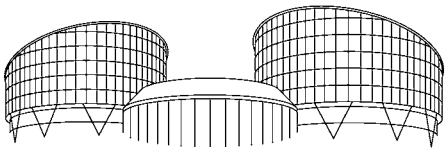

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on Article 15 of the European Convention on Human Rights

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Derogation in time of emergency

COUNCIL OF EUROPE
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Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter "the Court", "the European Court" or "the Strasbourg Court") to inform legal practitioners about the fundamental judgments delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 15 of the European Convention on Human Rights (hereafter "the Convention" or "the European Convention") until 31 August 2016. Readers will find the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court's judgments serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25.). The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012).

* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

I. General principles

Article 15 of the Convention – Derogation in time of emergency

"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 [the] 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 therefore. 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."

1. Article 15 is a derogation clause. It affords to Contracting States, in exceptional circumstances, the possibility of derogating, in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention.

2. The text of Article 15 is based on the draft Article 4 of the United Nations draft Covenant on Human Rights, which later became Article 4 of the International Covenant on Civil and Political Rights (ICCPR).[1]

3. Article 15 has three parts. Article 15 § 1 defines the circumstances in which Contracting States can validly derogate from their obligations under the Convention. It also limits the measures they may take in the course of any derogation. Article 15 § 2 protects certain fundamental rights in the Convention from any derogation. Article 15 § 3 sets out the procedural requirements that any State making a derogation must follow.

4. The making of a derogation need not be a concession that the State will not be able to guarantee the rights contained in the Convention. Indeed, the practice when lodging a derogation has been for the Contracting State to state that the measures it is taking "may" involve a derogation from the Convention. For this reason, in any case where an applicant complains that his Convention rights were violated during a period of derogation, the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court will go on to determine whether the derogation was valid (for instance, *A. and Others v. the United Kingdom* [GC], § 161; *Lawless v. Ireland (no. 3)*, § 15).

1. See p. 10 of, and Appendix I to, the *Travaux préparatoires* on Article 15 (document DH (56) 4 available on the Court's Library website at <www.echr.coe.int/Library>). The American Convention on Human Rights also contains a derogation clause (Article 27). There is no such clause in the African Charter on Human and Peoples' Rights.

II. Article 15 § 1: when a State may validly derogate

Article 15 § 1 of the Convention

"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 [the] 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.

..."

5. Article 15 § 1 sets out three conditions for a valid derogation:

i. it must be in time of war or other public emergency threatening the life of the nation;

ii. the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and

iii. the measures must not be inconsistent with the State's other obligations under international law.

A. "…war or other public emergency threatening the life of the nation…"

6. The Court has not been required to interpret the meaning of "war" in Article 15 § 1; in any case, any substantial violence or unrest short of war is likely to fall within the scope of the second limb of Article 15 § 1, a "public emergency threatening the life of the nation".

7. The natural and customary meaning of "public emergency threatening the life of the nation" is clear and refers to "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" (*Lawless v. Ireland (no. 3)*, § 28).

8. The emergency should be actual or imminent; a crisis which concerns only a particular region of the State can amount to a public emergency threatening "the life of the nation" (see, for instance, derogations in respect of Northern Ireland in *Ireland v. the United Kingdom*, § 205, and in respect of South-East Turkey in *Aksoy v. Turkey*, § 70); and the crisis or danger should be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate (*Denmark, Norway, Sweden and the Netherlands v. Greece* (the "*Greek case*"), Commission report, § 153).

9. The Court's case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary and, indeed, the cases demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years (see the security situation in Northern Ireland: *Ireland v. the United Kingdom*, *Brannigan and McBride v. the United Kingdom*, *Marshall v. the United Kingdom* (dec.); and the security situation in place in the aftermath of the al-Qaeda attacks in the United States: *A. and Others v. the United Kingdom* [GC], § 178).

10. Generally the Convention organs have deferred to the national authorities' assessment as to whether such an exceptional situation exists. As the Court stated in *Ireland v. the United Kingdom*

(§ 207): "it falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency'".

