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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP ON HUMAN RIGHTS IN SITUATIONS OF CRISIS
(CDDH-SCR)**

**DRAFT TOOLKIT FOR HUMAN RIGHTS IMPACT ASSESSMENT
OF THE MEASURES TAKEN BY THE STATE IN SITUATIONS OF CRISIS**

*as adopted by the Drafting Group at its 4th meeting
(12 – 14 September 2023)*

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Part I

INTRODUCTION

Why was the Toolkit developed?

In recent years, the member States of the Council of Europe have been struck by successive crises, including the Covid-19 pandemic, natural disasters, wars, energy crises or civil disorder. In such crisis situations, human rights remain applicable. Among other means, States have addressed these crises through the use of exceptional measures, sometimes under the umbrella of a declared state of emergency.

The Covid-19 pandemic in particular constituted an unprecedented global sanitary crisis and public health emergency which caused many States to establish lockdowns and other restrictive measures. These measures adopted by States in an effort to fulfil their positive obligations under the European Convention on Human Rights (ECHR), including in relation to the right to life, resulted in interferences with a large number of other rights that were in most countries unprecedented in their material, geographical, and temporal scope. Nevertheless, research suggests that few Council of Europe member States had an established practice for conducting a formal human rights impact assessment to support the decision-making process in relation to measures adopted during a crisis.¹

In this context, member States expressed a wish for guidance and tools to assist them in striking the difficult balance between competing interests and applying a human rights-based approach in the process of adopting and implementing measures in situations of crisis.

What are the objectives of the Toolkit?

The Toolkit's main objective is to serve as a practical tool to assist officials in the decision-making process related to the adoption of measures to respond to a situation of crisis in a manner that incorporates human rights. In this regard, it aims to provide guidance on establishing appropriate processes in anticipation of a future crisis and when considering whether and to what extent restrictive measures should be taken in response to a situation of crisis.

In particular, the Toolkit aims to provide guidance on how to conduct a human rights impact assessment (HRIA) in a situation of crisis, when there may be a need for an extremely rapid response. It therefore suggests a specific, streamlined process, potentially less complex than for an HRIA in normal circumstances, in order to save valuable time.

For the purpose of this Toolkit, a situation of crisis is understood as any situation leading to measures being adopted outside the regular legal framework, including but not limited to a situation that leads to a formal declaration of a state of emergency.

When could the Toolkit be used?

The Toolkit provides guidance in relation to the different phases of the HRIA process, when the crisis is ongoing and the State is considering measures to address it. The Toolkit also addresses the preparedness process, relating to what could be done by States in anticipation of a crisis to allow for more effective HRIAs to be conducted when the crisis strikes. Finally, in the aftermath of the crisis, the Toolkit could be used by national authorities to support them in taking stock and identify lessons learnt from the HRIA process.

¹ See the Report of the Steering Committee on Human Rights (CDDH) on member States' practice to derogations from the ECHR in situations of crisis, document [CDDH\(2022\)R97 Addendum 4](#).

The Toolkit is not intended to create new domestic processes where there are adequate existing ones. It could, however, be used to assess and strengthen such processes.

Who is the Toolkit intended for?

The primary audience for the Toolkit is civil servants, public officials, policy makers, legislators and others who are involved in emergency planning, drafting and applying measures that are adopted in relation to a crisis.

The secondary audience includes stakeholders, such as national human rights institutions and non-governmental organisations, that provide advice to governments or other actors directly involved in the development and implementation of measures in situations of crisis.

More widely, anyone having an interest in the subject matter or wanting to better understand the process of assessing the human rights compliance of measures adopted in situations of crisis may find useful information in this Toolkit.

Part II

UNDERSTANDING THE NATURE AND PURPOSE OF HUMAN RIGHTS IMPACT ASSESSMENTS IN THE SPECIFIC CIRCUMSTANCES OF A SITUATION OF CRISIS

Key issues addressed

- What is an HRIA? What are its purpose and objectives?
- What is the added value of conducting an HRIA of measures taken in a situation of crisis?

What is an HRIA?

An HRIA is a process for systematically identifying, analysing and addressing potential or actual adverse impacts on human rights of measures adopted by the State. It also aims to enhance transparency in public administration and accountability for negative impacts on human rights.

While an HRIA is not a monitoring process, it should include a review of the implementation of both its recommendations and the measures introduced following those recommendations, in order to allow for adjustment as required in the light of experience and in response to changes in the underlying situation.

An HRIA is not equivalent to a constitutionality review of the measures. It is a means for enhancing the protection of human rights throughout the decision-making process and not a judicial process that assesses legal acts against constitutional norms. It is however an opportunity to engage with independent State bodies to ensure the maintenance of an effective system of checks and balances.

What are the main characteristics of HRIAs?

- *Comprehensive*: HRIAs should address all human rights that are protected under the domestic legal order, which may include both civil and political rights and cultural, economic and social rights. It should also take into account a variety of points of view, through engagement with relevant stakeholders, such as national human rights institutions and civil society organisations, and consultation of potentially affected segments of the population and vulnerable groups. Finally, HRIAs should assess the overall impact of the measure, taking into consideration its nature and duration.
- *Evidence-based*: HRIAs should be based, as far as practicable, on comprehensive quantitative and qualitative data in order to accurately inform the adoption and implementation of measures taken within the crisis context.
- *Methodological*: HRIAs should follow an established methodology so that the evaluation is conducted systematically, each actor involved has a clearly defined role, and available resources are efficiently used to carry out the process.
- *Transparent*: HRIAs should be documented and, to the extent possible, the outcome report should be public and accessible. Transparency would also be increased by ensuring that the HRIA is participatory and that relevant stakeholders and rights-holders' representatives are included.

