Kamber K. Limiting State Responsibility under the European Convention on Human Rights in Time of Emergency: An Overview of the Relevant Standards

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LIMITING STATE RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN TIME OF EMERGENCY: AN OVERVIEW OF THE RELEVANT STANDARDS*

1. Introduction

The idea of the ECHR[1] as a common post-Second World War constitutional instrument of European public order in the field of human rights[2] has encountered many challenges in the ensuing years following its adoption.[3] The challenges to the system came from the totalitarian regimes,[4] terrorism,[5] internal conflicts and wide-

*The opinions expressed are personal.

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS No.005.

[2] See *BosphorusHavaYollarıTurizmveTicaretAnonimŞirketi* v. *Ireland* [GC], no. 45036/98, 30 June 2005, para. 156.

[3] The ECHR was open for signature by the Member States on 4 November 1950 and came into force on 3 September 1953.

[4] See further: The Greek case of the European Commission of Human Rights (Denmark, Norway, Sweden and the Netherlands v. Greece, no. 3321/67 et al.).

[5] *Lawless* v. *the United Kingdom*, no. 332/57, 14 November 1960.

scale military and police operations,[1]complexity of the processes of transitional post-conflict justice and reconciliation,[2] external military operations of the ECHR Member States,[3] and recent armed conflicts between the ECHR Member States.[4] This required the ECHR system to adapt to such challenges and to design the minimum permissible perspectives in which the rights and freedoms guaranteed under that Convention must be secured and respected. The case-law of the European Court of Human Rights (ECtHR) in this context represents an invaluable source of guidance and authoritative determination of the protection of human rights and the rule of law.[5]

The normative framework in which the ECHR rights are secured and respected is primarily determined by the ECHR's jurisdictional scope. Jurisdiction in this context can be viewed as an exigence of the state's responsibility to honour its engagements undertaken by the ECHR, which can be generally subjected to the derogation clause under Article 15 ECHR. This article will seek to outline the concepts of jurisdiction and responsibility of states under the ECHR (Part 2) and the manner in which states are permitted to derogate from their obligations under

[1] This in particular concerns the Russian government's activities in the North Caucasus (see further P. Leach, "The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights", 6 *European Human Rights Law Review* (2008), pp. 732-761) and Turkish security forces' actions in south-eastern Turkey (see further Buckley C., "The European Convention on Human Rights and the Right to Life in Turkey", 1(1) *Human Rights Law Review* (2001), 35-65).

[2] A number of issues have arisen in the context of the post-conflict transitional justice in the countries of the former Yugoslavia (see, for example, *Marguš* v. *Croatia* [GC], no. 4455/10, 27 May 2014).

[3] In particular, the military operations in Iraq (see, for example, *Hassan* v. *the United Kingdom* [GC], no. 29750/09, 16 September 2014).

[4] This gave rise to a number of Inter-state cases, such as *Cyprus* v. *Turkey* [GC], no. 25781/94, 10 May 2001; *Georgia* v. *Russia* [GC], no. 13255/07, 3 July 2014. However, it also gave rise to individual applications, with a strong inter-state inspiration, such as *Sargsyan* v. *Azerbaijan* [GC], no. 40167/06, 16 June 2015; *Chiragov and Others* v. *Armenia* [GC], no. 13216/05, 16 June 2015.

[5] A strong argument of indissociably related concepts of human rights and the rule of law was made by Tom Bingham in his seminal book *The Rule of Law* (Penguin 2011). Without intending to disagree with that assertion, it should be noted that the rule of law, as a guarantee of predetermined and predictable conduct governed by the authoritative rules expressing many of the dignitarian and functional aspects of the protection of individual rights, may exist even in the legal orders which are not governed by the human rights considerations, at least as they are nominally denoted in contemporary legal discourses. See in this respect the observance of the rights of the accused in the context of the trial following the assassination of the Austro-Hungarian Archduke Franz Ferdinand in Sarajevo in June 1914 (T. Vander Beken, K. Kamber and J. Jassens, "Gavrilo Principvoorcriminologen", 35(6) *Panopticon* (2014), pp. 491-501).

that Convention (Part 3). In conclusion, it will put the two perspectives of state responsibility into the contemporary context (Part 4).

