

DEROGATING FROM EU ASYLUM LAW IN THE NAME OF “EMERGENCIES”: THE LEGAL LIMITS UNDER EU LAW¹

STATES DO NOT HAVE A CARTE BLANCHE TO DEROGATE FROM EU ASYLUM LAW MEASURES.

A NATIONAL “EMERGENCY” MEASURE WHICH HAS THE EFFECT OF DEROGATING FROM EU LAW NEEDS TO BE STRICTLY INTERPRETED AGAINST THE WORDING, SCOPE, AND OBJECTIVES OF THE RELEVANT EU SECONDARY LEGISLATION, MEET THE REQUIREMENTS OF THE PROPORTIONALITY AND NECESSITY TESTS AND BE COMPATIBLE WITH FUNDAMENTAL RIGHTS.



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INTRODUCTION

1. National “emergencies” or “crisis management measures” (hereinafter emergency or emergencies²) have consistently been used by States as a pretext to bend usual legislative processes, set aside individual rights, and/or justify non-compliance with national, European or international legal obligations.³ Indeed, where States react to “emergency” situations through recourse to specific measures or actions, their failure to abide by constitutionally established legal systems are obviated, so they claim, by the response needed to the situation they face. This does not, however, mean that these measures are outside any form of legal framework or are immune to legal control. Rather, the relevant legal framework, whether it be national, regional or international law, will be “the benchmark against which the legality of an emergency measure is appraised”.⁴ As such, emergency or crisis management measures will only be admissible where they are justified within the parameters of applicable legal systems.⁵ For matters falling within the scope of EU law, these parameters are set by express derogations in primary and secondary law as well as applicable fundamental principles of EU law.
2. The purpose of this note is to examine whether EU Member States can lawfully derogate from their EU asylum obligations on the basis of an emergency.⁶ As such, the note is primarily addressed to legal practitioners who wish to challenge planned or implemented emergency measures derogating from EU asylum law. The note is structured to, first, lay out the derogations which exist in EU asylum law and which Member States could potentially use as a legal basis to displace certain obligations under the asylum *acquis*. The second part of the note examines the principles that underpin the application of derogations under EU asylum law and asks whether national emergency measures can fully satisfy these requirements? As will be made clear, measures which have the effect of derogating from EU law will be strictly interpreted against the wording, extent, and objectives of secondary legislation in addition to the proportionality and necessity of the measure and its compatibility with fundamental rights. In other words, the lawfulness of a national emergency measure derogating from the asylum *acquis* is entirely conditional on adherence to these principles.

Derogations under EU law in the field of asylum

3. For matters relating to asylum, both primary and secondary law contain specific derogations which allow, in theory, for Member States to lawfully set aside their EU asylum obligations. These derogations relate to internal, national or public security and law and order. Secondary EU asylum law also takes account of these grounds, as well as public order, public policy, and public health, but does not construe them as grounds for derogation from the application of the particular legislation.⁷ Instead, they acknowledge Member States’ responsibilities when implementing the asylum *acquis*.
4. The table in the Annex to this note outlines the relevant derogating provisions from EU asylum law as well as the grounds for derogation. It also lists the provisions in EU secondary asylum law where express mention is made to public security, order, and/or policy. As the table demonstrates, there is a framework in EU asylum law which Member States could potentially rely on to enact internal/national public security or order measures and which would have the effect of derogating from the otherwise applicable legislation. However, and as explained below, underlying principles in respect of the application of these derogations will be determinative of the lawfulness of the enacted national measure.
5. Under Title V of the TFEU, Article 72 states that the provisions relating to the area of freedom, security and justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. In recent cases before the CJEU, Member States have used Article 72 to defend actions taken in pursuance of internal/national security and public order

2 For the purposes of this note, the term “emergency” is used to convey the exceptional measures or deviations from the regular legal system which have been adopted by States in response to a perceived situation rather than a precise definition of the conditions which would trigger a specific procedure or emergency declaration

3 A recent example of this is the litigation giving rise to the recent judgment of 2 April 2020, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

4 Pablo Martín Rodríguez, ‘A Missing Piece of European Emergency Law: Legal Certainty and Individuals’ Expectations in the EU Response to the Crisis’, *European Constitutional Law Review*, Vol 12 Issue 2, September 2016, p 282.