What objectives do HRIAs aim to achieve?

- *Identifying, preventing and mitigating negative human rights impacts:* many human rights could be adversely impacted by the State's response to a crisis. In this regard, the main objectives of HRIAs are to identify, prevent and mitigate such adverse impacts on human rights, through an ongoing process of anticipation, design, review, and adjustment. HRIAs assist States in better carrying out human rights due diligence.
- *Supporting a human rights-oriented decision-making process:* conducting an HRIA of the measures is an effective way to support a human rights-based approach in decision-making processes during situations of crisis. In this regard, it is also a tool for those involved in the drafting and implementation of measures to develop human rights-compliant responses to the crisis. Ultimately, HRIAs will assist the State in fulfilling its duty to protect human rights by proactively tackling the adverse impacts of emergency measures on human rights. HRIAs will promote awareness of the positive role of human rights, which should be treated as one of the fundamental principles to be respected in the decision-making process.
- *Strengthening accountability:* assessing, understanding and remedying the negative impacts of measures on human rights will in turn enhance accountability. Indeed, the assessment can recommend that mechanisms for affected individuals or groups be established or strengthened, so that rights-holders can provide feedback, raise concerns, or file complaints and claim their rights and compensation regarding human rights violations related to crisis response measures. In addition, conducting HRIAs strengthens the legal accountability of decision-makers by demonstrating a commitment to upholding legal obligations and respecting human rights.
- *Balancing legal obligations in relation to human rights:* HRIAs have a crucial role in assisting State authorities, when adopting and implementing emergency measures, to strike a balance between the positive obligation to protect human rights and the negative obligation not to violate human rights.
- *Bolstering popular legitimacy of the measures:* transparency and participation throughout the HRIA process, and therefore as part of the decision-making process, will enhance public ownership and buy-in of the measures, which will in turn strengthen their popular legitimacy, including through respecting democracy and the rule of law. It is also likely to increase adherence to the measures by the population.
- *Supporting the justification of emergency measures:* by exposing the rationale behind decisions, demonstrating a human rights-based approach, methodically analysing the measures' impacts on human rights and documenting the consideration of alternative measures or safeguards to protect human rights, HRIAs help build a solid evidence base that supports the legal justification of emergency measures and can be used in the case of a legal challenge of the measures.

An HRIA should not be considered as an optional procedural luxury that can be set aside in a situation of crisis. As already noted, the State's human rights obligations remain applicable during a situation of crisis. At the same time, the necessity to take strong measures in response may increase the risk and severity of interference with human rights. The avoidance of this risk requires informed analysis and careful planning, even under pressure of time. The present Toolkit aims to facilitate this process.

Part III

ANTICIPATING CRISIS SITUATIONS AND PREPARING THE GROUND FOR HUMAN RIGHTS IMPACT ASSESSMENTS

Key issues addressed

- What steps could be taken in anticipation of a crisis to make a future HRIA process more efficient?
- How could possible challenges faced during the HRIA process be mitigated through preparedness?

Why is HRIA preparedness important?

Some elements of an HRIA can take a long time to set up, which can create unnecessary delays during a crisis. This valuable time can be saved if predictable, general steps are taken in advance. This preparedness involves setting up responsibilities, processes, and networks that will be required when a crisis arises.

Building on lessons learned to enhance future HRIA processes

- Assessing recent practice

Conducting a critical assessment of any recent HRIAs or similar exercises may help inform future processes and identify gaps, areas of improvement and best practices. This exercise should also include lessons learned during recent crises, such as the COVID-19 pandemic, and take into account feedback from relevant stakeholders.

Possible actions:

- *Examine whether the public authorities and stakeholders involved were the most relevant and competent ones to assess the measures against human rights standards.*
- *Examine whether independent institutions and other relevant stakeholders, such as national human rights institutions and civil society, were consulted in a timely and meaningful manner during the process.*
- *Analyse what did not work and what was overlooked in the process, and reflect on what could be done to make the assessment more effective.*
- *Look at the challenges faced during the process and at how they could be addressed in the future.*
- *Ask stakeholders who were previously involved for feedback, possibly using a standard form, and use their comments to improve future processes.*

- Adapting existing processes to a situation of crisis

HRIA processes may already exist, for example as part of the legislative process. It may be possible to build upon these, whilst adapting them to the specific circumstances of a crisis situation, including time constraints, resource limitations, and evolving circumstances.

Possible actions:

- *Look at the existing regular HRIA process and consider which of its elements could be retained in an “emergency HRIA”.*
- *Assess which existing procedures could become irrelevant when facing an emergency, how and to what extent relevant procedures could be expedited, and whether new ones would be required.*

- Setting up standard procedures and developing guidance

Establishing standard operating procedures and/ or guidelines, with the aim of streamlining the HRIA process, will ultimately save time and ensure consistency and efficiency throughout the process.

