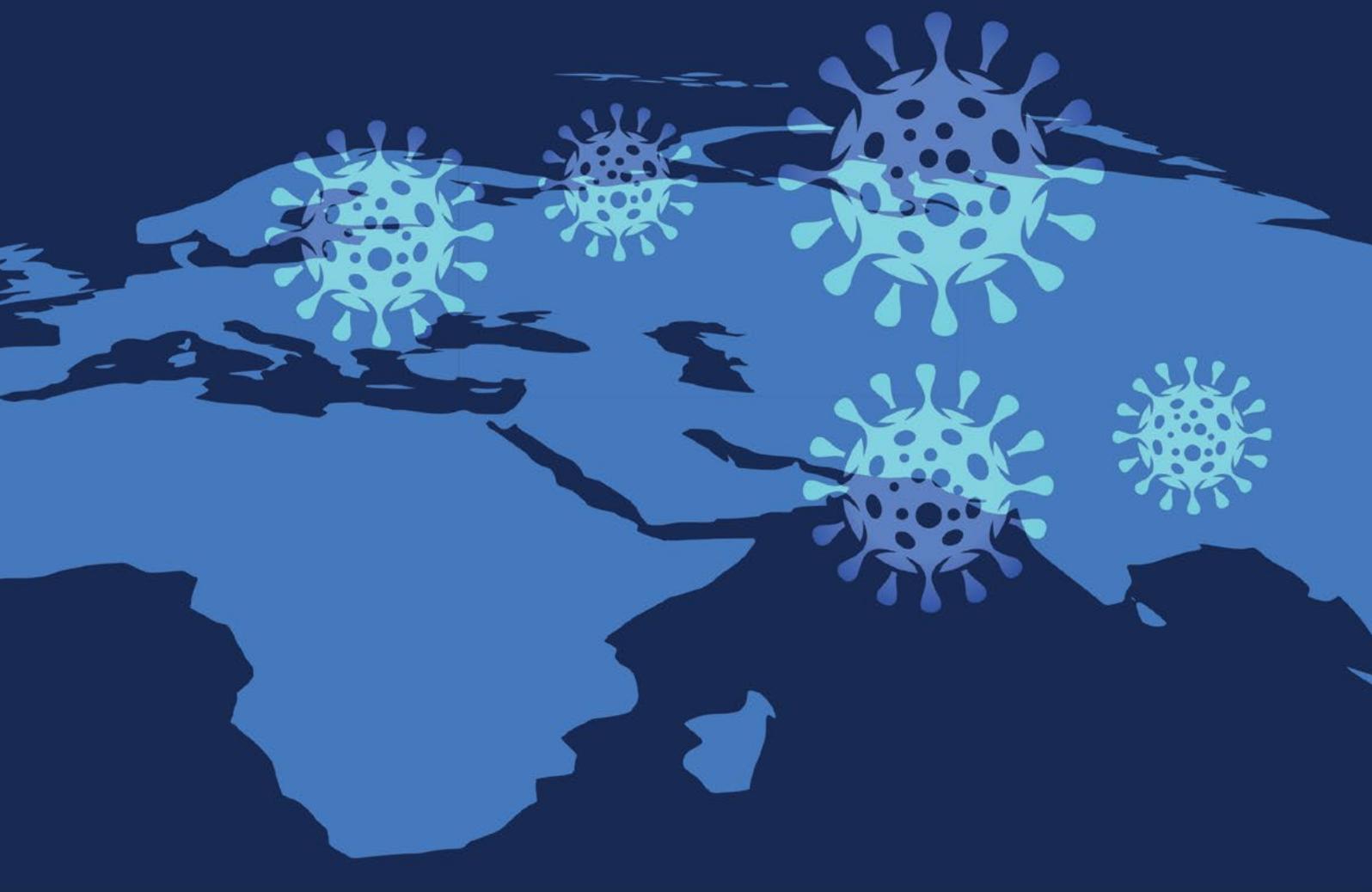


The Rights of Conscripts during National Emergencies in Eastern Europe, the South Caucasus and Central Asia:

A CASE STUDY OF COVID-19



About DCAF

DCAF – Geneva Centre for Security Sector Governance is dedicated to improving the security of states and their people within a framework of democratic governance, the rule of law, respect for human rights, and gender equality. Since its founding in 2000, DCAF has contributed to making peace and development more sustainable by assisting partner states, and international actors supporting these states, to improve the governance of their security sector through inclusive and participatory reforms. It creates innovative knowledge products, promotes norms and good practices, provides legal and policy advice and supports capacity-building of both state and non-state security sector stakeholders.

About this study

This study is part of DCAF's broader engagement in the area of human rights in the Armed Forces. DCAF advises governments and civil society organizations, provides assessments and trainings, creates knowledge products and conducts various projects addressing the rights of conscripts in Eastern Europe, the South Caucasus and Central Asia. The research constitutes a series of knowledge products exploring the legal framework to which conscripts, as citizens in uniform, are subject to and offers recommendations and practical tools protecting human rights in national emergencies, in line with international best practice. Other resources developed by DCAF on this topic include:

- ❖ Elizaveta Chymkh, Dr. Grazvydas Jasutis, Rebecca Mikova and Richard Steyne. Legal Handbook on the Rights of Conscripts (Geneva: DCAF, 2020). Available at: <https://www.dcaf.ch/legal-handbook-rights-conscripts>
- ❖ Dr. Grazvydas Jasutis, ed. Rights of Conscripts in Eastern Europe, Central Asia, and South Caucasus: A Review of Legislation and Practice (Geneva: DCAF, 2021). Available at: <https://www.dcaf.ch/rights-conscripts-eastern-europe-central-asia-and-south-caucasus-review-legislation-and-practice>
- ❖ E-learning course: Introduction to the Rights of Conscripts. Available at: <https://www.dcaf.ch/introduction-rights-conscripts>

Publisher

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Design & layout: Ziad Rizkallah

ISBN: 978-92-9222-658-9

Acknowledgements

DCAF would like to thank the Federal Department of Defence, Civil Protection and Sport (DDPS) of the Swiss Confederation for its generous support in making this publication possible.

The authors of this study would also like to express their gratitude to the those who provided valuable contributions on the measures addressing conscription during the COVID-19 pandemic. These include Aida Alymbaeva (International University of Central Asia, Lecturer), Dilrabo Samadova (Office of Civil Freedoms, Director).

Notes

The opinions expressed in this publication are those of the authors and do not reflect the opinions or views of the Federal Department of Defence, Civil Protection and Sport (DDPS) of the Swiss Confederation.

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TABLE OF CONTENTS

Abbreviations.....	6
Introductory remarks	7
Introduction.....	8
Scope, Assumptions and Limitations.....	11
Human Rights and National Emergencies	12
Restrictions of Rights Enshrined in International Human Rights Agreements.....	13
Derogations from Obligations under International Agreements during Public Emergencies.....	14
Non-Derogable Rights.....	18
States of Emergency in Eastern Europe, the South Caucasus and Central Asia Resulting from the COVID-19 Pandemic	19
Conscription and Rights of Conscripts during National Emergencies	23
Right to Life.....	24
Freedom of Expression and Freedom of Assembly and Association	33
Right to Respect for Private and Family Life and Correspondence.....	44
Prohibition of Forced Labour	47
Recommendations	50

ABBREVIATIONS

ACHR	American Convention on Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights

INTRODUCTORY REMARKS

The unprecedented impact of COVID-19 on societies and their institutions has led to a series of extraordinary responses by governments around the world. Some responses have included the deployment of armed forces to assist civilian authorities in fighting the pandemic. While, as with the Ebola outbreak in Western Africa in 2014, states have traditionally used armed forces to support civilian efforts to fight public health crises, the scale of the COVID-19 pandemic sets it aside from previous public health emergencies. This is witnessed both in the global scale of the pandemic, as well as the unparalleled participation by armed forces in efforts to fight its effects. This participation generally includes the provision of three broad services: logistical support to civilian authorities; medical support to health systems and support to maintain public law and order. These roles have, as with previous health crises, exposed armed forces to higher risk of exposure to infection, and therefore posed challenges to their right to health as recognized in international human rights law. To compound this, the introduction of legal and practical measures to fight COVID-19, in particular declarations of states of emergencies, have limited or restricted specific rights of both the general population and armed forces personnel. While numerous studies have been conducted into the potential human rights implications for both these groups, none have thus far examined conscripts as a sub-component of the armed forces. This is problematic as conscripts constitute one of the most vulnerable groups within the armed forces, and therefore remain at higher risk of human rights violations.

With the above in mind, this study was commissioned to examine how COVID-19 affected conscription and the rights of conscripts, focusing in particular on the measures implemented by states in order to protect their rights. It presents the international legal framework governing the restrictions of and derogations from human rights during national emergencies as applicable to conscripts, and uses case studies from Eastern Europe, the South Caucasus, and Central Asia to examine what measures states took to mitigate or prevent violations of the rights of conscripts. The study offers practical tools and situational analysis that military legal advisors can apply in order to check whether considered restrictions or derogations meet international standards and best practice.

Three factors make this study particularly timely. The first concerns the likelihood of future public health emergencies, and the consequent need to ensure that lessons are learnt from the way in which states restricted or derogated from human rights obligations during the COVID-19 pandemic. The second relates to the increased use of the armed forces, including conscripts, to deal with the consequences of national emergencies. The third concerns the reintroduction – or stated intention to do so – of conscription in several European countries, meaning that in future national emergencies, conscripts are likely to be used more frequently to deal with their consequences.

This study is aimed at all individuals who play a role in promoting, protecting, and enforcing the human rights of conscripts, including parliamentarians, government officials, policy makers, international organizations, military legal advisors, judges, professional military associations, and non-governmental organizations. It is also aimed at public health officials, practitioners, and researchers. DCAF hopes that this study will support their efforts to ensure that conscripts enjoy, to the fullest extent possible, the fundamental rights and freedoms granted to them under national and international law.

Darko Stančić

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INTRODUCTION

National emergencies are generally understood to be a state of exception during which the normal order in society is suspended or deviated from to allow for more stringent measures to address the threat at hand. One of the major concerns about the state of exception is the impact of associated measures on human rights and the fundamental guarantees of legal persons. As a result, provisions addressing national emergencies have been included in all major international human rights treaties including: the 1966 International Covenant on Civil and Political Rights (ICCPR); the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);¹ the 1961 European Social Charter (1996 European Social Charter, Revised); the 1969 American Convention on Human Rights (ACHR); and the 1981 African Charter on Human and Peoples' Rights.² The Charter of the European Union does not prevent its Member States from availing themselves of Article 15 of the ECHR. It, thus, allows for derogations in the event of war or other public dangers threatening the life of the nation. In such circumstances, actions can be taken in the areas of national defence in the event of war and of the maintenance of law and order.³ Furthermore, the 1985 Siracusa Principles were developed as non-binding guides on the limitation and derogation provisions in the ICCPR. These instruments aim to balance the need to prevent widespread and severe restrictions of human rights with the need to diminish the existing threat to society. The COVID-19 pandemic has once again shown that states of emergency lead to a broad range of human rights violations⁴ and possible democratic decline.⁵ These can range from intrusive surveillance measures used to silence criticism and target political opponents, to excessive use of police force. The violations can occur when governments declare a state of emergency, which can lead to the abuse of their extraordinary powers. But it can also come about in cases when governments do not formally declare a state of emergency, but instead restrict people's rights disproportionately.⁶

In exceptional situations like pandemics, states sometimes deploy armed forces to support the efforts of civilian authorities to fight public health emergencies. Armed forces were deployed in 2014 in Western Africa during the Ebola outbreak and in 2016 in Brazil during the Zika epidemic.⁷ The COVID-19 pandemic has increased this trend,

-
- 1 Other universal human rights law instruments include: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1989 Convention on the Rights of the Child; and the 1992 Declaration on the Protection of All Persons from Enforced Disappearances; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.
 - 2 Additional regional human rights law instruments include: the 1985 Inter-American Convention to Prevent and Punish Torture; and the 1994 Inter-American Convention on Forced Disappearances of Persons.
 - 3 Official Journal of the European Union C 303/17. 14 December 2007. Article 52 - Scope and interpretation. Available at: <https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles> [Accessed 10 March 2022]
 - 4 See Sara Davis. June 2020. Human Rights and Covid-19. Global Challenges. Issue no. 1. Article 12. Available at: https://globalchallenges.ch/issue/special_1/human-rights-and-covid-19/
 - 5 See, for example, Anna Luhrmann and Bryan Rooney. 2021. Autocratization by Decree: States of Emergency and Democratic Decline. Comparative Politics
 - 6 Neus Torbisco Casals. June 2020. Covid-19 and States of Emergency. Global Challenges. Issue no. 1. Article 4. Available at: https://globalchallenges.ch/issue/special_1/covid-19-and-states-of-emergency/
 - 7 For more information on Armed Forces during COVID-19 pandemic, see Luka Glušac and Ajla Kuduzovic. 16 February 2021. Impact of COVID-19 on Armed Forces. DCAF. Available at: <https://www.dcaf.ch/impact-covid-19-armed-forces>

and given rise to the unparalleled participation by armed forces in efforts to fight COVID-19.⁸ For example, in March 2020 Switzerland mobilised as many as 8,000 members of the military, the largest military mobilisation in the country since the Second World War.⁹

A number of studies have been carried out on the impact of national emergencies during COVID-19 on human rights in different countries. However, of these, only one addresses the implications for the human rights of military servicemembers,¹⁰ while none examine the impact of national emergencies during COVID-19 on military conscripts. This is problematic as conscripts constitute one of the most vulnerable groups within the armed forces, and thus have historically been subject to human rights violations.¹¹ This is, in part, due to their young age, lack of experience in the defence sector, and the fact that conscripts are at the bottom of the military hierarchy. During states of emergency conscripts may find themselves in an even more vulnerable position. For example, in Estonia the risk of COVID-19 infection was much higher for conscripts than was the national average because of their physical proximity.¹² Consequently, to ensure that the human rights of conscripts are respected, protected and fulfilled during states of emergency, governments must ensure that their extraordinary measures comply with international human rights law.

Beyond human security, ensuring respect and fulfilment of rights of conscripts is important as it contributes to state security and good governance of the security sector. Upholding rights of conscripts enhances discipline, professionalism, cohesion, and integrity in the armed forces. This leads to increased effectiveness of the armed forces as they are more likely to fulfil their respective roles, responsibilities, and missions to a high professional standard. It supports patriotism and strengthens values within the armed forces as well as in a broader society. Protection of conscript's rights further fulfils the primary *raison d'être* of conscription as it increases the likelihood of conscripts entering the regular armed forces following their completion of compulsory military training. Respect, protection, and fulfilment of conscript's rights through democratic control also enhances the efficiency of the armed forces by leading them to make the best possible use of public resources in fulfilling their respective roles, responsibilities, and missions. This ultimately results in the defence sector being more responsive and sensitive to the different security needs of all parts of the population and perform their missions in the spirit of a culture of service.

To this end, this study will explore how COVID-19 affected conscription and the rights of conscripts, focusing in particular on the measures implemented by states in order to protect their rights. The study will begin by presenting the international legal framework governing the restrictions of and derogations from human rights during national emergencies as applicable to conscripts. As an area in which conscription is widely used, the second part of the study will examine how the rights of conscripts in Eastern Europe, the South Caucasus and Central Asia were affected during COVID-19, and what measures states took to mitigate or prevent such violations. Each section on substantive rights is complemented by an application of that right in practice which includes a fictional scenario and a list of considerations that should be taken into account when assessing legitimacy of a given restriction or measure.