2. Jurisdiction and state responsibility under the ECHR

Rather than engaging in the contentious doctrinal debates of international public law over the relationship between the notions of "jurisdiction" and "state responsibility" and "attribution,"[1] an answer to a more practical question is in order: what is it that determines the notion of jurisdiction in international human rights law?

Some commentators have argued that the notion of jurisdiction in international human rights law does not necessarily correspond to the notion of jurisdiction in general international law.[2] In general, the latter understanding of "jurisdiction" relates to the capacity of a state to legislate in a particular territory (prescriptive jurisdiction), to secure compliance with its laws (enforcement jurisdiction), and to secure the resolution of legal disputes before its courts (adjudicative jurisdiction).[3] On the other hand, the notion of jurisdiction in international human rights law could be seen a factual power of a state over persons under its jurisdiction. More precisely, jurisdiction in human rights law is the possibility of a state to exercise factual power and authority over individuals.[4]

This distinction between the notions of jurisdiction in general international law and international human rights law has never been clearly made in the case-

[1] There are in principle two approaches which diverge over the question whether the notion of "jurisdiction" also encompasses the issue of "attribution." In general, according to one approach, the notion of jurisdiction is distinct to that of "attribution" of a human rights violation to the state whereas the other approach advocates that the two notions are interchangeable. See further: O. de Schutter, International Human Rights Law (Cambridge, Cambridge University Press 2014), pp. 147-148.

[2] M. Milanović, "From Compromise to Principle:Clarifying the Concept of StateJurisdiction in Human RightsTreaties", 8(3) *Human Rights Law Review* (2008), p. 417; S. Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", 20(4) *European Journal of International Law* (2010), p. 1231.

[3] D. Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct andthe Abuse of Rights Doctrine", 9(4) *Utrecht Law Review* (2013), p. 69

[4] See further: Milanović, *supra* n. 2, pp. 436-447.

law of the ECtHR[1] and it is not the intention of this article to argue in favour of one of the positions. It should be noted, however, that when designing various modes of jurisdiction, there has been a strong tendency by the ECtHR to regard the question of jurisdiction and responsibility as the possibility of the state to exercise factual power and authority over individuals. It will be therefore taken as a working premise of the present discussion that the state jurisdiction under the ECHR is determined on the basis of the general international law and specific human rights law considerations.

The principal jurisdictional competence under the ECHR is based on the principle of *territoriality*. This primarily includes the state territory proper, that is to say the internationally recognised territory of the state.[2] This means that the state may be held responsible for infringements or its failure to secure the ECHR rights to all those individuals who are in its internationally recognised territory. This, of course, also includes any board craft and vessels registered in, or flying the flag of, that state.[3]

The territorial jurisdiction of a state is a legal premise. The ECtHR has held that jurisdiction is *presumed* to be exercised normally throughout the State's territory.[4] This is also denoted as a "presumption of competence."[5] The presumption in question may be rebutted where a State is unable to exercise its authority in part of its territory. This is ordinarily a result of the following factors: (1) military occupation by the armed forces of another state, which therefore has an effective control of the territory in question,[6] (2) acts of war or rebellion preventing the state to exercise factual power and authority in the territory concerned, and (3)

[1]The ECtHR has stressed that "the notion of 'jurisdiction' within the meaning of Article 1 [ECHR] must be considered as reflecting the position under public international law" (*Assanidze* v. *Georgia* [GC], no. 71503/01, 8 April 2004, para. 137)

[2]*Al-Skeini and Others* v. *the United Kingdom* [GC], no. 55721/07, 7 July 2011, para. 131

[3]*Banković and Others* v. *Belgium and Others* [GC], no. 52207/99, 12 December 2001, para. 73; ECtHR (Judgment) *Bakanova* v. *Lithuania*, no. 11167/12, 31 May 2016, para. 63.