5 Prof. Dr. Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU institutions and the conclusion of Memoranda of Understanding*, Nomos Verlagsgesellschaft, Baden-Baden 2014, 17 February 2014, p 3.

6 The note will not look into questions relating to the incorrect transposition of EU asylum obligations and the judicial proceedings which have been initiated as a result.

7 Opinion of Advocate General Pikamäe of 27 February 2020, C-18/19, ECLI:EU:C:2020:130, para 40.

resulting in the disapplication of secondary legislation in parts or entirely.⁸ These States interpreted Article 72 as constituting an affirmation of a Member State’s retained competence in respect of security and a limit to the EU’s competence in the domain. Article 72, so they argued, was a clear legal basis to derogate from asylum law where emergencies raising internal security and law and order were at stake. A recent CJEU judgment in one of these cases, detailed below,⁹ has clearly rejected the States argument in this respect and, as a result, it is unlikely that Member States can continue to rely on Article 72 TFEU as entitling them to lawfully derogate from their EU asylum obligations on grounds of an emergency. In particular, where the security provisions contained in secondary law are sufficient to address State security interests, and are most appropriate to ensure that the objectives of the *acquis* are met, reliance on Article 72 TFEU by the States was rejected by the Court.

Article 72 TFEU

6. The judgment in C - 715/17, C-718/17 and C-719/17 demonstrates that reliance on Article 72 TFEU as a legal basis to implement emergency measures derogating from the asylum *acquis* is constrained by the scope of the Article, its interaction with secondary legislation and its overall purpose. In respect of the Article’s scope, the CJEU has held that a Member State may not simply rely on its internal security to insulate it from the application of EU law.¹⁰ Two implications follow from this finding. First, a Member State may only lean on the express derogations provided for in the Treaties and only to the extent of its limits, which, according to the CJEU, is a clearly defined and exceptional context.¹¹ On this basis and in respect to Article 72 a national (emergency) measure which, in practice, relates to matters other than the ‘maintenance of law and order and the safeguarding of internal security’ will not be permitted.
7. [Public] order has been interpreted by the CJEU to relate to “the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”¹² Conversely, security, according to the CJEU, “cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.”¹³ It covers issues of “fundamental importance for a country’s existence”, such as its economy, its institutions, its essential public services, and the survival of its inhabitants.¹⁴ Moreover, the CJEU has recently explained that a case-by-case investigation of the danger actually or potentially represented by an individual applicant is necessary in order to assess whether he or she constitutes an actual or potential threat to any of these interests.¹⁵ A Member State shall refrain ‘from peremptorily invoking Article 72 TFEU for the sole purposes of general prevention and without establishing any direct relationship with a particular case, in order to justify suspending the implementation of or even a ceasing to implement its obligations’ under EU law.¹⁶ As such, the application of Article 72 by the State will still have to respect the objectives of the asylum *acquis* – namely, a full examination of the circumstances surrounding an applicant’s need to protection. In practice, this means that Article 72 could only be applied to individual cases which have undergone an individual assessment as to the risks which that individual poses to the State’s security or law and order.
8. The second implication from the above argument is that reliance on Article 72 as a legal basis for derogation has to be viewed from the necessity of its use, and, in particular, its interaction with secondary law. For instance, in C- 715/17, C-718/17 and C-719/17, the Court considered the necessity of using Article 72 to maintain law and order and to safeguard internal security in an area which squarely falls within the asylum *acquis*. The Court does not accept that there is a need to use Article 72 TFEU where the relevant secondary legislation (in this example, the Relocation Decisions of 2015/1523 and 2015/1601 and the Qualification Directive) already

8 Opinion of Advocate General Sharpston of 31 October 2019, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2019:917, para 172-173. See also Case C-18/19 (Op. cit. n 7), paras 26-27 where the Swedish Government presented a similar argument to that of Poland and Hungary in C-715/17.

9 Judgments of 2 April 2020, C-715/17, C-718/17 and C-719/19, ECLI:EU:C:2020:257.

10 Judgment of 15 December 2009, Commission v Denmark, C-461/05, ECLI:EU:C:2009:783, para 51; C - 715/17, C-718/17 and C-719/17 (n 9) para 143.