This study uses primary and secondary data. The first section uses legal analysis and relies on primarily sources of international law, including international agreements, jurisprudence from international courts and official

8 Ibid.

9 Simon Bradley. 17 March 2020. Swiss militia soldiers get historic call up to fight coronavirus. Swissinfo. Available at: https://www.swissinfo.ch/eng/covid-19_swiss-militia-soldiers-get-historic-call-up-to-fight-coronavirus/45622436

10 For more information on the use of armed forces during the COVID-19 pandemic, see Luka Glušac and Ajla Kuduzovic. 16 February 2021. Impact of COVID-19 on Armed Forces. DCAF. Available at: <https://www.dcaf.ch/impact-covid-19-armed-forces>

11 Elizaveta Chymk, Dr. Grazvydas Jasutis, Rebecca Mikova and Richard Steyne. 15 December 2020. Legal Handbook on the Rights of Conscripts. Available at: <https://www.dcaf.ch/legal-handbook-rights-conscripts>

12 EER 31 August 2021. Силы обороны Эстонии намерены вакцинировать весь личный состав от коронавируса. Available at: <https://rus.err.ee/1608323369/sily-oborony-jestonii-namereny-vakcinirovat-ves-lichnyj-sostav-ot-koronavirusa>

documents from international organisations.¹³ The second section uses primary data obtained through responses from Embassies to a questionnaire disseminated in 2021 which addressed state policies regarding conscription and the use of conscripts during COVID-19. Additionally, input from civil society organisations was also sought. Finally, where possible, primary data was complemented by secondary data, including documents issued by relevant state organs; studies conducted by non-governmental organisations, as well as news articles and academic literature.

Three factors make this study particularly timely. The first concerns the likelihood of future public health emergencies,¹⁴ and the consequent need to ensure that lessons are learnt from the way in which states restricted or derogated from human rights obligations during the COVID-19 pandemic. The second relates to the increased of the armed forces, and sometimes military conscripts, to deal with the consequences of national emergencies. The third concerns the reintroduction – or stated intention to do so – of conscription in Europe, meaning that in future national emergencies, conscripts are likely to be used more frequently to deal with their consequences.¹⁵

Figure 1. States with Compulsory Military Service in Europe and Central Asia (Legal Handbook on the Rights of Conscript, 2020, p. ix)



Countries with compulsory military service

Austria	Georgia	Sweden
Armenia	Greece	Switzerland
Azerbaijan	Kazakhstan	Tajikistan
Belarus	Krgyzstan	Turkey
Cyprus	Lithuania	Turkmenistan
Denmark	Moldova	Ukraine
Estonia	- Norway	Uzbekistan
Finland	Russia	

Countries without compulsory military service

Albania	Ireland	Poland
Andorra	Italy	Portugal
Belgium	Latvia	Romania
Bosnia and Hercegovina	Lichtenstein	San Marino
Croatia	Luxemburg	Serbia
Czechia	Malta	Slovakia
France	Monaco	Slovenia
Germany	Montenegro	Spain
Hungary	Netherlands	United Kingdom
Iceland	North Macedonia	Vatican

13 See Article 38(1) of the Statute of the International Court of Justice

14 Jonathan Smith. 16 December 2021. Q&A: Future pandemic are inevitable, but we can reduce the risk. The EU Research & Innovation Magazine. Available at: <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/qa-future-pandemics-are-inevitable-we-can-reduce-risk>

15 Ukraine reintroduced conscription in 2014 and Lithuania in 2015. Additionally, Sweden re-activated peacetime conscription from 1 January 2018.

Scope, Assumptions and Limitations

Due to its geographic focus on Eastern Europe, the South Caucasus and Central Asia, this study predominantly considers the European Human Rights law system. This does not preclude the universal applicability of other international human rights instruments such as the ICCPR. Furthermore, the rights discussed in this study are limited to those that were considered by the authors to be most affected during the COVID-19 pandemic. This in no way precludes the possibility that other rights may have been restricted or violated during the COVID-19 pandemic, and that such restrictions or violations may have occurred outside of our region of focus, namely Eastern Europe, the South Caucasus and Central Asia.

This study also has an inherent gender limitation. While international law is not gender specific, the countries examined during the second part of this study only conscript males. Therefore, this study should be understood as an analysis of the how the rights of male conscripts in Eastern Europe, the South Caucasus and Central Asia were affected during COVID-19, and what measures states took to mitigate or prevent such violations.

It should also be noted that the COVID-19 case study presented herein only considers the measures declared by the authorities. It does not address compliance with them. This study is, then, predominantly descriptive in nature in that it compiles information on the rights of conscripts during national emergencies. It is, however, the first in-depth analysis of its kind that focuses on the international standards applicable to conscripted military personnel during COVID-19 and the measures to which they are subject.

The following section - 'Human Rights and National Emergencies' - is applicable to all national emergencies, including inter-state conflict. The second part of this study 'Conscription and Rights of Conscripts during National Emergencies' is, on the other hand, focused on derogations and restrictions of rights during public health emergencies. For this reason, its findings may not be transferable to other types of national emergencies (e.g. state of war).

HUMAN RIGHTS AND NATIONAL EMERGENCIES

The term ‘state of emergency’ encompasses a range of situations which can be described in various ways, including an “..emergency situation, state of siege, state of urgency, state of alert, state of readiness, state of internal war, suspension of guarantees, martial law, crisis powers, special powers, curfew, etc”.¹⁶ Any state of emergency has to result from a serious crisis which affects the population as a whole and which jeopardises the very existence of a community organised on the basis of the state.¹⁷ There are two branches of international law which provide the legal framework for limiting and regulating crises: international human rights law (IHRL); and international humanitarian law (IHL). IHRL applies when a crisis is serious enough to constitute a real threat to the community as a whole; IHL applies during international wars or internal armed conflict.¹⁸

States accept, both under international law and domestic law, that during a state of emergency the competent authorities may suspend the exercise of certain rights. This would be done for the sole and unique purpose of restoring normality and guaranteeing the exercise of the most fundamental rights.¹⁹ Nevertheless, it should be noted that many international agreements do not provide provisions concerning the suspension of rights during states of emergency. These include: ICESCR, ILO Conventions 29 (Forced Labour); 87 (Freedom of Association and Protection of the right to Organise); 98 (The Application of the Right to Organise and Bargain Collectively); and 105 (Abolition of Forced Labour); the 1951 Convention relating to the Status of Refugees; the 1989 convention on the Rights of a Child; the African Charter of Human and Peoples’ Right; and various conventions of IHL.

A distinction between restrictions of rights and derogations from them needs also to be made. Derogation has to be distinguished from limitations. Limitations are intrinsically related to qualified rights – such as freedom of expression – as opposed to absolute rights such as freedom from torture which cannot be restricted or derogated.²⁰ Under normal circumstances states can limit rights if it is necessary preserve national security, public safety, public health, the economic well-being of the country, prevent disorder or crime and protect the rights and freedom of others: for example, ICCPR Articles 12(3), 18(3), 19(3), 21 and 22(2); ECHR Articles 8(2), 9(2) and 11(2); and ACHR Articles 12(3), 15 and 16. Nevertheless, derogations can be invoked only when the normal restrictions permitted under the ECHR for maintenance of public safety, health and order are inadequate.²¹ In cases when an applicant complains that his or her rights were violated during a period of derogation (state of emergency), the ECtHR first examines whether the measures taken can be justified under the substantive Articles of the Convention. Only if it determines that the measures cannot be so justified, does it go on to determine whether derogations were valid.²²

16 Commission on Human Rights. 23 June 1997. Tenth annual report and a list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (E/CN. 4/ Sub. 2/ 1997/19) (**hereafter**: Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19), para. 5

17 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 34

18 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 37

19 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 42

20 ICRC. Derogations. Available at: <https://casebook.icrc.org/glossary/derogations> [Accessed 10 March 2022]

21 ECtHR. 30 April 2021. Guide on Article 15 of the European Convention on Human Rights. Available at https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf, para. 9

22 ECtHR. 30 April 2021. Guide on Article 15 of the European Convention on Human Rights, para. 4

That being said, it is not always clear when a specific measure constitutes a derogation or a restriction of a right. For example, in a note verbale to the Council of Europe, the permanent representative of Armenia stated that measures taken during the state of emergency may include derogations from the obligations under the ECHR.²³ The measures referred to in the letter prohibited, among others, the military units of the Ministry of Defence of Armenia from receiving and sending deliveries, parcels and packages, having visits (except video calls) or granting leave to conscripts. These measures could, *prima facie*, constitute both restrictions or derogations from ECHR rights, and it would be through the ECtHR assessment outlined above that the nature of these measures would be determined. Nevertheless, prior such an assessment, such measures exist simultaneously as derogations and restrictions. Of note, the applicable standards with which a measure must comply differ depending on whether the measure constitutes a restriction or a derogation from a right(s).

Restrictions of Rights Enshrined in International Human Rights Agreements

Restricting or interfering with rights enshrined in international human rights agreements is permitted only for the purposes prescribed within a given agreement.²⁴ In assessing whether a limitation of rights is lawful and justified it has to pass the following three tests²⁵:

1. Rule of Law test;
2. Democratic necessity test;
3. And the prohibition of discrimination test.

This first test questions whether a given limitation is prescribed by law. In order to conform to this standard a given measure must have a legal basis within the domestic legal system and must conform to certain standards with respect to the quality of the law. Namely, the domestic legal system should sanction infractions of a given measure, the measures must be accessible to the persons concerned and be sufficiently precise to enable them to foresee the consequences of any infraction. Lastly, the law has to provide adequate safeguards against arbitrary interference with respective substantive rights.²⁶

In order to pass the second test, a given measure must pursue one of the aims set out in the substantive provisions of an international agreement, and it must be necessary in a democratic society and proportionate. Further, the measure has to be justified by a pressing social need based on the particular facts of the case and the circumstance prevailing in the country at the time.²⁷ It has to achieve the legitimate aim in the least restrictive manner possible. Furthermore, the state has to act reasonably, carefully and in good faith. The restriction has to be proportionate and justified by relevant and sufficient reasons.²⁸

23 Note Verbale (JJ9015C) Tr./005-227. Permanent Representation of the Republic of Armenia to the Council of Europe (Ref.: 3201/C-084/2020). 20 March 2020. Available at: <https://rm.coe.int/09000016809cf885>

24 See Article 18 of ECHR, Article 5 of ICCPR, Article 29 of ACHR

25 See Elizaveta Chymk, Dr. Grazvydas Jasutis, Rebecca Mikova and Richard Steyne. 15 December 2020. Legal Handbook on the Rights of Conscripts. Available at: <https://www.dcaf.ch/legal-handbook-rights-conscripts>

26 ECtHR. Case of Kruslin v. France (11801/85), 24/04/1990. Available from: <http://hudoc.echr.coe.int/eng?i=001-57626>, paras. 27-36.

27 Steven Greer. 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Council of Europe Publishing). Available from: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf).

28 *Ibid.*

Lastly, no interference with rights can be discriminatory on the grounds of sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status. Interference based on these grounds is prohibited under Article 14 of the ECHR.

Derogations from Obligations under International Agreements during Public Emergencies

With respect to derogations from international human rights obligations, the suspension of guarantees during an emergency situation does not imply a temporary suspension of the rule of law. Nor does it authorise those in power to act in disregard of the principle of legality by which they are bound at all times.²⁹ The principle of legality provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.³⁰ It follows that the principle of legality continues to apply during states of emergency. This also implies that violations of the internal legal provisions of a Constitution are not permitted in the proclamation of a state of emergency.³¹ It is primarily up to a given government to assess whether an exceptional situation justifies a state of emergency: national authorities are, after all, best placed to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to deal with its consequences.³² In the ECHR system, while states have a wide margin of appreciation on this matter, they do not enjoy unlimited discretion. As such, the application of the margin of appreciation is subject to supervision ECtHR.³³

Various norms govern states of emergencies. These include:

The Principle of Proclamation

States are obliged to declare a state of emergency which is a legal act that must be ratified by a competent constitutional body. This is a formal requirement³⁴ intended to ensure that the population affected is precisely informed of the material, territorial and temporal scope of the emergency measures and their impact on the enjoyment of human rights.³⁵ The state must provide justification for the state of emergency, and this must be done via a clear statement about the grounds on which it is declared.³⁶

The Principle of Notification

States are additionally obliged to notify and inform other state parties to the ICCPR, through the UN Secretary General, of their derogation from the Covenant. The declaring government must, likewise, inform these bodies

29 See IACtHR Advisory Opinion OC - 8/87 of 30 January 1987, para. 24

30 European Union Charter of Fundamental Rights. Article 49 – Principles of legality and proportionality of criminal offences and penalties.

31 UNGA. 1 July 1955. Document A/2929 – Annotations on the text of the draft International Covenant on Human Rights, p. 23 para. 41; see also Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 58

32 ECtHR. 30 April 2021. Guide on Article 15 of the European Convention on Human Rights, para. 11

33 See ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993. Available at: <http://hudoc.echr.coe.int/eng?i=001-57819>, para. 43; see also ECtHR. Case of Mehmet Hasan Altan v. Turkey (13237/17), 20/3/2018. Available at: <http://hudoc.echr.coe.int/eng?i=001-181862>, para. 91; ECtHR. Case of Şahin Alpay v. Turkey (16538/17), 20/3/2018. Available at: <http://hudoc.echr.coe.int/eng?i=001-181866>, para. 75

34 See Article 4(1) of ICCPR.

35 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 54

36 Ibid., para. 36

once the state of emergency is lifted and the derogations have ceased.³⁷ The communication must be immediate and mention which provisions are being suspended and why.³⁸ Only following the formal notification can the state lawfully suspend certain guarantees in emergency situations.³⁹ State parties to the ECHR have also to notify the Secretary General of the Council of Europe.⁴⁰

The Principle of Time Limitation

The state of emergency has to be limited for a 'period of time strictly required by exigencies of the situation'.⁴¹ This period has to be included in the notification to other states described above.⁴²

The Principle of Exceptional Threat

The grounds for declaring a state of emergency are not limited but must be exceptional in nature. The danger has to be current or at least imminent.⁴³ It must affect the entire population or the entire territory or a part thereof so that it constitutes a threat to the life of a nation.⁴⁴

Additional norms govern the measures that can be taken during a state of emergency. They include the principles of proportionality and non-discrimination, and of the compatibility, concordance and complementarity with the various norms of international law:

Principle of Proportionality

Measures adopted during a state of emergency have to be consonant with the severity of the crisis⁴⁵ to the extent strictly required by the exigencies of the situation.⁴⁶ The ECtHR and other treaty monitoring bodies can examine and verify whether the state has gone beyond the extent strictly required by exigencies.⁴⁷ Any excessive use of measures with respect to the existing threat makes the measures illegitimate.⁴⁸ This is based on the presumption that the non-fulfilment of a legal obligation is unjustified, except for cases in which it can be demonstrated that it is necessary to proceed in a manner contrary to the law.⁴⁹ In such cases, the action has to

37 See Article 4(3) of ICCPR, see also Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 61

38 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 61

39 Ibid., para. 62

40 See Article 15(3) of ECHR

41 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 69; see also ACHR Article 27; for ECtHR context see ECtHR. Case of Lawless v. Ireland (No.3) (332/57), 1/7/1961. Available from: <http://hudoc.echr.coe.int/eng/?i=001-57518>, paras. 31-38