11. Terrorism in Northern Ireland met the standard of a public emergency, since for a number of years it represented a "particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties [of Northern Ireland] and the lives of the province's inhabitants" (ibid., §§ 205 and 212; *Brannigan and McBride v. the United Kingdom*, § 48; *Marshall v. the United Kingdom* (dec.)). So, too, did PKK terrorist activity in South-East Turkey (*Aksoy v. Turkey*, § 70) and the imminent threat of serious terrorist attacks in the United Kingdom after 11 September 2001 (*A. and Others v. the United Kingdom* [GC], § 181). The requirement of imminence is not, however, to be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it (ibid., § 177).

12. Notwithstanding this general approach of deference towards the national authorities' assessment, it is not unlimited: for instance, in the "*Greek case*" (Commission report, §§ 159-165 and 207)), the case brought against Greece in response to the "colonels" coup in 1967, the Commission found that, on the evidence before it, there was no public emergency which justified the derogation made. It should be noted that the existence of a "public emergency" was not disputed in the above-noted cases concerning the situation in Northern Ireland and south-east Turkey, whereas this was clearly disputed in some detail in the "*Greek case*" as regards the attempted derogation by the military government in Greece.

13. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently (*A. and Others v. the United Kingdom* [GC], § 177).

14. However, if measures are taken outside the territory to which the derogation applies, the derogation will not apply and the Government concerned will not be able to rely on it to justify the measures (*Sakık and Others v. Turkey*, § 39; *Sadak v. Turkey*, §§ 56; *Yurttas v. Turkey*, § 58; *Abdülsamet Yaman v. Turkey*, § 69).

15. As to the extraterritorial application of the Convention, the Court has acknowledged that "although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention, no State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities. The derogations (…) have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State" (*Hassan v. the United Kingdom* [GC], § 101).

B. "...measures … strictly required by the exigencies of the situation…"

16. The Court has said that the limits on its powers of review are "particularly apparent" where Article 15 is concerned (*Ireland v. the United Kingdom*, § 207):

> "It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 (…) leaves those authorities a wide margin of appreciation."

17. Nevertheless, the States do not enjoy an unlimited power in this respect: the Court is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (ibid.).

18. In determining whether a State has gone beyond what is strictly required, the Court will give appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation (*Brannigan and McBride v. the United Kingdom*, § 43; *A. and Others v. the United Kingdom* [GC],§ 173).

19. This involves the Court considering matters such as:

- whether ordinary laws would have been sufficient to meet the danger caused by the public emergency (*Lawless v. Ireland (no. 3)*, § 36; *Ireland v. the United Kingdom*, § 212);
- whether the measures are a genuine response to an emergency situation (*Brannigan and McBride v. the United Kingdom*, § 51);
- whether the measures were used for the purpose for which they were granted (*Lawless v. Ireland (no. 3)*, § 38);
- whether the derogation is limited in scope and the reasons advanced in support of it (*Brannigan and McBride v. the United Kingdom*, § 66);
- whether the need for the derogation was kept under review (ibid., § 54);
- any attenuation in the measures imposed (*Ireland v. the United Kingdom*, § 220);
- whether the measures were subject to safeguards (ibid., §§ 216-219; *Lawless v. Ireland (no. 3)*, § 37; *Brannigan and McBride v. the United Kingdom*, §§ 61-65; *Aksoy v. Turkey*, §§ 79-84);
- the importance of the right at stake, and the broader purpose of judicial control over interferences with that right (ibid., § 76);
- whether judicial control of the measures was practicable (ibid., § 78;[2] *Brannigan and McBride v. the United Kingdom*, § 59);
- the proportionality of the measures and whether they involved any unjustifiable discrimination (*A. and Others v. the United Kingdom* [GC], § 190); and
- the views of any national courts which have considered the question: if the highest domestic court in a Contracting State has reached the conclusion that the measures were not strictly required, the Court will be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article, or reached a conclusion which was manifestly unreasonable (ibid., § 174).