[4]*Ilaşcu and Others* v. *Moldova and Russia* [GC], no. 48787/99, 8 July 2004, para. 312.

[5]*Sargsyan* v. *Azerbaijan* [GC], no. 40167/06, 16 June 2015, para. 127.

[6]*Cyprus* v. *Turkey* [GC], no. 25781/94, 10 May 2001, paras. 76-80.

the installation of a separatist regime within the territory of the state supported by the acts of a foreign state.[1]

In all these instances the state concerned has no capability to exercise factual power and authority over individuals residing on the territory out of its factual control. The state has therefore limited territorial jurisdiction. This was, for instance, the case with the Moldovan jurisdiction over its eastern region, now known as Transdniestria, where a separatist regime of the "Moldavian Republic of Transdniestria" ("MRT") was established. The ECtHR found that the "MRT" had been established as a result of Russian military assistance and that the continued Russian military and armaments presence there was a strong signal of Russia's continued military support for the separatists. Moreover, the population were dependent on free or highly subsidised gas supplies, pensions and other financial aid from Russia. This accordingly brought the region in question under the Russian jurisdiction and limited the jurisdiction and the nature of Moldovan responsibility with regard to that territory.[2] On the other hand, in the case of *Sargsyan* v. *Azerbaijan*, the ECtHR has declined to consider "disputed areas" in Gulistan, which were subject to intense military operations, as falling out of the territorial jurisdiction and responsibility of Azerbaijan.[3]

The existence of limited territorial jurisdiction does not mean that the state's "jurisdiction" nominally ceases.[4] What it means is that the state's "responsibility" is modified and adjusted by being limited only to discharging positive obligations.[5]In this particular context, the discharging positive obligations implies

[1]*Ilaşcu and Others* v. *Moldova and Russia* [GC], no. 48787/99, 8 July 2004, para. 312.

[2] See further: *Mozer* v. *the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016, paras. 101-112.

[3]*Sargsyan* v. *Azerbaijan* [GC], no. 40167/06, 16 June 2015, paras. 150-151.

[4]*Catan and Others* v. *Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October, 2012, para. 109.

[5] In general, the positive obligations are a requirement on the state to take action or to do something, while the negative obligations denote a duty of the state to abstain from unjustified interference with the rights of an individual (D. Shelton and A. Gould, "Positive and Negative Obligations", in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press 2013), p. 566).

two groups of actions that the state must undertake: (1) measures to assert or re-assert its sovereignty over the territory and to refrain from any acts supporting the separatist regime, and (2) measures of judicial, political, or administrative nature aimed at securing individual human rights.[1] The latter may include issues such as securing the respect for rights of detained individuals[2] or securing educational rights.[3]

In addition to the territorial and limited territorial jurisdiction, the responsibility of the state under the ECHR may arise with regard to the actions taken out of its internationally recognised territory. The ECtHR has explained, however, that this will occur only exceptionally. Nevertheless, when the jurisdiction is extended over the principle of territoriality, it will be irrelevant whether the extension of the jurisdiction relates to the territory of an ECHR Contracting Party or not.[4] The extension of the jurisdiction over the principle of territoriality will normally occur in two forms.

The first form of the extended jurisdiction is "effective control of an area." Such a control may be a consequence of lawful or unlawful military action of a state through which it exercises effective control of an area outside its internationally recognised national territory. In such instances, the local administration survives as a result of the state's military and other support, which is sufficient for attracting the state's responsibility for the observance of the ECHR rights.[5]

The second form of the extended jurisdiction concerns the acts of the state authorities which produce effects outside the state's own territory. The most common modes of this jurisdictional notion include: (1) the acts of diplomatic and consular agents of the state, who are present on a foreign territory in accordance

[1] *Sargsyan* v. *Azerbaijan* [GC], no. 40167/06, 16 June 2015, para. 131.

[2] *Mozer* v. *the Republic of Moldova* [GC], no. 11138/10, 23 February 2016, paras. 151-155.

[3] *Catan and Others* v. *Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October, 2012, para.109.