42 See HRC General Comment No. 5 on Article 4 of the Covenant, 31/7/1981. Available at: <https://www.refworld.org/docid/453883ff1b.html>, para. 1; see also ECHR Article 15(3)

43 ECtHR. Case of Lawless v. Ireland (No.3) (332/57), 1/7/1961, para. 29

44 See ECtHR. Case of Ireland v. the United Kingdom (5310/71), 18/1/1978, para. 205; see also ECtHR. Case of Aksoy v. Turkey (21987/93), 18/12/1996, para. 70

45 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 83

46 See Article 4(1) of ICCPR, Article 15(1) of ECHR and Article 27(1) of ACHR

47 ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 43

48 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 84

49 Ibid., para. 86

be limited both in scope and in duration to what is immediately necessary.⁵⁰ In the ECHR system, the threshold was placed lower in that any measures taken should at least appear to allow the mitigation or elimination of the specific emergency situation. It should be noted, though, that with respect to the Convention, their justification does not depend on knowing whether they will effectively attain their objective.⁵¹ Proportionality should be analysed in respect to each individual derogation.⁵² The lawfulness of the measures taken to deal with the various special situations that may arise depends on the character, the intensity, the pervasiveness and the particular context of the emergency and the corresponding proportionality and reasonableness of the measures.⁵³ The principle of proportionality also presupposes periodic review by competent national organs, in particular the legislature and the executive.⁵⁴

Principle of Non-Discrimination:

Restrictions imposed during a state of emergency shall not involve any discrimination solely on the grounds of race, colour, sex, language, religion or social origin.⁵⁵

Principle of the Compatibility, the Concordance and the Complementarity of the Various Norms of International Law

States have to systematise their obligations under international law including customary international law. If a state has several similar obligations under IHRL, the most favourable standards for the protection of human rights are to be applied.⁵⁶ This includes the non-derogability of rights if a state is party to a Convention which considers certain rights non-derogable

The rights most commonly suspended during a state of emergency include: the right to liberty and security of persons (Article 9 of ICCPR, Article 5 of ECHR); the right to liberty of movement and freedom to choose place of residence throughout the national territory (Article 12(1) of ICCPR, Article 2 of Protocol No. 4 to the ECHR); the right to freedom from interference with one's home and correspondence (Article 17 of ICCPR, Article 8 of ECHR); the right to peaceful assembly and the right to demonstrate (Article 21 of ICCPR, Article 11 of ECHR); and the right to strike (Article 8 of ICESCR⁵⁷).⁵⁸

50 Ibid.

51 Ibid.

52 Ibid., para. 88

53 See the IACtHR Advisory Opinion OC-8/87; the ECtHR provide the relevant factors include the nature of the rights affected by derogation, the circumstances leading to, and the duration of the emergency situation, see ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993 para. 43

54 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 90; see also ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993 para. 54

55 See Article 4(1) of ICCPR and Article 27(1) of ACHR; see also Article 14 of ECHR; see also ECtHR. A. and Others v. The United Kingdom (3455/05), 19/2/2009

56 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 97

57 See also Article 6 of European Social Charter (revised). 1996. ETS No. 163.

58 Despouy. 1 January 1985. Report No. E/CN. 4/ Sub. 2/ 1997/19, para. 158

ECtHR jurisprudence shows that in deciding whether a specific measure was strictly required, the following questions should be considered:

- ❖ Whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;⁵⁹
- ❖ Whether the measures are a genuine response to an emergency situation;⁶⁰
- ❖ Whether the measures were used for the purpose for which they were granted;⁶¹
- ❖ Whether the derogation is limited in scope and, also, the reasons advanced in support of it;⁶²
- ❖ Whether the need for derogation was kept under review;⁶³
- ❖ Any attenuation in the measures imposed;⁶⁴
- ❖ Whether the measures were subject to safeguards;⁶⁵
- ❖ The importance of the right at stake, and the broader purpose of judicial control over the interference with that right;⁶⁶
- ❖ Whether judicial control of the measures was practicable;⁶⁷ and
- ❖ The proportionality, lawfulness and non-discriminatory nature of the measures.⁶⁸

59 ECtHR. Case of Lawless v. Ireland (No.3) (332/57), 1/7/1961, para. 36; European Court of Human Rights. Case of Ireland v. the United Kingdom (5310/71), 18/1/1978, para. 212

60 ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 51; ECtHR. Case of Alparslan Altan v. Turkey (12778/17), 16/4/2019. Available at: <http://hudoc.echr.coe.int/eng?i=001-192804>, para. 118

61 ECtHR. Case of Lawless v. Ireland (No.3) (332/57), 1/7/1961, para. 38

62 ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 66

63 ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 54

64 ECtHR. Case of Ireland v. the United Kingdom (5310/71), 18/1/1978, para. 220

65 ECtHR. Case of Ireland v. the United Kingdom (5310/71), 18/1/1978, para. 216-219; ECtHR. Case of Lawless v. Ireland (No.3) (332/57), 1/7/1961, para. 37; ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 61-65; ECtHR. Case of Aksoy v. Turkey (21987/93), 18/12/1996, para. 79-84

66 ECtHR. Case of Aksoy v. Turkey (21987/93), 18/12/1996, para. 76

67 ECtHR. Case of Aksoy v. Turkey (21987/93), 18/12/1996, para. 78; ECtHR. Case of Brannigan and McBride v. The United Kingdom (14554/89), 25/5/1993, para. 59

68 ECtHR. Case of A. and Others v. The United Kingdom (3455/05), 19/2/2009. Available at: <http://hudoc.echr.coe.int/eng?i=001-91403>, para. 190; ECtHR. Case of Mehmet Hasan Altan v. Turkey (13237/17), 20/3/2018, para. 140 and 213; ECtHR. Case of Şahin Alpay v. Turkey (16538/17), 20/3/2018, para. 119 and 183

Non-Derogable Rights

Certain rights cannot be derogated even during a state of emergency. These include: the right to life (Article 2 of ECHR); the prohibition of torture and other forms of ill-treatment (Article 3 of ECHR); the prohibition of slavery and servitude (Article 4(1) of ECHR); and there can be no punishment without law (Article 7 of ECHR). Additional non-derogable rights outlined in Protocols to the ECHR include the abolition of the death penalty (Protocol No. 6); prohibition of double jeopardy / the right not to be tried or punished twice (Protocol No. 7); and the absolute prohibition of the death penalty (Protocol No. 13).

With respect to the right to life, the limits need to be assessed in the light of Article 2(2) of the ECHR which provides that:

‘Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

Any death caused by an agent of the state using force beyond that which is absolutely necessary or for a reason other than that laid down in paragraph 2(2) and proportionate to the achievement of the aims set out in the subparagraph would amount to a violation of Article 2.⁶⁹ These criteria have been interpreted in a strict manner.⁷⁰ Additionally, Article 15(2) of the Convention provides that no derogation from Article 2 is permissible, except in respect of deaths resulting from lawful acts of war.

Furthermore, as indicated above, one of the conditions for the justifiability of any derogation from the ICCPR is that the measures do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.⁷¹ The provisions related to non-discrimination have not been listed in non-derogable provisions in Article 4(2) of ICCPR nor Article 15 of ECHR. There are, however, elements or dimensions of the rights to non-discrimination that cannot be derogated from in any circumstances.⁷²

69 ECtHR. Case of McCann and Others v. the United Kingdom (18984/91), 27/09/1995. Available from: <http://hudoc.echr.coe.int/eng?i=001-57943>, paras. 148-149.

70 International Justice Resource Center. Right to Life: Overview. [Accessed: 19/05/2021]. Available from: <https://ijrcenter.org/thematic-research-guides/right-to-life/>.

71 See ICCPR, Art. 4(1)

72 UNHRC. 31 August 2001. CCPR General Comment No. 29: Article 4: Derogations during a state of emergency. Available at: <https://www.refworld.org/docid/453883fd1f.html>, para. 8

STATES OF EMERGENCY IN EASTERN EUROPE, THE SOUTH CAUCASUS AND CENTRAL ASIA RESULTING FROM THE COVID-19 PANDEMIC

Many countries declared states of emergencies in response to COVID-19. This includes countries in Europe, the South Caucasus and Central Asia, some of which practice conscription (see Tables 1 and 2 below).

Table 1. States of emergencies declared in response to COVID-19 by countries in Eastern Europe, South Caucasus and Central Asia

State	CoE membership	Conscription	State of emergency	Beginning of Emergency	Emergency status	Rights derogated
<i>Armenia</i>	yes	yes	yes ⁷³	16.03.2020	lifted on 11.09.2020	(ECHR provisions not specified) Art. 9, 12, 21 ICCPR
<i>Azerbaijan</i>	yes	yes	no	n/a	n/a	No
<i>Belarus</i>	no	yes	no	n/a	n/a	No
<i>Estonia</i>	yes	yes	yes	12.03.2020	lifted on 18.05.2020	Art. 5, 6, 8, 11 of ECHR, Art. 1, 2 of ECHR Protocol, Art. 2 of ECHR Protocol No. 4 Art. 9, 12, 14, 17, 21, 22 ICCPR
<i>Georgia</i>	yes	yes	yes	21.03.2020	Extended until 1.01.2023 ⁷⁴	Art. 5, 6, 8, 11 of ECHR, Art. 1, 2 of ECHR Protocol, Art. 2 of ECHR Protocol No. 4 Art. 9, 12, 17, 21 ICCPR
<i>Kazakhstan</i>	no	yes	yes	16.03.2020	Lifted on 11.05.2020	No

73 For more information see Venice Commission. Observatory on emergency situations - Armenia. Available at: <https://www.venice.coe.int/files/EmergencyPowersObservatory/ARM-E.htm> [Accessed 22 March 2022]

74 See Communication contained in the Note Verbale No. 24/36213 from the Permanent Representation of Georgia, dated 31 December 2021, registered by the Secretariat General on 31 December 2021. Available at: <https://rm.coe.int/1680a4fdb0>

State	CoE membership	Conscription	State of emergency	Beginning of Emergency	Emergency status	Rights derogated
<i>Kyrgyzstan</i>	no	yes	yes	25.03.2020	generally lifted on 10.05.2020 but for some territories lifted on 21.10.2020	Art. 12, 21 ICCPR
<i>Latvia</i>	yes	no	yes	12.03.2020, 31.12.2020, 25.10.2021	lifted on 15.05.2020, 03.06.2020, 10.06.2020, 06.04.2020, 18.11.2021 ⁷⁵	Art. 8 (until 10.06.2020), 11 of ECHR, Art. 2 of ECHR Protocol (until 03.06.2020), Art. 2 of ECHR Protocol No. 4 (until 10.06.2020) Art. 12, 17, 21 ICCPR
<i>Lithuania</i>	yes	yes	yes	26.02.2020	Situation of emergency lifted on 16.06.2020	no ⁷⁶
<i>Moldova</i>	yes	yes	yes	17.03.2020, 31.03.2021	lifted on 15.05.2020, 28.04.2021	Art. 11 ECHR, Art. 2 of ECHR Protocol, Art. 2 of ECHR Protocol No. 4 Art. 12, 21 ICCPR
<i>Russia</i>	yes	yes	no	n/a	n/a	No
<i>Tajikistan</i>	no	yes	no	n/a	n/a	No
<i>Turkmenistan</i>	no	yes	no	n/a	n/a	No
<i>Ukraine</i>	yes	yes	yes	25.03.2020	active ⁷⁷	No
<i>Uzbekistan</i>	no	yes	no	n/a	n/a	No

75 In May and June 2020 Latvia gradually withdrew derogations from Article 11 of ECHR, Article 2 of ECHR Protocol, Article 8 of ECHR and Article 2 of Protocol No. 4. Subsequently, on 31.12.2021 Latvia notified derogation from Article 11, which it withdrew on 06.04.2021. Most recently Latvia derogated from Article 11 on 25.10.2021 and withdrew its derogation on 18.11.2021

76 Derogations would only be possible if state of emergency was declared under Article 114 of the Constitution. However, the situation of emergency was declared by the executive on the basis of the law on Civil Protection and subsequently on 16 March 2020 quarantine was introduced on the basis of the Law on Civil Protection and the Law on the Prevention and Control of Communicable Diseases in Humans

77 The quarantine regime was to remain in effect until 31 March 2022

Table 2. Other European countries with conscription

State	CoE membership	Conscription	State of emergency	Beginning of emergency	Emergency status	Rights derogated
<i>Austria</i>	yes	yes	no	n/a	n/a	No
<i>Cyprus</i>	yes	yes	no	n/a ⁷⁸	n/a	No
<i>Denmark</i>	yes	yes	no	n/a	n/a	No
<i>Finland</i>	yes	yes	yes	01.03.2020	lifted on 27.04.2021	No
<i>Greece</i>	yes	yes	yes	n/a	n/a	No
<i>Norway</i>	yes	yes	no	n/a	n/a	No
<i>Sweden</i>	yes	yes	no	n/a	n/a	No
<i>Switzerland</i>	yes	yes	yes	16.03.2020	lifted on 19.04.2020	No
<i>Turkey</i>	yes	yes	no	n/a ⁷⁹	n/a	No

78 While the Cypriot government adopted a number of emergency measures, Article 183 of the Constitution of Cyprus was not invoked due to ‘constitutional emergency’ and instead the government used the 1932 Quarantine Law. For more information see Venice Commission. Observatory on emergency situations - Cyprus. Available at: <https://www.venice.coe.int/files/EmergencyPowersObservatory/CYP-E.htm> [Accessed on 23 March 2022]

79 A state of emergency was not declared in Turkey due to the COVID-19 pandemic. Emergency measures were taken by regulatory acts of President and the executive authorities, based on the powers given to those authorities by the ordinary legislation on health risks, police powers of the regional governors etc. For more information see the Venice Commission. Observatory on emergency situations - Turkey. Available at: <https://www.venice.coe.int/files/EmergencyPowersObservatory/TUR-E.htm> [Accessed on 23 March 2022]

As a result of COVID-19, while some countries proceeded with conscription as originally envisaged, many others postponed the date of conscription or extended its duration. For example, the Georgian conscription period was postponed until the summer 2020. Subsequent fall conscription period could take place as planned according to the Prime Minister's Ordinances. In Ukraine, the Decree of the president dated 23 March 2020 No. 103/2020 'On Amendments to the Decree of the President of Ukraine dated 16 January, 2020 No. 13', postponed conscription from April-June 2020 to May-July 2020. In Kazakhstan, during the state of emergency conscription was suspended from 20 March to 11 May 2020 and, by a Decree of the President dated 30 April 2020 No. 312, was extended until August 2020. In Azerbaijan conscription in April 2020 was similarly delayed by one month, but its duration was not extended.