20. These factors will normally be assessed, not retrospectively, but on the basis of the "conditions and circumstances reigning when [the measures] were originally taken and subsequently applied" (*Ireland v. the United Kingdom*, § 214). However, it may be that, as with the assessment of whether there is a public emergency, the Court is not precluded from having regard to information which comes to light subsequently (*A. and Others v. the United Kingdom* [GC], § 177, where the Court took note of the bombings and attempted bombings in London in July 2005, which took place therefore years after the notification of the derogation in 2001).

2. See also the post-*Aksoy* cases: *Demir and Others v. Turkey*, §§ 49-58; *Nuray Şen v. Turkey*, §§ 25-29; *Elçi and Others v. Turkey*, § 684; *Bilen v. Turkey*, §§ 44-50.

C. "...provided that such measures are not inconsistent with [the High Contracting Party's] other obligations under international law"

21. The Court will consider this limb of Article 15 § 1 of its own motion if necessary (*Lawless v. Ireland (no. 3)*, § 40), even if only to observe that it has not found any inconsistency between the derogation and a State's other obligations under international law.

22. In *Brannigan and McBride v. the United Kingdom*, the Court considered the applicants' submission that official proclamation was a requirement for a valid derogation under Article 4 of the International Convenant on Civil and Political Rights[3] and the absence of such proclamation meant the United Kingdom's derogation was not consistent with its obligations under international law. The Court rejected that submission. It found that it was not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in Article 4 of the ICCPR. Nevertheless, it had to examine whether there was any plausible basis for the applicants' submission. It found that the Home Secretary's statement to the House of Commons on the derogation was "well in keeping with the notion of an official proclamation" (ibid.§§ 67-73).[4]

23. In *Marshall v. the United Kingdom* (dec.), the applicant relied on the observation of the United Nations Human Rights Committee that the emergency provisions in Northern Ireland were "excessive" and that withdrawal of the derogation made under Article 4 of the ICCPR should be envisaged. The Court stated that it found nothing in these references to suggest that the Government must be considered in breach of their obligations under the ICCPR by maintaining their derogation after 1995. On that account, the applicant could not maintain that the continuance in force of the derogation was incompatible with the authorities' obligations under international law.

24. In *Hassan v. the United Kingdom* [GC], the Court had to decide whether, in the absence of a derogation in an international conflict context, the Court could nevertheless re-interpret a Convention provision in accordance with the principles of international (humanitarian) law. The Court replied in the affirmative, accepting that, although internment was not a permitted ground for the deprivation of liberty under the text of Article 5, the Contracting Party was not required to derogate from its obligations under Article 5 in order to allow for the internment of prisoners of war and civilians posing a threat to security in a conflict context because that Article could be interpreted and applied in accordance with the principles of international humanitarian law namely, (the Third and Fourth Geneva Conventions).

3. Article 4 § 1 of the ICCPR providing, in relevant part: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…".

4. Cf. the Commission's conclusion in the case of *Cyprus v. Turkey* (Commission report of 10 July 1976, § 527): "Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Article 15 cannot apply."

III. Article 15 § 2: non-derogable rights

Article 15 § 2 of the Convention

"...

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.

..."

25. Article 15 § 2 protects certain rights from a derogation. According to the text of Article 15 § 2, these are: Article 2 (the right to life), except in respect of deaths resulting from lawful acts of war; Article 3 (the prohibition of torture and other forms of ill-treatment); Article 4 § 1 (the prohibition of slavery or servitude); and Article 7 (no punishment without law).

26. Three of the additional protocols to the Convention also contain clauses which prohibit derogation from certain of the rights contained in them. These are Protocol No. 6 (the abolition of the death penalty in time of peace and limiting the death penalty in time of war), Protocol No. 7 (the *ne bis in idem* principle only, as contained in Article 4 of that protocol) and Protocol No. 13 (the complete abolition of the death penalty).[5]

27. The effect of Article 15 § 2 (and the corresponding non-derogation clauses in Protocol Nos. 6, 7 and 13) is that the rights to which they refer continue to apply during any time of war or public emergency, irrespective of any derogation made by a Contracting State.