Possible actions:

- *Draft documents structuring future HRIA processes to serve as roadmaps or guidance for those involved.*
- *Develop practical tools and templates, such as checklists or assessments frameworks, and share them among those involved in the process.*

Assessing and ensuring the existence of sufficient resources

- Identifying and strengthening necessary resources

To a large extent, the mapping of resources can be done in advance. Will the resources likely to be needed to conduct the HRIA of measures adopted in a situation of crisis be readily available? If not, use this opportunity to make sure that they are. This assessment exercise could also include identifying information gaps and addressing them by locating information sources and/ or setting up databases or similar tools that can later be used to establish a baseline for the HRIA (see Part IV).

Possible actions:

- *Map and assess existing resources to determine whether they are effectively available, sufficient, available on short notice, etc.*
- *Identify gaps in resources and look at what could be done to address them.*
- *Create/ update IT tools such as databases or dashboards to support future HRIA processes.*
- *Draw up a “catalogue of rights”, which would list the various rights and freedoms that the State is obliged to guarantee, as well as their respective legal basis, both within the international and domestic legal frameworks.*

- Building capacity for HRIA

The quality of the HRIA relies on the level of expertise of those conducting it. It is important to build capacity and readiness among those who are involved or have an interest in drafting and processing emergency measures, including civil servants and officials of relevant ministries and parliaments, legislators, and policy makers.

Additionally, knowledge-sharing and collaboration platforms could be promoted, with a view to enhancing understanding of HRIA processes and crisis-related human rights issues among policy makers and others involved.

Possible actions:

- *Conduct needs assessments to determine the nature and extent of training requirements for those involved in the HRIA process.*
- *Organise regular training sessions and workshops for relevant public authorities, on substantive and procedural issues relevant to the HRIA.*
- *Develop and share among stakeholders training material, such as manuals and guides.*
- *Establish a platform involving all relevant stakeholders to share knowledge and best practices on HRIA processes and crisis-related human rights issues.*

Building networks and communication channels

- Identifying key actors and stakeholders

The persons in charge of starting the HRIA process and then supervising it and coordinating the work of the various people involved should be identified and their responsibilities clearly established in advance. The same applies to the identification of key stakeholders in different entities and the definition of their respective roles. In this context, it should also be ensured that contact information for all identified actors and stakeholders is available and up to date.

Possible actions:

- *Conduct internal discussions and reach out to key actors and stakeholders to determine who should be involved in an HRIA process and at which stage.*
- *List (in a document, database or in any other accessible format) all those involved in the HRIA process and their responsibilities, including stakeholders, and provide their contact information.*

- Establishing internal coordination mechanisms

To effectively conduct HRIAs and share information during a crisis, it could be important to establish internal mechanisms in advance. Such mechanisms will allow better coordination and facilitate circulation of information and mobilisation of public authorities participating in the HRIA process. Such mechanisms could also rely on, or coordinate with, other existing domestic mechanisms aimed at ensuring compliance with human rights.

Possible actions:

- *Ensure that focal points are appointed within the different entities involved in the HRIA, to act as primary contacts and redirect requests, and establish an internal network, so that they can react quickly when needed.*
- *Consider the opportunity to set up dedicated units, inter-ministerial committees, or task forces to coordinate HRIA processes, which could function only when activated, oversee establishing/ revising procedures and tools in support of HRIAs, coordinate training activities, etc.*

- Enabling wider participation to the process

A human rights-based response to a crisis should be inclusive and it is therefore important to make sure that the HRIA is as participative as possible. Certain population groups may be more vulnerable or marginalized than others and therefore have limited access to decision-making processes. To facilitate their participation to HRIA processes, it could be helpful, ahead of a crisis, to establish relationships that could then effectively be used.

Possible actions:

- *Establish inclusive consultation or feedback mechanisms involving different population groups, taking into account vulnerable ones, to facilitate engaging with them during future HRIA processes.*
- *Develop strategies to effectively engage with relevant stakeholders, including during a crisis.*
- *Ensure timely and effective consultations with relevant stakeholders.*
- *Consider establishing dedicated structures for the consultation of stakeholders.*

Part IV

CONDUCTING HUMAN RIGHTS IMPACT ASSESSMENTS IN CRISIS SITUATIONS: MOVING FORWARD IN PHASES AND ADAPTING TO THE CIRCUMSTANCES

Key issues addressed

- What key principles should guide the HRIA process?
- What steps could be followed, and key criteria assessed when conducting the HRIA of measures taken in crisis situations?
- How could the main challenges likely to be faced during the process be addressed?

Which key principles should be kept in mind and applied throughout the process?

Equality and non-discrimination: discrimination is treating people in analogous situations differently, based on an identified characteristic or status, or people in different situations alike, without objective and reasonable justification. Therefore, not all differential treatment is discrimination. When assessing emergency measures from a human rights perspective, it is crucial to consider their potential unequal impact on minorities, vulnerable groups, groups that enjoy special protection (such as children), etc. Non-discrimination, which is a core principle of human rights, should be applied throughout the HRIA process.

Participation: the HRIA process should include meaningful participation and consultation of rights-holders and other stakeholders, to the extent possible in a context where time is limited. The participation of vulnerable groups is key to ensure that their specific needs are taken into account. To enable them to be part of the process, they should be provided with relevant information in a timely and accessible manner, and as far as possible, with the opportunity to comment on and contribute to the findings of the HRIA. Including national human rights institutions in the process is an additional way to enhance participation.