[4] *Al-Skeini and Others* v. *the United Kingdom* [GC], no. 55721/07, 7 July 2011, paras. 131 and 142.

[5] *Ilaşcu and Others* v. *Moldova and Russia* [GC], no. 48787/99, 8 July 2004, para. 314.

with international law, exerting authority and control over others, (2) the exercise of public powers, such as executive or judicial, by the state authorities on foreign territory through the consent, invitation or acquiescence of the local government, and (3) the exercise of physical power and control over a person by the use of force by state agents operating outside the state's territory.[1]

The above discussion has shown that the ECHR jurisdictional scope has a strong basis in the standard jurisdictional principles of international public law (the principle of territorial jurisdiction). At the same time, the possibility of a state to exercise factual power and authority over individuals is what predominantly determines the state's jurisdiction and authority in cases of extraterritorial jurisdiction. There are also modes of state responsibility developed in the ECtHR case-law that does not fit easily in either of the two theories of state "jurisdiction" and "responsibility." A telling example in this context is the limited territorial jurisdiction where the state has certain human rights obligations although it does not exercise prescriptive, enforcement or adjudicative jurisdiction in the territory concerned nor does it have a possibility to exercise factual power and authority over individuals on that territory.

It therefore follows that it is difficult, and arguably inutile, to try to fit the concept of state jurisdiction and responsibility under the ECHR to any predesigned jurisdictional theory. The central question is rather whether there is a possibility for the state in question to honour its engagements undertaken by the ECHR. The extent of such a possibility will proportionally determine the scope of its "jurisdiction" and "responsibility."

In the context of an armed conflict or other public emergency threatening the life of the nation, the state will ordinarily have limited capacities in guaranteeing the rights and freedoms under the ECHR to the individuals under its jurisdiction and responsibility. Subject to the conditions provided for in Article 15 ECHR, the state will in such instances have a possibility to derogate from its duties under that

[1] *Al-Skeini and Others* v. *the United Kingdom* [GC], no. 55721/07, 7 July 2011, paras. 133-137.

Convention. It remains to be seen in what manner and under which legal constrains can the state exercise such a possibility of derogation.

3. Derogation from the ECHR obligations

It is widely accepted that there are two central authoritative legal documents guiding the interpretation and application of the derogation clauses in international human rights law:[1] the Paris Minimum Standards of Human Rights Norms in a State of Emergency ("the Paris Minimum Standards"),[2] and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("the Siracusa Principles").[3]

The Paris Minimum Standards were adopted by the International Law Association at its 61st Conference held in Paris in 1984 as an attempt to provide guiding principles for a bona fide application of the derogation clauses under the three central instruments of international human rights law: Article 4 of the International Covenant on Civil and Political Rights (ICCPR)[4], Article 15 ECHR, and Article 27 of the American Convention on Human Rights (ACHR).[5] This document is structurally divided into three sections. Section A defines the concept of emergency, its declaration, duration and control. Section B provides for the general principles governing the emergency powers and the protection of individuals, and Section C lists draft articles of the particular "non-derogable" rights and freedoms.

The Paris Minimum Standards reaffirm the principle according to which the declaration of a state of emergency will be justified only in the case of the

[1] See further: De Schutter, *supra* n. 1, pp. 583-584.

[2] R.B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency", 79 *American Journal of International Law* (1985), 1072-1081.

[3] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.

[4] International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[5] American Convention on Human Rights, Costa Rica, 22 November 1969.

existence of a "public emergency which threatens the life of the nation," which must be officially proclaimed (Section A.1.a). The "public emergency" referred to in this context concerns an "exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community" (Section A.1.b).

