**Resorting to emergency powers during armed conflict or other threats to national security: Considerations related to human rights and the rule of law**

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***Introduction***

Russia’s ongoing aggression against Ukraine has caused a clear change in the overall situation of European, and even global, security. Finland and Sweden have joined Nato. Russia is suspected of a number of actions that many characterize as hybrid attacks against European countries, including for instance the instrumentalization for its own known or unknown purposes of refugees or migrants who seek their way to Western Europe. Some European countries are preparing for the possibility of finding themselves as party to an international armed conflict (war), others navigate a course of supporting Ukraine in various ways but staying clear of themselves becoming involved in an armed conflict. Generally, European countries are identifying ongoing threats to their national security, which shift in itself affects the domestic political agenda and its priorities. One of such effects is the consideration of resorting to emergency powers to manage existing or eventual threats. This contribution intends to address the framework of international human rights law as to how it addresses states of emergency, as well as the experiences of Finland, an EU and Nato member with a 1340 kilometre land border with Russia.

***Framework of human rights law in times of emergency***

International human rights law applies also in times of war or other emergencies. This is true for all states as a matter of international law but is of particular relevance internally in countries such as the Netherlands or Finland where the country’s international human rights obligations are entrenched in the Constitution, in some respects with higher or stronger status than the Constitution’s own catalogue of fundamental rights.

Human rights treaties are not a straitjacket but allow for adjustments, both in normal times (“limitations”) or during emergencies (“derogations”). The difference between these two situations is not as drastic as it sounds, as also derogations, even if they allow for more far-reaching restrictions, must comply with the requirements of legality, legitimate aim, necessity and proportionality. Even more importantly, there is a category of non-derogable human rights – such as the prohibition against torture, inhuman treatment or refoulement – that allow for no derogation even in times of war. This is the framework both under the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

In times of war – international armed conflict - or an internal armed conflict also the framework of international humanitarian law (IHL) applies as a part of the laws of war. The application of IHL does not make international human rights law inapplicable but affects its interpretation. For instance, under the ICCPR, proactive security detention subject to judicial recourse will in principle be permissible during armed conflict without amounting to arbitrary deprivation of liberty. Similarly, deaths resulting from lawful acts of combat, including unavoidable and proportionate civilian casualties, will not be categorically characterized as violations of human rights law, either. This is not because human rights would not apply but because strict compliance with IHL affects the interpretation of what is a human rights violation.

***Reflections on the experience of Finland***

Finland has a modern Constitution (1999) with a full catalogue of fundamental rights and a clause allowing courts to set aside an Act of Parliament if its application were to be in manifest conflict with the Constitution (§ 106). Through multiple provisions the Constitution also entrenches the country’s international human rights obligations which, unlike the Constitution’s own catalogue of fundamental rights, do not allow for “exceptive Acts” adopted through a qualified majority procedure. The Constitution also has a modern state of emergency clause that allows derogations from fundamental rights during crisis but, notably, only in compliance with the country’s international human rights obligations (§ 23).

What makes the situation complicated is that for historical reasons there also is an Emergency Powers Act (2011) that itself is an exceptive Act, i.e. deviates from the Constitution but not from international human rights law. In 2022 this Act was amended to include a new category of “hybrid threats” among the types of crisis that allow the invoking of emergency powers. As politicians thought this was not enough, also an ordinary law, the Border Guard Act, was amended to include its own emergency provisions in Section 16. These three layers of emergency powers have created an unfortunate situation of ambiguity and even vulnerability to a power grab by the executive (the Government) as it is the Government itself that triggers its exceptional powers under said Section 16, and Parliament does not have a formal power of review (unlike the situation under the Emergency Powers Act).

Powers of derogation under human rights treaties or national Constitutions have been criticized for creating a slippery slope, including for the reason that emergency powers once resorted to will be easy to invoke repetitiously, even semi-permanently and in the worst case abusively in bad faith. But they have also been commended for their capacity of taming emergency powers through an international notification requirement, international scrutiny and insistance on legality also when a country declares a state of emergency.