In Moldova, according to Law number 212/2004 'On the State of Emergency, Siege and War' recruitment of a new batch was stopped from 22-23 April, 2020, and resumed from 23-24 June 2020. The period of military service was extended until June 2020 for those personnel who were to have been released in April 2020. In Kyrgyzstan, President, Sooronbay Jeenbekov, also Commander-in-Chief of the Armed Forces of the Kyrgyz Republic, suspended spring conscription in April 2020. While it was resumed again in May, the duration of the conscription period was not extended, ending instead at the end of May.⁸⁰ Representatives of the Ministry of Defence of Kyrgyzstan noted that the conscription period was not extended as new conscripts had received sufficient training in the months of March and May. All subsequent conscription periods were executed as originally planned.⁸¹

In Uzbekistan, the spring 2020 conscription period (March-April), which includes one years' service in the armed forces and a month-long mobilization of reservists, was postponed. More than 7,000 conscripts who had already served the established term of military service by March-April 2020 were dismissed into the reserve and then sent home. The spring conscription recommenced in June 2020, with the duration of conscription unchanged (12 months for active-duty service and one month for mobilisation reserve). The only country where the COVID-19 pandemic did not lead to an adjustment in the spring 2020 conscription was Tajikistan.⁸² Conscription proceeded as scheduled in the first, then in the second wave of COVID-19 in autumn 2020 and in the spring and autumn of 2021.⁸³

80 Presidential Decree dated April 5, 2020 on "Military Discharge and Spring Conscription in 2020"., Available at: <http://cbd.minjust.gov.kg/act/view/ru-ru/430184#unknown> ; Presidential Decree dated May 7, 2020 on "Resumption of Military Discharge and Spring Conscription in 2020".

81 Interview with Colonel Kanatbek Shamyrov, Chief, Conscription Department, Kyrgyzstan's Ministry of Defense, Bishkek, November 29, 2021; Interview with Kuban, Head, Conscription Service of Leninsky District in Bishkek city, November 28, 2021.

82 Sputnik. 22 May 2020. Все в строю: в Таджикистане раньше срока завершён весенний призыв в армию. Available at: <https://tj.sputniknews.ru/20200522/tajikistan-zavershen-vesenniy-prizyv-1031281761.html>

83 Sputnik. 12 November 2020. Вазорати дифоъ: даъват ба артиш дар Тоҷикистон 100% иҷро шуд. Available at: <https://sputnik-tj.com/20201112/Vazorati-difo-davat-ba-artish-dar-Toikiston-100-iro-shud-1032255825.html>; <https://regnum.ru/news/3259042.html>

CONSCRIPTION AND RIGHTS OF CONSCRIPTS DURING NATIONAL EMERGENCIES

As outlined above, the effects of national emergencies on the rights of conscripts are different with respect to derogable and non-derogable rights: under no conditions can non-derogable rights be derogated from, even in the context of a state of emergency, and even for military conscripts.⁸⁴ Inherent in the protection of non-derogable rights is that they must be secured by procedural, often judicial guarantees.⁸⁵ The legal duty of states to take positive steps effectively to protect the right to life is, then, equally valid in times of public emergency.⁸⁶ State authorities exercise exclusive control over conscripts and any events in the army lie wholly or in large part within the purview of the authorities.⁸⁷ As a result, during a state of emergency states have to take sufficient steps to ensure that the non-derogable rights of conscripts are effective and not diminished to an unacceptable level. In practice, during COVID-19 this means that if state authorities decide to proceed with conscription, which implies that a large number of young individuals will stay in closed premises, states also have to fulfil their responsibility. They must ensure that the rights of conscripts are sufficiently protected as any infringement thereof is the responsibility of the state.

Considering this, it should be noted that courts limit the scope of the positive protective obligations of states in light of: the difficulties involved in policing modern societies; the unpredictability of human conduct; and the operational choices which must be made in terms of priorities and resources.⁸⁸ As such, this obligation 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities' and 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising'.⁸⁹ Consequently, there is only a legal issue if it can be demonstrated that the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to life. It must also be shown that they failed to take corrective measures which, within the scope of their powers, might have reasonably been judged to have avoided such risks.⁹⁰ Positive obligations of states may further vary by time and

84 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 25

85 See HRC General Comment No. 29 on Article 4 of the Covenant, 31/8/2001. Available at: <https://www.refworld.org/docid/453883fd1f.html>, para. 15

86 OHCHR. Chapter 16: The Administration of Justice During States of Emergency in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. Available at: <https://www.ohchr.org/documents/publications/training9chapter16en.pdf>, p.834

87 ECtHR. Case of Malik Babayev v. Azerbaijan (30500/11), 01/09/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-173776>, para. 66.; see also Legal Handbook on the Rights of Conscripts p. 13.

88 ECtHR. Case of Osman v. the United Kingdom (87/1997/871/1083), 28/10/1998. Available from: <http://hudoc.echr.coe.int/eng?i=001-58257>, para. 116.

89 Ibid.; see also ECtHR. Case of Malik Babayev v. Azerbaijan (30500/11), 01/09/2017. Available from: <http://hudoc.echr.coe.int/eng?i=001-173776>, para. 66.

90 ECtHR. Case of Osman v. the United Kingdom (87/1997/871/1083), 28/10/1998. Available from: <http://hudoc.echr.coe.int/eng?i=001-58257>, para. 116

place according to the needs and resources of the community and of individuals.⁹¹

With reference to derogable rights, states have to follow the standards discussed in the section above. Among other things, all measures have to be strictly required by the exigencies of the situation which would be periodically reviewed to ensure that the derogations from rights are limited to those strictly necessary to address the situation at hand. It should also be noted that not all or even most measures taken as a result of COVID-19 are derogations from rights under a formally declared state of emergency. As outlined above, many of the measures, in fact, constitute exceptional measures taken to protect public health. These measures, nevertheless, must meet the requirements of legality, necessity, proportionality and must be non-discriminatory.

Measures addressing both derogable and non-derogable rights during states of emergency interact with one another. This relationship is not equal because states generally take measures that restrict or derogate from derogable rights in order to protect non-derogable rights. A general rule, particularly relevant for the COVID-19 pandemic, is that measures taken to address a public emergency are aimed at increasing safeguards in order to protect the right to life. As such they restrict or derogate from other rights such as the right to private and family life. For example, suspension of family leave for conscripts and their being kept exclusively in barracks during conscription restricts their right to private and family life and their freedom of movement. This is done with the purpose of reducing the likelihood of conscripts being infected by COVID-19. It, thus, contributes to the fulfilment of their right to life. Restrictions or derogations from rights are simultaneously measures taken to protect other rights.

An additional impact of COVID-19 is the increased isolation of conscripts from society. This can lead to reduction in the monitoring of the situation of conscripts both by the authorities and by civil society. While this does not mean that violations of the rights of conscripts have necessarily increased, it is an enabling factor. It also means that the violations of the rights of conscripts are more likely to be undocumented.

The following sections will address how the rights of conscripts were affected by measures taken by state authorities to combat COVID-19.

Right to Life

It is the decision of states to conduct conscription. It follows, then, that even during a state of national emergency, states also have to ensure that conscripts' right to life is effective and not diminished. As a result, during an emergency such as COVID-19 they have to adopt measures to protect the right to life of conscripts and to ensure that procedural safeguards allow for the effective protection of this right. Procedural safeguards in this instance refer to the obligations of the procedural nature which the ECtHR derived from substantive ECHR provisions. These procedural obligations apply both *ex ante* and *ex post*. *Ex ante* obligations, are primarily relevant in the context of protective measures. These apply to the procedure that led the individual decision allegedly violating the Convention (e.g., rules mandating that persons must be heard before a decision is taken). They also require procedural guarantees as part of the general normative framework governing the matter that gave rise to any alleged human rights violation (e.g. rules providing for internal monitoring), or that concern the procedure leading up to the adoption of this normative framework (e.g. consultations with experts).⁹² *Ex post* obligations may concern the need for and the quality of an investigation into an alleged human rights violation or the availability and quality of remedies for those who claim to have suffered a human rights violation.⁹³

91 ECtHR. Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v. Belgium (1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64), 23/07/1968. Available at: <https://hudoc.echr.coe.int/eng?i=001-57525>, para. 5

92 Eva Brems. 2013. Chapter 7: Procedural protection: An examination of procedural safeguards read into substantive Convention rights. In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (eds.) Eva Brems and Janneke Gerards. Cambridge University Press, p. 138

93 Ibid.

A number of protective measures have been taken by states to effectively protect conscripts' right to life. These include, among others: measures addressing sanitation and disinfection (see Table 3); distribution of protective equipment (see Table 4); vaccination (see Table 5); social distancing (see Table 6); awareness raising (see Table 7); and screening and testing to identify COVID-19 infections (see Table 8).

While the prohibition on torture, inhuman and degrading treatment will not be discussed separately, it should be noted that measures intended to protect the right to life may be relevant in the context of Article 3 of the ECHR. If such measures reach a sufficient level of severity they may amount to torture, inhuman or degrading treatment. An example of this is the case of *Feilazoo v. Malta*, where the Court found that there has been a violation of Article 3. This case concerned, inter alia, the conditions of the detention of a Nigerian national, an immigrant, including time spent in de facto isolation and a subsequent period where the applicant had been placed with new arrivals in COVID-19 quarantine. The Court held that there had been a violation of Article 3 of the ECHR on account of the applicant's inadequate conditions of detention. In particular, the Court was concerned about the applicant's assertion, that following an isolation period the applicant had been moved to other living quarters where new asylum seekers were being kept in COVID 19 quarantine. There was no indication that the applicant had been in need of quarantine – particularly after an isolation period which, moreover, lasted nearly seven weeks. Thus, the decision to place him, for several weeks, with other persons who could have posed a risk to his health, could not be considered as a measure complying with basic sanitary requirements.⁹⁴

Table 3. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to sanitary measures and disinfection⁹⁵

Precaution	States	Specific measure taken by state
<i>Adequate ventilation of indoor spaces</i>	Ukraine	Thorough and regular ventilation of the rooms
	Georgia	Frequent ventilation of rooms
<i>Antiseptics</i>	Ukraine	Introduction of points for cleaning hands with alcohol-containing antiseptics marked with signs indicating the need for hands' disinfection
	Kazakhstan	Antiseptics were provided and installed in places of general congestion of people (in corridors, offices, etc.)
	Uzbekistan	During the initial phases of the COVID-19 pandemic all service members were provided with masks and individual hygiene toolkits. In addition, each conscript in spring 2020 was provided with an individual hygiene toolkit upon finishing his military service.

94 ECtHR. Case of *Feilazoo v. Malta* (6865/19), 11/03/2021. Available at: <https://hudoc.echr.coe.int/fre?i=001-208447>, paras. 91-93

95 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

Precaution	States	Specific measure taken by state
<i>Disinfection of premises and spaces</i>	Armenia	Preventive medical and disinfection measures were carried out in the military units of the Armed Forces and administrative complex of the Ministry of Defense. The military units and adjacent areas were disinfected with special products. ⁹⁶ Disinfectants supplied to the military units had undergone laboratory tests to determine the effectiveness of the sanitizers. ⁹⁷ In addition, before accepting conscripts, the rooms of military commissariats were disinfected ⁹⁸
	Ukraine	Disinfection of floors, dining tables and food delivery points; disinfection of premises every 4-6 hours; special attention paid to disinfection at facilities of increased epidemic risk related to food and water supply
	Kazakhstan	Wet cleaning and disinfection measures were carried out in the premises at least twice a day with the use of disinfectants, filling stations and other equipment
	Kyrgyzstan	Disinfection was used broadly, and the Armed Forces followed the health and sanitary standards developed by the Health Ministry
	Uzbekistan	Both dismissed and newly recruited conscripts in 2020 were transported to and from military units on special trains which were disinfected. New conscripts were escorted under the supervision of doctors

96 Zinuzh, 06.06.2020, 14:00; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021. Available at: <https://peacedialogue.am/en/wp-content/uploads/sites/2/2021/08/DEFENSE-SECTOR.pdf>, p. 71

97 Zinuzh, 02.05.2020, 26:48; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 71

98 Zinuzh, 04.07.2020; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

Table 4. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to protective equipment⁹⁹

Precaution	States	Specific measure taken by state
<i>Prior and upon arrival to military units</i>	Armenia	Heads of territorial subdivisions were obliged to organise conscription activities in compliance with COVID-19 safety rules. Each conscript underwent examination by the medical commission with a mask and a hand sanitizer. They also ensured that there was only one conscript present per doctor-specialist to prevent any accumulation of people in the common area of the territorial subdivision ¹⁰⁰
	Uzbekistan	Each newly recruited conscript was provided with a medical mask, the use of which was strictly enforced
<i>General</i>	Armenia	Masks of conscripts were changed every 3-4 hours ¹⁰¹
	Estonia	Rules within military units were adopted concerning wearing of masks and other protective gear
	Georgia	All military/civilian personnel were provided with protective equipment (i.e., face masks, gloves, hand sanitizers).
	Kazakhstan	Conscripts, the personnel of local military authorities and medical personnel were provided with medical masks, gloves and individual disinfectants
	Moldova	Protective personal equipment was provided
	Tajikistan	Conscripts were provided with face masks
	Uzbekistan	During the initial phases of the COVID-19 pandemic all service members were provided with the masks. In addition, each conscript in spring 2020 was provided with medical masks at the end of service

99 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

100 MoD / 510-QG / 1719-20, 20 May 2020; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 73

101 Zinuzh, 04.07.2020, 2:05; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

Table 5. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to vaccination¹⁰²

Precaution	States	Specific measure taken by state
Vaccination for conscripts against COVID-19	Estonia	In 2021, the Armed Forces of Estonia drafted only those who had received at least one vaccination against COVID-19. Those who had decided not to be vaccinated had their period of conscription postponed
	Georgia	Vaccination was not introduced as a compulsory measure
	Kazakhstan	Vaccination was carried out on a voluntary basis under the country's general vaccination program. Conscripts who were not vaccinated before conscription for military service received, upon arrival at the military unit, a COVID-19 vaccination
	Kyrgyzstan	Vaccination was not introduced as a mandatory requirement and remains voluntary for conscripts. The Kyrgyz government has not released information on the percentage of vaccinated conscripts as this information is considered confidential. ¹⁰³ There was one case in Ala-Buka, Djalal-Abad province, when after having an AstraZeneca vaccine, 44 conscripts had severe side effects, with four being hospitalized. ¹⁰⁴ After this case, the Health Ministry suspended the AstraZeneca vaccine throughout the country
	Moldova	COVID-19 vaccines were offered to all conscripts and professional armed forces personnel at the same time on a voluntary basis
	Ukraine	Conscripts were not included in the list of priority groups for vaccination against COVID-19 at the early stages of the vaccination campaign. Later on, when they were sworn in and had started their serving in the Armed Forces of Ukraine, they could be vaccinated within the framework of the vaccination campaigns.
	Uzbekistan	Servicemembers were among the first social groups eligible for mandatory vaccination. By August 2021, all servicemembers were double vaccinated with the Uzbek-Chinese vaccine ZF-UZ-VAC2001

102 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

103 Interview with Saadat Imanova, Department of Defense and Law Enforcement, Presidential Office, November 30, 2021.

104 Айжамал Джаманкулова. 24 September 2021. Вакцинацию AstraZeneca приостанавливали из-за истекающего срока годности — глава минздрава Бейшеналиев. Available at: <https://kloop.kg/blog/2021/09/24/vaktsinatsiyu-astrazeneca-priostanavlivali-iz-za-istekayushhego-sroka-godnosti-glava-minzdrava-bejshenaliyev/>

Table 6. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to social distancing¹⁰⁵

Precaution	States	Specific measure taken by state
<i>Social distancing in general spaces</i>	Armenia	Upon entering military units, conscripts were invited to the military commissariat one by one. In the corridors of military units, social distancing is maintained by the distribution of seats in the waiting hall. In addition, conscripts are called to the military commissariat according to separate groups, days and hours to exclude accumulations. ¹⁰⁶ In general, markings in military commissariats were introduced to maintain social distance. ¹⁰⁷ Conscription activities at the Republican Conscription station were carried out only in outdoor areas ¹⁰⁸
	Azerbaijan	Maintenance of the necessary physical distance during medical examinations and training of conscripts was strictly observed ¹⁰⁹
	Ukraine	Queues were not allowed in possible gathering points for conscripts; introduction of temporary markings on the floor in spaces of potential gathering of conscripts to ensure a distance of 1.5 meters
	Georgia	Ensured that premises allow for 9/12 cubic metre space per person
<i>Social distancing with respect to Housing</i>	Moldova	Vacant spaces were used to adapt housing conditions to allow for social distancing
	Georgia	The distance between (single) beds for personnel was set at 2 meters or more

105 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

106 Zinuzh, 20.06.2020, 1:33; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

107 Zinuzh, 04.07.2020, 2:05; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

108 Zinuzh, 04.07.2020, 2:05; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

109 BBC. 3 July 2020. Azərbaycan: hərbi xidmət çağırışçıları koronavirusdan necə yoxlanılır? Available at: <https://www.bbc.com/azeri/azerbaijan-53221024>

Awareness-raising measures outlined in the table below are relevant in the context of public health emergencies. First, they facilitate the efficiency and enforcement of all other measures imposed by the authorities. Second, they provide conscripts with information that enables them to assess the risks that they face as a result of exposure to the virus. Absence of measures facilitating conscripts' access to relevant information is important not only in the context of the right to life. It may also raise questions with respect to other rights. For instance, in *Roche v. the United Kingdom* the applicant suffered serious health problems owing to exposure to mustard and nerve gas during tests carried out on him in the 1960s while he was serving in the British Army. The Court found that the respondent State had not provided an effective procedure for the applicant to have access to all relevant and appropriate information enabling him to assess any risk to which he had been exposed during his participation in the tests. As such there had been a violation of right to respect his private and family life under Article 8.¹¹⁰ It follows, that for the authorities to fulfil their obligations with respect to the right to life and other rights they should establish adequate procedures to inform conscripts about the risks that they face in the context of COVID-19 and what measures they should follow in order to avoid them.