28. In respect of Articles 2 and 7 of the Convention, the exceptions already contained in those rights will also continue to apply.

29. Thus as regards Article 2, any deprivation of life will not be in contravention of the article if it results from the use of force which is no more than absolutely necessary in the circumstances set out in Article 2 § 2 (a)-(c) (the defence of any person from unlawful violence, to effect a lawful arrest or prevent escape of a person lawfully detained, action lawfully taken for the purpose of quelling a riot or insurrection). Article 15 § 2 adds the additional exception that the right to life will not be violated if the death results from a lawful act of war.

30. Equally, as regards Article 7, the prohibition on no punishment without law is subject to the provisions of Article 7 § 2, namely that the article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

5. Article 3 of Protocol No. 6, Article 4 § 3 of Protocol No. 7, and Article 2 of Protocol No. 13.

IV. Article 15 § 3: the notification requirements

Article 15 § 3 of the Convention

"...

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 therefore. 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."

31. The primary purpose of informing the Secretary General is that the derogation becomes public. A further purpose is that the Convention is a system of collective enforcement and it is through the Secretary General that the other Contracting States are informed of the derogation: by Resolution 56(16) of the Committee of Ministers, any information transmitted to the Secretary General in pursuance of Article 15 § 3 must be communicated by him as soon as possible to the other Contracting States (*Greece v. the United Kingdom*, Commission report, § 158)

32. In the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent State (*Cyprus v. Turkey*, Commission report of 4 October 1983, §§ 66-68).

33. The requirement to notify the Secretary General of the measures taken and the reasons therefor is usually met by writing a letter and attaching copies of the legal texts under which the emergency measures will be taken, with an explanation of their purpose (*Lawless v. Ireland (no. 3)*, § 47). If copies of all relevant measures are not provided, the requirement will not be met (the "*Greek case*", Commission report, § 81(1) and (2)).

34. In the case of *Greece v. the United Kingdom*, the Commission found that it was clear from the wording of Article 15 § 3 that the notification did not need to be made before the measure in question had been introduced but also that the wording of this provision did not give guidance either as to the time within which the notification must be made or as to the extent of the information to be furnished to the Secretary General. The Commission considered that it was for the State concerned to notify the measures in question without any unavoidable delay together with sufficient information concerning them to enable the other High Contracting Parties to appreciate the nature and extent of the derogation which the measures involved. In that case, the three-month period between the taking of the derogating measure and its notification had been too long and could not be justified by administrative delays resulting from the alleged emergency. The same was true for the notification of certain measures four months after they were taken in the "*Greek case*" (Commission report, § 81(3)). On the contrary, the Court found that notification twelve days after the measures entered into force was sufficient (*Lawless v. Ireland (no. 3)*, § 47).

35. The question of whether a notification by a State complies with the formal requirements provided by Article 15 § 3 will be examined by the Court *motu proprio* even if it has not been contested by any of the other parties (*Aksoy v. Turkey*, §§ 85-86).

36. The Court has also found that Article 15 § 3 implies a requirement of permanent review of the need for emergency measures (*Brannigan and McBride v. the United Kingdom*, § 54).

37. Finally, when the derogation is withdrawn (in compliance with the last sentence of Article 15 § 3), in any case concerning measures taken after the withdrawal of the derogation, the Court will examine the case on the basis that the relevant articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account

being taken of the background circumstances of the case. It is for the Court to determine the significance to be attached to those circumstances and to ascertain whether the balance struck complied with the applicable provisions of the relevant article, in the light of their particular wording and the article's overall object and purpose (*Brogan and Others v. the United Kingdom*, § 48, in respect of Article 5).

List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights ("the Commission").

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

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The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties.

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