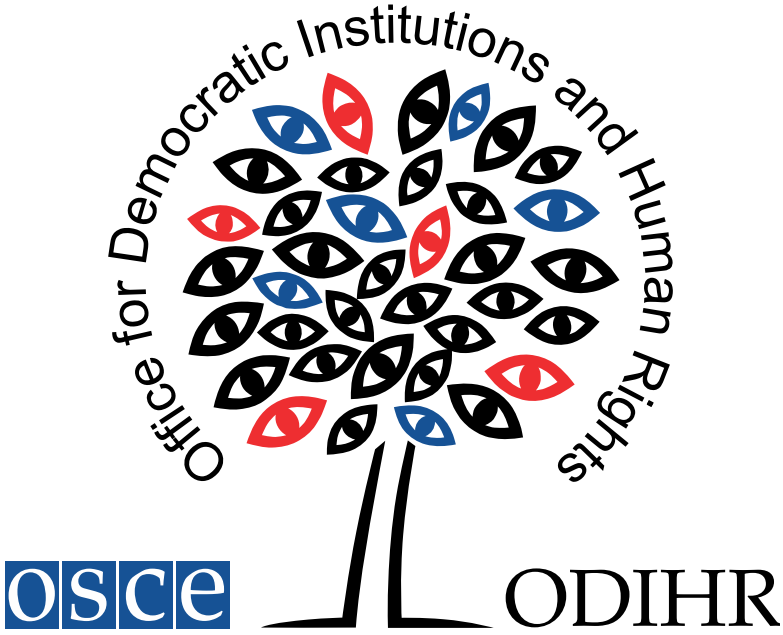
Office for Democratic Institutions and Human Rights

FAIR TRIAL RIGHTS DURING STATES OF CONFLICT AND EMERGENCY

Expert Meeting
Warsaw, Poland
27-28 October 2016

OSCE/ODIHR Meeting Report



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This report should not be interpreted as comprising official OSCE recommendations based on a consensus decision, an opinion of the OSCE Office for Democratic Institutions and Human Rights or of any particular OSCE participating State. The content of this report reflects opinions expressed by participants in the Expert Meeting on Fair trial rights during states of conflict and emergency which took place in Warsaw, Poland on 27 and 28 October 2016.

I. EXECUTIVE SUMMARY

Throughout the OSCE region, an erosion of fair trial standards has been observed as a result of excessive recourse to states of emergency or emergency laws to handle security threats. This trend is often accompanied by a reinforcement of the power and role of the executive to the detriment of the legislative and judiciary. However, the functioning democratic institutions and the rule of law represent the best way to counteract security threats. To the contrary, the weakening of guarantees and the failure by States to secure adequate and functioning democratic institutions may in themselves constitute a breeding ground for a range of threats. The OSCE's comprehensive concept of security rests on the full respect for human rights and fundamental freedoms, democracy and the rule of law. With this in mind, and in light of participating States' commitments to fair trial guarantees and limited recourse to derogations from human rights obligations (Copenhagen and Moscow Documents), Office for Democratic Institutions and Human Rights (hereinafter ODIHR) convened an expert meeting in Warsaw on 27-28 October 2016 on Fair Trial during States of Conflict and Emergency. Bringing together participants from a range of professional and academic disciplines with expertise in the field of human rights, fair trial and emergencies (see Annex 3), the expert meeting sought to address the worrying trend of States curtailing individuals' enjoyment of fair trial standards either as a result of an excessive recourse to states of emergency or as a consequence of other forms of restrictions of fair trial guarantees, short of an accompanying derogation, triggered by threats to national security.

Prompted by issues identified in a background paper distributed ahead of the meeting (Annex 1), the meeting agenda (Annex 2) comprised four sessions on: (1) derogations during states of conflict and emergency; (2) comparative country-context experiences and responses to derogations; (3) fair trial rights during states of conflict and emergency; and (4) the rule of law and the role of justice sector actors during states of conflict and emergency. The meeting concluded with discussion of possible action that might be taken by ODIHR to ensure participating States' compliance with formal conditions and substantive requirements in respect to derogations from human rights obligations, particularly as this concerns the right to a fair trial and the administration of justice.

This report elaborates further on the rationale and objectives of the expert meeting. It provides a summary of the meeting's discussions on each of the key issues addressed at the meeting, as well as on the four case study countries, and sets out the proposals made by expert participants for action by ODIHR. Overall, expert participants all concurred that the OSCE Region is witnessing a dangerous shift from a situation where authorities were asked to provide security so that people could enjoy their rights, to a situation where people's rights are being restricted in order for authorities to provide security. The provision of security, in other words, becomes the authorities' ultimate goal and not just a means to achieve the fulfillment of individual rights and freedoms.

II. INTRODUCTION AND BACKGROUND

OSCE participating States have solemnly declared that fair trial guarantees are among those elements of justice that are "essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings", including by ensuring "the independence of judges and the impartial operation of the public judicial service" (Copenhagen and Moscow Documents). They have similarly confirmed that any derogation from human rights obligations during a state of emergency "is justified only by the most exceptional and grave circumstances; must remain strictly within the limits provided for by international law […] especially with respect to rights from which there can be no derogation", and that recourse to states of

emergency "may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms". Notwithstanding these commitments, an erosion of fair trial standards can be observed throughout the OSCE region, independently of or as a result of excessive recourse to states of emergency. Exceptional circumstances, such as the fight against terrorism and the suppression of various forms of threats, including those resulting from unprecedented migration flows, the raise of extremisms and attempts to overturn established institutions, are put forward by OSCE participating States as the most common arguments to justify the formal derogation from or the restriction of fair trial guarantees.

As set out in Article 28.10 of the OSCE Moscow Document, "when a state of public emergency is declared […] as well as of any derogation is made from the State's international human rights obligations", the State has an obligation to notify OSCE Institutions of such decision. ODIHR as the main OSCE human rights institution therefore plays an important role in assisting participating States in implementing human dimension commitments, including with respect to fair trial rights.

A. Meeting objectives and participants' profiles

ODIHR convened an expert meeting in Warsaw on 27-28 October 2016 on Fair Trial during States of Conflict and Emergency. The meeting built on ODIHR's extensive experience and expertise on fair trial rights, specifically as they relate to criminal justice reform and established methodology on trial monitoring. ODIHR's seminal publications, *Trial Monitoring: A Reference Manual for Practitioners* and *Legal Digest of International Fair Trial Rights* (both published in 2012) are used widely throughout the OSCE region.

The expert meeting intended to address the worrying trend of States curtailing individuals' enjoyment of fair trial standards either as a result of an excessive recourse to states of emergency or as a consequence of other forms of restrictions of fair trial guarantees, short of an accompanying derogation, triggered by threats to national security.

This expert meeting aimed to:

- Highlight challenges and exchange good practices related to fair trial rights during states of conflict or emergency;
- Raise awareness of international fair trial standards and significant implications experienced during states of conflict or emergency;
- Strengthen networks and horizontal exchange of information across the OSCE region; and
- Consider ways in which ODIHR could support States and civil society in this field.

To achieve the abovementioned objectives, ODIHR adopted a participatory and comparative approach to the meeting. Participants, (23 in total, 12 female and 11 male)_were selected among a wide range of academics and legal professionals with a specific expertise in the field of human rights, fair trial and emergencies. Furthermore, a comparative approach to the discussion was followed and four OSCE countries, namely France, Turkey, United Kingdom and Ukraine were selected as case studies. Whereas states of emergency or other forms of restrictions of fair trial guarantees are not unique to the case study countries, ODIHR choose this focus considering that their inclusion would be beneficial fo to the discussion and could generate concrete recommendations.

III. SUMMARY OF THE DISCUSSIONS

A. Derogation during states of conflict and emergency

The aim of this session was to examine the legal framework, including procedural and substantive requirements for a valid derogation from rights and relevant to State action in response to public emergencies threatening the life of the nation.

The Copenhagen Document 1990 expressly reaffirms that derogating measures must be taken in strict conformity with the procedural and substantive requirements set out in relevant international instruments by which OSCE participating States are bound (paras 25.1-25.4). The Moscow Document 1990 also makes it clear that a "*de facto* imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible" (para 28.4).

The framework allowing for derogations in states of emergency is established under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the European Convention of Human Rights (ECHR). As set out in the Background Paper annexed to this report, certain rights may not be derogated from, even in states of emergency; and derogating measures may only be taken following an official proclamation of the existence within a State of a public emergency that threatens the life of the nation, alongside notification of such derogation to the UN Secretary General (in the case of the ICCPR), the Secretary General of the Council of Europe (in the case of the ECHR) and to the OSCE (in the case of any derogation by participating States). Additional to these procedural elements are four substantive requirements for a valid derogation, namely that the derogating measures must be:

(1) adopted only during a "time of public emergency which threatens the life of the nation";
(2) limited to those "strictly required by the exigencies of the situation";
(3) "consistent with [the State's] other obligations under international law"; and
(4) in compliance with the principle of "non-discrimination on the ground of race, colour, sex, language, religion or social origin".

Noting that there are some differences between the texts of the ICCPR and ECHR concerning derogations, one of the speakers said that one should not be referring to a 'reconciliation' between the two instruments, but rather to a full implementation of obligations under both the ICCPR and ECHR, given that both Article 4 of the ICCPR and Article 15 of the ECHR require derogating measures to be consistent with a derogating State's other obligations under international law. Participants noted that jurisprudence of the European Court of Human Rights has treated the latter as requiring that derogating measures must not involve discrimination, notwithstanding that this substantive element is not expressed within Article 15 of the ECHR. By the same logic, participants noted that the difference between the list of non-derogable rights in Article 4(2) of the ICCPR and Article 15(2) of the ECHR (the latter of which is a shorter list) must be treated as obliging States that are parties to both instruments not to derogate from the combined list of non-derogable rights, albeit that this position has not been tested in jurisprudence of the UN Human Rights Committee or European Court of Human Rights. Also on the question of the list of non-derogable rights, participants noted that this list is not exhaustive, since other rights, including many, and in some cases all, elements of the right to a fair trial, must be treated as non-derogable where required to ensure the protection of expressly non-derogable rights.

As to the nature of derogations, one of the speakers also expressed that it is a common misconception that this involves the 'suspension' of rights, a term never used by the Human Rights Committee. Derogable rights never disappear, the speaker stressed, and the derogations framework simply allows for them to be narrowed as to their scope of application within the bounds of necessity and proportionality.