The experience of Finland affirms that the coin has two sides. The Emergency Powers Act was activated in March 2020 for the first months of the Covid-19 pandemic. The in-built system of parliamentary review of emergency measures and the requirement of terminating emergency powers as soon as possible worked, and normalcy was restored in part through the mechanisms created by the Emergency Powers Act itself. But no international notifications of derogations were filed pursuant to ECHR or ICCPR, and some of the emergency measures – such as a de facto closing of borders – did not have a proper legal basis in the Emergency Powers Act, or otherwise.

What has then happened in 2022-2024 during Russia’s aggression against Ukraine confirms – in my assessment – the risk of a slippery slope. Inserting a highly ambiguously written new “hybrid threat” emergency hastily into the Emergency Powers Act and separate emergency clauses in the Border Guard Act, equally in a haste, signify the normalization of the exceptional. Since 16 November 2023 the Government has through a series of short-term decisions made under Section 16 of the Border Guard Act closed the 1340 km long land border with Russia, currently until 14 April 2024 but likely to be again extended. With the justification that secret intelligence information suggests that Russia is instrumentalizing refugees and migrants by allowing or facilitating their arrival at the Finnish border, the Government has concluded that the “phenomenon” constitutes a hybrid threat and allows for the closing of all border crossing points at the Russian border, including by suspending any possibility to apply for asylum (international protection) there. It is known that a large part of those who would come, would be genuine refugees. By declaring a “hybrid threat”, the Government has de facto turned it back also to people fleeing persecution, torture or other inhuman treatment, for instance from Syria. The Government nevertheless continues to claim compliance with Finland’s international human rights obligations as the option for applying for asylum remains open at Helsinki Airport – for those who manage to board a plane. This argument of course is a mere fig leaf to hide the fact that Finland is currently violating its non-derogable human rights obligations by refusing to receive applications for asylum anywhere along its 1340 km long border with Russia, and neither at its embassies abroad.

Further support to the “slippery slope” argument is provided by the fact that the current situation still is not enough for the Minister of Interior who has prepared again one more layer of emergency powers laws. The draft “Act on temporary measures to combat instrumentalized entry into the country” would be enacted as an exceptive Act, i.e. in the same qualified procedure as required for amending the Constitution. It would explicitly derogate from many provisions of the Constitution by, for instance, allowing for so-called pushbacks where a person who has managed to cross the border is physically pushed back to the Russian side, without any formal decision or any kind of judicial or other redress. For the first time in history, the draft Bill also openly admits that it is in conflict with Finland’s international human rights obligations and EU law and that such breaches may have some “consequences” for Finland.

The current worst-case scenario is that there will actually be a five sixths’ majority in Parliament that will push through this Bill in an urgent procedure. To me, this would be conclusive proof of how resorting to emergency powers may escalate to a corrosive process that destroys a liberal democracy’s commitment to constitutional rights, international human rights and the rule of law. As an eternal optimist, I believe that civil society actors, legal expertise and professional ethics within the Border Guard Agency will stop the Bill. The best-case scenario is that we will see a national catharsis through which it will generally be understood that human rights must be respected even in times of emergency.

A final proposed lesson from Finland is that the corrosive pull of emergency powers heightens the problems related to xenophobia, nationalist populism, authoritarianism, securitization and the so-called post-truth era. Cynical disregarding of a country’s international human rights obligations and reducing them to a “cost” is an alarming sign of a democracy losing its moral compass. Resorting to the idea of an exception, instead of patiently and methodically walking through the requirements of legality, legitimate aim, necessity and proportionality entails closing the door for a rational discourse based on proven facts and best arguments, thereby also destroying the foundation for a common and unifying space for a discourse between equals, i.e. a democracy.