Transparency and accountability: rights-holders and duty-bearers should be identified with regard to each measure, so that the latter can be held responsible should the infringement on human rights amount to a violation. In addition, it should be ensured that all measures taken in response to the crisis are adopted in a transparent manner, in accordance with domestic legal procedures, that they can be challenged, and that there are mechanisms in place to continuously monitor and evaluate their impact on human rights. The accountability of those involved in the HRIA process should also be taken into consideration: they are responsible for its quality and, as such, should make sure that it will effectively enhance respect for human rights, despite the challenges that a situation of crisis brings to such a process.

Gender mainstreaming: gender issues should be mainstreamed throughout the HRIA and decision-making processes. It covers making sure that gender considerations are taken into account whenever relevant.

Coordination and communication: coordination and communication between the multiple actors involved in the HRIA process can be challenging, especially in a situation of crisis. It is therefore essential to establish clear lines of communication and ensure that information is shared efficiently among relevant actors and that deadlines are clearly set and respected. In addition, clear and effective communication to the public is necessary to ensure the accessibility and foreseeability of the measures, and therefore that they are understood and implemented.

Focus and efficiency: emergency measures taken in response to a situation of crisis are intended to protect human rights, fundamental freedoms and important public interests. The process of assessing the human rights impact of these measures should not delay their implementation, even if it also serves an important public interest, namely protecting individual rights and freedoms. An HRIA of measures taken in a situation of crisis should therefore be designed and undertaken with focus and efficiency in mind.

Phase 1: Defining the scope and scale of the HRIA

Before starting the HRIA process, its parameters and objectives should be realistically defined. It should therefore be clear to everyone involved what purpose the HRIA serves, which measures it targets, what the applicable legal framework is and what resources are available to conduct it.

1. Determining the measures to be assessed

As a starting point, the measures that need to be assessed should be defined, their content and objectives should be understood, and the population (and specific groups within that population) that would be affected by those measures should be identified.

Possible questions:

- *Which measures are to be assessed?*
- *What purpose do the measures serve? In which context will they be applied?*
- *Which public interest is to be achieved?*
- *Which sections of the population are likely to be affected by the measures, and how?*

2. Identifying applicable human rights norms

International human rights norms continue to apply, even in times of crisis and even if a state of emergency or another special legal regime is in place. The HRIA should be based on internationally recognised human right standards and principles. It should be comprehensive and cover civil and political rights as well as economic, social and cultural rights. The legal framework should take account of any higher standards of human rights protection that may be guaranteed under domestic laws.

Possible questions:

- *Which national (constitution, laws, decrees, etc.) and international legal instruments (multilateral and bilateral treaties, conventions, etc.) are relevant?*
- *Are all categories of rights (civil, political, economic, social and cultural) included?*

3. Mapping the resources and determining the timeline required for the HRIA

It is important to have a precise overview of resources available to conduct the assessment. This could encompass human and financial resources, sources of information, or tools (for example relevant practical documents such as standard operating procedures) at the disposal of those conducting the process. In this context, it is critical that those involved in the HRIA have the right expertise and that clear responsibilities are assigned to them.

Possible questions:

- *Who should be involved in the process, and what should their responsibilities be?*
- *Which resources can be used to support the HRIA process?*

Addressing any lack of expertise and resources

Ensuring a clear methodology for the HRIA is key to its efficiency. It should take into account the available resources and expertise and allow, if needed, adjustment of the process to the availability of means.

Relevant stakeholders, for instance national human rights institutions, non-governmental organisations or independent experts, could be engaged: they have the necessary technical expertise and knowledge of the context, and access to pre-existing data and information that can usefully inform the HRIA process.

In any case, the results of the HRIA should acknowledge any limitations in expertise or resources, as this is likely to strengthen the credibility of the process and identify areas where additional resources or expertise may be needed in the future.

In addition, especially in the context of a crisis situation, setting a timeline and establishing clear and strict deadlines for all those involved is necessary to support a fast and effective HRIA process. Should some stakeholders be unable to contribute within a short deadline, their inputs could still be taken into account in any subsequent assessment or during the monitoring and evaluation process.

Possible questions:

- *By when do the different phases of the process have to be completed?*
- *Have the deadlines been communicated clearly to all actors involved in the process?*

Addressing the limited time available

In a situation of crisis, there may be time constraints that make it difficult to conduct a comprehensive HRIA. It may be necessary to prioritize the most urgent human rights issues and focus on those in the short term, while also planning for another and more comprehensive HRIA in the medium term. This HRIA could complement the first one with a more thorough assessment, including (wider) consultations with relevant stakeholders, and would still be followed by a monitoring and evaluation exercise of the implementation of the measures and, when relevant, a review of the measures (see Phase 5).

As regards participation in the HRIA process when time is limited, and in order to save time and enhance efficiency once it starts, its purpose and scope should be clearly and concisely communicated to all those involved in the process. This may involve providing them with briefings or summaries, so that they are aware of the objectives and expected outcomes of the assessment and can quickly contribute. Relying on existing networks is also crucial to time efficiency in such contexts.

4. Identifying the key actors and stakeholders

Involving a wide range of stakeholders, such as national human rights institutions, can help to ensure that the assessment is comprehensive and takes into account a variety of perspectives. Having an advance picture of relevant focal points and stakeholders, such as non-governmental organisations, national human rights institutions or rights-holders' representatives, is critical to ensure that they contribute effectively to the process (see Part III). This is also relevant for focal points or counterparts within the State administration, who should be identified and informed as soon as possible that a given task will be required of them. The distribution of competences and different levels of governance should be taken into account. Attention should be given to ensuring that stakeholders can contribute meaningfully to the process.