Participants noted a significant challenge concerning the requirement to proclaim a state of emergency, given the importance of a proclamation to: (a) ensure that there can be judicial and legislative review and oversight; (b) make the public aware of the material, territorial and temporal scope of the emergency and of measures taken in response; and (c) thereby prevent the application of *de facto* derogations or retroactive claims of state of emergency measures. Proclamations and notifications of derogation must be specific enough to achieve those ends, especially to allow effective judicial and parliamentary review, and one speaker stressed that the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR explain the nature of information to be provided. Participants observed that, at the very least, a notification of derogation should have appended to it the law under which derogating measures are implemented, provided that these are clear and precise as to their scope of application and potential impact, and explain how these measures impact on rights set out in the ICCPR and/or ECHR. Several participants expressed the view that, against this background, the recent derogations by France and Turkey fail to meet the requirements of specificity necessary under the derogations framework. In the context of France's derogation, a few speakers noted that this may have been influenced by France's reservations to Article 4(1) of the ICCPR and Article 15(1) of the ECHR. Several participants expressed the view that the Government of Turkey would have been emboldened by France's derogation in the making of its own vaguely described derogations in 2016.

Also on the question of judicial and legislative review, one speaker noted that the Human Rights Committee has, in its General Comment No 29, called for reviews at regular intervals in order to ensure that derogating measures are in place only for as long as a state of emergency threatening the life of the nation exists, and that they remain necessary and proportionate. Notwithstanding the wide margin of appreciation applied by the European Court of Human Rights, participants highlighted that the Court has emphasized the role of independent national institutions in informing whether a national emergency exists, as well as whether the implementation of derogating measures are and remain necessary and proportionate. Participants in part acknowledged the restriction on supranational supervisory bodies to deal with fact-sensitive questions, including whether there exists a state of emergency within the meaning of the derogations framework, given their lack of ability to receive and confidentially deal with classified information, which was in part credited for the European Court's approach to affording States a wide margin of appreciation.

As to the practice of States to introduce limitations to human rights and dealing with threats to national security within 'normal' legislative and policy measures, participants noted that, in practice, there may be little difference in the nature of such measures and the ones that are adopted in response to national security threats for which a state of emergency is deemed necessary. There is often little difference in the measurement of the proportionality of measures when relying on provisions of the ICCPR or ECHR providing for the qualification of rights or when relying on derogating measures in a proclaimed state of emergency. The decision of whether or not to derogate is a matter that is highly political in nature. Some States may be reluctant to formally derogate, as appears the case for the United Kingdom where formal derogations were few despite the long-standing nature of national security concerns in Northern Ireland for example. This reluctance to derogate was characterized by participants as motivated by a desire to avoid impressions at the domestic and international levels of an inability to deal with such concerns, and also due to a desire to avoid the guarantees and potential supranational review that are brought into play under the ICCPR and ECHR when the derogations framework is invoked. By not invoking recourse to derogations, measures to deal with national security may avoid international scrutiny.

The latter approach is dangerous and a trend can be observed towards "the normalization" of emergency measures over time, with countries resorting more and more to emergency

legislation outside the "derogations framework". While state of emergency allows only temporary derogations from rights, i.e. only so long as the emergency exists and to the extent that derogating measures remain necessary to deal with such emergency, the implementation of emergency measures is oftentimes prolonged way beyond the abovementioned parameters. This is apparent in many countries in the context of measures adopted to deal with the threat of terrorism. A further practical problem with this approach is the requirement for individual victims to separately pursue claims of violations, whereas challenges to the validity of derogating measures may be capable of dealing with the measures as a whole rather than with their impact on individuals in each case. As to why France, Turkey and Ukraine recently derogated, speakers posited that this may have been motivated by the need to emphasize the existence and continuation of states of emergency, for the purpose of influencing public opinion and potentially also for seeking to avoid or diminish calls for accountability of public institutions. The anticipated derogation of the United Kingdom concerning activities of British armed forces abroad is an example of the latter, even if, one speaker described it, as a likely ineffective mean of preventing accountability. The derogations by Ukraine seem to infer that Ukrainian authorities no longer have the capacity, and thus arguably the responsibility, to guarantee rights within occupied territories.

Where derogations are made, participants noted that it takes time before the supranational supervisory mechanisms of the Human Rights Committee and European Court of Human Rights are able to review the legitimacy of derogations and measures adopted under them. Whether in response to individual complaints or, in the case of the Human Rights Committee, in response to periodic reporting obligations under the ICCPR. Several participants therefore urged that the political arms of intergovernmental organizations, including within the OSCE, should pay greater attention to such questions.

B. Fair trial rights during states of conflict and emergency

Although the bulk of fair trial rights are not expressly included in the list of non-derogable rights under the ICCPR and ECHR, "the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights" (Siracusa Principles, para 70). The Background Paper annexed to this report notes that the Human Rights Committee has explained, in this context, that guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Added to this, deviation from certain fundamental principles of fair trial is prohibited at all times, even in a state of emergency. Additional to full adherence with fair trial rights where this is needed to ensure the protection of non-derogable rights, and the prohibition against deviation from certain fundamental principles of fair trial, there are constraints as to the extent to which other fair trial rights may be limited in crisis situations involving national security. Generally speaking, this requires that the encroachment on full enjoyment of such rights must be necessary and proportionate and must not undermine the essence of fairness in the proceedings. With these parameters in mind, the aim of this session was to consider the boundaries applicable to derogations impacting on the right to a fair trial.

This session began with experts recalling certain features of fair trial rights: (1) their particularly complex nature and combination of various guarantees, aspects of which are treated differently, e.g. the absolute nature of the requirement for trial by an independent, impartial and competent tribunal established by law, contrasted with the facts-dependent right to trial without unreasonable delay; (2) the temporal application of rights beyond the trial itself, most especially to pre-trial phases but also to issues of subsequent appeal and review; (3) the extent of their application in states of emergency; and (4) the long-lasting consequences of any

violation of fair trial rights, particularly where this has involved an uncorrected miscarriage of justice and consequent sentence of imprisonment or imposition of the death penalty.

In the context of derogations from the right to a fair trial, one of the speakers suggested that the complex nature of fair trial rights, including the non-derogable and/or absolute nature of aspects of fair trial rights, suggests that an even higher level of specificity is required in the proclamation and notification process. One speaker noted that Turkey's notice of derogation under the ICCPR stands as one of only two known examples of a purported derogation from Article 14 (the other being under the recent derogations by Ukraine). The vague language of the said notice – indicating that derogating measures "may" be taken regarding Article 14 of the ICCPR – is far from meeting the requirements for a valid derogation, let alone the need to be more specific in the context of any derogation from fair trial rights. Ukraine's derogation from Article 14 of the ICCPR and Article 6 of the ECHR, while more specific than that by Turkey, also fails to describe how derogating measures impact on fair trial rights. Another speaker took the view that the European Court of Human Rights would not accept a derogation from fair trial rights under Article 6 as being valid. A participant suggested that a solution might be to take a pilot case to the European Court to test this.

Concerning the situation in Turkey, participants recalled that access to a lawyer is restricted by the measures adopted in the country. In the context of the right to access to a lawyer, participants noted that the status of this feature of fair trial rights was not entirely clear. The Human Rights Committee's General Comment on states of emergency emphasises the requirement of non-deviation from fundamental principles of fair trial, and it would be hard for anyone to contend that the right to a lawyer is not fundamental to a fair trial, this having also been identified in the Siracusa Principles as a feature of fair trial rights that must always be respected. That said, participants noted that laws and practices restricting an accused's access to a lawyer have been extensive, without resort to formal derogation, including in the context of the European Court of Human Rights Grand Chamber decision in *Ibrahim v United Kingdom*, in which withholding access to a lawyer on national security grounds during interrogation did not prevent the ability to rely on evidence obtained during the interrogation. One speaker described that as highly problematic since the exclusion of legal representation from the interrogation process prevents an external assessment of the legitimacy of the interrogation, including to guard against improper threats of prosecution used as a 'bargaining' tool to elicit information about others. Another speaker also noted the challenges posed by the *Ibrahim* decision, recalling that fair trial restrictions on national security grounds can never go so far as to extinguish the overarching right to fairness in a trial. Participants recalled that the European Union has recently adopted an EU Directive setting out when restrictions to the right to a lawyer may be permissible.

As to the right to adequate preparation of a defence through disclosure of information, one speaker noted that the European Court of Human Rights has accepted the use of special advocates as a means of protecting classified information through participation of special advocates in closed material proceedings. The same speaker emphasized that this does not go so far as to enable authorities to deny access to information as to the nature of the case against a person, since this would go to the essence of the right to a fair trial by preventing the person from answering the case. Participants also noted that several practical impediments exist in the effective functioning of special advocates, e.g. the inability of special advocates to seek further instructions after accessing non-redacted files, these not having been considered by the European Court. They further suggested that it was key in such situations to consider what safeguards are in place to protect against the improper recourse to classified information and that it is insufficient to simply rely on a trial judge to make such determinations alone, including because it will be difficult for a finder of fact to 'un-see' intelligence information to which they have been privy when then making a determination in the case. Participants recommended that a good practice to guard against unprofessional or wilful misinterpretation of informant

evidence or in the making of transcripts from surveillance recordings is to offer the defence access to the primary source, especially when such information comes from a foreign source and has been translated.

The normalization of restrictions to fair trial rights in situations outside declared states of emergency was noted by several participants. One speaker noted, for example, that there has been a trend towards moving away from criminal proceedings to administrative action on security grounds through which restrictions may be imposed on the right to liberty, freedom of movement and association of persons, amongst other things, with lower standards of proof applicable and with potentially less vigorous judicial scrutiny. Participants therefore stressed that strict review and clear opinions as to the need for respect of fair trial rights in non-emergency situations should be insisted upon. Participants therefore discussed ways to embolden in these circumstances supranational mechanisms to undertake close scrutiny.

One speaker further suggested that one of the solutions, at least when a state of emergency is proclaimed, is to consider what is strictly necessary to respond to the emergency. For example, while it could be envisaged that administrative detention as a means of detaining persons short of being charged might be acceptable during a temporally-restricted state of emergency, it was doubted by one participant that proceeding with a trial in an emergency situation would be appropriate. Also on the question of trial, the likely holding of mass trials in Turkey and whether such mass trials can ever guarantee fairness for each defendant, including through a proper defence was raised by a few speakers as a matter of deep concern.

C. Country contexts

Working groups and plenary sessions considered country-specific contexts in France, Turkey, Ukraine and the United Kingdom, discussing challenges and experiences concerning states of emergency and their impact on fair trial rights, the rule of law and the administration of justice.

C.1 *France*

Since 14 November 2015, France has been in a state of emergency derogating from both the ICCPR[1] and ECHR[2]. The notice of derogation under the ECHR expresses that the derogation "may involve a derogation from the obligations" under the ECHR, without explaining which measures in fact required a derogation and to what extent. The notice under the ICCPR is slightly more explicit, by referring to the possible derogation from ICCPR rights, "in particular its articles 9, 12 and 17". The state of emergency involves four derogations from the ordinary law: (1) administrative searches without prior judicial authorization; (2) curfews; (3) warrantless seizures of computer and cell phone data, subsequently struck down by the Constitutional Council[3]; and (3) restrictions on movement. In January 2016, five UN Special Procedure experts shared their concerns with the French Government as to the lack of clarity and precision of several provisions of the state or emergency and surveillance laws.

