georgia, and by Ukraine, in relation to the Russian war of aggression in 2022.
- Several notifications have indicated that both Article 2 of Protocol no. 1 (the right to education) and Article 2 of Protocol no. 4 (freedom of movement) would be affected, including Armenia in relation to violent civil disorder in 2008; Armenia and Azerbaijan in relation to the conflict between them/Nagorno-Karabakh conflict in 2020; Estonia, Georgia, Latvia, North Macedonia, and the Republic of Moldova in relation to the Covid-19 pandemic; and Ukraine, in relation to the Russian war of aggression in 2022.
- Ukraine's 2022 derogation in relation to the Russian war of aggression mentioned Article 3 of Protocol no. 1 (right to free elections).

74. Four of the five derogations notified by the Republic of Moldova between 2020 and 2022 (i.e. the two derogations related to Covid-19, and the two related to energy supply crises) referred to "certain provisions" of the ECHR generally, whilst also indicating specific rights. The derogation indicated by the Republic of Moldova in 2022 relating to Russia's military aggression in Ukraine, however, referred only to "certain provisions", without more; similarly, Serbia's Covid-19-related derogation only mentioned "certain obligations".

75. It can be noted that of the rights that allow for restrictions in response to a competing public interest, Article 9 (freedom of thought, conscience and religion) has never been the subject of a derogation. This may be because Article 4 ICCPR does not permit derogation from its Article 18, which protects freedom of thought, conscience and religion in similar (although not identical) terms to Article 9 ECHR; and Article 15 ECHR does not permit derogations that are "inconsistent with [the State's] other obligations under international law".

76. Notifications often describe the relevant measures in such a way as to give an idea of which rights may be affected. The notification of the Albanian derogation related to Covid-19, for example, stated that the measures would include "restriction of air, land and sea traffic, suspension of education process, establishment of quarantine procedures and self-isolation, restriction of assembly, manifestation and gathering, restriction on the right of property..." Similarly, notifications by Ireland and the United Kingdom of derogations relating to a terrorist threat described measures concerning deprivation of liberty. This approach leaves it unclear whether or not the derogation is intended to cover all of the rights that might be affected by the measures described.

77. Some States have submitted successive notifications of derogation as the underlying situation and the measures taken in response evolved. In the case of Latvia's derogations in response to the Covid-19 pandemic, these successive notifications indicate a reduction in the number of rights that may be affected by the relevant measures. Some States have noted that certain measures were no longer in effect when notifying an extension of a derogation,

although without necessarily indicating whether that would reduce the number of rights affected.

e. The content of the notification to the Secretary General of the Council of Europe

78. Apart from the varying practice in relation to indication of the rights affected by a derogation, which is examined above, the other main difference between notifications of derogations concerns the description of the reasons why the relevant measures were taken. As well as being explicitly required under Article 15(3), this information is relevant to the question of whether the derogating measures are “strictly required by the exigencies of the situation”, as stipulated in Article 15(1).

79. The type and degree of factual detail on the underlying situation that is provided in notifications of derogation varies enormously. This would appear to be for essentially political reasons: for example, when a derogation relates to an international armed conflict, the notification may set out the derogating State’s view of the situation; or when the derogation, or rather the relevant measures, are controversial, the reasons for the measures may be explained in particular detail. So long as the basic legal requirement of providing objective information to the Secretary General on the reasons for the measures is satisfied, however, the degree of detail and the inclusion of additional information would seem to be a matter for the derogating State.

80. Information contained in notifications of renewals, extensions, and withdrawals of derogations tends to be more concise. This is understandable: for a renewal or extension, the original reasons for the derogation may still be relevant; and for a withdrawal, there is no obligation to provide explanations. For example, the notifications of extension of Armenia’s 2020 derogation recalled the reason for the underlying state of emergency but only in very succinct terms (“in response to the global outbreak and spread of COVID-19 virus”). The notifications of the Turkish derogation of 2016–2018 simply stated that the underlying state of emergency had been extended.