Possible questions:

- *Whose expertise is needed to carry out the HRIA process in an effective and efficient manner?*
- *Which population groups (minorities, vulnerable and/ or exposed groups, etc.) should be heard? Have their views been taken into account?*
- *What methods can be used to reach stakeholders and ensure that they are consulted in a timely and effective manner? Do they need support to engage with those responsible for the HRIA? What can be done to assist them?*

Addressing the lack of access to relevant stakeholders

Whether because of a lack of time, or any other reason preventing the inclusion of some stakeholders, including potentially affected population groups, in the process, the use of proxies e.g., representatives of professional, non-governmental or other types of organisations, can offer a relevant alternative to ensure that the concerns of some categories of the population are heard that otherwise would not be. In addition, a lack of time can limit the possibility for the HRIA process to be fully inclusive and participative. In such situations, prioritizing engagement with the most critical stakeholders, e.g., those that have the most expertise or that are most likely to be affected by the measures, could be an appropriate strategy.

Relying on technology can also be key: virtual exchanges and consultations can save time, while maximising engagement. Finally, relying on already existing structures and networks will allow those responsible for the HRIA process to initiate consultations straight away, in a fast and efficient manner.

5. Developing a baseline to support the assessment

Developing a baseline is key to enable impact assessment, as it allows measurement of the scope and scale of specific impacts as well as comparison over time, which is critical for monitoring, and highlights the context in which the measures are to be applied. All HRIAs should be based on reliable and relevant data and evidence. This includes quantitative and qualitative data, as well as information provided by relevant stakeholders, such as reports from national human rights institutions. Information can be obtained, for example, through desk review or consultations with other stakeholders and potentially affected rights-holders.

Possible questions:

- *What sources can be used to determine the baseline? Are there official records available? Is it possible to use/ access external sources?*
- *Can stakeholders be consulted? If yes, what information should be requested?*
- *Is the information comprehensive and consistent enough to enable comparison over time? If not, what type of information/ data is missing and where could it be found? Which external actors could assist?*

Phase 2: Assessing the measures in the light of human rights

1. Analysing the measures against human rights standards

The analysis of the measures against human rights standards implies ensuring their compliance with relevant legal instruments such as treaties, conventions, laws, policies, and regulations, and identifying which rights they may interfere. Considering the principles of indivisibility and interdependence of human rights, this should encompass civil and political rights as well as economic, social and cultural rights.

Possible questions:

- *What human rights issues are at stake?*
- *Which rights are likely to be affected by the measures?*
- *Have all rights been considered?*
- *What effects would the measures have on individuals?*

2. Assessing the potential for interference with identified human rights

▪ *Non-derogable/ absolute rights*

Non-derogable/ absolute rights are rights which cannot be subject to derogations, exceptions, or permissible interference e.g., the prohibition of torture (Article 3 of the ECHR). Measures adversely affecting non-derogable/ absolute rights should be immediately identified, reviewed and amended or withdrawn.

Possible questions:

- *Are non-derogable/ absolute rights affected by the measures?*
- *If so, is there a way to address the issue so the right is no longer at risk of being violated?*

• *Rights subject to exceptions*

Some rights may be subject to specific exceptions provided by the relevant legal provision, e.g. the right not to be arbitrarily deprived of liberty (Article 5 of the ECHR). In such cases, the European Court of Human Rights has clearly established that the list of exceptions in a given provision is exhaustive and that only a narrow interpretation of those exceptions is consistent with the aim of that provision. Measures affecting such rights should respect the limits of the exceptions set in the relevant provisions.

Possible questions:

- *Are there exceptions to the rights affected by the measures?*
- *If so, does the potential interference fall within the proper scope of these exceptions?*

• *Qualified rights*

Qualified rights are rights which may be interfered with in order to protect the rights of others or the wider public interest, e.g. the right to private and family life (Article 8 of the ECHR). If such a right is at stake, the assessment should take into account the possibility for legitimate interference with it. As described in the case law of the European Court of Human Rights, the interference should be lawful, in pursuit of a legitimate aim, necessary, and non-discriminatory.

The necessity criterion implies that the interference is proportionate to the situation that it is supposed to address. The measures should be the least restrictive possible, to ensure that the restrictions imposed on human rights do not go further than necessary to achieve the legitimate aim. They should not impair the very essence of the rights at stake. The measures should be limited in time and not extend beyond the end of the crisis that led to their adoption

– they should not have permanent effect. When relevant and to the extent possible, their geographical scope should also be limited as the measures should not go further than the aim being pursued in terms of both time and geographical application.

In addition, criteria should be set out for lifting the restrictions as soon as possible. Such criteria should be tailored to the situation and clearly defined, and the authority in charge of assessing them should be identified.

Possible questions:

- *Do the rights affected by the measures allow for interference in order to protect the rights of others or the wider public interest?*
- *Is there a legal basis for the restrictive measure?*
- *Is there a legitimate aim for the restrictive measure, i.e. what is the justification for the restriction of the right?*
- *Will the measures reduce the problem? Would less restrictive measures achieve the same goal?*
- *Do the measures go beyond what would be considered legitimate interference?*
- *Is there a time limit to the measures? Are they set to expire unless renewed?*
- *Is the geographical scope of the measures defined and, where relevant, limited?*
- *How can the restrictions be lifted? Are the conditions clearly listed? Who is responsible for this decision?*

3. Ensuring that the measures are non-discriminatory

It is also crucial to assess the measures against the principle of non-discrimination, keeping in mind that discrimination can be indirect where a generally applicable law or policy has a disproportionately adverse effect on members of a particular group, even if there is no discriminatory intent. Only measures that are non-discriminatory (see definition above) should be adopted.