In the context of the administration of justice, one speaker suggested that emergency powers are not necessary in France, given that judges have broad powers under counter-terrorism laws, including to authorize arrest and search. The application of emergency powers in this context seems to indicate a lack of trust in the judiciary on the part of the government. Participants

[1] On 25 November 2015, the UN Secretary-General received from the French Government a notification declaring a state of emergency had been established pursuant to Decree No. 2015-1475 of 14 November 2015.
[2] On 24 November 2015, the Permanent Representation of France to the Council of Europe deposited a Note Verbale to the Secretary General.
[3] Decision from Constitutional Council adopted on the 19 February 2016.

further suggested that some actions undertaken during the state of emergency, including the high number of law enforcement agencies searches conducted in what seemed to have taken place in absence of material evidence, points to a motivation to destabilize suspects and their support networks rather than as a step towards establishing criminal culpability. Participants highlighted that some measures seem not being applied to protect national security or public order, instead to undermine effective checks and balances against the state, including through: forbidding lawyers to enter the Calais migrants' and refugees' detention centre; absence of proper chains of evidence to allow any challenge to the use of such evidence; the last-minute production of evidence at trial; and the inability of persons subject to administrative controls, such as house arrest, to be present at court hearings.

As in other countries, participants raised concerns about the speed with which emergency measures have been adopted; measures that, while meant to be temporary to deal with the emergency, run the risk of resulting in a de facto 'normalization' that has not followed a process of adequate democratic debate.

C.2 *Turkey*

Following the attempted military coup in Turkey in July 2016, the government declared and has since maintained a state of emergency, accompanied by derogations under the ICCPR[4] and ECHR[5]. The notice of derogation under the ECHR explains that "measures taken may involve derogation" from the obligations under the ECHR. The ICCPR derogation states that derogating measures "may" be taken "regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4", thus purporting to derogate from unspecified elements of the right to a fair trial. The vague language used in those derogations seems to suggest that the French precedent was used as an example to be followed.

Emergency measures allow for detained persons to be held in custody for a period of 30 days prior to being brought before a court, and allow the police to restrict access to family and legal counsel until five days after the time of arrest or detention, presenting serious risks of torture and ill-treatment whilst in detention. Extensive evidence exists to show that persons have been tortured and ill-treated during these detention periods, including through subjecting family members to abuse as a means of inducing confessions from detainees. Measures also allow for the surveillance of lawyer-client communications and the denial of counsel's access to medical records. Participants unanimously raised concern about the speed with which the list of more than 2,500 judges and lawyers said to be associated with the 'Guleinist movement' was produced, i.e. on the day after the attempted coup, with some participants suggesting that the list was already in existence and was comprised of judges and lawyers who the government considered to be acting in a manner contrary to its interests. Participants noted that the dismissal of several thousand public servants, including close to 3,500 judges, have had the effect of undermining public functions, especially the administration of justice. Participant further noted that mass trials are likely to be expected.

Many international actors voiced their concern and the Council of Europe Commissioner for Human Rights expressed "serious misgivings" about the necessity and proportionality of the derogating measures; a group UN human rights experts criticized the derogation notice under the ICCPR.. A few participants described national resistance towards the adoption of derogating measures as fairly weak, especially on the part of the Union of Bar Associations, although they

[4] On 2 of August Turkish authorities notified the Secretary-General of the United Nations of their intention to derogate to the International Covenant on Civil and Political Rights as a result of the declaration of State of Emergency.

[5] On 21 July 2016 Turkish authorities sent a notification to the CoE Secretary General communicating their intention to temporarily suspend part of the European Convention on Human Rights.

also noted that the strength and breadth of the Government's actions following the attempted coup has led many to fear the consequences of speaking out.

C.3 *Ukraine*

In June 2015, Ukraine lodged notices of derogation from the ICCPR and ECHR, which are still in place, expressed to be caused by "the annexation and temporary occupation by the Russian Federation of the integral part of Ukraine - the Autonomous Republic of Crimea and the city of Sevastopol" alongside "certain areas of the Donetsk and Luhansk oblasts of Ukraine".[6] Therefore, the Ukrainian derogation does not involve the whole of the national territory but it is geographically confined to parts of it. Also, the proclamation of a state of emergency was not made by the President of Ukraine, but by the parliament. The derogating measures included a special regime of pre-trial investigation and detention under martial law, under which Ukraine derogated from Articles 2(3), 9, 14 and 17 of the ICCPR and Articles 5, 6, 8 and 13 of the ECHR. As with Turkey, this involves derogation from the right to a fair trial. It was stated by participants that some of these measures were put in place and implemented some time before Ukraine lodged its notices of derogation under the ICCPR and ECHR.

Emergency measures include replacement of investigative judges with prosecutors in allowing for pre-charge investigative detention and administrative detention at the discretion of the security services, permitted for periods of up to 30 days without recourse to the courts. One speaker noted that the territorial scope of application of emergency measures is difficult to define due to the extent of occupation and insurgency and thus is something that has been left for determination by security services. Furthermore, the language of parliament's proclamation of a state of emergency purports to shift responsibility for human rights protection to the occupying power.[7]

Concerning the functioning of courts in parts of Ukraine, few participants stated that former Ukrainian judges in Crimea were required to take up Russian nationality in order to retain their judicial appointments, although many judges were refused permission for reappointment by Russia due to their previous appointments within the Ukrainian public service. Ukraine's judicial jurisdiction over proceedings concerning the territory of Crimea was subsequently transferred to courts in Kiev. With respect to areas of insurgency, participants stated that judicial functions have been replaced by mechanisms operating in a manner identical to equivalent mechanisms in Russia. While attempts have been made to provide judicial jurisdiction to Ukrainian courts, files confiscated or destroyed within certain areas have prevented or seriously curtailed the possibility of exercise of such jurisdiction. One speaker highlighted further challenges including the enforcement of judgments and the possibility of judges being influenced through the existence within occupied or insurgent areas of relatives or property.

C.4 *United Kingdom*

The United Kingdom has implemented emergency measures and limited or derogated from rights under the ICCPR and ECHR in response to threats of international terrorism[8] as well as

[6] Paragraph 1 and 2 of the Note verbale from the Permanent Representation of Ukraine registered at the Secretariat General on 9 June 2015 following the adoption by the Verkhovna Rada of Ukraine on the 21 May 2015 of the Resolution № 462-VIII, "On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms".

[7] In line with the derogation note quoted in footnote No. 4 above.

[8] See notice of derogation by United Kingdom under the ECHR, dated 18 December 2001.

organised terrorism connected with the affairs of Northern Ireland.[9] There is currently no proclaimed state of emergency in the UK, although the Prime Minister has announced on 4 October 2016 that the UK will derogate from the ECHR in times of armed conflict,[10] apparently in an attempt to limit the possibility of litigation against individual members of the British armed forces for alleged misconduct overseas in situations of conflict. While the details of this plan remain vague, it does not appear to include the possibility of derogation from the right to a fair trial. This planned derogations regime was said by participants to be motivated by a political commitment at the national level to denounce the ECHR and repeal the Human Rights Act.

The general lack of recourse to derogating measures by the UK to date was characterized by some participants as representing an attempt to avoid international attention and supranational judicial scrutiny. Participants voiced concerns that the UK has instead pushed the boundaries of *exceptionalism* to the very limits permitted under qualified rights in the ICCPR and ECHR, purportedly establishing exceptional measures to deal with the threat of terrorism which have over time come to be regarded by the public as 'normal', such as through investigative detention, control orders (now replaced by terrorism prevention and investigation measures) and recourse to secret evidence in closed material proceedings. Participants commented that the public, largely influenced by sensational media, struggles to accept that human rights are something that benefits all persons, instead viewing human rights as something that protects criminals and 'the other'. Participants also raised concern about the shift in adoption of security measures away from recourse to the criminal justice system in favour of administrative measures that have seen a diminished application of due process rights and overall judicial scrutiny. One speaker noted that judicial review proceedings in large part involve a 'hands-off' approach to questions involving national security, except in cases of clear irrationality.

D. Rule of law and the role of justice sector actors during states of conflict and emergency

The rule of law and the protection of human rights demand ever vigilant safeguarding and become particularly vulnerable to erosion during states of conflict and emergency. In such circumstances, states often curtail the rights and fundamental freedoms of individuals. Legal professionals, including judges, prosecutors and lawyers have a duty to safeguard and uphold human rights and the rule of law in times of crisis (*The Paris Minimum Standards of Human Rights Norms in a State of Emergency*). The legal profession plays a key role in inhibiting conduct by the political branches that exceeds permissible bounds in emergencies (*ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*). Judges have a special role in acting as a checking and oversight mechanism at the national level, a role that can only be successfully relied upon if the judiciary is independent and capable of functioning effectively. OSCE participating States have committed to respecting "the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service" and, in implementing relevant standards and commitments, to "ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice" (1991 Moscow Document, paras 19.1-19.2).

With that in mind, the aims of this session were to: consider the roles of judges, prosecutors, and lawyers in safeguarding the rule of law and human rights through fair trials in times of crisis; examine concrete examples of challenges concerning the independent and effective functioning of the judiciary as well as the individual work of judges, lawyers, and prosecutors

[9] See the notice of derogation by United Kingdom under the ECHR, dated 23 December 1988.
[10] Ministry of Defence, 'Government to protect Armed Forces from persistent legal claims in future overseas operations'.

during states of conflict and emergency; and identify early warning mechanisms and effective responses to protect this category of professionals from undue pressure, intimidation and persecution for discharging their professional duties.

In the context of action within a territory of a foreign State, this session first discussed the role of judicial actors of the territorial state, and the special considerations that apply. From a practical perspective, participants observed that this may involve action by a foreign state having the effect of displacing or preventing action by a territorial state as it is seen in parts of the Ukraine in relation to the Russian Federation intervention. Notwithstanding the practical impediments for action by the territorial state in such circumstances, participants noted that the European Court of Human Rights has held that, even where prevented from exercising authority within part of its territory, a territorial state retains responsibility to guarantee enjoyment of rights within the meaning of Article 1 of the ECHR. While practicalities reduce the scope of the exercise of jurisdiction, the territorial state must pursue legal and diplomatic means to protect the rights that are guaranteed by the Convention. Participants suggested that supranational judicial review may provide more effective means of resolving such jurisdictional issues and responsibilities, noting that the ECHR allows for inter-state claims to be made, as has been initiated in the case of Ukraine's application against Russia lodged in March 2014.

As to the work of the UN Special Rapporteur on the independence of judges and lawyers, participants noted that, following establishment of that mandate, there was early recognition of the need for priority focus to be given to the issue of justice in emergency situations. This work has identified the central role of judges and lawyers in the maintenance of the rule of law, measures taken by states to limit the administration of justice in states of emergency and the recourse by states to military justice. Notwithstanding this, participants suggested that the mandate should more holistically and in more detail consider the role of justice sector actors during states of conflict and emergency. This includes how to deal with questions of the independence and impartiality of judges appointed by an occupying power concerning their judicial functions pertaining to the territory being occupied and the longer-term consequences of derogations and limitations on the credibility of the justice system, including from the perspective of public trust in the justice system.