Table 7. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to awarenessraising¹¹¹

Precaution	States	Specific measure taken by state
<i>Provision of Information about COVID-19 and its spread</i>	Armenia	Servicemembers were informed about the precautionary measures against the spread of COVID-19 ¹¹²
	Kazakhstan	Explanatory work was carried out with conscripts on measures for the prevention of coronavirus infection, personal hygiene and social distance (at least 2 meters)
	Kyrgyzstan	The Kyrgyz government conducted a broad awareness raising campaign among conscripts and soldiers that addressed the benefits of vaccination, masks and other preventive measures.
	Ukraine	Information materials on the prevention of COVID-19 were posted at the facilities' entrances
	Uzbekistan	Awareness raising campaigns were widely conducted both with conscripts and career service personnel

110 ECtHR. *Case of Roche v. the United Kingdom* (32555/96), 19/10/2005. Available at: https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_32555-96, paras. 167 and 169

111 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

112 Zinuzh, 06.06.2020; see also Peace Dialogue. 2021. *Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021*, p. 71

Table 8. Measures taken by countries during COVID-19 to protect the right to life of conscripts with respect to screening and testing for COVID-19¹¹³

Precaution	States	Specific measure taken by state
<i>Testing and Screening prior to arrival to military unit</i>	Armenia	During the medical examination at the Central Military Conscription station, the conscripts' temperature was measured, and blood sampling tests were taken to check for the presence of coronavirus antibodies. In the case of results indicating the presence of coronavirus antibodies, the conscript was quickly isolated and underwent PCR testing to confirm or rule out infections ¹¹⁴
	Ukraine	Conscripts, who upon admission to recruitment and social support centres of the Armed Forces had temperatures above 37.2 C or signs of respiratory diseases were isolated in allocated rooms. This was done in compliance with requirements of infection control practices pending the arrival of medical personnel and proper medical examination. If a COVID-19 infection was confirmed, the conscript was sent to inpatient treatment in a medical institution or was self-isolated
	Kazakhstan	The first stage of PCR testing was organised before being sent to a military unit at the regional (city) recruitment centres
<i>Measures during transportation to military unit</i>	Kazakhstan	While transporting conscripts to the place of deployment of the military unit, the contact of young recruits with civilians was prohibited. For this purpose, separate railway carriages were used, and the accumulation of military personnel in one carriage was not allowed
<i>Testing and Screening upon arrival to military unit</i>	Armenia	The entrances of military units included control devices and thermometers. ¹¹⁵ Upon arrival in the unit the temperature of conscripts was measured, and their hands were disinfected ¹¹⁶
	Azerbaijan	Conscripts sent to active military service in military units were tested on the first day of their admission ¹¹⁷
	Ukraine	Upon the arrival of the conscripts to the military unit, obligatory observation activities were carried out for 14 days.
	Kazakhstan	PCR testing was organised upon their arrival to the military unit
	Kyrgyzstan	During the fall of 2020, recently conscripted recruits were required to get tested for COVID-19. ¹¹⁸ Testing was provided at the government's cost. In 2021, the testing requirement was abolished. A chest X-ray/screening was also used. Conscripts were required to take an X-ray, even before the COVID-19 pandemic. Hence, conscripts took a chest X-ray both in 2020 and 2021

113 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

114 Zinuzh, 04.07.2020, 2:05; Zinuzh, 13.02.2021, 5:01; Zinuzh, 27.02.2021, 11:41; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

115 Zinuzh, 06.06.2020; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 71

116 Zinuzh, 20.06.2020, 1:33; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 74

117 BBC. 3 July 2020. Azərbaycan: hərbi xidmət çağırışçıları koronavirusdan necə yoxlanılır? Available at: <https://www.bbc.com/azeri/azerbaijan-53221024>

118 Ibid.

Precaution	States	Specific measure taken by state
Routine Screening and Testing	Armenia	Travel of servicemembers between cities was allowed only in the absence of fever, which was measured and recorded by the military police ¹¹⁹
	Azerbaijan	The temperature of all conscripts was measured and conscripts with symptoms were immediately isolated. ¹²⁰ If conscripts exhibited any symptoms, they were subject to testing and screening
	Lithuania	Temperatures were checked for every person entering the military unit
	Ukraine	Temperature screening was carried out daily upon for all employees of the territorial recruitment and social support centres. Employees, whose temperature exceeded 37.2 C or who had signs of respiratory diseases, were not permitted to perform their official duties. Routine COVID-19 tests were not offered to conscripts
	Kazakhstan	A medical post (filter) was organized to measure the body temperature of conscripts using a non-contact thermometer. Those with high temperatures were isolated and sent to the nearest medical institution
	Moldova	COVID-19 tests were offered to conscripts
	Georgia	COVID-19 tests were offered to conscripts

In addition to the above, it should be noted that in some instances measures to protect the right to life of conscripts were taken by civil society organisations. For example, in Tajikistan in July 2020, the Office of Civil Liberties together with the Tajik Human Rights Directorate conducted training for doctors on COVID-19 prevention in military hospitals and distributed 1,500 masks and antiseptic products. In 2021, the Office of Civil Liberties distributed 1,500 disposable masks and 1,000 reusable masks to military units.

119 Zinuzh, 18.04.2020, 1:44; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 72

120 BBC. 3 July 2020. Azərbaycan: hərbi xidmət çağırışçıları koronavirusdan necə yoxlanır?. Available at: <https://www.bbc.com/azeri/azerbaijan-53221024>

Hypothetical scenario:

Your country decides to proceed with conscription as planned in spite of a surge in COVID-19 infection rates. You are concerned about the likelihood of the spread of infection among conscripts and whether this violates their right to life.

Consider the following:

- ❖ Did the state take any measures to prevent COVID-19 infection among conscripts?
- ❖ Are the measures taken to protect conscripts from COVID-19 infection holistic? Namely:
 - » Do the measures sufficiently address all stages of conscription (prior to conscription, during medical evaluation, during transportation to military units, upon arrival at military units, during training in military units, and upon return from family leave)?
 - » Do the measures address all possible ways that COVID-19 spreads (crowded places, close-contact settings, confined and enclosed spaces with poor ventilation¹²¹) and do they contribute sufficiently to the mitigation of transmission (regular testing and screening against COVID-19, vaccination against COVID-19, protective equipment, physical distancing, hand hygiene, cleaning, and disinfection)?
- ❖ Are the measures taken to protect conscripts from COVID-19 non-discriminatory?
- ❖ Are the measures taken proportional to the risk of infection and consequences from contracting COVID-19?
- ❖ Upon the identification of COVID-19 infection, are conscripts provided with adequate healthcare and conditions for recovery?
- ❖ Are conscripts informed about the measures applicable to them?
- ❖ Are the measures periodically reviewed and adjusted in light of the changing situation?
- ❖ Is compliance with the measures enforced?

Freedom of Expression and Freedom of Assembly and Association

As governments around the world declare a state of emergency in response to the COVID-19 outbreak, it is crucial to ensure that any exceptional measures introduced do not undermine freedom of expression (Article 10) and other human rights enshrined in the ECHR. Indeed, these measures have to be “strictly required by the exigencies of the situation”.¹²² The Guidelines of the Committee of Ministers of the Council of Europe on protecting the freedom of expression and information in times of crisis were adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers’ Deputies. These guidelines emphasised that freedom of expression and information and freedom of the media are crucial for the functioning of democratic society. Concerns were

121 WHO. 23 December 2021. Coronavirus disease (COVID-19): How is it transmitted?. Available at : <https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted> (Accessed on 6 January 2022)

122 Council of Europe (2021). COVID-19 and media freedom – guidance based on the Council of Europe standards. Available from: <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis>

expressed over the fact that crisis situations, such as wars and terrorist attacks, are still widespread and threaten human life and liberty. As such governments, concerned about the survival of society may be tempted to impose undue restrictions on the exercise of this right.¹²³ The term “crisis” includes, but is not limited to, wars, terrorist attacks, natural and man-made disasters, i.e., situations in which freedom of expression and information is threatened (for example, by governments imposing limits for security reasons). The Guidelines further stipulate that:

- ❖ Member states should not restrict the public’s access to information in times of crisis beyond the limitations allowed by Article 10 of the ECHR and interpreted in the case law of the ECtHR.
- ❖ Member states should always bear in mind that free access to information can help to effectively resolve the crisis and expose any abuses. In response to the legitimate need for information in situations of great public concern, the authorities should guarantee free access to information for the public, including through the media.
- ❖ Member states should not use vague terms when imposing restrictions on freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined.
- ❖ International and national courts should always weigh the public’s legitimate need for essential information against the need to protect the integrity of court proceedings.
- ❖ Member states should constantly strive to maintain a favourable environment, in line with Council of Europe standards, for the functioning of independent and professional media. This is particularly so in crisis situations. In this respect, special efforts should be made to support the role of public service media as a reliable source of information and a factor for social integration and understanding between different groups in society.
- ❖ Member states should consider criminal or administrative liability for public officials who try to manipulate public opinion exploiting its special vulnerability in times of crisis (including in the media).

Admittedly, the right to freedom of expression is not absolute and may be limited under certain conditions.¹²⁴ According to Article 19(3) of the ICCPR, any restriction must be: provided by law; undertaken to respect the right or reputations of others; protect national security, public order or public health or morals; and necessary and proportionate to achieve a legitimate objective. As noted above, Article 10(2) of the ECHR states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such restrictions as are ‘prescribed by law’ and are ‘necessary in a democratic society’ in the interests of any one or more of the prescribed objectives. A notable case in this regard is *Engel and Others v. The Netherlands*, where the Court found that a ban on the publication and distribution by conscripts of a paper criticising senior officers was a justified interference with their freedom of expression. In its analysis the Court emphasised that ‘public order’ under Article 10(2) of the ECHR covers the order that must prevail within the confines of a specific social group such as the armed forces. The proper functioning of an army, the Court continued, was hardly imaginable without legal rules designated to prevent servicemembers from undermining military discipline, for example in their writings.¹²⁵

Special caution is needed in introducing restrictions on freedom of expression in crisis situations. Measures taken by governments in a state of emergency can involve derogations from the States’ obligations to secure certain rights and freedoms under the ECHR, including freedom of expression. However, such measures need to be subject

123 Council of Europe (2007). Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers’ Deputies. Available from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e

124 For more on the freedom of expression, see Elizaveta Chmykh, Dr. Grazvydas Jasutis, Rebecca Mikova, Richard Steyne (2020). Legal Handbook on the Rights of Conscripts. DCAF. Available at: <https://www.dcaf.ch/legal-handbook-rights-conscripts>

125 ECtHR. Case of Engel and others v. the Netherlands (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available at: <https://hudoc.echr.coe.int/tur?i=001-57479>, paras. 98 and 100

to a form of democratic review in order to ensure that they are not only 'strictly required by the exigencies of the situation', as laid down in Article 15 of the ECHR, but also 'an appropriate response to the state of emergency', as established by the Court.¹²⁶ Also, in the context of emergency measures the Court emphasised that democracy thrives on freedom of expression and that the existence of a 'public emergency threatening the life of the nation' should not serve as a pretext for limiting the freedom of political debate.¹²⁷

Measures to restrict freedom of expression must also provide sufficient protection against arbitrariness and be reasonably foreseeable.¹²⁸ In general, the ECtHR has tended to privilege states with a wide margin of appreciation in cases involving restrictions on the rights of military service personnel, including conscripts.¹²⁹ This is related in part to the ambiguity of 'national security' and its varying interpretations. Nevertheless, if a state is unable to demonstrate that a restriction has a solid legal basis, it would be unable to apply such restrictions. It has been observed that the margin of appreciation remains opaque, and the decisions of the Court can vary; as Judge Lohmus observed in a dissenting opinion, 'the Court makes distinctions within Article 10 when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation.'¹³⁰ The proportionality test used by the Convention system requires a consideration of the nature and extent to which a restriction on or interference with rights is justified by recourse to a legitimate objective. For example, legislation prohibiting in absolute and unconditional terms the dissemination of all information related to national security, in the process eliminating the ability of the public to exercise oversight over the activities of intelligence services, would constitute a breach of Article 10 on the basis that, though it pursues a legitimate objective, it is not 'necessary in a democratic society'¹³¹. It is therefore clear that, notwithstanding the generally wide margin of appreciation, the Court's repeated observation that 'Article 10 does not stop at the gates of the army barracks',¹³² retains some force. Another guideline is linked to the prescription by law. It can be found in Principle 12 of the Johannesburg Principles, where it is written that 'a state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest'.¹³³ While permitting access to- and the dissemination of related information should be the default position for states, in certain circumstances, limitations may be legitimately imposed. For example, documents may be classified for objective and justifiable reasons during national emergencies or, for that matter, during times of peace. In addition, the protection of national security, defence, or international relations may constitute legitimate grounds

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- 126 ECtHR. *Alparslan Altan v. Turkey*, 12778/17, 16 April 2019. Available from: <https://hudoc.echr.coe.int/fre?i=001-192804>, para. 118
- 127 Council of Europe (2021). *Mitigating a global health crisis while maintaining freedom of expression and information*. Available from: <https://rm.coe.int/en-mitigating-a-global-health-crisis-while-maintaining-freedom-of-expr/16809e2d1e>
- 128 Council of European Council. *Human rights of members of the armed forces*. Recommendation CM/Rec (2010) 4 of the Committee of Ministers and explanatory memorandum. Directorate General of Human Rights and Legal Affairs Council of Europe. P. 51
- 129 Council of European Council. *Human rights of members of the armed forces*. Recommendation CM/Rec (2010) 4 of the Committee of Ministers and explanatory memorandum. Directorate General of Human Rights and Legal Affairs Council of Europe. P. 51
- 130 ECtHR. *Case of Wingrove v. The United Kingdom* (17419/90), 25/11/1996. Available at: <http://hudoc.echr.coe.int/webservices/content/pdf/001-58080>,
- 131 Bychawska-Siniarska, D., July 2017. *A handbook for legal practitioners: protecting the right to freedom of expression under the European Convention on Human Rights*. Council of Europe. P.52. Available at: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> [Accessed 22 April 2020];
- 132 ECtHR. *Case of Grigoriades v. Greece* (121/1996/740/939), 25/11/1997. Available at: <https://hudoc.echr.coe.int/eng?i=001-58116>, para. 45
- 133 Bychawska-Siniarska, D., July 2017. *A handbook for legal practitioners: protecting the right to freedom of expression under the European Convention on Human Rights*. Council of Europe. P.52. Available at: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> [Accessed 22 April 2020];

for which access to also be limited.¹³⁴ Nevertheless, states must clearly prescribe such exceptions in national legislation in order to define the scope of protected interests and to ensure that they meet the requirements of national security.