On the procedural level, the Paris Minimum Standards provide that the procedure for declaring a state of emergency should be defined under the constitution and that any prerogative of the executive authority in this respect must be subjected to a prompt confirmation by the legislature (Section A.2). It also envisages the necessity of a judicial or other review of the declaration of emergency at the international level by the relevant institutions, and at the national level by the bodies empowered by the constitution and other legal instruments (Sections A.7 and B.5).Moreover, any declaration of a state of emergency should not exceed the period which is "strictly required" to restore normal functioning of the society; the duration of emergency, save for the case of war, should be for a fixed term period; every extension should be also for a predetermined fixed period of time and made by way of a new declaration before the expiry of the initial period, and every extension should be based on a prior approval by the legislature (Section A.3). Upon the termination of a state of emergency, the full restoration of rights and freedoms must come into effect (Section A.6). With regard to the territorial scope, the declaration of a state of emergency may cover the entire territory of a state or only part of its territory, and this may change depending of the development of the situation of emergency (Section A.4).

The Paris Minimum Standards condition the application of the measures of derogation form international human rights obligations with the following general conditions: (1) the compliance with the notification requirements, as provided under the particular treaty, (2) the existence of proportionality between the measures applied and the exigencies of the situation, (3) consistency with the

measures applied with other obligations of the state under international law, (4) non-discrimination on the grounds of race, colour, sex, language, religion, nationality or social origin, and (5) recognition of non-derogability of the "basic rights and freedoms" guaranteed by international law (Section B.2).In addition, the Paris Minimum Standards set out the principles securing the functioning of legislature and judiciary in the country during the state of emergency (Section B.3).

The draft articles of the Paris Minimum Standards list the following non-derogable rights and freedoms: right to legal personality (Article 1), freedom from slavery or servitude (Article 2), freedom from discrimination (Article 3), right to life (Article 4), right to liberty (Article 5), freedom from torture (Article 6), right to a fair trial (Article 8), freedom of thought, conscience and religion (Article 9), rights of minorities (Article 10), rights of the family (Article 11), right to a name (Article 12), rights of the child (Article 13), right to nationality (Article 14), right to participate in government (Article 15), and right to a remedy (Article 16).

The Siracusa Principles are the result of a high-level international conference held in Siracusa (Italy) in 1984 where law professors, practitioners and other experts in human rights discussed the limitation and derogation provisions of the ICCPR. The document was later circulated as an official document of the United Nations Economic and Social Council's Commission on Human Rights. The Siracusa Principles identify and proclaim a close relationship between respect for human rights, the maintenance of international peace and security and development in the broadest sense. In Part I, they deal more specifically with the limitation clauses in the ICCPR, and in Part II they provide the necessary guiding definitions of measures of derogations in a public emergency.

The Siracusa Principles define the "public emergency which threatens the life of the nation" as a situation of exceptional and actual or imminent danger which threatens the life of the nation in a sense that it affects the whole of the population and either the whole or part of the territory of the State, and threatens

the physical integrity of the population, the political independence or the territorial integrity of a state or the existence or basic functioning of institutions indispensable to ensure and protect the right s recognised in the ICCPR (para. 39). In this connection, further explanation is provided with regard to the internal conflicts and unrests and the economic difficulties. In particular, the internal conflicts and unrests which do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under the ICCPR (para. 40). Likewise, economic difficulties as such cannot justify the introduction of derogation measures (para. 41).

The Siracusa Principles also provide a useful guidance for the understanding of the requirement of necessity in the introduction of the derogation measures. They stress that the scope of any derogation measure must be strictly necessary to deal with the threat to the life of the nation and proportionate to its nature and extent (para. 51). However, if a measure justified by a limitation clause under the ICCPR is adequate to deal with the situation, a derogation for the achievement of the same aim will not be permissible (para. 53). The principle of necessity must be applied in an objective manner which means that any measure must target an actual, clear, present or imminent danger and should not be used for the apprehension of potential danger (para. 54). There should also be an independent and periodic review of the necessity of derogation and effective remedies should exist in order to determine whether the derogation measures are strictly required by the exigencies of the situation (sections 55-56).

The Siracusa Principles also refer to the non-derogable rights and freedoms under the ICCPR: the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent, freedom from slavery or involuntary servitude, the right not to be imprisoned for contractual debt, the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation, the right to recognition as a person before the law, and freedom of thought, conscience and

religion (para. 58).