A significant challenge identified throughout the meeting was the extent, in times of crisis and emergency, of political interference with the administration of justice with the effect of compromising the role of judicial actors to act as safeguards against unlawful and arbitrary action and compromising the protection of judicial actors from attack. It was noted that states' political organs remain interested in preserving at least the appearance of the proper administration of justice, including: to create or preserve legitimacy for the governing power, even in the case of authoritarian regimes, by retaining mechanisms that can deliver justice; and to defer difficult political decisions to the courts, a process described as the 'judicialization of politics', the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. Motivated also by a desire to influence politically sensitive cases in which the governing power has an interest, a few speakers noted that political interference can be seen in the areas of judicial appointment, tenure, sanctions, removal, reduction or expansion of jurisdictional authority, non-implementation of unwanted rulings and reform initiatives. They suggested that contrasts can be seen, however, between states in which political competition is high (in which case there is a great interest in ensuring the independence of justice mechanisms because a ruling party may in time become an opposition party) versus states in which authoritarianism prevails (in which case judicial mechanisms are often viewed as a tool and thus there is no desire to ensure independence).

Participants further noted that, both in 'normal' times and times of crisis, various factors can undermine the effective functioning of justice mechanisms, including: disciplinary action taken

against judges, allegedly taken for the purpose of combating corruption or due to lack of professionalism or integrity, whilst actually motivated by a desire to retain 'loyal judges'; lack of knowledge and understanding by judges and lawyers of international law; the absence of security to protect judges and lawyers from physical attack and other malicious threats; lack of adequate case management systems, which may be mitigated by forms of 'electronic justice', the latter also pertinent to avoid problems caused by lost files during conflicts or other unrest; political statements directed against 'activist' judges or 'left-leaning' lawyers; the association of lawyers with the views or action of their clients; reduction of legal aid remuneration; and fear by lawyers to speak out against public misconduct, exacerbated in situations of inexperienced lawyers.

IV. RECOMMENDATIONS

Bearing in mind the mandate of ODIHR to support participating States and civil society, the meeting concluded with discussion of possible action that might be taken to ensure participating States' compliance with formal conditions and substantive requirements in respect to derogations from human rights obligations, particularly as this concerns the right to a fair trial and the administration of justice. Several concrete proposals were made for action by ODIHR:

1. Remind participating States of their commitment not to impose or continue a *de facto* state of public emergency. Solicit prompt formal notifications of derogation in the case of participating States who have declared that a state of emergency threatening the life of the nation exists within their territory;

2. Where a notification of derogation is made by a participating State, inform other participating States as well as relevant stakeholders. In the case of a derogation by a State party to both the ICCPR and ECHR, state should ensure that a proper notice of derogation is made under both instruments;

3. When adopting a state of emergency, participating States shall ensure that:
    a) The formal requirements of that framework, especially in regard to the need for transparency and specificity are met; and
    b) The substantive requirement not to derogate from certain non-derogable rights, including the right to a fair trial is also met;

4. Monitor the implementation of derogating measures adopted by participating States, especially with a view to:
    a) Ensuring that the geographical scope of derogating measures is and remains necessary;
    b) Ensuring that each derogating measure is and remains necessary and proportionate;
    c) Ensuring the existence and operation of appropriate national checks and balances, including through the monitoring of judicial scrutiny of derogating measures with a view to guarantee that they are and remain necessary and proportionate;
    d) Ensuring the regular review of the derogation in order to guarantee that derogating measures are in place only for as long as a state of emergency threatening the life of the nation exists and that the measures adopted remain necessary and proportionate;

5. Propose and develop a new OSCE commitment on upholding fair trial rights during states of conflict and emergency, the content of which may be drawn from the above recommendations as well as reinforcement of the human dimension of security;

6. Strengthen the link between the three OSCE dimensions of security, (politico-military, economic and environmental, and human), so as to ensure a holistic approach to the work of the organization on upholding fair trial rights during states of conflict and emergency. This includes, for example, considering ODIHR activities that might be appropriate in the context of states of emergency resulting from natural disasters. This also includes taking steps to ensure ODIHR's regular involvement in the OSCE's Conflict Prevention Centre;

7. Engage with OSCE Representative on Freedom of the Media to tackle the issue of professional and ethical reporting of media with a view to resist dangerous populist trends calling for state authorities to crack down on fundamental rights during states of conflict and emergency;

8. Develop and disseminate guidelines and practical measures for the guarantee of fair trial rights, the rule of law and the effective administration of justice in states of conflict and emergency, including with respect to the role of national and international mechanisms to allow for effective legislative and judicial oversight;

9. Consider the deployment of trial observation missions to participating States within which a state of emergency has been proclaimed with a view to ensuring the guarantee of fair trial rights, the rule of law and the effective administration of justice in states of conflict and emergency;

10. Assist civil society organizations within participating States in which a derogation has been made to monitor the implementation of derogating measures, including with respect to the elements identified in Recommendation 4 above.

V. ANNEXES

1. Background paper

FAIR TRIAL RIGHTS DURING STATES OF CONFLICT AND EMERGENCY

Expert Meeting -27-28 October 2016

ODIHR Warsaw, Poland

Background Paper

Introduction

OSCE participating States have solemnly declared that fair trial guarantees are among those elements of justice that are "essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings",[1] including by ensuring "the independence of judges and the impartial operation of the public judicial service".[2] They have similarly confirmed that any derogation from human rights obligations during a state of emergency "must remain strictly within the limits provided for by international law… especially with respect to rights from which there can be no derogation",[3] and that recourse to states of emergency "may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms".[4]

Notwithstanding these commitments, an erosion of fair trial standards can be observed throughout the OSCE region, independently of or as a result of excessive recourse to states of emergency. Exceptional circumstances, such as the fight against terrorism and the suppression of various forms of threats, including attempts to overturn established institutions, are put forward by OSCE participating States as the most common arguments to justify the formal derogation from or the *de facto* restriction of fair trial guarantees.

The expert meeting will aim at:

- Raising awareness of international fair trial standards and significant implications experienced during states of conflict or emergency;
- Highlighting challenges and exchange of good practices related to fair trial rights during states of conflict or emergency;
- Providing a forum to discuss concrete examples, raise concern, and explore lessons learned;
- Strengthening networks and horizontal exchange of information across the OSCE region; and
- Informing OSCE/ODIHR's support to participating States and civil society in this field.

Session 1: Derogations during states of conflict and emergency

The Copenhagen Document 1990 expressly reaffirms that derogating measures must be taken in strict conformity with the procedural and substantive requirements set out in relevant international instruments by which OSCE participating States are bound.[5] The Moscow Document 1990 also makes it clear that a "*de facto* imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible".[6] With that in mind, the aim of this session is to:

- Examine the procedural and substantive requirements for a valid derogation from rights in a state of emergency threatening the life of the nation

Procedural conditions for derogations in times of emergency threatening the life of the nation

1. *Certain rights may not be subject to derogation*

   Articles 4(2) of the ICCPR and 15(2) of the ECHR list provisions of each instrument that may never be subject to derogation, even in states of emergency. Although the right to a fair trial is not included in these lists, it is noted below (under Session 2) that, even in states of emergency, full adherence with fair trial rights is required where this is needed to ensure the protection of non-derogable rights and that deviation from certain fundamental principles of fair trial is prohibited at all times.

2. *Formal proclamation and notice of derogation*

   Articles 4(1) and (3) of the ICCPR and 15(1) and (3) of the ECHR require a derogating State to officially proclaim the existence within its territory of a public emergency that threatens the life of the nation and to notify the Secretary General of the UN and Council of Europe respectively of its derogation. The UN Human Rights Committee has spoken of the need for such notification to provide full information about the derogating measures and of the reasons for them.[7] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights further call for information on: (a) the provisions of the ICCPR from which the State has derogated; (b) a copy of the proclamation of emergency, together with accompanying laws and decrees allowing for an understanding of the scope of the derogation; (c) the effective of the state of emergency and the period for which it has been proclaimed; (d) an explanation of the reasons for the decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and (e) a brief description of the anticipated effect of the derogating measures on ICCPR rights.[8]

Substantive requirements

Article 4(1) of the ICCPR sets out four substantive requirements applicable to the adoption of measures that derogate from the ICCPR, reflected in Articles 14, 15(1) and 53 of the ECHR:

1. *The derogating measures must be ones that are adopted during a "time of public emergency which threatens the life of the nation".*

   The UN Human Rights Committee has characterised such an emergency as being of an exceptional nature.[9] Not every disturbance or catastrophe qualifies as such and the Committee has commented that, even during an armed conflict, measures derogating from the ICCPR are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.[10] Interpreting Article 15 of the ECHR, the European Court

of Human Rights has identified four criteria to determine whether such a situation exists (mirroring various aspects of the Human Rights Committee's General Comment 29, and the Siracusa Principles): (i) the situation in question should be a crisis or emergency that is actual or imminent; (ii) it must be exceptional, such that 'normal' measures are plainly inadequate; (iii) it must threaten the continuance of the organised life of the community; and (iv) it must affect the entire population of the State which is taking the derogating measures.[11] On the latter point, it is now accepted that an emergency threatening the life of a nation might only materially affect one part of the nation at the time of the emergency.[12]

In light of the Committee's repeated emphasis upon the exceptional and temporary nature of derogating measures, which may continue only as long as the life of the nation concerned is actually or imminently threatened, it is important for a derogating State to continually review the situation faced by it to ensure that the derogation lasts only as long as the state of emergency exists.[13] The Siracusa Principles call for such review to be independent and undertaken by the legislature of the State party concerned.[14] The European Court of Human Rights has also interpreted Article 15(3) of the ECHR as implying an obligation to keep derogating measures under permanent review so as to ensure that there continues to be a need for emergency measures.[15] It should in this context also be recalled that General Comment 29 of the Human Rights Committee declares that the restoration of a state of normalcy, where full respect for the provisions of the ICCPR can again be secured, must be the predominant objective of a derogating State.[16]

Relevant to this and the following substantive condition for derogations, it should be noted that there is a marked difference in the approaches of the Human Rights Committee and the European Court of Human Rights as to the appropriate level of scrutiny of States' decisions. Dating back to the first recourse to Article 15 of the ECHR by Greece, the European Court has taken the view that a wide margin of appreciation must be afforded to States in determining whether a state of emergency exists, and that it should do no more than proclaim whether a government's decision is 'on the margin' of the powers conferred by Article 15. The Court has explained that: "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".[17] In contrast, the Human Rights Committee has taken the view that compliance with all aspects of Article 4 of the ICCPR is a matter in respect of which it has final say.[18]

2. *The derogating measures must be limited to those "strictly required by the exigencies of the situation".*

This condition incorporates the elements of necessity and proportionality of derogating measures which, according to the Human Rights Committee, "establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation".[19] It should be noted that derogating measures will not be deemed necessary where the same result could be achieved through the use of limiting provisions found in the applicable treaty.[20] When examining Israel's derogations from the ICCPR, for example, the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism explained that: "…recourse to derogations under article 4 must be temporary and exceptional in nature, and that the enunciation of certain rights within the International Covenant on Civil and Political Rights already

provide for the proportionate limitation of rights as prescribed by law and necessary for the protection of national security or public order…".[21]

3. *The derogating measures must not be "inconsistent with [the State's] other obligations under international law".*

   This principle is reinforced by Article 5(2) of the ICCPR and Article 53 of the ECHR, according to which there may be no restriction upon or derogation from any fundamental rights recognised in other instruments.