11 C - 715/17, C-718/17 and C-719/17, (Op. cit. n 9) paras.143 and 145

12 Judgment of 15 February 2016, C - 601/15 PPU, ECLI:EU:C:2016:84, para 65.

13 Judgment of 11 June 2015, C - 554/13, ECLI:EU:C:2015:377, para 48.

14 Judgment of 10 July 1984, *Campus Oil Limited and others v Minister for Industry and Energy and others*, C-72/83, ECLI:EU:C:1984:256, para 34.

15 C-715/17, C-718/17 and C-719/17 (Op. cit. n 9), para 160.

16 *Ibid*

provides a framework which adequately ensures the protection of States security concerns.¹⁷ In short, Member States have at their disposal all the necessary tools in these instruments to address security interests and, thus, the necessity of applying Article 72 TFEU is without cause.

9. The Court's judgment in this case harks back to its previous case law on limits to the fundamental freedoms and that where "harmonising measures provide for measures necessary to ensure the protection of [security] interests," there is a sufficient framework for Member States to ensure that their security related interests are accounted for.¹⁸ Whilst the Court only looked at the Relocation Decisions and the Qualification Directive in C-715/17, C-718/17 and C-719/17, it is important to state that the other instruments of the asylum acquis, governing the processing and reception of international protection applicants as well as returns of irregular migrants and reunification of family members with beneficiaries of international protection,¹⁹ also contain references to national security, public order, and public policy. These instruments lay out procedures which individually assess the relevance of these specific grounds and allow Member States to implement their asylum obligations with reference to these security interests. Given that there are security-related provisions within the asylum acquis – applying to limited contexts and specific procedures – Member States do not need to use Article 72 to safeguard their security or law and order - they already have a framework in secondary law to rely on. Indeed, these provisions are the most appropriate to rely on since they also meet the objectives of the asylum acquis.²⁰
10. As an extension of this argument, it is advanced that since appropriate responses to States security concerns already exist in the asylum acquis, it is only on the basis of the acquis framework, and within the scope of the wording of the relevant provision, that States can legitimately invoke its security interests.²¹ A State's leeway to adopt a national security measure, then, is in fact limited to the specific security provisions in the Regulations and Directives making up the acquis. An opposite conclusion would impair the application of the asylum acquis and "compromise the proper application of the common standards and procedures introduced by [a] directive."²² Moreover, it "would jeopardise the objectives of the Directive,"²³ a point which was also made in the recent C-715/17, C-718/17 and C-719/17 judgment.²⁴
11. Member States do not have a *carte blanche* to adopt emergency derogation measures on the basis of Article 72 TFEU. They are unable to disapply specific Articles or entire pieces of legislation under the asylum acquis at their will. Recourse to emergency security measures can only be to the extent that the provisions of the asylum acquis allow for. It seems that the role of Article 72 TFEU is as several Advocates General have expressed: a rule of co-existence which "most obviously serves to remind the EU legislature of the need to make appropriate provision, in any secondary legislation enacted under Title V, for Member States to be able to discharge their security and law and order provisions".²⁵ Moreover, Member States' "actions taken must respect the overarching principles that the Member State signed up to when it became a Member State and any relevant rules contained in the Treaties or in EU secondary legislation."²⁶ This is important to note as if, on the basis of the above, a State were to argue that measures in the asylum acquis do not, in fact, ensure the protection of security interests or public order or policy because the Member State is faced with, for example, a significant number of arrivals, a further set of considerations will come into play. In particular, these relate to the proportionality of the emergency measure, its necessity, the broader framework of international protection and the EU Charter of Fundamental Rights.

17 Ibid paras 150-156.

18 See also judgment of 22 December 2007, C-112/05, ECLI:EU:C:2007:257, para 72; Opinion of Advocate General Sharpston C-715/17, C-718/17 and C-719/17 (Op. cit. n 8), para 221; judgment of 6 September 2017, C-643/15 and C-647/15, ECLI:EU:C:2017:631, where the Court dismissed the argument advanced by Poland that the 2015 Relocation Decision (Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece) was disproportionate when set against 'retained competences' under Article 72 TFEU since the Relocation Decision provided the requisite security safeguarding measures.