As the risk of disproportionate interference is especially high during times of national emergencies, governments should exercise particular prudence and caution to only introduce measures that constitute ‘an appropriate response to the state of emergency’.¹³⁵ This should not exclude military personnel and conscripts who must retain the right to hold opinions, to receive information and ideas as well as to impart them. As mentioned before, COVID-19 has led to many countries declaring a state of emergency, a state of emergency which included derogations on certain rights. On a positive note, the countries in Eastern Europe, the South Caucasus and Central Asia have not imposed any restrictions on the right of expression.

Application in Practice: Freedom of Expression Checklist

Hypothetical scenario:

During the time of national emergency, a group of conscripts created an on-line platform to exchange information and to reach out to those deployed in other military installations. Commanding staff demanded that the forum be closed without providing any justification. A group of conscripts considers the request to be violating their free access to information.

Consider the following:

- ❖ Does the decision meet the requirements for limitations allowed by Article 10 of the ECHR and interpreted in the case law of the ECtHR?
- ❖ What are the objectives that the restriction of access to information aims to achieve?
- ❖ Does the existing on-line forum violate a set of rules related to military discipline?
- ❖ Is the commanding staff authorised to impose such limitations? Is it prescribed by the law?
- ❖ Does the decision effectively support resolution and/or mitigation of the crisis?
- ❖ Are the limitations applied across the entire armed forces? Are the limitations applied in a discriminatory manner?
- ❖ Does the forum contain sensitive information of importance for national security?
- ❖ Is the objective to suspend the forum in time of crisis or to close the on-line platform in general?

134 Council of European Council. Human rights of members of the armed forces Recommendation CM/Rec (2010) 4 of the Committee of Ministers and explanatory memorandum. Directorate General of Human Rights and Legal Affairs Council of Europe. P. 53

135 Council of Europe (2021). COVID-19 and media freedom - guidance based on the Council of Europe standards. Available from: <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis>

The right to freedom of peaceful assembly is closely connected to the freedom of expression. Articles 10 and 11 (the freedom of assembly and association) are the cornerstones of a democratic society and should not be interpreted restrictively.¹³⁶ The protection of opinions and the freedom to express them is one of the key elements of Article 11.¹³⁷ Thus, Article 11 must be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the expression of personal opinions and the ability to secure a forum for public debate and open expressions of protest.¹³⁸

The right to freedom of assembly and association is not absolute.¹³⁹ Under Article 4 of the ICCPR, countries may take measures derogating from certain obligations under the Covenant, including the right to freedom of assembly and association, 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.' Such measures may only be taken 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'¹⁴⁰ Article 21 of the ICCPR stipulates that no restrictions may be placed on the exercise of the right to freedom of assembly other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals, or the protection of the rights and freedoms of others. Article 22(2) makes similar provision in relation to freedom of association. According to Article 11 of the ECHR, freedom of assembly and association includes three key elements: freedom of peaceful assembly; freedom of association with others; and the right to form and to join trade unions for the protection of one's interests. Article 11 further provides that 'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police, or of the administration of the State.'¹⁴¹ This clearly identifies the scope and applicability of the norm to conscripts. The jurisprudence of the Court further clarifies that while the state is bound to respect the freedom of assembly and association of its employees, Article 11 § 2 in fine allows it to impose lawful restrictions on the exercise of these rights by members of its armed forces, police or administration.¹⁴² As to whether or not interference with Article 11 rights is 'necessary in a democratic society', the Court has reiterated that lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the state. However, the exceptions set out in Article 11 are to be applied only in certain circumstances; namely, in cases where convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether or not a necessity exists, within the meaning of Article 11(2), the Contracting States have a limited margin of appreciation. This goes hand in hand with rigorous supervision covering both the law and the decisions applying it, including those issued by independent courts.¹⁴³ The ECtHR frequently begins its

136 ECtHR. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and association. Available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf , Para 1

137 ECtHR. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and association. Available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf , Para 3

138 ECtHR. 2020. Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and association. Available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf , Para 4

139 For more on the freedom of assembly Elizaveta Chmykh, Dr. Grazvydas Jasutis, Rebecca Mikova, Richard Steyne (2020). Legal Handbook on the Rights of Conscripts. DCAF. Available at: <https://www.dcaf.ch/legal-handbook-rights-conscripts>

140 ICCPR, Art. 4(1)

141 ECHR, Art. 11(2)

142 Council of Europe/ECtHR, 2020. *Guide on Article 11 of the Convention - Freedom of assembly and association*. Available at: https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf

143 ECtHR. Case of *Tüm Haber Sen and Çınar v. Turkey* (28602/95). 21/02/2006. Available at: <https://hudoc.echr.coe.int/fre?i=001-72519>

consideration of necessity in democratic society by questioning whether or not the interference responds to a 'pressing social need'. For example, in determining whether a restriction on the right to organise responds to a pressing social need, there must be plausible evidence that the establishment or activities of a trade union represent a sufficiently imminent threat to the state or to a democratic society. The assessment of such a threat is primarily for the national authorities, who are privileged with a wide margin of appreciation. Nevertheless, this cannot displace judicial supervision by the Court.¹⁴⁴

The interference must also respond to an assessment of its proportionality, a consideration that – as noted above – involves balancing the right of the individual against the interest of the state and the society it represents. The reasons provided by national authorities must be relevant and sufficient, meaning that national authorities must apply standards in conformity with the principles embodied in Article 11. In addition, national authorities must also base their decisions on an acceptable assessment of the relevant facts.¹⁴⁵

Measures aimed at preserving the order and discipline necessary in the armed forces also represent a legitimate aim. This is reflected in the case of *Engel and Others v. the Netherlands*, discussed above in the context of freedom of expression under Article 10.¹⁴⁶ The Court found that, on the facts, there had been no interference with Article 11 (meaning that the issue of justification did not arise). However, the close connection between Articles 10 and 11 means it is comparatively clear that the maintenance of military discipline would also constitute a legitimate aim for the purposes of potential restrictions on freedom of assembly and association.

Following the Guidelines of the Venice Commission, restrictions may be justified, on occasion, where the health of participants in an assembly, or of others, becomes, or risks becoming, seriously compromised.¹⁴⁷ The COVID-19 outbreak remains of immense importance in this regard. Public health may at times be invoked to limit assemblies only where there is no alternative, less restrictive means of safeguarding it. There are rare instances in which general public health concerns (including, e.g., smog or air pollution or a contagious disease, such as COVID-19) may be an appropriate basis for restricting one or more public assemblies. But those restrictions should not be imposed unless other similar aggregations of individuals are also restricted, such as crowds in a shopping area, at a concert, or a sports event.¹⁴⁸ This is applicable, too, to military installations. A large number of countries in Eastern Europe, the South Caucasus and Central Asia officially derogated from their obligations with respect to freedom of assembly. They include Armenia, Estonia, Georgia, Kyrgyzstan, Latvia, and Moldova.¹⁴⁹ The necessary social distancing rules, public health precautions and state of emergency measures have affected conscripts' ability to exercise their rights. For instance, in the Ukrainian Armed Forces, the holding of public events indoors has been limited and the gathering of conscripts was carried out only within teams determined by shared accommodation. Meals and canteens have also been organised in shifts by team, determined again by shared accommodation. While it is natural to limit physical public gatherings, on-line forms of civic and communal life must not only be preserved but actively supported by the state.¹⁵⁰

144 Schabas, A.W., 2015. *The European Convention on Human Rights: A Commentary*. Oxford University Press

145 Ibid.

146 ECtHR. Case of *Engel and others v. the Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 08/06/1976. Available at: <https://hudoc.echr.coe.int/tur?i=001-57479>

147 Venice Commission (2020). Guidelines on Freedom of Peaceful Assembly. Strasbourg / Warsaw, 15 July 2020 Study n° 769/2014. Available from: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e)

148 Ibid.

149 For more information see Right of Assembly. Derogations by States Parties from Article 21 ICCPR, Article

11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic (Information believed correct as of 3 March 2021). Available at: [https://www.rightofassembly.info/assets/downloads/Derogations_by_States_Parties_from_the_right_to_assembly_on_the_Basis_of_the_COVID_19_Pandemic_\(as_of_3_March_2021\).pdf](https://www.rightofassembly.info/assets/downloads/Derogations_by_States_Parties_from_the_right_to_assembly_on_the_Basis_of_the_COVID_19_Pandemic_(as_of_3_March_2021).pdf) [Accessed 22 March 2022]

150 Council of Europe (2021). COVID-19 and media freedom – guidance based on the Council of Europe standards. Available at: <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis>

Hypothetical scenario:

During their free time, conscripts used to get together in a library twice a week in order to discuss political developments in their country. With the eruption of COVID-19, commanding staff issued an order, which forbade any gathering. Conscripts thought the order violated their right to assembly as a hidden objective was linked to the political nature of their debates.

Consider the following:

- ❖ Does the order constitute a logical response to prevent the spread of COVID-19?
- ❖ Is the requirement applied in a non-discriminatory manner?
- ❖ Does it serve for the protection of health?
- ❖ Does the order only temporarily suspend any gathering in military installations?
- ❖ Does the order provide any alternative for replacing physical meetings, for instance, the creation of an on-line platform?

Right to Liberty and Security and Freedom of Movement

Under IHRL everyone has a right to liberty and security¹⁵¹ and the right to freedom of movement.¹⁵² Under the ECHR they are respectively enshrined under Article 5 of the Convention and Article 2 of Protocol No. 4. The deprivation of liberty is subject to stricter substantive and procedural conditions.¹⁵³ The ECHR outlines that everyone has the right to liberty and security save in the case of the lawful detention of persons for the prevention of spreading infectious diseases.¹⁵⁴ In the case of freedom of movement, lawful restrictions have to be in accordance with law and be necessary in a democratic society: namely to protect national security, public safety, maintenance of public order, for the protection of health, or for the protection of the rights and freedoms of others.¹⁵⁵ The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5(1) and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree and intensity. It is not a question of nature or substance.¹⁵⁶ The Court previously stated that the classification of an act into one of these two categories has not proved to be an easy task, and, in some cases, is a matter of pure

151 ICCPR, Article 9(1), see also UDHR, Art. 9

152 UDHR, Art. 13(1), ICCPR, Art. 12(1), ACHR, Art. 22(1)

153 Niall Coghlan. 17 March 2020. Rights in a time of quarantine – an extended look by Niall Coghlan. Available at: <https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-coghlan/>

154 ECHR, Article 5(1e)

155 ECHR Protocol No. 4, Art. 2(3)

156 ECtHR. Case of De Tommaso v. Italy (43395/09), 23/02/2017. Available from: <https://hudoc.echr.coe.int/eng?i=001-171804>, para. 80.

opinion.¹⁵⁷ Relevant criteria in this assessment, depending on the situation in question, may include the type, duration, effects and manner of implementation of the measure in question.¹⁵⁸

With respect to conscripts, under normal circumstances the freedom of movement of conscripts may be restricted in contravention of Article 2 of Protocol No. 4, for example, through the obligation to remain in the barracks outside service hours or the prohibition of conscripts to leave the country.¹⁵⁹ Similarly, the Court found that confining soldiers to barracks, when placed under light arrest, does not run afoul of Article 5 because such restrictions are not beyond the exigencies of normal military service. This is so even though the same would not be acceptable in the case of civilians.¹⁶⁰

There are a number of ways in which these rights have the potential to be affected during public health emergencies in general, and in the COVID-19 context specifically. During the COVID-19 pandemic states adopted three types of general measures: 1) movement limitations; 2) quarantine and isolation requirements; and 3) lockdown regimes. During a state of emergency, movement limitations and lockdown regimes affect conscripts in a nearly identical manner and thus will be considered together. Lockdowns and movement limitations are more likely to constitute a restriction to freedom of movement rather than a deprivation of liberty. This is because they are wide enough to permit some semblance of life and social contact.¹⁶¹ More severe movement restriction, such as confinement to one's home may amount to a deprivation of liberty.¹⁶² Similarly, cases of quarantine and isolation are more likely to constitute deprivation of liberty as they resemble instances of house arrest.¹⁶³

That being said, in *Terheş v. Romania* the Court found an application under Article 5(1) inadmissible.¹⁶⁴ The case concerned a Romanian national who claimed that the lockdown regime amounted to a deprivation of liberty. The Court considered that the lockdown was a general measure during which the applicant was free to leave his home to go to various places at any time for reasons provided in the legislation; because of the degree of intensity the measure could not be seen to equate with house arrest. As such the restrictions on the applicant's freedom of movement had not been such that the general lockdown could be deemed to constitute a deprivation of liberty. Because the applicant did not invoke Article 2 of Protocol No. 4 the Court did not further examine the validity of Romania's derogation under this provision.

With respect to the right to liberty during quarantine, in its only judgement on this matter, the ECtHR considered that there are two essential criteria when assessing the lawfulness of the detention of a person for the prevention of the spreading of infectious diseases. First, is the spreading of the infectious disease dangerous to public health or safety; and, second, is the detention of an infected person the last resort in order to prevent the disease's spread – as such less severe measures have been considered and found to be insufficient to safeguard public

157 ECtHR. *Case of Khlaifia and Others v. Italy* (16483/12), 15/12/2016. Available from: <https://hudoc.echr.coe.int/eng?i=001-170054>, para. 64

158 Ibid.

159 Erik Jurgens. 3 June 1998. Report on Human Rights of Conscripts (Council of Europe, Committee on Legal Affairs and Human Rights). Doc. 7979. Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7898&lang=EN>, para. 41

160 ECtHR. *Case of Engel and Others v. Netherlands* (5100/71, 5101/71, 5354/72, 5370/72), 8/06/1976. Available at: <https://hudoc.echr.coe.int/eng?i=001-57479>, para. 61

161 Niall Coghlan. 17 March 2020. Rights in a time of quarantine – an extended look by Niall Coghlan. Available at: <https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-coghlan/>

162 European Parliamentary Research Service. September 2020. Upholding human rights in Europe during pandemic. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI\(2020\)652085_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI(2020)652085_EN.pdf), p. 5

163 Niall Coghlan. 17 March 2020. Rights in a time of quarantine – an extended look by Niall Coghlan. Available at: <https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-coghlan/>

164 ECtHR. *Terheş v. Romania* (49933/20), 13/04/2021. Available at: <https://hudoc.echr.coe.int/eng?i=001-210026>

health.¹⁶⁵ The second question is essentially a matter of proportionality which can be determined based on factors such as nature, scope and duration of restrictions to rights (e.g., surveillance by authorities, possibility to exercise outdoors etc.). For example, the Court previously took into account whether the restrictions deprived an individual from having a social life and maintaining relations with the outside world when assessing whether right to liberty under Article 5 was violated.¹⁶⁶ In the case of isolation, the exemption under Article 5(1e) is very likely to extend to those reasonably suspected of being infected, which is consistent with the purpose of the Article, as well as with the 2005 International Health Regulations^{167, 168}.