4. *Such measures must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".*

   In contrast to Article 4 of the ICCPR, Article 15 of the ECHR does not make specific mention of the need for derogating measures to be non-discriminatory. Notwithstanding, States derogating from the ECHR are bound by the general prohibition against discrimination in Article 14 of the Convention; they may not derogate from human rights in a manner that is inconsistent with other international treaties, as made clear by Article 53 of the ECHR; nor may they derogate from the customary international law principles of non-discrimination.

Session 2: Country-contexts and responses to derogations

The session builds on the previous one and provides examples from countries, including but not limited to: France, Tunisia, Turkey, United Kingdom and Ukraine. In order to provide context for the discussions participants are invited to identify and discuss recent challenges and experiences concerning derogations in states of emergency.

France

On 13 November 2015, large-scale terrorist attacks took place in the Paris region, prompting the Government to declare a state of emergency on 14 November 2015.[22] Considering that the terrorist threat in France was of a lasting nature, the Government took measures it deemed necessary to prevent the commission of further terrorist attacks. In a derogation under Article 15 of the European Convention on Human Rights (ECHR), it expressed that this "may involve a derogation from the obligations" under the ECHR, without explaining which measures in fact required a derogation and to what extent.[23] Its notice of derogation under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) was slightly more explicit, by referring to the possible derogation from ICCPR rights, "in particular its articles 9, 12 and 17".[24] In January 2016, five UN Special Procedure experts shared their concerns with the French Government as to the lack of clarity and precision of several provisions of the state or emergency and surveillance laws.[25] The Constitutional Council in November and December 2015 and February 2016 declared some measures under the state of emergency to be unconstitutional, but upheld other provisions.[26] The state of emergency was most recently extended on 21 July 2016, with expanded emergency provisions, including the reinstatement of warrantless seizures of computer and cell phone data that had been struck down by the Constitutional Council in February 2016.[27] As to proposed amendments to the Constitution to allow the deprivation of nationality, which were ultimately abandoned, the Venice Commission of the Council of Europe in March 2016 gave an opinion that this was not *per se* against international standards, but that recourse to such measures would have to respect fair trial standards and proportionality.[28]

The right to a fair trial is not explicitly invoked as being derogated from under the ECHR derogation notice, although the ICCPR notice of derogation mentions certain articles 'in particular', without identifying Article 14 of the Covenant. It remains unclear whether the emergency measures will be impacted on the full enjoyment of fair trial rights, such as proper access to judicial review or other applications for remedial action, and thus whether such restrictions are to be treated as permissible, necessary and proportionate.

Tunisia

Two recent states of emergency have been declared in Tunisia: during the popular uprising of 14 January 2011, which was lifted in March 2014; and on 5 July 2015 by reason of "dangers threatening the country", following attacks on foreign tourists. In neither case, however, were the states of emergency accompanied by notices of derogation under Article 4 of the ICCPR. The current state of emergency instead relies on the right of the President "in the event of imminent danger threatening the nation's institutions, or the security or independence of the country" to "take any measures necessitated by such exceptional circumstances".[29] By not derogating from the ICCPR, Tunisia has thereby restricted itself to imposing emergency measures that must be compatible with the qualifications set out within each of the relevant human rights provisions of the ICCPR. As this concerns the right to a fair trial, concerns have been raised about the broad jurisdiction of the Tunisian military justice system, which extends to cases of gross human rights violations committed by members of the military as well as by law enforcement officials.[30] In his report in 2012, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recommended that Tunisian authorities should "ensure that the jurisdiction of military tribunals is limited to military personnel who have committed military offences".[31]

Turkey

Following an attempted coup on the night of 15-16 July 2016, elements of Turkey's military allegedly linked to the 'Gulenist movement' unsuccessfully attempted a coup to overthrow the established Government. Based on the coup attempt and its aftermath, together with other terrorist acts, the Government declared a state of emergency on 20 July 2016, which it deemed to amount to a threat to the life of the nation within the meaning of Article 15 of the ECHR.[32] A formal notification to the Council of Europe was made the following day, in which it explained that "measures taken may involve derogation" from the obligations under the ECHR.[33] A notice of derogation under Article 4 of the ICCPR was filed with the United Nations the same day, in which it was stated that derogating measures "may" be taken "regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4".[34] The Council of Europe Commissioner for Human Rights expressed "serious misgivings" about the necessity and proportionality of the derogating measures.[35] By and large, the Government of Turkey was criticized for its reaction, described by some as appearing to go far beyond the holding to account of those involved in attempting to overthrow it, including what was described as appearing to be "a wholesale attack on the judiciary" seen as endangering "the deepest foundations of the separation of powers and the rule of law".[36] A group of 22 UN human rights experts similarly criticized the derogation notice under the ICCPR, including by emphasizing that "the Government has a legal obligation to limit such measures to those that are strictly required by the needs of the situation".[37] The Turkish Constitution states that "no action can be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.[38]" On the basis of such provision a recent decision of the Constitutional Court declared that domestic courts had no jurisdiction to review whether such emergency measures were required by the exigencies of the situation.[39]

Of the comparative examples outlined in this synopsis, this stands as the only express derogation from the right to fair trial under Article 14 of the ICCPR, other than by Ukraine (see below).

Ukraine

In June 2015, Ukraine lodged notices of derogation from the ICCPR and ECHR, expressed to be caused by the annexation and temporary occupation by the Russian Federation of Crimea and the city of Sevastopol, treated by Ukraine as constituting a public emergency threatening the life of the nation within the meaning of Article 4 of the ICCPR and Article 15 of the ECHR. The derogating measures included a special regime of pre-trial investigation and detention under martial law, under which Ukraine derogated from Articles 2(3), 9, 14 and 17 of the ICCPR;[40] and Articles 5, 6, 8 and 13 of the ECHR.[41] As with Turkey, this involves a derogation from the right to a fair trial under Articles 14 of the ICCPR and 6 of the ECHR. While certainly more specific than the derogations by France and Turkey mentioned above, the notice remains vague as to precisely how the derogating measures will impact on fair trial rights, although the implication is that recourse will be, or is being made, to military courts.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom has implemented emergency measures and limited or derogated from rights under the ICCPR and ECHR in response to both threats of international terrorism post September 11, 2001,[42] and national threats, which it has described as "campaigns of organised terrorism connected with the affairs of Northern Ireland".[43] Most measures have involved derogations from the right to liberty, involving extended powers to arrest or detain and to extended periods of detention without charge. In the absence of derogations, and also applicable to judicial review and oversight of derogating measures, restrictions on fair trial rights have been implemented over the years. In the context of the former 'control orders' regime under the Prevention of Terrorism Act 2005, for example, special measures were taken aimed at preserving the security of sensitive, often classified, information during the course of hearings related to such orders. The UK Prime Minister has recently announced that the UK will derogate from the ECHR in times of armed conflict,[44] apparently in an attempt to limit the possibility of litigation against individual members of the British armed forces for alleged misconduct overseas in situations of conflict. While the details of this plan remain vague, it does not appear to include derogation from the right to a fair trial.

Ensuring compliance with the substantive conditions for a valid derogation

National mechanisms

Under the Copenhagen Document 1990, OSCE participating States have confirmed that any derogation from human rights obligations during a state of emergency "must remain strictly within the limits provided for by international law… especially with respect to rights from which there can be no derogation".[45] The Moscow Document 1990 reiterates that derogating measures "will neither go further nor remain in force longer than strictly required by the exigencies of the situation",[46] and includes a commitment by OSCE participating States to "endeavor to provide in their law for control over the regulations related to the state of public emergency".[47] These commitments, combined with derogating States' obligation to continually review the situation with the objective of returning to a state of normalcy (outlined above), call for the operation of national oversight mechanisms. Drawing from identified best practices in the operation and review of counter-terrorism law and practice,[48] and the role of the judiciary in situations of crisis (Session 4), such mechanisms might include:

- Annual governmental review of and reporting on the continuation or otherwise of a state of emergency threatening the life of the nation, and on the exercise of emergency measures;
- Annual independent review of the overall operation of emergency measures;
- The use of annual 'sunset clauses', requiring the renewal of emergency measures and triggering an automatic parliamentary review based on advice by parliamentary counsel as to the compatibility of the derogation and its measures with the State's international obligations;
- Judicial authority to examine the legality and legitimacy of proclamations of states of emergency and implementing legislation and to invalidate such proclamations that violate procedural and substantive requirements under international law;
- Judicial authority to require a government to withdraw corresponding derogations or other limitations on rights that are not supported by legal and legitimate grounds; and
- Attributing to civil society a formal role of national oversight, including through periodic parliamentarian review of reports issued by civil society platforms.

External mechanisms

Additional to the notification provisions in Articles 4(3) of the ICCPR and 15(3) of the ECHR, Moscow 1991 includes a commitment by OSCE participating States to immediately inform the OSCE of a decision to declare or lift a state of public emergency, as well as of any derogation made from the State's international human rights obligations.[49] When considered alongside the other commitments under Copenhagen 1990 and Moscow 1991 mentioned above, ODIHR as the main OSCE human rights institution therefore plays an important role both as a custodian of participating States' derogations and notifications of states of emergency and as an overall guardian of the OSCE commitments in the area of fair trial rights. It is notable in this regard that, although the Human Rights Committee and European Court of Human Rights have been called upon to institute formal procedures for automatic reporting and review of derogations and derogating measures,[50] no such external oversight mechanisms exist other than the continued possibility of individual claims brought before those bodies by alleged victims of violations. Should the OSCE institute such a procedure, it may need to consider the need for initial deference as to decisions concerning the existence of a state of emergency, nevertheless allowing for ex post facto review to consider whether it remains objectively reasonable to conclude that an actual or imminent threat remains. Such an initiative would also need to bear in mind that recent practice has seen a lack of adherence by derogating States with the need to provide sufficiently precise information allowing for external assessments to be made.

Furthermore, a whole array of external mechanisms exist, including but not limited to NGOs' and International Organizations' advocacy, so that OSCE participating States at times of Emergency and Conflict are duly scrutinized in respect to the legality and legitimacy of their responses as well as the impact that such responses bear on the full enjoyment of fair trial guarantees and more broadly on the upholding of their human dimension commitments.