19 Opinion of Advocate General Sharpston, C-715/17, C-718/17 and C-719/17, (Op. cit. n 8), para 210. The Dublin Regulation is the sole instrument within the asylum acquis which does not contain references to State's internal security or law and order.

20 C-715/17, C-718/17 and C-719/17, (Op. cit. n 9) para 154, 159-160.

21 Opinion of Advocate General Sharpston, C-715/17, C-718/17 and C-719/17, (Op. cit. n 18) para 219-221; C-643/15 and C-647/15, para 309.

22 C-329/11, 20 January 2011, para 43.

23 Advocate General Pikamäe Opinion, Case C-18/19, (Op. cit. n 7) para 45.

24 C-715/17, C-718/17 and C-719/17, (Op. cit. n 9) para 171.

25 Advocate General's Opinion in C-715/17 (Op. cit. n 18) para, 202. A similar argument was advanced by the Commission at para. 186.

26 Ibid, paras 202 and 212; Advocate General Pikamäe, Opinion, C-18/19 (Op. cit. n 7) para 40.

The application of EU law general principles and fundamental rights to derogations under EU law

12. In the absence of harmonising measures necessary to ensure the protection of an emergency derogation measure, the Court has held that “it is in principle for the Member States to decide on the degree of protection which they wish to afford to [security] interests and on the way in which that protection is to be achieved.”²⁷ However, the burden of proof is on the Member State to show specific evidence in each and every individual case that the “measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it.”²⁸ The Court, therefore, has hemmed in the scope of derogations²⁹ by placing several duties on Member States in respect of the justification of the measure, its proportionality and the evidence required.
13. In particular, Member States are required to show a reasonable connection or nexus between the national derogating measures and its attainment to the objective sought. As an example, the Court will ask why, in order to safeguard internal security or maintain law and order, it is appropriate and necessary for States to impose automatic detention measures for an undefined period to persons arriving at a State’s border and wishing to apply for asylum?³⁰ In this sense, the Court requires “objective, detailed analysis, supported by figures, and capable of demonstrating, with solid and consistent data, that there are genuine risks”³¹ to security. It also requires the State to have addressed why and how a national measure gives effective protection to national security or law and order and why security would be hampered were it not for the adoption of the national derogation measure.³² General considerations in respect of security as well as justifications which relate to the general prevention of security concerns - without direct links to an individual case - will not be permitted.³³ The inference from this is that blanket provisions – which, by their nature, apply indiscriminately - fall far short of addressing a specific quantified risk and cannot, intrinsically, allow for an assessment of the risk that an individual may or may not present to a State’s internal security or law and order.
14. Alongside a national measure which is clearly justified by the State as being appropriate and necessary to safeguard and maintain internal security and law, a State will also have to show that the national derogating measure is suitable to meet the State’s security interests and that the “adverse consequences of” a national measure on other interests (such as the individual’s interests) “are justified in view of the State’s security”.³⁴ As Barnard points out, the Court will look at whether a State’s security interests “could not be achieved by less extensive restrictions producing the same result.”³⁵ In previous case law, the Court has required Member States to examine and even apply other alternatives which have been proved to be insufficient and ineffective³⁶ before accepting that a Member State had chosen the most suitable measure. Moreover, the suitability/proportionality assessment requires the State to “have reconciled in an appropriate way, the attainment of [security] with the requirements of European Union law”³⁷ or, as otherwise put, that “the national measure does not have an excessive effect on the applicant’s interests.”³⁸

27 Judgment of 22 December 2007, C-112/05, ECLI:EU:C:2007:623, para 73.

28 Judgment of 13 April 2010, C-73/08, ECLI:EU:C:2010:181, para 71.

29 C. Barnard, *Derogations, Justifications and the Four Freedoms: Is State interest really protected?* In: Barnard C, Odudu O (eds) *The outer limits of European Union law*. Hart, Oxford, p 273.