Possible questions:

- *Are members of vulnerable or marginalised groups specifically targeted or adversely affected (de jure or de facto) by the measures?*
- *Do the measures involve any kind of differential treatment? If so, are these differences justifiable insofar as they pursue a legitimate aim and are proportionate to that aim?*
- *Will the measures apply in the same way to everyone? Do they allow for different/ personalised treatment?*
- *Have the needs of vulnerable groups been identified and taken into account throughout the process? Is the HRIA process inclusive enough to allow for the views of vulnerable groups to be considered?*

4. Assessing the lawfulness of the measures

Any measure that creates an interference with or an exception to protected rights must have a clear legal basis. This means that for potentially affected individuals, the measures must be sufficiently foreseeable to enable individuals to understand when the authorities will apply the measures. Foreseeability does not mean certainty – individuals should be able to foresee to a reasonable degree, at least with legal advice, that they would be regarded as covered by the law. The measures should also be accessible. Indeed, they should demarcate clearly the scope of discretion for public authorities and the manner of exercise of the discretion conferred.

Possible questions:

- *Are the measures to be made public? By which means?*
- *How can the public have access to the text setting out the measures?*
- *Are they drafted in a sufficiently clear manner that the public can understand them and there is little margin for different or unforeseeable implementation?*

Phase 3: Examining the existence of remedies

The legal obligation of the State to provide effective remedies remains applicable in times of crisis. The European Court of Human Rights has recognised that it would be inconsistent with the rule of law in a democratic society not to submit the implementation of emergency measures to an effective judicial review if their legal basis does not contain any clear or explicit wording excluding the possibility of judicial supervision. It is indeed crucial that courts exercise control over the human rights restrictions introduced by the measures and the legality and proportionality of the measures themselves. In this regard, the State should ensure that affected individuals have access to effective remedies should their human rights be violated as a result of the crisis response measures.

Possible questions:

- *What remedies are available to address any human rights violations or harms that may result from the measures taken? How effective are they? Are they accessible to all?*
- *Can the measures be challenged before domestic courts or other bodies who can review and, if appropriate, repeal them?*

Phase 4: Analysing and mitigating the impact of the measures

As well as examining the potential impact on specific rights, the HRIA should consider the overall impact of the measures on human rights. This analysis should consider the nature and extent of the various impacts, their causes and consequences, their severity, and the possible cumulative impact on particular groups. Building on this analysis, the assessment should contain proposals for mitigating measures and recommendations to enhance respect for human rights.

1. **Assessing the severity of the overall impact on human rights**

Once the measures have been assessed through a human rights lens, their overall impact on human rights should be analysed.

In this context, it is key to consider the extent of the impact, including the number of people potentially affected, and to consider both the direct and indirect impacts of the measures taken. Direct impacts are those that result directly from the measures taken, while indirect impacts may result from other factors that are related to the measures taken, such as changes in economic conditions or access to healthcare.

The assessment of the severity of the impact requires an understanding of the practical consequences of implementation of the measures on human rights. It should consider the scope and scale of the impact, but also its duration and whether a remedy is available. The likelihood or immediacy of the impact should not necessarily be determining factors - depending on the context, impacts that are the most immediate or likely, manifest quickly or affect the most people are not automatically the most severe. In addition, the assessment should take into account the possible differential impact of the measures, both individually and cumulatively, and therefore give special consideration to human rights impacts on groups or

populations that require particular attention, such as women, elderly people or persons with disabilities.

This is the moment when the impact of the measure as a whole is assessed, on the basis of the results of the examination of its various aspects conducted in Phases 2 and 3, and taking into consideration the factors mentioned above.

In that sense, this goes beyond the strict assessment of legality. Indeed, the overall impact assessment will show the extent of the adverse consequences of the measure on human rights and, while the assessment may conclude that there is no illegitimate interference (i.e. there is a no violation), it may still be that such harmful consequences should be taken into consideration and mitigated to the extent possible, with a view to minimizing negative impacts (see below).

Possible questions:

- *How serious is the impact and how many people is it likely to affect?*
- *Are the measures likely to cause, directly or indirectly, harm or violations of human rights?*
- *Are the measures likely to contribute to existing human rights issues or inequalities?*
- *Are the measures likely to put some categories of the population more at risk of interference with their human rights than others?*
- *What are the short-, medium- and long-term impacts that may result from the measures taken?*
- *Can the consequences of the impacts be mitigated?*

2. Mitigating the negative human rights impacts

The HRIA should identify new or additional options to mitigate any negative impacts identified in the assessment, in particular to prevent or minimize harm, such as exemptions. The HRIA should aim to address all negative impacts but, should it not be possible to address them all simultaneously, the mitigation actions could be prioritised and their implementation planned according to the severity of the human rights consequences of the identified impacts.

Possible questions:

- *Will the mitigating actions effectively reduce negative impacts on the enjoyment of human rights? If not, what more could be done to that end?*
- *Will additional support be provided to individuals or groups that may face particular negative impact on their rights due to the measures?*
- *Are there any alternative measures that could mitigate the negative impact on human rights while still achieving the intended goals of the proposed measure?*

3. Drafting recommendations to enhance human rights protection

Recommendations should be developed to address any negative impacts on human rights that have been identified. These recommendations should be practical, feasible, and tailored to the situation, and those responsible for their implementation should be clearly identified.