Session 3: Fair trial rights during states of conflict and emergency

The country situations described above point to notices of derogation that, while vaguely formulated, either expressly refer to actual (Ukraine) or possible (Turkey) derogation from fair trial rights, or to possible derogation from an array of human rights, which might include the right to a fair trial (France). Legislation to deal with emergency situations in Tunisia and the United Kingdom have involved restrictions on the full enjoyment of fair trial rights, albeit without going to the extent of formally derogating from Articles 14 of the ICCPR or 6 of the ECHR. With that in mind, the aims of this session are to:

- Understand the boundaries applicable to derogations impacting on the right to a fair trial; and
- Examine the common recourse in times of crisis to military courts in the administration of justice.

Limitations on fair trial rights

Although the right to a fair trial is not included in the list of non-derogable rights under Articles 4(2) of the ICCPR and 15(2) of the ECHR, it has been made clear that "guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights".[51] The UN Human Rights Committee has explained that this means, for example, that any trial leading to the imposition of the death penalty during a state of emergency must conform to all the requirements of Article 14 of the ICCPR, since the right to life is non-derogable in its entirety.[52] Similarly, no statements or confessions obtained in violation of the non-derogable prohibition of torture and ill-treatment may be used as evidence in any proceedings covered by Article 14, including during a state of emergency,[53] except if the statement or confession is used as evidence that torture or other ill-treatment occurred.[54]

Added to this, deviation from certain fundamental principles of fair trial is prohibited at all times.[55] According to the UN Human Rights Committee, "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected", even in a state of emergency.[56] The Committee has explained that, because certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, there can be no justification for derogation from these guarantees during other emergency situations.[57] According to the Siracusa Principles, this includes the following fair trial rights applicable to any person charged with a criminal offence:

- The right to be tried by a competent, independent and impartial tribunal established by law.[58]
- The presumption of innocence and the right not to be compelled to testify against oneself or to make a confession.[59]
- The right to be informed of the charges promptly, in detail and in a language understood by the defendant.[60]
- The right to have adequate time and facilities to prepare the defence, including the right to communication confidentially with legal counsel.[61]
- The right to a lawyer of one's choice, with free legal assistance if the defendant does not have the means to pay for it.[62]
- The right to be present at the trial.[63]
- The right to obtain the attendance and examination of defence witnesses.[64]
- The right to a public hearing, save where the court orders otherwise on grounds of security, and then only so long as adequate safeguards are in place to prevent abuse.[65]
- The right to appeal to a higher court.[66]
- The prohibition against double jeopardy.[67]

The Siracusa Principles also explain that where persons are detained without charge, the need for their continued detention must be periodically considered by an independent review tribunal.[68] In its Principles and Guidelines on *habeas corpus*, the UN Working Group on Arbitrary Detention explains that the right to bring proceedings before a competent, independent and impartial tribunal to determine the lawfulness of one's detention "is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation".[69]

Additional to full adherence with fair trial rights where this is needed to ensure the protection of non-derogable rights, and the prohibition against deviation from certain fundamental principles of fair trial, there are constraints as to the extent to which other fair trial rights may be limited in crisis situations involving national security. Generally speaking, this requires that the encroachment on full enjoyment of fair trial rights must be necessary and proportionate and must not undermine the essence of fairness in the proceedings. For example:

- Although one of the central pillars of the right to a fair hearing is the open administration of justice, the press and public may be excluded from a hearing for reasons of national security, although this must be limited to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[70] This should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.[71]

- Albeit that the right to have adequate time and facilities to prepare the defence is identified above as a fundamental principle of fair trial, it has been accepted that it may be necessary in some cases to withhold information from a defendant in criminal proceedings, or a respondent in non-criminal proceedings, so as to preserve an important public interest such a national security. Measures restricting the right to disclosure must be strictly necessary and sufficiently counterbalanced by judicial procedures so that, overall, the person still receives a fair hearing.[72] Whether a person has enjoyed a fair hearing will always be fact specific, generally distinguishable between three situations.[73] The first, which is unproblematic, is where proceedings rely largely or completely on the basis of open material so that person concerned may answer the case against him or her. The second, which requires a careful evaluation to ensure that the essence of the right to a fair hearing is guaranteed, is where much of the material is closed but where the open material (or a redacted summary of the closed material) effectively conveys the thrust of the case against the person. The third situation, which will result in a violation of the right to a fair hearing, is where reliance on closed material is so great that the person is confronted by an unsubstantiated assertion that she or he can do no more than deny.

- In situations where there is extensive reliance on closed material in a trial, some States have attempted to counterbalance this through the use of special advocates (lawyers with security clearance who have access to a full, unredacted, version of the information put before a court). The European Court of Human Rights has concluded that the use of special advocates can only sufficiently counterbalance a lack of full disclosure if the person concerned is "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate".[74]

<u>Recourse to military or other exceptional courts</u>

Setting aside questions concerning the independence and effective functioning of military and other specialized courts (a general issue to be considered in Session 3), and the fair trial guarantees elaborated above, UN human rights mechanisms have treated recourse to such courts or tribunals as restricted by certain fundamental human rights obligations and guarantees, particularly in the case of jurisdiction over civilians and in respect of alleged violations of human rights.

Jurisdiction of military or exceptional courts over civilians

Although the trial of civilians by military or exceptional courts is not expressly prohibited by international law, the UN Human Rights Committee has explained that such trials must be "in full conformity with the requirements of article 14 and that its guarantees cannot be limited or

modified because of the military or special character of the court concerned".[75] There is, instead, a general presumption in favour of the trial of civilians by ordinary courts.[76] In the case of military courts and tribunals, this position is underpinned, according to the former UN Special Rapporteur on the independence of judges and lawyers, by the fact that civilians cannot commit offences of a military nature.[77] Where States are unable to demonstrate that regular civilian courts are unable to try an individual, or that other forms of special or high-security civilian courts are inadequate, the Human Rights Committee has found violation of fair trial rights under Article 14 of the ICCPR.[78]

The 2006 Decaux Principles reiterate that military courts should not have jurisdiction to try civilians and that States must, in all circumstances, ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. The Commentary to Principle 5 notes that the existence in many countries of military or special tribunals that try civilians can present serious problems for the equitable, impartial, and independent administration of justice. It opines that "[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[79]

Jurisdiction of military courts over cases involving human rights violations

The UN Human Rights Committee has expressed its concern in a large number of situations where jurisdiction has been conferred to military courts to try cases concerning allegations of human rights violations. This has in practice involved the use of military courts to put military personnel on trial, and sometimes civilians, concerning allegations that such persons have violated human rights, including allegations of torture and ill-treatment, summary executions and enforced disappearances. This has in many cases been linked to a contribution of impunity enjoyed by military personnel.[80]

The updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity establishes that the jurisdiction of military tribunals must be restricted solely to military offences committed by military personnel, to the exclusion of human rights violations, which must instead come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.[81] The Decaux Principles further provide that: "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".[82] In the context of the right of all persons to be protected against enforced disappearance, Article 16(2) of the Declaration on the Protection of all Persons from Enforced Disappearance provides that all acts of enforced disappearance "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts". In her 2013 report on military tribunals, the former UN Special Rapporteur on the independence of judges and lawyers reaffirmed that, in all circumstances concerning alleged offences involving serious human rights violations, the jurisdiction of ordinary courts should prevail over that of military courts, including when the alleged acts are said to have been committed by military personnel.[83]

Session 4: Rule of law and the role of justice sector actors during states of conflict and emergency

The rule of law and the protection of human rights demand ever vigilant safeguarding and become particularly vulnerable to erosion when countries pass through periods of crisis and strife, including states of emergency. It has been observed that: "Judges and legal practitioners frequently absorb a large brunt of stress during such times of crisis. At the same time, they play

a special role as the last line of defence against the exercise of arbitrary power by political, military and other actors."[84] With that in mind, the aims of this session are to:

- Consider the roles of judges and other justice sector actors in the safeguarding of the rule of law and of human rights through fair trials in times of crisis;
- Examine the challenges, responsibilities and safeguards concerning the independent and effective functioning of the judiciary in carrying out the fair administration of justice; and
- Identify early warning mechanisms and effective responses to protect this category of professionals from undue pressure, intimidation and prosecution for simply discharging their professional duties.

The role of the judiciary and other justice service actors in time of emergency

The Paris Minimum Standards of Human Rights Norms in a State of Emergency affirm that members of the legal profession, including judges, lawyers and prosecutors, have a duty to safeguard and uphold human rights and the rule of law in times of crisis.[85] In times of crisis, States often curtail the rights and fundamental freedoms of individuals. In such circumstances, legal professionals have a duty to ensure that rights are respected and that the rule of law and the principle of legality are guaranteed.[86] The legal profession plays a key role in guarding against abuses and inhibiting conduct by the political branches which exceeds permissible bounds in emergencies and other crises.[87]

The first-stated principle of the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis thus states:[88]

> "The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law. In times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of Law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case."

In particular, the judiciary is able to act as an oversight mechanism at the national level. As affirmed by the former UN Special Rapporteur on the independence of judges and lawyers, the competency and capacity of judges to review the executive's decision to declare an emergency is critical to preserving the rule of law:[89]

> "In the light of the tendency to abuse the state of emergency and the related restriction of rights, the Special Rapporteur considers that the courts cannot be denied the authority to question a Government's motives in declaring a state of emergency and suspending rights, or the authority to limit the measures imposed during states of emergency if such measures violate national and international legality… The Special Rapporteur welcomes legislation that stipulates that a state of emergency proclaimed by a Government or parliament must be subsequently ratified by the highest judicial body. Judicial oversight of the duration of a state of emergency in relation to the circumstances that prompted its adoption and that justify its renewal and maintenance is also essential. Judges must be able to nullify extensions of states of emergency if they do not meet legal requirements or if the circumstances that justified the adoption of the state of emergency have changed."

Prosecutors, as well as other government counsel and advisers, also play an important role in times of crisis, often complicated by the political objectives being pursued in such situations, equally often manifested in the form of pressure and expectations from the State to prosecute and advise in a manner that is consistent with those political objectives. Private counsel, especially when seeking to check the actions of the State in times of emergency, including through constitutional challenges or the representation of those negatively impacted upon by emergency measures, can become especially vulnerable to violence, threats, retaliation and other forms of pressure or arbitrary action as a consequence of undertaking their professional functions (111-113).[90]

Lawyers necessarily play a critical role in protecting the right against arbitrary detention by challenging arrests and filing writs of *habeas corpus*. They act to ensure a full and effective right to a fair trial, to challenge, where necessary, the court's independence and impartiality and to ensure that the defendants' rights are respected.[91] Lawyers also advise and represent victims of human rights violations and their relatives in criminal proceedings against alleged perpetrators of such violations and in lawsuits aimed at obtaining remedy and reparation. They play a vital role in combating impunity. Furthermore, lawyers are typically in a position to challenge before the courts national legislation that undermines basic principles of human rights and the rule of law.[92] The European Parliament has thus recognized "the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice".[93]

Independent and effective functioning of the judiciary

For the judiciary to be able to exercise its functions under the rule of law – to act as a check and balance on the other branches of government and to ensure that laws and State conduct comply with the rule of law and international human rights – members of the public must have access to fair and effective proceedings in the administration of justice. This includes their ability, in times of crises, to challenge the lawfulness of measures that limit or restrict human rights, and to obtain effective remedies for any abusive application of emergency measures.[94] To give practical effect to these functions and rights, and as a founding precept of the right to fair trial, this means that the judiciary must be independent and capable of functioning effectively.