30 See the Hungarian Act ‘on the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area’, amending, inter alia, the Act on Asylum, the Act on the Admission and Right of Residence of Third-Country Nationals and the Act on State Border, available at: <https://bit.ly/34gVLXB>.

31 By analogy see C-73/08, (Op. cit. n 28) para 71.

32 By analogy see Johnston (Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 15 May 1986), which concerned a ban on judicial review in Northern Ireland. The CJEU held that “none of the facts before the Court and none of the observations submitted to it suggest that serious internal disturbances...make judicial review impossible or that measures to protect public safety would be deprived of their effectiveness because of such review.”

33 C - 715/17, C-718/17 and C-719/17, (Op. cit. n 9) para 160.

34 C. Barnard, *Derogations, Justifications and the Four Freedoms: Is State interest really protected?* In: Barnard C, Odudu O (eds) *The outer limits of European Union law*. Hart, Oxford, p 273.

35 Judgment of 11 July 1989, C - 265/87, ECLI:EU:C:1989:303, para 21; Judgment of 12 July 2001, C-189/01, ECLI:EU:C:2001:420, para 81.

36 Judgment of 16 December 2010, *Marc Michel Josemans v Burgemeester van Maastricht*, C-137/09, ECLI:EU:C:2010:774; Judgment of 29 November 2001, C-17/00, *François De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort*, ECLI:EU:C:2001:651, para 38.

37 C-73/08, (Op. cit. n 28) para 79.

38 C. Barnard, (Op. cit. n 34), p 273.

15. Broadly speaking, the requirements of EU asylum law is that Member States adhere to the objectives of the asylum acquis, in particular, that a procedure is established to ascertain a responsible Member State for an applicant, that an individual's protection needs are assessed – and protection granted where relevant - and a system to accommodate the individual during these procedures is provided. The applicant's interests are evidently that the Member State respects these objectives and fully adheres to their obligations under the Geneva Convention.³⁹ Where a national derogating measure has the effect of severely restricting these objectives or depriving an individual of any of these interests (such as through border closures and refusal to accept asylum applicants⁴⁰ or automatic imposition of inadmissibility grounds⁴¹), it is submitted that the individual's interests would be considerably affected, to the extent that there can be no justification on the basis of State security for it. This conclusion follows from the disproportionality of such a measure but also its impact on fundamental rights – an additional framework which States are bound by when implementing a national measure derogating from EU asylum law.⁴²
16. Under EU law, fundamental rights are general principles of EU law and the Charter of Fundamental Rights has the same legal value as the Treaties. Therefore, fundamental rights are general principles of EU law.⁴³ The Court has held that even where States rely on their internal security or law and order to derogate from EU asylum law, the compatibility of these measures with fundamental rights must still be ensured.⁴⁴ The Charter “establishes the criteria against which limitations on Charter rights should be assessed in general.”⁴⁵ However, Article 52(3) states that Charter rights which correspond to rights under the ECHR carry the same meaning and scope as the latter.⁴⁶ Article 52(3) thereby incorporates the absolute and non-derogable rights⁴⁷ under Articles 2 and 3 of the European Convention on Human Rights (ECHR), which correspond to Articles 2, 4 and 19 of the Charter. Therefore, whenever a national measure derogating from EU asylum law is capable of adversely affecting the absolute ban on torture or inhuman or degrading treatment or punishment (for example through border closures or summary returns without an individual assessment of a protection claim), the measure will be unlawful from the perspective of Article 4 of the Charter and Article 3 of the Convention regardless of the state security or law and order justification that is put forward.⁴⁸ Indeed, this was found to be the case by the Slovenian Constitutional Court which held that legislative proposals to limit “the type and the number of circumstances which can form the basis of the individual's claim regarding the existence of serious harm in case of return, and which limit the individual's ability to access the procedure in which such a claim would be assessed, is in violation of the principle of non-refoulement.”⁴⁹
17. By extension, whilst the non-derogability of Article 13 ECHR (corresponding to Article 47 of the Charter) is not explicit in the Convention, it is a procedural component of Convention rights which enables them to be

39 Member States are bound by the Geneva Convention 1951 and the 1967 Protocol by virtue of being a signatory to the Convention but also by virtue of Article 78(1) TFEU which states that the EU asylum acquis must be in accordance with the Convention and its Protocol.