81. There are, of course, exceptions. The notifications of extension of France’s 2015–2017 derogation explained why each one was required, with detailed examples of further terrorist attacks.

82. Some notifications have been somewhat ambivalent about whether the relevant measures required a derogation or not. For example, the 2020 Estonian derogation, 2015–2017 French derogation, 1957 Irish derogation, 2016–2018 Turkish derogation, and several of the very early United Kingdom derogations indicated that the relevant measures “may involve” derogation. The Treaty Office considers this approach to be potentially problematic.³⁵

f. Situations in which derogation was considered but did not take place

83. Several member States considered derogating from their obligations under the ECHR in relation to measures taken against the Covid-19 pandemic, but concluded that it was not necessary.

- Belgium considered that measures restricting freedom of assembly, freedom of movement, and the right to education were necessary and proportionate and thus justified under the substantive ECHR provisions and so would not require a derogation.

³⁵ See doc. CDDH-SCR(2022)01, p.10.

- Estonia, which derogated from the ECHR between 20 March 2020 and 16 May 2020, considered doing so again in March 2021 when measures were introduced in response to a deterioration in the sanitary situation. As no state of emergency was declared, it was decided not to derogate under Article 15 either.
- France chose to ensure full respect for human rights in its response to the pandemic, by using as proportionate an approach as possible, which explains the choice not to derogate from the ECHR.
- Lithuania considered derogating from the ECHR in relation to the wide-ranging measures in force between March and June 2020, but concluded that it was unnecessary as the protection of health was sufficient justification under the limitation clauses of the affected rights and freedoms.
- Although Poland did not declare a state of emergency, it did declare a “state of epidemiological threat” and, later on, a “state of epidemic”; these alternative regimes were considered sufficient to allow the introduction of adequate and proportionate restrictive measures. The government also considered derogating from its international human rights obligations: in doing so, it took into account the Council of Europe’s information document on respecting democracy, the rule of law and human rights in the framework of the Covid-19 sanitary crisis, and the Ministry of Foreign Affairs consulted other ministries responsible for the measures taken. It was eventually considered that the anti-Covid-19 measures remained within the limits of restrictions allowed by the respective provisions of the ECHR.

84. France declared a state of emergency in November 2005, following an outbreak of rioting in late October, and introduced measures affecting enjoyment of Articles 8 and 11 ECHR, Article 1 of the first Protocol, and Article 2 of Protocol no. 4. These restrictions were considered to fall within the scope of the relevant ECHR provisions, however, and so not to require application of Article 15. France nevertheless informed the Secretary General of the Council of Europe about the measures that were taken and the reasons why it did not derogate.

85. Poland introduced a state of emergency in the area bordering Belarus during the migrant crisis of September 2021. After inter-ministerial consultations and legislative activity assessing the duration of the state of emergency, its territorial scope, and the nature of the restrictions, however, it was not considered necessary to engage the derogation procedure.

g. The relationship between derogations and states of emergency

86. There is no common understanding amongst States of whether a state of emergency must be declared before a derogation is possible, or of whether a derogation is necessary once a state of emergency has been declared.

87. As to whether the declaration of a state of emergency, in the sense of an exceptional legal regime, is a prerequisite for derogating, States expressed differing views. Armenia, and Latvia, for example, clearly indicated that it was. The Netherlands indicated that the declaration of a state of emergency is a prerequisite for derogating (*afwijken*) from constitutional rights referred to in article 103 of the Dutch Constitution. Portugal’s reply implied that it was a prerequisite, since domestic law permits the suspension of fundamental rights only under a state of emergency. Belgium, France, Lithuania, Montenegro, Poland, and the United Kingdom, however, indicated that it was not.