OSCE participating States have in this regard committed to respecting "the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service" and, in implementing relevant standards and commitments, to "ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary".[95]

The former Special Rapporteur for the independence of judges and lawyers has asserted that the independence and impartiality of the judiciary are cornerstone principles of democratic societies that can be considered among those general principle of law that constitute one of the sources of public international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[96] The UN Human Rights Committee has further characterized the requirement of independence, competence and impartiality of the judiciary, within the meaning of Article 14(1) of the ICCPR, as "an absolute right that is not subject to any exception".[97]

For the judiciary to function independently, the functions and competencies of the judiciary and the executive must be clearly distinguishable.[98] The UN Human Rights Committee has affirmed that the "fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive".[99] The OSCE Legal

Digest of International Fair Trial Standards points to four main features to ensure independence of the judiciary:[100]

1. Appointment of judicial officers, so as to be sure that judicial officers are not, nor do not feel, subject to instructions from an appointing authority in their adjudicatory role.[101]

2. Security of tenure of judicial officers, pertaining to the duration of their term of office and the general principle that they should not be subject to removal. The Human Rights Committee has in this regard emphasized that: "Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary".[102]

3. The existence of adequate guarantees protecting the judiciary and its members from external pressures. If the treatment of individual judicial officers is subject to executive control without measures in place to protect the judicial officers from being influenced, this will amount to a violation of the requirements of independence.[103]

4. An outward appearance that the tribunal is independent, meaning that the mere possibility of external influence, for example by virtue of a judicial officer's concurrent roles as an officers of a tribunal and as an office holder of an executive position,[104] will be sufficient to undermine the independence of the tribunal.[105]

Concerning the second of these elements, and particularly relevant to the current situation in Turkey, Principle 5 of the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis provides that:[106]

> "In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions."

Session 5: Next steps and recommendations for further action

The final session will attempt to bring the discussion to the next step of proposing concrete action, for the OSCE and ODIHR in particular, to ensure participating States' compliance with formal conditions and substantive requirements in respect to derogation from human rights obligations, particularly as this concerns the right to a fair trial and the administration of justice.

Reference notes

(See at the end of this document)

2. Agenda

FAIR TRIAL RIGHTS DURING STATES OF CONFLICT AND EMERGENCY

Expert Meeting 27-28 October 2016

ODIHR Warsaw, Poland

AGENDA

Day 1: Thursday, 27 October

09:30 – 09:45	**Welcoming remarks by ODIHR - Introduction to the meeting** *Mr Marcin Walecki*, Democratization Department, ODIHR
09:45 – 11:15	**Session 1: Derogation during States of Conflict and Emergency** Introducer/Moderator: *Mr Johannes Heiler*, Advisor on Anti-Terrorism issues, ODIHR Speakers: *Mr Ian Seiderman*, International Commission of Jurists *Ms Angela Patrick,* Barrister
11:15 – 11:30	Coffee/Tea
11:30 – 13:00	**Session 2: Working Groups, country-contexts and Responses to derogation**
13:00 – 14:00	Lunch
14:00 – 15:45	**Session 3: Fair trial rights during States of Conflict and Emergency** Introducer/Moderator: *Ms Libby McVeigh*, Fair Trial Speakers: *Mr Stefan Trechsel*, Former ICTY Judge *Mr Christophe Marchand*, Lawyer
15:45 – 16:00	Coffee/Tea
16:00 – 17:30	**Session 3: continued - Presentations from country-contexts** Introducer/Moderator: *Ms Maria Alcidi*, Rule of law Unit, ODIHR Speakers: *Mr Dominique Tricaud,* Attorney & *Mr Christian Vigouroux,* Judge - France *Ms Aisling Reidy,* Human Rights Watch - Turkey *Mr Roman Romanov,* Renaissance - Ukraine *Ms Hayley J. Hooper* - University of Cambridge - United Kingdom

Day 2: Friday, 28 October

09:30 – 11:00	**Session 4: Rule of law and the role of justice sector actors during States of Conflict and Emergency** Introducer/Moderator: *Mr Alex Conte,* University of Sussex School of Law Speakers: *Ms Amanda Flores,* OHCHR Special Procedures Branch *Mr Roman Kuybida,* The Centre of Policy and Legal Reform

Ms Idil Elveris, Istanbul Bilgi University
Mr Ralph Wilde, University College London

11:05 – 11:15 Coffee/Tea

11:15 – 12:45 **Session 5: Next Steps and Recommendations for Further Action**
Introducer/Moderator: *Ms Michelle Brady,* Rule of law Unit, ODIHR

12:45 – 13:00 **Closing remarks by ODIHR & Lunch**

3. List of Participants

	Name	Title	Organization	Country
1	Ms Libby McVeigh	Legal and Policy Director	Fair Trials	UK
2	Ms Amanda Flores	Human Rights Officer	Special Procedures Branch - UN OHCHR	Switzerland
3	Mr Ralph Wilde	Member of the Faculty of Laws	University College London	UK
4	Mr Christian Vigouroux	Judge	State Council	France
5	Mr Ian Seiderman	Legal and Policy Director	International Commission of Jurists	UK
6	Mr Stefan Trechsel	Former ICTY Judge	ICTY	Switzerland
7	Ms Angela Patrick	Barrister	Doughty Street Chambers	UK
8	Mr Alex Conte	Reader in Human Rights Law	University of Sussex	New Zealand
9	Mr Christophe Marchand	Criminal defence attorney	Jus Cogens Law Firm	Belgium
10	Mr Dominique Tricaud	Criminal defence attorney	Tricaud-Traynard Law Firm	France
11	Mr Roman Kuybida	Deputy Head of the Board	The Centre of Policy and Legal Reform	Ukraine
12	Ms Aisling Marie Reidy	Senior Legal Advisor	Human Rights Watch	Ireland
13	Ms Idil Elveris	PHD-Associate Professor	Istanbul Bilgi University	Turkey
14	Ms Jeanne Sulzer	Senior policy advisor	Amnesty International - France	France
15	Ms Sinem Hun	Attorney	Hun Consultancy	Turkey
16	Mr Roman Romanov	Director of Human Rights and Justice Program	International Renaissance Foundation	Ukraine
17	Ms Nataliia Stupnytska	OSCE Programme Manager	OSCE Project Coordination Ukraine	Ukraine
18	Ms Barbara Davis	Deputy Head of Office	OSCE Office in Yerevan	Armenia
19	Ms Annelise Godber	Rule of Law Adviser	OSCE SMM Ukraine	Ukraine
20	Mr Lenur Kerymov	Member of the Board	Helsinki Foundation for Human Rights - Poland	Poland
21	Mr David Vaughn	Chief of Party	USAID New Justice Program	US
22	Ms Hayley J Hooper	Junior Research Fellow in Law	University of Cambridge	UK
23	Ms Maria Radziejowska	Lawyer	Polish Law firm	Poland

Reference notes from the Background Paper

[1] Copenhagen Document 1990, para 5.
[2] Copenhagen Document 1990, para 5.12.
[3] Copenhagen Document 1990, para 25.
[4] Moscow Document 1991, para 28.1.
[5] Copenhagen Document 1990, para 25.1-25.4.
[6] Moscow Document 1991, para 28.4.
[7] Human Rights Committee, General Comment 29: States of Emergency (Article 4), UN Doc **CCPR/C/21/Rev.1/Add.11 (2001), paras 5 and 16-17.**
[8] UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 45**. See also the Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency (1991)** ***American Journal of International Law*** **85(4) 717-720.**
[9] General Comment 29, op cit, para 2.
[10] General Comment 29, op cit, para 3.
[11] *Lawless v Ireland (No 3)* [1961] ECHR 2, para 28 (followed in *The Greek Case* (1969) 12 *Yearbook of the European Court of Human Rights* 1, para 153).
[12] *Ireland v United Kingdom* [1978] ECHR 1. See also *Sakik and others v Turkey* (1978) 2 EHRR 25, para 39, where the European Court of Human Rights considered a geographically restricted derogation by Turkey and held Turkey bound by the geographical restriction when it attempted to rely on the derogation to respond to acts occurring outside that area. Note that this is consistent with the view expressed in the Siracusa Principles (at para 51) that the geographic scope of any derogating measure must be such as strictly necessary to deal with the threat to the life of the nation.
[13] General Comment 29, op cit, para 2. See also the Siracusa Principles, op cit, paras 48-50.
[14] Siracusa Principles, op cit, paras 55.
[15] *Brannigan and McBride v United Kingdom* [1993] ECHR 21, para 54.
[16] General Comment 29, op cit, paras 1 and 2. See also the Siracusa Principles, op cit, para 48.
[17] *Ireland v United Kingdom* [1978] ECHR 1, para 207. See also *Aksoy v Turkey* [1996] ECHR 68, para 68.
[18] See, for example, the Concluding Observations of the Committee concerning: Bolivia, UN Doc CCPR/C/79/Add.74 (1997), para 14; Colombia, UN Doc CCPR/C/79/Add.76 (1997), para 25; the Dominican Republic, UN Doc CCPR/C/79/Add.18 (1993), para 4; Israel, UN Doc CCPR/C/79/Add.93 (1998), para 11; Lebanon, UN Doc CCPR/C/79/Add.78 (1997), para 10; Peru, UN Doc CCPR/C/79/Add.67 (1996), para 11; the United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/79/Add.55 (1995), para 23; the United Republic of Tanzania, UN Doc CCPR/C/79/Add.12 (1992), para 7; and Uruguay, UN Doc CCPR/C/79/Add.90 (1998), para 8.
[19] General Comment 29, op cit, para 6.
[20] See, for example, Human Rights Committee, Concluding Observations: Israel, UN Doc CCPR/C/79/Add.93 (1998), para 12.
[21] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/6/17/Add.4 (2007), para 10.
[22] The country did not declare state of emergency nor did it derogate to fundamental rights as a result of the killings which had previously taken place in January 2015 (Charlie Hebdo).
[23] Declaration contained in a Note Verbale from the Permanent Representation of France to the Council of Europe, dated 24 November 2015, at: http://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?_coeconventions_WAR_coeconventionsportlet_formDate=1448451789213&_coeconventions_WAR_coeconventionsportlet_searchBy=cets&_coeconventions_WAR_coeconventionsportlet_numSTE=005&_coeconventions_WAR_coeconventionsportlet_codePays=FRA&_coeconventions_WAR_coeconventionsportlet_enVigueur=true&_coeconventions_WAR_coeconventionsportlet_dateDebut=05%2F05%2F1949&_coeconventions_WAR_coeconventionsportlet_dateStatus=25%2F11%2F2015&_coeconventions_WAR_coeconventionsportlet_numArticle=15&_coeconventions_WAR_coeconventionsportlet_codeNature=.
[24] France: Notification under Article 4(3), dated 23 November 2015, at: https://treaties.un.org/doc/Publication/CN/2015/CN.703.2015-Eng.pdf.
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[26] Décision no 2015-722 DC du 26 novembre 2015, *Loi relative aux mesures de surveillance des communications électroniques internationals* (Act on surveillance measures of international electronic communications), at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-722-dc/decision-n-2015-722-dc-du-26-novembre-2015.146546.html#xtor=RSS-5; Décision no 2015-527 QPC du 22 décembre 2015, *M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence]* (House arrest in the event of a state of emergency), at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/decision-n-2015-527-qpc-du-22-decembre-2015.146719.html#xtor=RSS-5; Décision no 2016-535 QPC du 19 fevrier 2016, *Ligue*

des droits de l'homme [Police des réunions et des lieux publics dans le cadre de l'état d'urgence] (Policing of meetings and public places during a state of emergency), at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-535-qpc/decision-n-2016-535-qpc-du-19-fevrier-2016.146999.html#xtor=RSS-5; and Décision no 2016-536 QPC du 19 fevrier 2016, *Ligue des droits de l'homme [Perquisitions et saisies administratives dans le cadre de l'état d'urgence]* (Administrative searches and seizures in the event of a state of emergency), at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-536-qpc/decision-n-2016-536-qpc-du-19-fevrier-2016.146991.html#xtor=RSS-5.