40 For example, in March 2020, Greece, by virtue of a legislative act that was issued on the 2nd of March and was subsequently ratified by Law 4681/2020 (Government Gazette A '74 / 27.03.2020), suspended the acceptance of asylum applicants by persons arriving irregularly and declared that they will deport those without registration. This measure was in force for one month. For more information see: <https://bit.ly/3c2FQz1>.

41 See Asylum Information Database (AIDA), Country Report: Slovenia 2019 Update, 27 March 2020. For example, amendments to Aliens Act in Slovenia states that the Slovenian National Assembly can vote with a simple majority on effectively closing the borders in case it is determined that a 'changed migration situation' poses 'a threat to public order and internal safety in the Republic of Slovenia.' If the parliament adopts such 'extraordinary measures', the police are required by law to reject all applications for international protection as inadmissible, as long as the persons wishing to apply entered Slovenia from a neighbouring EU Member State, in which there are no systemic deficiencies of asylum procedure and reception conditions, which could lead to torture, inhuman or degrading treatment. As mentioned in the note, this proposal has subsequently been found to be unconstitutional by the Constitutional Court of Slovenia.

42 Judgment of 11 July 2002, *Carpenter v Secretary of State for the Home Department*, C-60/00, ECLI:EU:C:2002:434, para.40

43 Article 6(1) TEU. See also N.Shuibhne, *Exceptions to the Free Movement Rules*, in S.Peers and C.Barnard, *European Union Law*, Second Edition p 495.

44 C-60/00 (Op.cit. n 42), para 41.

45 Article 52(1) Charter N.Shuibhne, *Exceptions to the Free Movement Rules*, in S.Peers and C.Barnard, *European Union Law*, Second Edition p 495.

46 Explanations relating to the Charter of Fundamental Rights OJ C 303, 14 December 2007.

47 By virtue of Article 15(2) ECHR.

48 ECtHR, *Aksoy v Turkey*, No. 21987/93, 18 December 1996, para 62. ECtHR, *Soering v. The United Kingdom*, No. 14038/88, 7 July 1989, para 88; ECtHR *Chahal v. United Kingdom* [GC], No. 22414/93, 15 November 1996, para, para 79.

49 AIDA, Country Report: Slovenia (Op. cit. n 41), p 17.

invoked.⁵⁰ Were a derogation to Article 13 ECHR be enforced by a Member State, inter alia, through the imposition of highly circumscribed time-tables for asylum appeal procedures⁵¹, independent scrutiny as to the real risk of inhuman treatment would be undermined, as would the substance of Article 3. It is submitted, then, that the requirements of a thorough and effective investigation in respect of Article 3 allegations are also non-derogable and cannot be set aside on the basis of security interests.⁵²

18. Lastly, in respect of other relevant fundamental rights such as the right to liberty under Article 5 ECHR and Article 6 of the Charter, States may derogate from their obligations under the Convention “[i]n time of war or other public emergency threatening the life of the nation”.⁵³ This means that where a national derogating measure affects the right to liberty under Article 6 of the Charter (corresponding to Article 5 ECHR), a different framework to the internal security and law and order of Article 72 TFEU will apply. Instead, States will have to justify that a “public emergency threatening the life of the nation” applies. According to the European Court of Human Rights (ECtHR) a public emergency threatening the life of the nation is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.”⁵⁴ This threshold requires States to show that emergency is actual or imminent and the crisis or danger should be exceptional.⁵⁵ As under EU law, States under the ECHR framework will also have to show the necessity, proportionality and appropriateness of the measure.⁵⁶ This includes establishing the nexus between the measure and the aim sought.⁵⁷ Abundant examples exist in the ECtHR’s case law of States tipping the balance too far in favour of their emergency interests to the detriment of their obligations under the ECHR. For example, States detaining persons under national security justifications for an indefinite duration of time,⁵⁸ or without access to legal representatives or effective remedies,⁵⁹ are unnecessary and disproportionate resulting in a violation of the right to liberty under the Convention.