88. Several States recalled Article 4 ICCPR, which requires “official proclamation” of a “public emergency that threatens the life of the nation”.³⁶ It may be noted that the argument that the absence of a declaration of a state of emergency invalidates a derogation to the ECHR, on the basis that it was “inconsistent with other obligations under international law” by failing to satisfy the requirements of Article 4 ICCPR, has been rejected by the Court. The Court found it sufficient that the existence of an emergency and the fact of derogation were publicly and formally announced to parliament by a government minister.³⁷

89. As to whether a derogation is necessary once a state of emergency has been declared, only Estonia and the United Kingdom answered this question directly, in the negative. A negative response was also implicit in other replies. Poland declared a state of emergency along its border with Belarus in September 2021, but given its temporal and territorial scope and the nature of the restrictions, derogation was considered unnecessary. By contrast, in Azerbaijan, the law requires notification of a declaration of martial law or a state of emergency to the Secretary General; in practice, it is understood that this means notification of a derogation.

90. The 2015–2017 French derogation seems to have been motivated by the fact that the measures in question were introduced under a state of emergency; once those same measures were integrated into ordinary law, however, the authorities considered that the derogation was no longer necessary. There were cases when France had declared a state of emergency, but did not derogate. For example, in November 2005, following an outbreak of rioting in late October, the government introduced measures affecting enjoyment of Articles 8 and 11 of the ECHR, Article 1 of the first Protocol, and Article 2 of Protocol no. 4. These restrictions fell within the scope of the relevant ECHR provisions and did not require application of Article 15.³⁸ France has never considered derogating from the ECHR without having first declared a state of emergency.

91. France recalled the Court’s requirement that “normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate” for a derogation to be justified. France considers this to mean that if ordinary laws would be sufficient, Article 15 cannot be applied. This could make States feel obliged to declare a state of emergency in order to be able to derogate and thereby benefit from a wider margin of appreciation. This would be to the detriment of legal certainty and would complicate the law in those States.

5. Derogation from other international human rights treaties

92. Several replies to the questionnaire provided information on whether the State had also derogated from other international human rights treaties, in particular the ICCPR.

- Azerbaijan derogated from both the ECHR and the ICCPR in relation to the conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict in 2020;
- Estonia stated that in 2020, the Secretary General of the UN was also informed, in relation to the ICCPR;
- France explained that in 2015–2017, derogations to the ECHR and ICCPR were done in parallel. The reply notes that Article 15 ECHR states that derogations must not be “inconsistent with [the State’s] other obligations under international law”, which was understood to indicate that Article 4 ICCPR should also be applied. In

³⁶ The UN Human Rights Committee, in General Comment no. 29, seems to use the expression “state of emergency” to refer to both the “public emergency that threatens the life of the nation” and the legal regime permitting exercise of emergency powers.

³⁷ *Brannigan & McBride*, op. cit., §67-73.

³⁸ It can be noted, however, that France did inform the UN Secretary General, under Article 4(3) ICCPR, of the declaration and subsequent termination of this state of emergency.

- 1985, France derogated only from the ECHR. The reply explains that this was probably because France had only recently ratified the ICCPR, which entered into force for France in 1981; and the possibility of individual application to the UN Human Rights Committee, along with confirmation in domestic law of the direct effect of the ICCPR's provisions, both took place in 1984;
- Latvia derogated from both the ECHR and the ICCPR on all three occasions during the Covid-19 pandemic. The reply notes that the derogations were not identical, however, as the ICCPR does not protect the right to education contained in Article 2 of the first Protocol to the ECHR;
 - Türkiye derogated from both the ECHR and the ICCPR in relation to the measures taken under the state of emergency following the 2016 attempted coup d'état;
 - The United Kingdom notified derogations to both the ECHR and the ICCPR in 1988–2001, 2001–2005, and in 1976, which is when the ICCPR entered into force for the United Kingdom.