Concerning limitations of movement, states enjoy relatively wide discretion under Article 2 of Protocol No. 4 as long as they can establish that there is a rational connection between the measure and the aim pursued, and that the restrictions do not last an unduly long time.¹⁶⁹ According to the UN Human Rights Committee, the possibility of restricting freedom of movement is generally sufficient during national emergencies: as such derogation from the ICCPR provision would not be justified by the exigencies of the situation.¹⁷⁰ This point was reiterated in a statement of the Human Rights Committee on derogations from the Covenant in connection with the COVID-19 pandemic.¹⁷¹ Interestingly, a number of Council of Europe member states have, though, notified the organisation about derogations from Article 2 of Protocol No. 4 on the freedom of movement due to COVID-19 measures. These states include Estonia, Georgia, Latvia, and Moldova. In assessing whether a given measure has exceeded the standard of proportionality the ECtHR considers the duration of the measures, the existence of a sunset clause¹⁷² and the admissibility of the exceptions (for example hardship clauses¹⁷³). Such measures should remain temporary and be discontinued as soon as circumstances permit.¹⁷⁴ Measures with long duration are thus particularly likely to be considered disproportionate.¹⁷⁵

As a result of COVID-19 states adopted numerous requirements for their citizens to quarantine and self-isolate. There were also exit bans preventing citizens and residents from leaving their territory in order to contain the

165 ECtHR. Case of *Enhorn v. Sweden* (56529/00), 25/01/2005. Available at: <https://hudoc.echr.coe.int/eng?i=001-68077>, para. 44

166 ECtHR. Case of *De Tommaso v. Italy* (43395/09), 23/02/2017. Available from: <https://hudoc.echr.coe.int/eng?i=001-171804>, para. 88

167 See Arts. 1, 51(1)

168 Niall Coghlan. 17 March 2020. Rights in a time of quarantine - an extended look by Niall Coghlan. Available at: <https://ukhumanrightsblog.com/2020/03/17/rights-in-a-time-of-quarantine-niall-coghlan/>

169 ECtHR. Case of *Miażdżyk v. Poland* (23592/07), 24/01/2012. Available from: <https://hudoc.echr.coe.int/eng?i=001-108766>, paras. 31, 35-41

170 UNHRC. 31 August 2001. CCPR General Comment No. 29: Article 4: Derogations during a state of emergency. Available at: <https://www.refworld.org/docid/453883fd1f.html>, para. 5

171 UNHRC. 20 April 2020. Statement on derogations from the Covenant in connection with the COVID-19 pandemic. Available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>, para. 2(c)

172 Sunset clause describes a provision which expires automatically on a specified date

173 Hardship clause describes a provision which is intended to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract or an agreement resulting in an excessive burden being placed on one of the parties involved.

174 European Parliamentary Research Service. September 2020. Upholding human rights in Europe during pandemic. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI\(2020\)652085_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI(2020)652085_EN.pdf), p. 5

175 ECtHR. Case of *Kuimov v. Russia* (32147/04), 08/04/2009. Available at: <https://hudoc.echr.coe.int/tur?i=001-90433>, para. 96

epidemic.¹⁷⁶ Both newly recruited conscripts and those suspected of infection were subject to various restrictions. In addition, state authorities imposed requirements for quarantine and self-isolation in order to prevent the spread of COVID-19. These were applicable in cases of infection or suspicion of infection from COVID-19, as well as for newly recruited conscripts prior to their entry to military units. Table 9 provides an overview of the measures taken by state authorities concerning quarantine and isolation.

Table 9. Measures taken by countries during COVID-19 that restricted the right to liberty and security of conscripts through mandated quarantine and isolation¹⁷⁷

Precaution	States	Specific measure taken by state
<i>Quarantine or isolation for newly recruited conscripts or in the case of detection or suspicion of infection of COVID-19</i>	Armenia	After undergoing medical examination in the conscription station, the conscripts were quarantined for 14 days before leaving for selected military units. ¹⁷⁸ Servicemembers infected with COVID-19 were hospitalised and those who had close contact with them were isolated in a specially designated area. ¹⁷⁹
	Azerbaijan	Upon arrival in their military units, conscripts were quarantined for 14 days in a separate isolated building ¹⁸⁰
	Estonia	Conscripts infected with COVID-19 had to quarantine or self-isolate at home. Quarantined soldiers were reachable by cell phones and could be sent packages
	Georgia	Quarantine facilities were provided for conscripts who were coming back from their homes and who tested positive for COVID-19
	Kazakhstan	Quarantine facilities were provided in all military units and medical institutions. During the period of conscription of citizens for military service, the recruiting centre was divided into two zones: the first zone – ‘dirty’ and the second zone – ‘clean’. The ‘dirty’ zone was intended for conscripts who have not passed the test for coronavirus infection. The ‘clean’ zone was reserved for recruits who had negative test results. The accommodation of young recruits in military units was carried out separately from other personnel so that isolation could be followed by a two-week quarantine
	Kyrgyzstan	Quarantine of up to 14 days was introduced during which communication with outsiders was prohibited. ¹⁸¹ This requirement applied only in 2020 and is no longer practised in military units

176 Exit bans were imposed in Belgium, Czechia, Lithuania and Malta. Exit bans similarly to other measures outlined in this section curtail people’s freedom of movement, more specifically the right to leave any country as provided under Article 2(2) of the Protocol No. 4 to the ECHR. Such interferences may be lawful provided that they are proportional and comply with requirements set out in Article 2(3) of Protocol No. 4 to the ECHR.

177 Where references are not provided in the table, information was obtained directly from civil society organizations or state authorities

178 Zinuzh, 04.07.2020, 2:04; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia’s National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 75

179 Zinuzh, 28.03.2020, 0:17; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia’s National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 71

180 BBC. 3 July 2020. Azərbaycan: hərbi xidmət çağırışçıları koronavirusdan necə yoxlanılır?. Available at: <https://www.bbc.com/azeri/azerbaijan-53221024>

181 Interview with Gulshair Abdrasulova, Lawyer, Kylym Shamy NGO, 26 November, 2021.

Precaution	States	Specific measure taken by state
	Lithuania	If a soldier was diagnosed with COVID-19 they were isolated, and an ambulance was called. The premises where the conscript had resided were disinfected and those who had come into contact with him were isolated and observed for 14 days. The ill conscript was handed off to civilian healthcare institutions.
	Moldova	Quarantine facilities were granted for soldiers with COVID-19 symptoms, who were then hospitalised in the medical facilities of military units, with the possibility of transport to the Central Military Clinical Hospital if they tested positive with COVID-19
	Uzbekistan	Upon arrival to military units, conscripts were isolated and put into 14 days quarantine

COVID-19 has seen quarantine and isolation be generally accepted as a legitimate restriction of right to liberty and security and to the freedom of movement. A good practice in this regard to ensure that the rights of conscripts are restricted as little as possible is to ensure that conscripts: are able to communicate with their family and friends virtually; and that they are able to receive packages from them (see example of Estonia above). For example, it is important that conscripts have access to electricity and internet while in quarantine.

Application in Practice: Right to Liberty and Security and Freedom of Movement Checklist

Hypothetical scenario:

A conscript is informed that he/she will have to be placed under quarantine for 14 days. The conscript believes this constitutes a violation of his/her right to liberty and security and is contemplating filing a complaint.

Consider the following:

- ❖ Is the quarantine/self-isolation requirement a genuine response to prevent the spread of COVID-19?
- ❖ Are the grounds for quarantine/self-isolation and its length non-discriminatory?
- ❖ Is the length of the quarantine lawful and proportional to the threat at hand?
- ❖ Are the conditions of quarantine/self-isolation lawful, proportionate, and non-discriminatory?
- ❖ Is the quarantine/self-isolation requirement imposed on conscript in a way that restricts his/her rights to the least extent possible?
 - » Under what conditions do conscripts have to undergo quarantine/self-isolation?
- ❖ Is the need for quarantine/self-isolation periodically reassessed in light of the developments in COVID-19 infection rates?

Right to Respect for Private and Family Life and Correspondence

The ECHR, under Article 8, provides that ‘everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence’ and ‘there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. A similar provision is included under Article 17 of the ICCPR: ‘No one shall be subjected to arbitrary or unlawful interference with his/her privacy, family home or correspondence, nor to unlawful attacks on his/her honour and reputation’ and ‘everyone has a right to the protection of the law against such interference or attacks’.¹⁸² Article 8 encompasses the negative obligations of the state to protect individuals against arbitrary interference by public authorities, as well as positive obligations inherent in an effective respect for private life which may involve adoption of measures designed to secure respect for this right.¹⁸³

While Article 8 has been generally understood to encompass four rights (the right to respect for private life, to family life, to home and to correspondence) over time its interpretation evolved to include other rights such as the right to physical, psychological and moral integrity, the right to privacy and the right to identity and autonomy.¹⁸⁴ While the positive obligations of states with respect to Article 8 are directly secured to anyone within their jurisdiction, states have a reinforced duty towards people who are under their exclusive control, including conscripts or individuals carrying out compulsory military service.¹⁸⁵

With compulsory military service, the state has a primary duty to put in place rules appropriate to the level of risk that may result from military activities and operations. But it must also have rules taking into account the human element that comes into play when a state decides to call up ordinary citizens to serve.¹⁸⁶ Such rules must require: the adoption of practical measures aimed at the effective protection of conscripts against the dangers inherent in military life; and appropriate procedures for identifying shortcomings and errors committed in that regard by those in charge at different levels.¹⁸⁷

A notable Article 8 case addressing the positive obligation of states to protect physical integrity during compulsory military service in the context of infectious diseases is *Demir v. Turkey*. There the applicant brought a claim to the Court after having contracted tuberculosis during his military service. In its judgement the ECtHR stated that it has been reluctant to impose rigid standards in respect of the specific medical tests to be performed prior to or

182 This right is also enshrined under Article 12 of UDHR which provides that ‘No one shall be subjected to arbitrary interference with his/her privacy, family, home or correspondence, nor to attacks upon his/her honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’

183 ECtHR. 31 March 2021. Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence. Available at: https://www.echr.coe.int/documents/guide_art_8_eng.pdf [Accessed 22 March 2022], p.8

184 *Ibid.*, the number of rights considered under Article 8 is extensive and its scope is likely to broaden in the future. Examples of other rights include: 1) Physical, psychological and moral integrity: reproductive rights, forced medical treatment and compulsory medical procedures, end of life issues, disability issues, issues concerning burial and deceased persons, environmental issues; 2) Privacy: right to one’s image and photographs, data protection, right to access personal information, information about one’s health; 3) Identity and autonomy: right to personal development and autonomy, right to discover one’s origins, right to ethnic identity, etc.

185 ECtHR. *Ziver Demir and Nasraddin Demir v. Turkey* (58402/09), 10/01/2017. Available at: <https://hudoc.echr.coe.int/eng?i=001-171209>, para. 31

186 *Ibid.*

187 *Ibid.*, see also ECtHR. *L’affaire Kılınc et autres c. Turquie* (40145/98), 07/06/2005. Available at: <https://hudoc.echr.coe.int/eng?i=001-69269>, para. 41; ECtHR. *Case of Mosendz v. Ukraine* (52013/08), 17/01/2013. Available at: <https://hudoc.echr.coe.int/eng?i=001-115887>, para. 91; ECtHR. *Case of Chember v. Russia* (7188/03), 03/07/2008. Available at: <https://hudoc.echr.coe.int/eng?i=001-87354>, para. 50

during military service, leaving the states some margin of appreciation in this matter.¹⁸⁸ That being said, special measures must be taken to adequately secure the health and well-being of conscripts by, among other things, providing them with the medical assistance they require. Not every claimed risk to physical integrity can entail a requirement for the authorities to take operational measures to prevent that risk from materialising.¹⁸⁹ Instead it must be established that the authorities know or ought to have known at the time of the existence of a real risk to the physical integrity of an identified individual or individuals. It must also be established that they failed to take measures within the scope of their powers which, judged reasonable might have been expected to avoid that risk.¹⁹⁰ Despite the best efforts of state authorities, it may not be possible to completely eradicate or prevent the spread of transmissible diseases among conscripts. This is owing to the nature and demands of military life. But in such circumstances the provision of timely and adequate medical treatment becomes key in assessing the liability of state authorities.¹⁹¹

As Article 8 enshrines a qualified right, restrictions thereto are lawful as long as they are proportional and comply with the requirements set out in Article 8(2). Similarly, derogations from Article 8 are permissible, provided that they are in line with the standards set out in the previous sections. During the COVID-19 pandemic a number of states in Eastern Europe and the South Caucasus derogated from their obligations under Article 8 of ECHR or Article 17 of ICCPR. They include Estonia, Georgia, and Latvia.

As the scope of Article 8 is broad, there are many ways in which the rights of conscripts can be affected. Among others:

- ❖ Private and family life of conscripts may be limited through suspended leave from military units;
- ❖ Respect for the physical integrity of conscripts may be affected due to the risk of infection and infection from COVID-19 in the absence of adequate protective measures and subsequent treatment;¹⁹²
- ❖ Respect for the physical integrity of conscripts may be affected due to mandatory vaccination programs¹⁹³ and due to measures related to screening and testing for COVID-19 depending on its frequency and intensity;
- ❖ Respect for psychological integrity may be affected due to prolonged isolation within military units (e.g., quarantine) and from their family and the rest of society (e.g., suspension of family leave)
- ❖ Right to privacy, especially in reference to one's medical information and information about health may be affected as a result of collecting data on COVID-19 in general and in military units.

The right to respect for private and family life was restricted most extensively in the case of conscripts. As conscription brings together individuals from different geographical locations and diverse social groups the risk of COVID-19 spreading is high. The most prevalent measure in this regard was the suspension of conscripts' family leave. While under normal circumstances conscripts are, in most countries, allowed to periodically leave military units to meet with their family and friends, a number of states adopted measures suspending the right to family leave. Similarly, visits of families and friends to military units were suspended in multiple states.