50 ECtHR, *Aksoy v Turkey*, No. 21987/93, 18 December 1996, para 98.

51 For example, in Hungary, following on from the Hungarian Act ‘on the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area’, amending, inter alia, the Act on Asylum, the Act on the Admission and Right of Residence of Third-Country Nationals and the Act on State Border, the deadlines to seek judicial review against inadmissibility decisions and rejections of asylum applications decided in accelerated procedures were drastically shortened to just three days. <https://bit.ly/2N2ewpK>

52 ECtHR, *Chahal v. United Kingdom* [GC], No. 22414/93, 15 November 1996, para 151.

53 Under Article 53 of the Charter Member States are also obliged to respect the level of protection of human rights in international law, which can consist of more thorough obligations. As under the ECHR, the International Covenant on Civil and Political Rights (ICCPR), Article 4(1) provides that State Parties may take measures to derogate from their obligations under the Covenant “[i]n time of public emergency which threatens the life of the nation [...]” The Human Rights Committee has explicitly found that neither internal conflict, internal disturbance or unrest nor economic difficulties per se can constitute a grave and imminent threat to the life of the nation (UN Human Rights Office of the High Commissioner, *Human Rights in the Administration of Justice, Professional Training Series No. 9/Add.1*, 2011, p 823 and UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (1984) 39-41.

54 ECtHR, *Lawless v Ireland*, No 332/57, 01 July 1961 para 28.

55 *The Greek Case: Application No. 3321/67 - Denmark V. Greece, Application No. 3322/67 - Norway V. Greece, Application No. 3323/67 - Sweden V. Greece, Application No. 3344/67 - Netherlands V. Greece*, para 113.

56 In particular, States will have to show that derogating measures were strictly required by the exigencies of the situations (ECtHR, *Mehmet Hasan Altan v. Turkey*, No. 13237/17, 20 February 2018, para 94); that they were a genuine response to an emergency situation (ECtHR, *Brannigan and McBride v United Kingdom*, App No 14553/89 and App No 14554/89, 25 May 1993 para 51); whether the derogation was limited in scope and the reasons advanced in support of it; the proportionality of the measure (ECtHR, *A. and others v. the United Kingdom*, No. 3455/05, 19 February 2009, para 190.); whether the need for derogation was kept under review (ECtHR, *Brannigan and McBride v United Kingdom*, App No 14553/89 and App No 14554/89, para 54); whether the measures were subject to safeguards (ECtHR, *Lawless v Ireland (No 3)*, *Lawless v Ireland, Judgment on Merits*, App no 332/57, 1 July 1961, para 37); whether the measures were lawful and had been effected in accordance with a procedure prescribed by law (ECtHR, *Mehmet Hasan Altan v. Turkey*, No. 13237/17, 20 February 2018, para 140 and 213) the views of any national courts which have considered the question (ECtHR, *Mehmet Hasan Altan v. Turkey*, No. 13237/17, 20 February 2018, para 140) and the importance of the right at stake (ECtHR, *Aksoy v Turkey*, No. 21987/93, 18 December 1996, para 76).

57 ECtHR, *Aksoy v Turkey*, (Op. cit. n 56), para 78. For further case law, see Guide on Article 15 of the European Convention on Human Rights, updated 31 December 2019.