The substantive requirements and the process of derogation under the ECHR is in harmony with the standards set out in the two discussed international documents. The normative basis for a derogation under the ECHR is provided for in Article 15.[1] This provision sets the elements of a valid derogation in connection with: (1) the existence of relevant circumstances allowing for a derogation and compliance with the limits set out in Article 15 § 1; (2) prohibition of derogation from certain rights (Article 15 § 2), and (3) the observance of the notification requirements (Article 15 § 3).

Similar to the derogations under the ICCPR, the validity of a derogation under the ECHR is relevant only if the measures taken by the Government cannot be justified under the restriction clauses or the definitional scope of the substantive articles under that Convention.[2] This means that in the case of an allegation that a particular governmental action or omission has breached an ECHR right, the ECtHR will first examine whether the action or omission in question can be otherwise justified under the relevant substantive provision. Only when that is not possible, the issue of derogation becomes relevant. The ratio behind such an approach can be traced to the usual practices of States when lodging a derogation to submit that its measures "may" involve a derogation from the Convention.[3]

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[1] This provision reads:

> "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 § 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."

[2] *A. and Others* v. *the United Kingdom* [GC], no. 3455/05, 19 February 2009, para. 161.

[3] Guide on Article 15 of the European Convention on Human Rights (Council of Europe/European Court of Human Rights 2016), p. 5.

The relevant substantive requirements justifying a derogation under Article 15 § 1 have two limbs. The first is the existence of a "war" and the second is the existence of a "public emergency threatening the life of the nation." The ECtHR has not so far interpreted the meaning of the term "war" in this context. This is, however, of a secondary importance for the application of a derogation given that the situation ordinarily qualifying as a "war" is also likely to be considered as a "public emergency threatening the life of the nation."[1]

A public emergency threatening the life of the nation is "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[2] Such a threat must be imminent, which means that it might occur without warning at any time. However, it cannot imply a requirement for a state to wait for a disaster to happen in order to constitute a threat as imminent.[3]

In the assessment of the imminence of a threat to the life of the nation regard must be primarily held to those facts which were known at the time of the derogation. This does not mean that an information which later comes to light cannot inform the ECtHR's decision with regard to its assessment of the validity of a derogation.[4] This may be of a particular importance for the methodology of assessment of the validity of a derogation given that some states of emergency may last for a prolonged period of time and the derogation may therefore be warranted throughout the period in question.[5] When the derogation is no longer in force and the relevant rights and freedoms under the ECHR become applicable, this does not preclude the ECtHR from taking into account the background circumstances of the case in the assessment of a proper compliance with the relevant Article under the ECHR.[6]

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[1]Ibid., p. 6.

[2]*Lawless* v. *Ireland* (No. 3), no. 332/57, 1 July 1961, para. 28

[3]*A. and Others* v. *the United Kingdom* [GC], no. 3455/05, 19 February 2009, para. 177.

[4]Loc. cit.

[5] Guide on Article 15, *supra* n. 3, pp. 6-7.

[6]*Brogan and Others* v. *the United Kingdom*, nos. 11209/84 et al., 29 November 1988, para. 48.

Derogation may be applied with regard to the whole *or* part of the territory. Accordingly, the term "threatening the life of the nation" under Article 5 § 1 also encompasses actual or imminent threats to the particular parts of a country. However, if a state has decided to make a derogation only with regard to a particular part of its territory, then it cannot invoke the derogation for the whole of the territory under its jurisdiction.[1] In this connection, it should be also noted that so far no State has ever made a derogation in respect of its extraterritorial activities, although a number of the ECHR Member States are engaged in extraterritorial military missions.[2] This accordingly means that, to the extent that an individual falls under the jurisdiction of a state engaged in an extraterritorial military mission, the state in question is under an obligation to secure all the ECHR guarantees to such an individual under its jurisdiction.