93. The website of the Office of the UN High Commissioner for Human Rights (OHCHR) provides further information on derogations to the ICCPR as is provided by the Council of Europe Treaty Office in relation to derogations to the ECHR.³⁹ The OHCHR website indicates there were derogations to the ICCPR in relation to almost all situations that gave rise to derogations to the ECHR. The only apparent exceptions are:

- Albania, in relation to its three relatively short derogations (one in 1997 and two in 2020);
- North Macedonia, in relation to its relatively short 2020 derogation;
- The Republic of Moldova, in relation to the three very brief derogations in 2021 and 2022 (the Republic of Moldova did notify the UN Secretary General of its two Covid-19-related derogations in 2020).

6. Conclusions

94. The right for States parties to derogate from the ECHR is an important part of the system. In a situation of crisis requiring exceptional measures in response, a derogation allows the authorities to continue applying human rights, whilst exceeding the normal limits permitted on restrictions – but only if “the normal measures or restrictions ... are plainly inadequate”, and only “to the extent strictly required by the exigences of the situation”.

95. In accordance with the intended exceptional nature of the right of derogation, it has been used on relatively few occasions. Indeed, only 17 out of 46 Parties have ever derogated from the ECHR, and several States noted that they had never seriously considered derogating.

96. There was an unprecedented increase in the number of derogations during the Covid-19 pandemic. This is unsurprising, given the unprecedented nature of the pandemic itself, which affected every Party to the ECHR. Most of these derogations were relatively brief in duration, showing a recognition of their exceptional nature. The fact that, as the sanitary situation evolved, certain States withdrew and reinstated derogations or reduced their scope may suggest that those States were particularly alert to the need to derogate only when, and to the extent, strictly required.

97. When looking at the reasons given for the measures to which derogations have related, the underlying situation would seem *prima facie* to correspond to a “war or other public emergency threatening the life of the nation” – and when situations might have been considered less critical, the derogations have been very limited in duration or territorial scope,

³⁹ See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND, consulted on 11 September 2022.

which would help to ensure that they did not go beyond the extent strictly required by the exigences of the situation. It may be recalled that although the Court has not been called upon to determine the validity of every derogation that has been made, on only three occasions has a Convention organ (Court or Commission) found a derogation to be invalid.⁴⁰

98. Similarly, there have been very few instances in which the Court has found that the measures went beyond what was permitted by Article 15. In fact, in many cases, the problem seems to have been more that the derogation did not cover the measures in question, for example because of its temporal or territorial scope.

99. Very few States have an established procedure for deciding on whether or not to derogate, although many States provided extensive information on the declaration and administration of a state of emergency. The decision on whether or not to derogate, whilst not taken lightly, seems often to involve an ad hoc procedure. Whilst this approach is not inconsistent with a 'step-by-step' approach (i.e. permitted restrictions under ordinary law/ permitted restrictions under a state of emergency/ exceptional restrictions requiring derogation), it may leave human rights as a secondary consideration, taken into account only after the measures have been decided. It is, of course, recognised that the inherent urgency of a situation of crisis may leave authorities with little choice but to expedite decision-making. At the same time, that very urgency could be said to argue in favour of having in place an established procedure that can be applied quickly, easily, and efficiently.

100. One important aspect revealed by the replies to the questionnaire is the differences in States' understanding of the fundamental issue of when and why a derogation may be necessary.

- One approach was taken by many of the States that reported having considered derogating on account of *i.a.* their Covid-19 measures, but which eventually found it unnecessary. These States asked themselves whether or not the measures they were implementing exceeded the ordinary restrictions permitted by the rights affected.
- Another approach was also described in relation to Covid-19 measures. Estonia considered it likely that in many cases, the Court would find that general restrictions without individual assessment were not acceptable under the ECHR. Latvia expressed a view that general restrictions without any case-by-case assessment of their individual impact would go beyond interferences permissible under specific provisions of the ECHR; Latvia's submission of a derogation reflected a concern to avoid expanding the permitted restrictions beyond their intended scope.
- Some are of the view that a derogation is useful to underline that emergency measures do not form part of the permanent ordinary law. Whilst a derogation would indeed have this effect, so arguably would the adoption of those measures under a domestic state of emergency (or similar legal regime), which would also be exceptional and temporary. Also, derogating for this reason does not necessarily involve an assessment of whether the measures actually exceed the restrictions permitted under the affected rights, and thus of whether the derogation is legally necessary.
- France noted that the transposition of emergency measures into ordinary law, with stricter domestic judicial supervision, permitted the removal of those measures from the scope of the 2015–2017 derogation.
- Finally, France considered that the Court's requirement that "normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate" for a derogation to be justified could make States