Possible questions:

- *What should be changed to enhance the measures' respect for human rights?*
- *Does the HRIA contain recommendations to address negative impacts?*
- *Are these recommendations clear and realistic i.e., can they be implemented in a practical and effective manner?*
- *Have those responsible for the implementation of each recommendation been clearly identified?*

Phase 5: Adapting the measures in light of the experience and in response to a changing context

The implementation of the recommendations of the HRIA should also include regular monitoring and evaluation exercises until the crisis ends, to ensure that the measures are timely reviewed and adapted to an evolving context.

1. Monitoring and evaluation of the measures

Constant and close monitoring of the implementation of the measures will allow quick identification of human rights concerns. Monitoring the implementation of the recommendations of the HRIA allows an assessment of their effectiveness in addressing the anticipated impacts on human rights and can contribute to improvement of the HRIA process over time. This also involves examining allegations of human rights violations that have been brought to the attention of the State. Whenever appropriate, relevant stakeholders should also be consulted at this stage of the process.

Possible questions:

- *Are monitoring mechanisms in place?*
- *Have monitoring and evaluation responsibilities been clearly identified and assigned?*
- *Are there deadlines in place for regular evaluation? How often will it take place and who will be responsible for it?*
- *Are the results of the monitoring and evaluation cycles used to improve the HRIA and/or the measures?*
- *Has the context evolved to the extent that measures should be reviewed and modified? Are the measures effective in achieving their goal?*

2. Reviewing and adjusting the measures

Following monitoring, adaptation of the measures to an evolving context and correction of possible mistakes could be necessary. It is also a way to ensure that only measures that are still necessary and proportionate remain in place. The adjustment of the measures should refer to the findings of the initial HRIA and may to some extent imply further assessment of the human rights impact, should the changes to the measures be significant and likely to interfere with different human rights or with the same ones but in a different manner. This process should also include timely and effective consultations with relevant stakeholders.

Possible questions:

- *Have the measures had an impact that was not foreseen in the HRIA? How to deal with it?*
- *If the context has evolved significantly, are the measures still effective in pursuit of a legitimate aim: do they remain necessary and proportionate, or should they be modified?*

Phase 6: Identifying and taking stock of lessons learned

1. Conducting an after-action review of the HRIA

After the crisis has come to an end and the measures have been withdrawn, an after-action review should be conducted to assess what could have been done differently or better in the HRIA process and how to improve it in the future. These lessons learned should inform and strengthen the preparedness process.

2. Conducting an independent review of the response to the crisis

An independent review of the measures, including their effectiveness and their impact on human rights over time, should be conducted once the crisis is over. These evaluations are crucial to learn from the crisis response as they allow the State to adapt both the overall approach to the crisis and the way in which the HRIA was used, in order to strengthen respect for human rights in the management of future crises.

Part V

BASING DECISION-MAKING ON HUMAN RIGHTS IMPACT ASSESSMENTS

Key issues addressed

- How can an HRIA be used to inform the decision-making process in relation to derogations?
- How can it help strengthen the legal framework surrounding the adoption of measures under a declared state of emergency or other situations of crisis and ensure that their content is human rights compliant?

How can HRIAs influence decision-making in relation to derogations in time of emergency?

The HRIA may conclude that, despite efforts to limit the scope and impact of the proposed restrictions and to introduce mitigating measures, their impact risks going beyond what is normally permitted under the relevant human rights instrument. It may be that the gravity of the crisis is such that the restrictions are nevertheless considered a necessary part of the response to it. In such a case, the State may consider derogating from certain human rights instruments, so as to allow it to introduce the restrictions without violating its obligations.

Derogation is an exceptional procedure that is only permissible in, and justifiable by, a situation of grave crisis. This does not mean, however, that measures taken in response to a situation of grave crisis will necessarily require derogation. The need for derogation depends not on the nature of the crisis but on the nature of the measures and on the extent of their impact on human rights. This is why an HRIA can be crucial to the decision to derogate: it provides information on whether the proposed measures go beyond what is normally allowed.

At the same time, derogation should go no further than “the extent strictly required by the exigencies of the situation”. The HRIA will provide the information necessary to assess whether the impact of the measures goes beyond what is strictly required by the exigencies of the situation of grave crisis, and what is permissible even under a derogation.

Main requirements for derogation under Article 15 of the ECHR²

Article 15 (1) and (2) states that:

- A derogation is permitted in two sets of circumstances: in time of war or other public emergency threatening the life of the nation;
- No derogation is permitted from certain provisions of the ECHR and additional protocols;
- The measures taken in response to the emergency situation must not go beyond the extent strictly required by the exigencies of the situation;

² For more details on State practice regarding derogations and relevant case law of the European Court of Human Rights, see the Report of the Steering Committee on Human Rights (CDDH) on member States' practice to derogations from the ECHR in situations of crisis, document [CDDH\(2022\)R97 Addendum 4](#) and the [Guide on Article 15 of the European Convention on Human Rights – Derogation in time of emergency](#) prepared by the Registry of the European Court of Human Rights. It should in particular be noted that the provisions of the relevant Article 4 ICCPR are not identical to those of Article 15 ECHR.

- The measures must not be inconsistent with the State's other obligations under international law, including the ICCPR, peremptory norms of international law, provisions of international humanitarian law, and procedural safeguards necessary to the protection of non-derogable rights.