The assessment of *necessity* of the application of derogation is made with regard to the test of "strictly required by the exigencies of the situation" provided for in Article 15 § 1 ECHR. In making that assessment the ECtHR applies the standard doctrine of subsidiarity. This in particular means that it is primarily for the domestic authorities to determine whether the life of their nation is threatened by a public emergency and, if so, what is *necessary* to be taken in order to effectively respond to the emergency. In these matters, the states have a wide margin of appreciation. However, that is not an unfettered power allocated to the authorities. It always remains for the ECtHR to determine whether the state has remained within the margin of appreciation or has taken measures which are not *strictly required* by the exigencies of the situation. In making that assessment, the ECtHR will have regard to the following factors: the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.[3]

[1] *Aksoy* v. *Turkey*, no. 21987/93, 18 December 1996, para. 70; *Yurttas* v. *Turkey*, nos. 25143/94 and 27098/95, 27 May 2004, para. 58.

[2] *Hassan* v. *the United Kingdom* [GC], no. 29750/09, 16 September 2014, para. 101.

[3] *Brannigan and McBride* v. *the United Kingdom*, nos. 14553/89 and 14554/89, 26 May 1993, para. 43.

An overview of the ECtHR case-law shows that the relevant factors taken in this context include: (1) the assessment whether other ordinary laws could adequately deal with the exigencies of the situation; (2) whether the measures taken by the authorities are genuine and bona fide; (3) what is the scope of the derogation and what are the reasons justifying it; (4) whether the derogation was kept under supervision and, if appropriate, attenuated; (5) the existence of safeguards, in particular of an effective judicial control, and (6) absence of any discrimination.[1]

In addition to the above requirements, Article 15 § 1 ECHR prohibits the states to adopt measures "inconsistent with [their] other obligations under international law." This does, not, however, mean that the ECtHR will carry out a thorough assessment of the obligations flowing from other sources of international law nor that it will define authoritatively the particular aspects of such obligations. Nevertheless, the ECtHR must satisfy itself that there is no plausible basis for a suspicion that the measure taken by the state is not inconsistent with its other international obligations.[2]

The non-derogable rights under Article 15 § 2 are: Article 2 (right to life); Article 3 (prohibition of torture); Article 4 § 1(prohibition of slavery or servitude), and Article 7 (no punishment without law). In addition, Protocols 6[3] and 13[4] to the ECHR exclude the possibility of a derogation from the prohibition of death penalty, and Article 4 of Protocol No. 7[5] from the *ne bis in idem* principle (right not to be tried or punished twice for the same offence).

[1] See further: Guide on Article 15, *supra* n. 3, p. 8.

[2] *Brannigan and McBride* v. *the United Kingdom*, nos. 14553/89 and 14554/89, 26 May 1993, paras. 67-73.

[3] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983, ETS No.114.

[4] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3 May 2002, ETS No. 187.

[5] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS No. 117.

The non-derogability of a right means that it continues to apply irrespective of a derogation introduced by the state. This means that they operate with their full strength and relevance even in the times of war or other public emergency. The only exceptions to this rule concern Article 2, which has a restriction only with regard to the deaths resulting from lawful acts of war, and Article 7 (§ 2) which otherwise does not prevent the trial and punishment for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. It should be noted, however, that the cited restriction under Article 7 will not be of a particular relevance as it is only a contextual clarification of Article 7, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war.[1]

Lastly, the validity of a derogation under the ECHR will also depend on the compliance with the notification requirements under Article 15 § 3 ECHR. The Secretary General of the Council of Europe must be fully informed of the measures taken and the reasons therefore as well as any change in the regime of the application of the measures in question. The central purpose of the notification requirement is to make the derogation public and known to the other Member States of the Council of Europe system. In addition, it also implies a necessity to keep the need for the derogation under constant review.[2]

The notification is usually made by writing a letter to the Secretary General by which the reasons for the derogation are provided and copies of the legal texts under which the emergency measures will be taken are attached, with an explanation of their purpose. The notification must be made without any "unavoidable delay" following the introduction of the relevant derogation measure. A period of twelve days was found to be sufficient whereas the periods of three

[1] *Maktouf and Damjanović* v. *Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 18 July 2013, para. 72.