⁴⁰ In particular, the Greek derogation of 1967-1970 (see the *Greek case*, op. cit.), the UK derogation of 2001-2005 (see *A. & otrs v. UK*, op cit), and the Armenian derogation of 2008 (see *Dareskizb Ltd v. Armenia*, op. cit.).

feel obliged to declare a state of emergency in order to be able to derogate and thereby benefit from a wider margin of appreciation.

101. Finally, some States noted in their replies that in the light of recent experience, they had reviewed or revised their approach to and in some cases procedure for derogating from the ECHR. One State indicated that it could be advisable to do so. Another noted that whilst the matter was not currently under review, ongoing work of the Council of Europe and good practices of other Parties to the ECHR would be studied.

102. The CDDH considers that this report and its future work in the field of derogations, in particular the planned Toolkit for human rights impact assessment of the measures taken by States in situations of crisis and the non-binding legal instrument on the effective protection of human rights in situations of crisis, may encourage States to reflect on their national procedure in relation to derogation and the possibility of reviewing it. Even if derogation is a rare and exceptional event, it is nevertheless of great significance for the respect and protection of human rights.

Appendix I

Questionnaire to member States**Question 1**

A. In case there is a specific procedure to be followed in your country when considering whether or not to derogate from obligations under the European Convention on Human Rights or other international human rights treaties:

- i. Please describe it, including its legal basis, the issues examined, the actors involved, and the different stages.
- ii. Does the procedure involve a human rights impact assessment of the domestic measures in relation to which a derogation is being considered? If so, please describe how this assessment is done.
- iii. Is a declaration of a 'state of emergency' or some other form of exceptional legal regime under domestic law a necessary precondition for derogating? Does the declaration of some form of 'state of emergency' establish a requirement to derogate?
- iv. If a derogation is considered necessary, how and by whom is the final decision to derogate taken?
- v. How and by whom is the decision taken on whether or not to renew/extend or to withdraw a derogation?
- vi. Is consideration being given to reviewing the procedure, in the light of recent experience?

OR

B. In case there is not a specific procedure to be followed in your country: have your authorities ever seriously considered whether or not to derogate from obligations under the European Convention on Human Rights or other international human rights treaties?

- i. Please describe the ad hoc procedure that was followed when considering this question, including any legal basis, the issues examined, the actors involved, and the different stages.
- ii. Did this ad hoc procedure involve a human rights impact assessment of the emergency measures in relation to which a derogation was being considered? If so, please describe how this assessment was done.
- iii. Was the declaration of a 'state of emergency' or some other form of exceptional legal regime understood to establish a requirement to derogate?
- iv. Was consideration given to the need to derogate even in the absence of a declaration of some form of state of emergency?
- v. If a derogation was considered necessary, how and by whom was the final decision to derogate taken?

- vi. How and by whom was any decision taken on whether or not to renew/ extend or to withdraw that derogation?
- vii. Is consideration being given to reviewing the procedure, in the light of recent experience, for example by establishing a specific procedure?

Question 2

Have your authorities ever actually derogated from obligations under the European Convention on Human Rights or other international human rights treaties? If so, please:

- i. Briefly describe the nature of the crisis which gave rise to the need to derogate.
- ii. Briefly indicate the reasons why it was decided that a derogation was necessary, including by specifying any particular measure taken that made a derogation seem to be necessary.
- iii. Indicate the dates of the introduction and withdrawal of the measures that gave rise to the need to derogate.
- iv. Indicate the provisions of the European Convention on Human Rights or other international human rights treaties to which the derogation(s) related.
- v. Indicate the dates and briefly describe the content of the notification(s) given to the relevant office, as specified in the treaty concerned.
- vi. If a derogation was made in relation to the European Convention on Human Rights but not the International Covenant on Civil and Political Rights or vice versa, was there any particular reason for distinguishing between the two?