58 ECtHR, *A. and others v. the United Kingdom*, No. 3455/05, 19 February 2009.

59 ECtHR, *Aksoy v Turkey*, (Op. cit. n 56), para 76

CONCLUSION

19. States do not have a *carte blanche* to derogate from EU asylum law as soon as they raise the alarm bell of a state emergency. In fact, States are required to surmount several hurdles before they can lawfully derogate from their EU asylum obligations on the basis of an emergency.
20. The first hurdle is that a derogation from EU asylum law requires a legislative basis. A legislative basis for derogations to EU asylum law may be found in Article 72 under Title V of the Treaty on the Functioning of the European Union or in secondary legislative provisions, which provide for a State's security interests to be taken into account in an applicant's asylum procedure. The second hurdle is that to be lawful under EU law, an emergency derogation measure can only relate to the circumstances provided for by EU law: maintenance of law and order and the safeguarding of internal security under Article 72 and public security, policy, order under the asylum *acquis*. A national (emergency) measure which, in practice, relates to matters other than these situations, will not be permitted. The third hurdle is that Member States need to demonstrate that the security context they face requires the use of a legislative basis to derogate from EU asylum law. The necessity to use Article 72 to derogate from asylum law is extremely difficult to prove given that the asylum *acquis* already provides States with appropriate provisions to safeguard their security interests. The scope of any derogations to asylum law on the basis of security can then only be justified to the extent that they are provided for in the applicable Regulations and Directives of the asylum *acquis*. If, however, the State succeeds in arguing that the asylum *acquis* does not sufficiently provide for its security interests, a fourth hurdle is presented: the proportionality, necessity, and appropriateness of the measure, substantiated with conclusive evidence of the security risks that the individual applicant presents to the State. The fifth and final hurdle that States will have to surmount is the full compliance with the non-derogable rights set out in the ECHR, and which correspond to the rights of the Charter, or with the conditions of a public emergency and accompanying procedural requirements in respect of other human rights. Where Member States trip up against any of these five hurdles, the national emergency measure derogating from EU asylum law will be deemed unlawful.

ANNEX

Treaty/Directive provision	Grounds
Article 72 TFEU	This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.
<p>Directive 2011/95/EU (Qualification Directive)</p> <p>Recital 37</p> <p>Article 14(4)</p> <p>Article 17(1)(d)</p> <p>Article 21(2)(a)</p> <p>Article 23(4)</p> <p>Article 24(1) and (2)</p> <p>Article 25(1) and (2)</p>	<p>The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.</p> <p>Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when: there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present.</p> <p>A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.</p> <p>Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refuse to grant refugee status, whether formally recognised or not, when: there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present.</p> <p>Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.</p> <p>As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).</p> <p>As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.</p> <p>Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.</p> <p>Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.</p>

<p>Directive 2013/32/EU (Asylum Procedures Directive)</p> <p>Recital 20</p> <p>Recital 24</p> <p>Recital 35</p> <p>Recital 51</p> <p>Article 8(2)</p> <p>Article 13(d)</p> <p>Article 23(1)</p> <p>Article 25(6)(a)(iii) and (6)(b)(iii)</p>	<p>In well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns, Member States should be able to accelerate the examination procedure, in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive.</p> <p>The notion of public order may, inter alia, cover a conviction for having committed a serious crime.</p> <p>When, in the framework of an application being processed, the applicant is searched, that search should be carried by a person of the same sex. This should be without prejudice to a search carried out, for security reasons, on the basis of national law.</p> <p>In accordance with Article 72 of the Treaty on the Functioning of the European Union (TFEU), this Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.</p> <p>Limits on such access [organisations and persons providing advice and counselling] may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.</p> <p>The competent authorities may search the applicant and the items which he or she is carrying. Without prejudice to any search carried out for security reasons, a search of the applicant's person under this Directive shall be carried out by a person of the same sex with full respect for the principles of human dignity and of physical and psychological integrity</p> <p>Member States may make an exception [to access to information within an applicant's file] where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised.</p> <p>Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may: apply or continue to apply Article 31(8) only if: the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if: the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law</p>
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<p>Article 31(8)(j)</p>	<p>Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if: the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.</p>
<p>Directive 2013/33/EU (Reception Conditions Directive)</p> <p>Recital 19</p> <p>Article 7(2)</p> <p>Article 8(3)(e)</p> <p>Article 10(4) and (5)</p> <p>Article 11(6)</p> <p>Article 13</p>	<p>There may be cases where it is not possible in practice to immediately ensure certain reception guarantees in detention, for example due to the geographical location or the specific structure of the detention facility. However, any derogation from those guarantees should be temporary and should only be applied under the circumstances set out in this Directive. Derogations should only be applied in exceptional circumstances and should be duly justified, taking into consideration the circumstances of each case, including the level of severity of the derogation applied, its duration and its impact on the applicant concerned.</p> <p>Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.</p> <p>An applicant may be detained only when protection of national security or public order so requires</p> <p>Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant nongovernmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.</p> <p>Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU.</p> <p>In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, paragraph 4 and the first subparagraph of paragraph 5, when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of Directive 2013/32/EU.</p> <p>Member States may require medical screening for applicants on public health grounds.</p>