[2] Guide on Article 15, *supra* n. 39, p. 11.

and four months were considered to be inadequate to meet the necessary requirement under the ECHR.[1]

4. Instead of Conclusion

It is an inevitable concession to reality that the discussions on derogations from the rights and freedoms guaranteed under the ECHR are becoming the mainstream political and legal discourse in confronting often complex and multidimensional political and security challenges facing the European countries. Indeed, since the creation of the ECHR system of human rights protection there were in total eight derogations from that Convention (by Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom) whereas in the period of a year (between June 2015 and July 2016) three States (Ukraine, France and Turkey) have introduced the emergency measures and announced derogation from their ECHR obligations.[2]

It is hard to argue that the derogations which France, Ukraine and Turkey recently introduced were not aimed at addressing "the emergencies threatening the life of the nation" related to the acts of terror, insurgency and war and political unrests respectively. The French derogation followed the large-scale terrorist attacks which had taken place in the Paris region in November 2015 and the introduction of the emergency measures was justified with reference to the necessity to prevent the commission of further terrorist attacks.[3] The Turkish derogation was introduced in response to the large-scale coup attempt in July 2016 aimed at overthrowing the government,[4] and the Ukrainian derogation was made

[1] Loc. cit.

[2] See further: Factsheet – Derogation in time of emergency (ECHR 2017).

[3] Declaration contained in a Note verbale from the Permanent Representation of France, dated 24 November 2015, registered at the Secretariat General on 24 November 2015, available athttp://www.coe.int/en/web/conventions/search-on-reservations-and-declarations(last visited 27 January 2017).

[4] Declaration contained in a letter from the Permanent Representative of Turkey, dated 21 July 2016, registered at the Secretariat General on 21 July 2016, available

with regard to the annexation and temporary occupation of the integral part of its internationally recognised territory (Crimea and the city of Sevastopol) and the insurgencies and security operations in other parts of its territory (Donetsk and Luhansk regions).[1]

However, even if accepting the necessity of introduction of derogation and emergency measures at a political level, the difficulty from the perspective of human rights and the rule of law relates to the fact that human rights abuses are often associated with states of emergency.[2] The governments must therefore be ready to justify the measures taken in the light of the relevant substantive and procedural ECHR requirements. This will, on the one hand, legitimise their political decision to introduce the emergency measures and, on the other hand, secure an effective protection of human rights and the rule of law to the individuals concerned with the introduction of such measures.

The verification of the governmental justification in question is a shared task of the national courts and the ECtHR.[3] In accordance with the principle of subsidiarity, it is primarily for the ECHR Member States that have introduced derogation and emergency measures to comply with the relevant ECHR standards in that respect and to secure that the introduction of the emergency measures does not represent a negation of the very concepts of human rights and the rule of law.

The states must put in place adequate safeguards from abuses, in particular through an effective judicial control. It is through such institutions that a dialogue between the affected individuals and the political decision-makers must take place and only then will the government be able to legitimise derogation and emergency measures. It is a hope that states will stand up to that commitment.

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athttp://www.coe.int/en/web/conventions/search-on-reservations-and-declarations(last visited 27 January 2017).

[1] Derogation contained in a Note verbale from the Permanent Representation of Ukraine, dated 5 June 2015, registered at the Secretariat General on 9 June 2015, available athttp://www.coe.int/en/web/conventions/search-on-reservations-and-declarations(last visited 27 January 2017).

[2] See further: M. O'Boyle, "Emergency Government and Derogation under the ECHR", 4 *European Human Rights Law Review* (2016), 331-341.

[3]Ibid., p. 340.

Abstract

It is generally accepted that the effective and full enjoyment of rights and freedoms guaranteed under the European Convention on Human Rights (ECHR) is seriously impaired by the existence of an armed conflict or other public emergency threatening the life of the nation. Such a state of affairs often leads to the restricted jurisdiction and responsibility of states and represents a legitimate ground for derogation from the obligations under the ECHR.This article seeks to outline the relevant ECHR standards in these two perspectives of restricted state responsibility.

Keywords: *European Convention on Human Rights, jurisdiction, state responsibility, derogations*