Question 3

Has there ever been an occasion when your authorities considered derogating from the European Convention on Human Rights or other international human rights treaties but did not derogate? If so, please provide information on relevant situations, including the reasons for this outcome, and specifying any particular measure taken that had given rise to these considerations.

Question 4

If your authorities have experience of conducting human rights impact assessments other than when considering whether to derogate, please provide any relevant information on this process, including details of the procedure, the actors involved, and the standards to which reference is made.

Appendix IQuestionnaire to member States**Question 1**

C. In case there is a specific procedure to be followed in your country when considering whether or not to derogate from obligations under the European Convention on Human Rights or other international human rights treaties:

- vii. Please describe it, including its legal basis, the issues examined, the actors involved, and the different stages.
- viii. Does the procedure involve a human rights impact assessment of the domestic measures in relation to which a derogation is being considered? If so, please describe how this assessment is done.
- ix. Is a declaration of a 'state of emergency' or some other form of exceptional legal regime under domestic law a necessary precondition for derogating? Does the declaration of some form of 'state of emergency' establish a requirement to derogate?
- x. If a derogation is considered necessary, how and by whom is the final decision to derogate taken?
- xi. How and by whom is the decision taken on whether or not to renew/extend or to withdraw a derogation?
- xii. Is consideration being given to reviewing the procedure, in the light of recent experience?

OR

D. In case there is not a specific procedure to be followed in your country: have your authorities ever seriously considered whether or not to derogate from obligations under the European Convention on Human Rights or other international human rights treaties?

- viii. Please describe the ad hoc procedure that was followed when considering this question, including any legal basis, the issues examined, the actors involved, and the different stages.
- ix. Did this ad hoc procedure involve a human rights impact assessment of the emergency measures in relation to which a derogation was being considered? If so, please describe how this assessment was done.
- x. Was the declaration of a 'state of emergency' or some other form of exceptional legal regime understood to establish a requirement to derogate?
- xi. Was consideration given to the need to derogate even in the absence of a declaration of some form of state of emergency?
- xii. If a derogation was considered necessary, how and by whom was the final decision to derogate taken?

- xiii. How and by whom was any decision taken on whether or not to renew/ extend or to withdraw that derogation?
- xiv. Is consideration being given to reviewing the procedure, in the light of recent experience, for example by establishing a specific procedure?

Question 2

Have your authorities ever actually derogated from obligations under the European Convention on Human Rights or other international human rights treaties? If so, please:

- vii. Briefly describe the nature of the crisis which gave rise to the need to derogate.
- viii. Briefly indicate the reasons why it was decided that a derogation was necessary, including by specifying any particular measure taken that made a derogation seem to be necessary.
- ix. Indicate the dates of the introduction and withdrawal of the measures that gave rise to the need to derogate.
- x. Indicate the provisions of the European Convention on Human Rights or other international human rights treaties to which the derogation(s) related.
- xi. Indicate the dates and briefly describe the content of the notification(s) given to the relevant office, as specified in the treaty concerned.
- xii. If a derogation was made in relation to the European Convention on Human Rights but not the International Covenant on Civil and Political Rights or vice versa, was there any particular reason for distinguishing between the two?

Question 3

Has there ever been an occasion when your authorities considered derogating from the European Convention on Human Rights or other international human rights treaties but did not derogate? If so, please provide information on relevant situations, including the reasons for this outcome, and specifying any particular measure taken that had given rise to these considerations.

Question 4

If your authorities have experience of conducting human rights impact assessments other than when considering whether to derogate, please provide any relevant information on this process, including details of the procedure, the actors involved, and the standards to which reference is made.