188 ECtHR. *Ziver Demir and Nasraddin Demir v. Turkey* (58402/09), 10/01/2017. Available at: <https://hudoc.echr.coe.int/eng?i=001-171209>, para. 31

189 *Ibid.*, para. 32

190 *Ibid.*

191 *Ibid.*, for application of the same principles to Article 3 see also ECtHR. *Case of Dmitriy Sazonov v. Russia* (30268/03), 01/03/2021. Available at: <https://hudoc.echr.coe.int/eng?i=001-109326>, para. 40

192 See ECtHR. *Ziver Demir and Nasraddin Demir v. Turkey* (58402/09), 10/01/2017. Available at: <https://hudoc.echr.coe.int/eng?i=001-171209>

193 See Notice of application before Court concerning the compulsory vaccination of certain workers imposed by French law in the health crisis: *Thevenon v. France* (46061/21). Available at: <https://hudoc.echr.coe.int/eng-press?i=003-7145912-9686564>

In **Moldova**, according to decision No. 55 of the Moldovan parliament of 17 March 2020 'On the Declaration of the State of Emergency established following the declaration by the WHO of the COVID-19 pandemic on 11 March 2020 and the establishment by the National Extraordinary Public Health Commission of 13 March 2020 of the national red code in connection with the epidemiological situation due to COVID-19 infection' the right to family leave for the military was temporarily suspended. The Ministry of Defense suspended only the right to go on leave during the term of conscript service. But it was granted on dismissal by reducing the term of military service by ten days: this was relevant only for the conscripts whose period of service was temporarily suspended in April 2020 and once their service resumed, the completion date was moved to June 2020.

In **Lithuania**, weekend leave for conscripts of the Continuous Mandatory Initial Military Service (CMIMS) was temporarily suspended. This preventive measure was applied in order to ensure the safety of conscripts and any family members they would visit. But, at the same time, opportunities were created to stay in touch via technology. Family members were not allowed to visit soldiers at military units during quarantine, on the basis of the Chief of Defence's action plan restricting access by unauthorised persons to military units. Delivery of parcels was allowed, but conscripts were prohibited from keeping food in their barracks.¹⁹⁴ Likewise, in **Estonia**, after quarantine was announced, conscripts had to live in the barracks for several months, communicating with their families only remotely.¹⁹⁵

In **Georgia**, the COVID-19 restrictions also applied to family leave for some time and depended on the COVID-19 situation in the unit and in the family of the conscript. In **Kazakhstan** it was forbidden to conduct ceremonial send-offs of conscripts with the participation of parents and relatives. In Azerbaijan, both family leave and meetings of soldiers with their parents at military bases were periodically suspended.¹⁹⁶ In exceptional cases meetings could be carried out through digital means. After 2020 military activities, some soldiers were allowed to visit their families. In **Tajikistan**, from May to August 2020, relatives and loved ones were not allowed into military units to visit conscripts.

In 2020 in **Armenia**, the relatives of conscripts could not visit the Republican Conscription station. This was to prevent the spread of COVID-19. Restrictions have been imposed on the movement of armed forces personnel including the indefinite banning of holidays and visits.¹⁹⁷ Later plans included the restoration of vacations and the provision of separate rooms to ensure online communication for servicemembers and relatives.¹⁹⁸ It was also planned to allow visits, in compliance with anti-epidemic measures and safety rules, in exceptional cases and with the permission of the head of the territorial division of the garrison and under direct supervision of the commander of the military unit.¹⁹⁹

In **Kyrgyzstan**, the only restriction on family visits were during the time that a conscript was in quarantine. Here it should be noted that the Kyrgyz armed forces, as a general rule, permit family leave only rarely, for examples in the cases of the funeral of relatives.²⁰⁰

194 Lithuanian Military Digest No. 3 (22). March 2020. Available at: https://kariuomene.lt/data/public/uploads/2021/02/lmd_2020_nr.-3_kovas_internetui.pdf

195 Budas. 14 May 2020. Šauktiniai savaitgaliui bus išleisti į namus – kariuomenė. Available at: <http://www.budas.lt/naujienu-portalas-budas-lt/aktualijos/11-aktuali-informacija/38592-sauktiniai-savaitgaliui-bus-isleisti-i-namus-kariuomene>

196 BBC. 3 July 2020. Azərbaycan: hərbi xidmət çağırışçıları koronavirusdan necə yoxlanırlar?. Available at: <https://www.bbc.com/azeri/azerbaijan-53221024>

197 Zinuzh, 16.05.2020; see also Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 71

198 Ibid.

199 Peace Dialogue. 2021. Defence Sector-Related Actions in the Scope of 2020-2022 Action Plan Derived from Armenia's National Strategy for Human Rights Protection: Monitoring Report January 2020-May 2021, p. 71

200 Interview with Gulshair Abdrasulova, Lawyer, Kylym Shamy NGO, November 26, 2021.

Hypothetical scenario:

Upon arrival to the military unit a conscript is informed that their right to family leave will be suspended until further notice. The conscript is unhappy about this measure and asks you to submit a complaint on their behalf, claiming that it violates their right to private and family life.

Consider the following:

- ❖ Is the suspension of family leave a genuine response to prevent the spread of COVID-19?
- ❖ Is the suspension of family leave lawful and proportionate to the threat at hand?
- ❖ Does the suspension of family leave apply to all conscripts? Is it non-discriminatory?
- ❖ Is the suspension of family leave imposed on conscript in a way that restricts his/her rights as little as possible?
 - » Are conscripts able to communicate remotely/virtually with their loved ones?
 - » If vacation days are suspended, did the state make any adjustment to the duration of conscription?
 - » Are there exceptions to suspension of family leave (e.g., as a result of death or illness of a family member, birth of a child, etc.)?
- ❖ Is the need for suspension of family leave periodically reassessed in light of the developments in COVID-19 infection rates?

Prohibition of Forced Labour

During the COVID-19 pandemic, armed forces personnel were in deployed to provide logistical support²⁰¹, medical support²⁰² and to enforce COVID-19-related-measures.²⁰³ Conscripts are in a category apart from professional or volunteer servicemembers. While professional personnel receive remuneration for their work, conscripted personnel do not. Similarly, while volunteer servicemembers chose to join the armed forces, conscripted personnel do not. Conscripts are consequently exempted from the prohibition on forced labour as long as their service is of a military character (unless the servicemember n is a conscientious objector granted an alternative civilian service).²⁰⁴ Therefore, in principle, conscripts should only have to perform military tasks.²⁰⁵

201 The types of support included in order of frequency: transport, providing personal protective equipment, food aid and producing medical supplies

202 The type of support included in order of frequency: setting up field hospitals and mobilizing military medical personnel, voluntary blood donations and health checks along national borders

203 The type of support included in order of frequency: patrolling borders, ensuring compliance with the COVID-19 regulations and controlling infected communities. For a more detailed overview see Luka Glušac and Ajla Kuduzovic. 16 February 2021. Impact of COVID-19 on Armed Forces. DCAF. Available at: <https://www.dcaf.ch/impact-covid-19-armed-forces>

204 See ECHR, Art. 4(3b)

205 Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7898&lang=EN>, para. 42

In general, members of the armed forces, including conscripts, should not be used to perform tasks incompatible with their assignment to as military servicemembers: with the exception of emergency and civil assistance carried out in accordance with the law.²⁰⁶ The fact that a person binds him or herself to following orders when entering the armed forces by conscription, does not mean that those in military authority can exploit their services for personal purposes.²⁰⁷ In times of national emergency, members of the armed forces may be called upon to join emergency medical teams or the civilian police force. However, in principle, servicemembers, particularly conscripts, should be obliged to carry out only the tasks to which they are officially assigned, or the ancillary tasks associated with their rank.²⁰⁸

To understand the type of tasking permissible for conscripts, it is useful to draw a distinction between military, civilian and private purposes. Under normal circumstances the tasks of conscripts should be limited to purely military purposes. In the case of national emergencies, it may be the case that it is necessary to deploy conscripts to conduct tasks of a civilian nature. Nevertheless, neither under normal circumstances, nor during a state of emergency should conscripts be deployed to conduct tasks for private purposes.

With respect to the measures taken by states during the COVID-19 pandemic, this study did not identify any broader trend in employing conscripts to combat COVID-19. No country made broader changes to its conscription system, nor did any country introduce conscription to combat the consequences of COVID-19. In two instances, namely Azerbaijan and Kyrgyzstan, the authorities tasked conscripts with enforcing public measures against COVID-19. In Azerbaijan, while conscripts in general were not employed, servicemembers of the Internal Troops were involved in anti-COVID-19 measures in various cities, especially in Baku. They were tasked with monitoring the movement of citizens during quarantine hours. In Kyrgyzstan, conscripts were involved in combating COVID-19 during the state of emergency only. On 24 March 2020, a state of emergency was imposed in the capital of Kyrgyzstan, Bishkek. It was initially introduced for three weeks, from March 25 to April 15, 2020²⁰⁹, but it was, then, extended several times until 19 October 2020, with some breaks.²¹⁰ The state of emergency was later launched in other parts of the country as well. During this period, the president and the Interior Ministry employed the Armed Forces to maintain public order. First, conscripts were mobilised to control movement, as well as law and order at the checkpoints installed at the border between different infected zone areas, such as Bishkek and other parts of the country. They checked the documents of citizens passing through patrol points and were mandated to prohibit entrance for non-Bishkek residents. The same service was rendered by conscripts in Osh, a second largest city in Kyrgyzstan, as well as in other towns. Conscripts also guarded vital public facilities such as clinics. For example, conscripts, who joined the National Guard, a special military unit created to defend public premises, were employed to guard several healthcare facilities based in Bishkek. These clinics treated patients infected with COVID-19. According to interviews with the Ministry of Defense, this service is no longer provided; it was only used in 2020 during the state of emergency.²¹¹ Since then, soldiers have not been mobilised to provide guard services for healthcare facilities.

206 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum. Available from: <https://policehumanrightsresources.org/content/uploads/2016/06/CoEGuidelines-on-Human-Rights-of-members-of-the-armed-forces.pdf?x96812>, para. 15

207 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 32

208 Council of Europe: Committee of Ministers. 2010. Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces and explanatory memorandum, p. 32

209 Presidential Decree “On Imposing State of Emergency in Bishkek”, March 24, 2021, Available at: http://www.president.kg/ru/sobytiya/ukazy/16382_podpisan_ukaz_ovvedenii_chrezvichaynogo_pologheniya_nateritorii_goroda_bishkek_kirgizskoy_respubliki

210 Presidential Decree “On Imposing State of Emergency in Bishkek”, October 12, 2021, Available at: <http://cbd.minjust.gov.kg/act/view/ru-ru/43>

211 Interview with Colonel Kanatbek Shamyrov, Chief, Conscription Department, Kyrgyzstan's Ministry of Defense, Bishkek, November 29, 2021; Interview with Kuban, Head, Conscription Service of Leninsky District in Bishkek city, 28 November, 2021.

Hypothetical scenario:

Conscripts in a military unit were tasked with disinfecting the premises of a local high school. You are tasked with assessing whether this assignment constitutes forced labour.

Consider the following:

- ❖ Is the task for private or public purposes?
- ❖ Is the task officially assigned to a conscript?
- ❖ Is the ancillary task associated with the rank of conscript?
- ❖ Is the work strictly required to counter an imminent danger to the population?²¹²
- ❖ Is the need for the ancillary task periodically reassessed in light of the developments concerning COVID-19?

212 ILO: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2337201

RECOMMENDATIONS

This study analysed the effects of national emergencies on the rights of conscripted military personnel. It showed that the COVID-19 pandemic has extensively affected the rights of conscripts. COVID-19 endangered predominantly the right to life of conscripts and, as a result, states adopted a variety of measures to ensure that the risk of infection and the consequences of infection be mitigated. In addition, with the purpose of protecting the right to life, states adopted a number of restrictions and derogations from other rights. These included the right to private and family life, freedom of association and assembly and the right to liberty and security.

The study focused on a select number of rights most affected by the COVID-19 public health emergency. This list is not exhaustive, though. It is not precluded that other rights including freedom from torture, inhuman and degrading treatment, freedom to manifest one's religion or beliefs and a number of other social and economic rights were affected during this global public health crisis. Furthermore, the COVID-19 pandemic may raise other new questions about the role of the state and the positive obligations of authorities with respect to conscripts. For example, to what extent do states have obligations in the context of long COVID-19? If a conscript contracts COVID-19 during their military service, as a result of insufficient protective measures, it may be appropriate that the authorities are responsible for the immediate treatment of the conscript as well as for the long-term consequences of their infection with COVID-19. The reluctance of most states to adopt mandatory vaccination programmes for conscripts also shows the tension between the obligation to protect the right to life and the right to respect the physical integrity of conscripts. These are only a few of many questions that the COVID-19 public health emergency has raised as regards the rights of conscripts and the application of human rights standards in general.

On the basis of this study, the following recommendations are proposed to guide state policies concerning conscription during public health emergencies:

Preference should be given to limitations rather than derogations from rights

During public health emergencies states, depending on the circumstances in the crisis, can decide to limit the rights of conscripted personnel or derogate from their obligations under international human rights agreements to which they are a party. If limitations to the right of conscripts are sufficient to address public health emergencies, it is recommended that states proceed with measures restricting the rights of conscripts, rather than derogating from their international commitments. Rights can be limited with the purpose of protecting public health,²¹³ while derogations during a state of emergency have to result from a serious crisis which affects the population as a whole and jeopardises the very existence of the community and the state. States should ensure that it is clear whether specific measures constitute limitations in line with international agreements (e.g. ECHR, ICCPR) or whether such measures are derogations addressing the emergency at hand.

Limitation of rights must meet the standards enshrined in international agreements

Limitations to rights of conscripts have to be prescribed by law. They must pursue a legitimate aim, be proportionate, non-discriminatory and restrict the given right as little as possible.

213 Other legitimate justifications include protection of public order, public morals, national security and public safety.

Derogations from rights must meet the standards enshrined under international law

If authorities consider it necessary to impose measures that derogate from their international human rights commitments they have to do so under a formally declared state of emergency. They must ensure that their conduct conforms to the principles of proclamation, notification, time limitation and the principle of exceptional threat. Measures adopted during a state of emergency have to be proportional to the severity of a crisis to the extent strictly required by the exigencies of the situation. The scope and duration of each measure that constitutes a derogation should be limited to what is immediately necessary. Derogating measures should be lawful, non-discriminatory and in harmony with other obligations under international law. In addition, the measures should be used only as a genuine response to the emergency and be subject to adequate safeguards. Authorities should regularly review the measure and ensure its judicial review.

States should take proactive steps to effectively protect the right to life of conscripts

During public health emergencies authorities should protect the right to life of conscripts through various protective means to ensure that the right is effective and not diminished to an unacceptable level. Such protective measures should be holistic in that they consider all stages of conscription cycle and address all risk factors of the public threat at hand. They should also mitigate risks. The measures must be non-discriminatory and proportional to the risk of infection and to the consequences thereof, and the conscripts should be adequately informed about their scope and duration. Authorities should regularly review and, if appropriate, adjust protective measures.

States should consider ways of mitigating limitations to the rights of conscripts

During national emergencies when gatherings and the movements of conscripts are restricted, states should consider introducing measures to mitigate the limitations of the rights of conscripts so that their rights are restricted to the least extent necessary. For example, the provision of online access and online services can mitigate restrictions to the freedom of expression, freedom of assembly and the right to respect for private and family life.

The tasks of conscripts during national emergencies should meet appropriate international standards

Tasks of conscripts addressing the public emergency at hand should be assigned to them with the public purpose of combating or mitigating the emergency situation in line with existing legislation. These tasks should be officially assigned, associated with the conscripts' rank and required to counter an imminent danger to the population. The need to deploy conscripts to conduct ancillary tasks should be periodically reassessed in light of the developments in the emergency situation.

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