[27] Prorogation de l'état d'urgence : un accord en commission mixte paritaire marqué par les apports du Sénat tendant à renforcer la lutte contre le terrorisme, at: http://www.senat.fr/presse/cp20160721a.html.

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[29] Constitution of Tunisia, Article 80(1).

[30] See, for example, International Commission of Jurists, 'Illusory Justice, Prevailing Impunity. Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia' (Geneva, 2016), pp.96-103, available at: http://www.icj.org/tunisia-illusory-justice-prevailing-impunity/.

[31] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/HRC/24/42/Add.1 (2012), para 85 (c).

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[34] Turkey: Notification under Article 4(3), dated 21 July 2016, at: https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf.

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ventions_WAR_coeconventionsportlet_dateDebutYear=1949&_coeconventions_WAR_coeconventionsportlet_dateStatus=29%2F09%2F2016&_coeconventions_WAR_coeconventionsportlet_dateStatusDay=29&_coeconventions_WAR_coeconventionsportlet_dateStatusMonth=8&_coeconventions_WAR_coeconventionsportlet_dateStatusYear=2016&_coeconventions_WAR_coeconventionsportlet_numArticle=15&_coeconventions_WAR_coeconventionsportlet_codeNature=&p_auth=svhhkOXR.

[43] E.g., see the notice of derogation by United Kingdom under the ECHR, dated 23 December 1988, at: http://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?_coeconventions_WAR_coeconventionsportlet_formDate=1475145057517&_coeconventions_WAR_coeconventionsportlet_searchBy=cets&_coeconventions_WAR_coeconventionsportlet_numSTE=005&_coeconventions_WAR_coeconventionsportlet_codePays=UK&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_dateDebut=05%2F05%2F1949&_coeconventions_WAR_coeconventionsportlet_dateDebutDay=5&_coeconventions_WAR_coeconventionsportlet_dateDebutMonth=4&_coeconventions_WAR_coeconventionsportlet_dateDebutYear=1949&_coeconventions_WAR_coeconventionsportlet_dateStatus=29%2F09%2F2016&_coeconventions_WAR_coeconventionsportlet_dateStatusDay=29&_coeconventions_WAR_coeconventionsportlet_dateStatusMonth=8&_coeconventions_WAR_coeconventionsportlet_dateStatusYear=2016&_coeconventions_WAR_coeconventionsportlet_numArticle=15&_coeconventions_WAR_coeconventionsportlet_codeNature=&p_auth=svhhkOXR.

[44] Ministry of Defence, 'Government to protect Armed Forces from persistent legal claims in future overseas operations', 4 October 2016, at: https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations.

[45] Copenhagen Document 1990, para 25.

[46] Moscow Document 1991, para 28.7.

[47] Moscow Document 1991, para 28.8.

[48] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/16/51 (2010), paras 17-22.

[49] Moscow Document 1991, para 28.10.

[50] **Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency, op cit, Guideline A(2).**

[51] Human Rights Committee, General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), para 6.

[52] General Comment 29, op cit, **para 15;** General Comment 32, op cit, para 6.

[53] General Comment 29, op cit**, paras 7 and 15;** General Comment 32, op cit, para 6.

[54] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.

[55] General Comment 29, op cit**, para 11;** General Comment 32, op cit, para 6.

[56] General Comment 29, op cit**, para 16.**

[57] General Comment 29, op cit**, para 16.**

[58] Siracusa Principles, op cit, para 70(e). See also General Comment 29, op cit**, para 16.**

[59] Siracusa Principles, op cit, para 70(g). See also: Convention against Torture, op cit, Article 15; General Comment 29, op cit**, paras 7 and 15;** General Comment 32, op cit**, paras 6 and 16;** *Jalloh v Germany* (2006) ECHR 721, para 99; *Levinta v Moldova* (2008) ECHR 1709, paras 11 and 104-105; G*äfgen v Germany* (2010) ECHR 759, paras 166-167.

[60] Siracusa Principles, op cit, para 70(g).

[61] Siracusa Principles, op cit, para 70(g).

[62] Siracusa Principles, op cit, para 70(g). Note that the European Court of Human Rights has recently accepted that temporary restrictions on the right to legal advice may be permissible if there is an urgent need to avert serious consequences for the life and physical integrity of the public: see *Ibrahim and Others v United Kingdom*, Application Nos 50541/08, 50571/08, 50573/08 and 40351/09, judgment of the Grand Chamber of 13 September 2016, para 259, available at: http://hudoc.echr.coe.int/eng?i=001-166680.

[63] Siracusa Principles, op cit, para 70(g).

[64] Siracusa Principles, op cit, para 70(g).

[65] Siracusa Principles, op cit, para 70(g).

[66] Siracusa Principles, op cit, para 70(g).

[67] Siracusa Principles, op cit, para 70(i). See also Protocol 7 to the ECHR, Article 4(3).

[68] Siracusa Principles, op cit, para 70(d).

[69] United Nations Working Group on Arbitrary Detention, Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, UN Doc A/HRC/30/37 (2015), Principle 4, para 4. See also Human Rights Committee, General Comment 35, 'Article 9 (Liberty and security of the person)', UN Doc CCPR/C/GC/35 (2014), para 66.

[70] ICCPR, Article 14(1); ECHR Article 6(1).

[71] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/63/223 (2008), paras 30 and 44(c). See also the report of the Sub-Commission Rapporteur on terrorism and human rights, UN Doc A/HRC/Sub.1/58/30 (2006) para 45.

[72] *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52, and *Fitt v United Kingdom* (2000) 30 EHRR 480, para 45.

[73] *A and others v United Kingdom* [2008] ECHR 113, para 220.

[74] *A and others v United Kingdom* [2008] ECHR 113, para 220.

[75] General Comment 32, op cit, para 22.
[76] Siracusa Principles, op cit, para 70(f); UN Basic Principles on the Independence of the Judiciary, Principle 5; updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 29; Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle 3. See also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/68/285 (2013), paras 46-56 and 100-105.
[77] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/61/384 (2006), para 26.
[78] See, for example: *Madani v. Algeria*, Human Rights Committee Communication 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007), para 8.7; *Kavanagh v. Ireland*, Human Rights Committee Communication 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001), paras 10(2), 10(3) and 11.
[79] Report on the issue of the administration of justice through military tribunals, UN Doc E/CN.4/2006/58 (2006), para 20. See also: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/63/223 (2008), paras 27 and 45(b); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/68/285 (2013), paras 72-85.
[80] See, for example, Human Rights Committee, Concluding Observations: Second Periodic Report of Guatemala, UN Doc CCPR/CO/72/GTM (2001), para 20.
[81] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 29.
[82] Report on the issue of the administration of justice through military tribunals, UN Doc E/CN.4/2006/58 (2006), Principle 9. See also Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle 3a).
[83] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/68/285 (2013), paras 63-71 and 106.
[84] International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (2011), Foreword, p.xi, available at: http://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/.
[85] Paris Minimum Standards of Human Rights Norms in a State of Emergency, Principle B.3(c). See also: Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Principle 1(b); Beijing Statement on the Independence of the Judiciary in the LAWASIA Region, Principle 10(b); Council of Europe Recommendation No. R(2009)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, Principle 24(b); UN Basic Principles on the Role of Lawyers, Principle 4; Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Chapter VII.59; Council of Europe Recommendation No. R (2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer, Preamble; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles F(h) and I(i).
[86] Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, New York and Geneva, 2003), p.884.
[87] *Legal Commentary to the ICJ Geneva Declaration*, op cit, p.4.
[88] Op cit.
[89] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/63/271 (2008), paras 16 and 18.
[90] *Legal Commentary to the ICJ Geneva Declaration*, op cit, pp.111-113.
[91] See, for example, UN Basic Principles on the Role of Lawyers, Principle 1.
[92] See, for example, UN Basic Principles on the Role of Lawyers, Principles 4 and 12.
[93] European Parliament, Resolution on the legal professions and the general interest in the functioning of legal systems, P6_TA(2006)0108, 23 March 2006, para 1.
[94] Report of the Special Rapporteur on states of emergency and human rights, 'Sixth Annual Report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency', UN Doc E/CN.4/Sub.2/1993/23 (1993), para 52; ICCPR, Article 2; ECHR, Article 13.
[95] Moscow Document 1991, paras 19.1 and 19.2.
[96] Report of the Special Rapporteur for the independence of judges and lawyers, UN Doc E/CN.4/1995/39 (1995), para 34.
[97] General Comment 32, op cit, para 19. See also *Gonzalez del Rio v. Peru*, Human Rights Committee Communication 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para 5.2.
[98] General Comment 32, op cit, para 19.
[99] General Comment 32, op cit, para 25.
[100] OSCE Office for Democratic Institutions and Human Rights, *Legal Digest of International Fair Trial Rights* (Warsaw, 2012), pp.59-61.
[101] See, for example, *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 79.
[102] General Comment 32, op cit, para 20.
[103] See, for example: Human Rights Committee, Concluding Observations: Slovakia, UN Doc CCPR/C/79/Add.79 (1997), para 18; and *Kadubec v Slovakia* (1998) ECHR 81, paras 56-57.
[104] See, for example, *Belilos v Switzerland* (1998) ECHR 4, para 67.

[105] *Delcourt v Belgium* (1970) ECHR 1, para 13; *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 78; *Findlay v the United Kingdom* (1997) ECHR 8, para 73; *Bochan v Ukraine* (2007) ECHR, para 65; *Moiseyev v Russia* (2008) ECHR 1031, para 173.
[106] Op cit.