Non-derogable rights (Article 15(2))

- 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 forced or compulsory labour under Article 4(2)).
- the prohibition on punishment without law under Article 7.
- 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)
- the abolition of the death penalty in all circumstances (Protocol no. 13, Article 1; see Article 2).

Notification of the derogation

According to Article 15(3), as interpreted by the European Court of Human Rights, a State:

- must keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. This means that an official and public notice of derogation is required, which implies a requirement for States to provide copies of all measures and an explanation of their purpose, together with sufficient information to enable the other High Contracting Parties to appreciate the nature and extent of the derogations involved;
- must inform the Secretary General when such measures have ceased to operate, and the provisions of the Convention are again being fully executed;
- must notify the measures without any unavoidable delay.

How can HRIAs contribute to the assessment of the need for an emergency legal framework?

An HRIA involves the examination of the lawfulness of the measures. As part of this, those conducting the assessment will have to consider where the measures are adopted under a clear and sufficient legal framework. In the context of a crisis, the ordinary legal framework or an emergency legal framework, such as a state of emergency, could be used for the adoption of measures. In the absence of an existing emergency legal framework, the HRIA can assist in assessing the need for such a legal framework by confirming or infirming the adequacy of the ordinary legal framework for the adoption of emergency measures, depending on whether the HRIA concludes that the framework is clear and sufficient or not.

Additionally, the HRIA can provide an opportunity to verify that an existing emergency legal framework meets the requirements of clearness and sufficiency to allow the adoption of lawful measures. The HRIA provides an opportunity to reassess it as well and adopt a new one to be applied for future crises, in the case where the analysis conducted as part of it leads to the conclusion that the existing framework is unsatisfactory.

ANNEX I

Checklist of the human rights impact assessment process

Phase 1: Definition of the scope and scale of the HRIA

- Determine the measures to be assessed, the purpose they serve and what they entail, including the population they are likely to affect.
- Determine the legal framework of the HRIA i.e., which standards and legal texts to consider when assessing the human rights impact of the measures.
- Map all available resources to conduct the HRIA (human resources, sources of information, tools, etc.), assign responsibilities and set clear deadlines to ensure respect of the overall timeline.
- Identify all relevant stakeholders, such as duty-bearers, rights-holders or vulnerable groups that may be disproportionately affected, national human rights institutions, civil society organisations, etc.
- Develop a baseline, to support the assessment and analysis, of the current state of human rights enjoyment by gathering all relevant (quantitative and qualitative) data from available internal and external sources.

Phase 2: Assessment of the measures in the light of human rights

- Identify which rights may be affected by the measures, and ensure that the measures comply with the legal framework determined in Phase 1.
- Identify the type of affected rights, i.e. are they non-derogable, are they subject to exceptions, or can they be interfered with legitimately taking into account established international human rights standards and relevant case law of the European Court of Human Rights.
- In the case of interference with qualified rights, assess the proportionality of the measures i.e., whether the extent of the interference is proportionate to a legitimate aim, including that they are limited in time and (as relevant) geographical scope.
- Ensure that the measures are non-discriminatory, in particular by checking that they do not have a disproportionately adverse effect on members of a particular group and that their implementation will not lead to any form of unjustifiable differential treatment.
- Assess whether the measures are accessible (affected groups and individuals can have access to the text and can understand its content) and foreseeable (the text is clear enough that its implementation should be consistent).

Phase 3: Assessment of the existence of remedies

- Examine whether there are effective and accessible remedies against the measures.

Phase 4: Analysis and mitigation of the impact of the measures

- Analyse the overall severity of the identified human rights impacts, in particular in light of their scope and scale, their duration, their cumulative effect, and their likelihood or immediacy.
- Identify and plan for new or additional mitigating actions of the negative human rights impacts identified, starting with the most severe ones.
- Draft recommendations aiming to enhance the respect for and protection of human rights by the measures, including through the establishment of exemptions, derogations and remedies if lacking.

Phase 5: Adaptation of the measures in light of the experience and in response to a changing context

- Monitor and evaluate the situation and the implementation of the measures to quickly identify emerging human rights concerns.
- Review the measures according to the results of the monitoring and evaluation process and adjust them as required, which may entail revoking or modifying them.

Phase 6: Identification and stock-taking of lessons learned

- Conduct an after-action review of the HRIA to ensure that lessons learned are taken into account for future HRIAs.
- Conduct an independent review of the response to the crisis, in particular of the measures, including their effectiveness and their respect for human rights and the rule of law.

ANNEX II

Checklist of the five essential steps of the human rights impact assessment

Under pressure of time, it may not be feasible to conduct a thorough HRIA. The following checklist aims to provide public authorities with five essential steps that should absolutely be part of a “fast-tracked” HRIA, keeping in mind that such situation should lead to a second, more comprehensive HRIA being conducted to complement it.

- Determine the measures to be assessed and their scope and content, as well as the applicable legal framework.
- Assess the measures against the applicable human rights norms, considering the nature of the rights affected (non-derogable, subject to exceptions, qualified).
- Ensure that the measures are non-discriminatory.
- Assess the severity of the measures' impact on human rights, taking into account their scope, scale, duration, likelihood, immediacy, and cumulative effect.
- Draft clear recommendations aiming to address all identified negative impacts (the most severe ones can be prioritised if necessary), including by establishing exemptions, derogations, and remedies if lacking.