

# OPINION ON THE DRAFT CODE ON THE ORGANIZATION AND FUNCTIONING OF THE PARLIAMENT OF MOLDOVA (REGARDING THE PROCEDURE FOR DECLARING A STATE OF EMERGENCY, SIEGE OR WAR, CHAPTER V)

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## REPUBLIC OF MOLDOVA

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Based on an unofficial English translation of the Draft Code commissioned by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Given the inherent risk of abuse associated with states of emergency or other similar regimes – which typically concentrate power in the executive – robust legal and institutional safeguards are essential to ensure that emergencies or crises are not misused to undermine the rule of law or suppress human rights. In this context, parliaments play a crucial role in oversight throughout, not only in terms of continuously assessing the necessity and justification for declaring and then maintaining the state of emergency or other similar regimes, but also to control and review the emergency measures introduced by the executive to ensure that they are strictly justified, proportionate, and that they are eased or terminated as soon as the situation allows. Finally, the Parliament should also exercise post-emergency scrutiny to evaluate the use of emergency powers, evaluate the laws and other measures adopted during states of emergency or other similar regimes and prevent any lasting erosion of democratic norms.

International human rights law remains applicable even in times of international or non-international armed conflicts, and even more so during other types of emergencies, subject only to the derogation or restriction clauses contained in international human rights treaties and OSCE commitments. Limited derogations from or suspension of certain human rights obligations during public emergencies threatening the life of a nation are allowed, while upholding principles of legality, proportionality, human dignity, the rule of law and balance of power.

Chapter V of the Draft Code on the Organization and Functioning of the Parliament (Draft Code) provides a framework governing the procedure for declaring, extending or lifting states of emergency, siege, or war in the Republic of Moldova. It sets the procedural steps for declaring such states of exception, emphasizing some degree of parliamentary oversight, open debate, adherence to international obligations, and the prohibition of measures such as restrictions on the right to life or access to justice. Some provisions constrain emergency measures by subjecting them to parliamentary control for review of their necessity or termination. In line with international obligations, the Draft Code requires the state to notify certain international bodies and report on emergency measures, while safeguarding constitutional stability by prohibiting constitutional revision during times of crisis.

At the same time, Chapter V and the Draft Code could be improved by further elaborating several areas, in order to introduce safeguards to prevent abuse or misuse of emergency regimes while strengthening parliamentary oversight at the time of declaring the state of exception, throughout and *ex post facto*. Greater specificity in criteria and thresholds to define the exceptional circumstances for declaring emergencies and using emergency procedures should be ensured. In addition, the Draft Code should introduce more detailed regulation regarding the continuity of operation of the Parliament, as well as parliamentary decision-making procedures – including with the composition of parliament, the use of virtual or hybrid proceedings, rules about agenda-setting and debate procedures to be tailored to the state of exception.

Parliamentary oversight mechanisms over the declaration, prolongation and termination of states of emergency and other emergency regimes, as well as the application of emergency powers, should be enhanced – while ensuring the participation of the opposition in such oversight mechanisms to be effective, aiming

for a wide consensus. In particular, certain mechanisms should be designed to mitigate specific risks, needs and vulnerabilities during states of emergency or similar regimes and respecting the rights of all, including vulnerable groups, such as women, persons with disabilities, older people, low-income or homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI persons, who may be impacted differently by the emergency measures.

Derogations from human rights obligations must strictly follow the safeguards of necessity and proportionality outlined in Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the European Convention on Human Rights (ECHR), under both domestic and international supervision. These measures should prioritize restoring normalcy without breaching international humanitarian law or norms, ensuring human rights compliance and that the rule of law is upheld even during crises.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations how the Draft Code could be further enhanced:

**A. Regarding the Declaration of a State of Emergency, Siege or War:**

1. To explicitly require the Parliament to confirm a presidential declaration of war under Article 87.3 of the Constitution within a defined timeline for it to remain in effect beyond a specified initial (short) period; [para. 33]
2. To provide for an explicit quorum requirement for the adoption of a decision declaring a state of exception, or alternatively, to require a higher threshold for the legislature to adopt such a decision, though acknowledging that this may require an amendment to the Constitution; [para. 35]
3. To elaborate, in Article 138 of the Draft Code, the elements to be considered by the committee to assess whether the threat-severity threshold is reached to justify the declaration of a state of emergency – explicitly requiring that the emergency be actual or imminent, temporary and exceptional, threatening the life of the nation, affects the whole population and constitutes a threat to the organized of the community, while requiring measures that are not permissible under ordinary constitutional standards, applying the “strict necessity” test; [para. 40]
4. To supplement Article 138 or other relevant sections of the Draft Code to further elaborate the elements that should be examined and assessed in the report submitted to the Parliament to inform the decision declaring a state of exception, including a justification of the outcome of the assessment and course of action pursued – to address the situation through a declaration of emergency, a derogation from one or more treaties, or to adopt new or adapt existing legislation – while, whenever possible, pursuing that the committee in charge engages in prompt consultations with civil society organizations, the national human rights institution and, when appropriate, consider consulting with relevant international expert bodies; [para. 41]
5. To specify in the Draft Code the maximum duration for the initial period of any state of exception declared by the Parliament, or cross-reference the provisions of the Organic Law 212/2004, and for the maximum duration of potential subsequent extensions of any state of exception; [para. 49]

6. To specify the required majority and quorum requirement for subsequent extensions of state of exception, while considering the introduction of increasing voting threshold for subsequent extensions; Additionally, it should require a separate justification for each extension; [para. 51]
7. To specify that information of the public about the declaration of a state of exception and emergency measures shall be made accessible to individuals, including those with disabilities; [para. 54]
8. To supplement Article 140 (6) of the Draft Code to require that the OSCE Office for Democratic Institutions and Human Rights is informed of the decision to declare (and to lift) a state of exception and of the potential derogations made from their international human rights obligations; [para. 55]

**B. Regarding Decision-Making within the Parliament and Continuity of Operation during a State of Emergency, Siege or War:**

1. When a state of emergency is declared, to require the legislature to sit automatically, or to meet without formal convocation by the executive, or to remain in session throughout the emergency regime, while introducing the possibility to hold the parliamentary session in a different location, including remotely (as an exceptional case when physical meetings are not feasible), and providing the related procedure for online voting; [para. 60]
2. To supplement the Draft Code to specify the modalities of decision-making during the state of emergency, siege or war, while considering specific mechanisms and procedures for the Parliament to continue to effectively function during such times, including in terms of use of virtual/remote or hybrid proceedings, online voting, as well as potential different rules relating to agenda-setting and debate procedures, including in terms of quorums, or at least to provide the possibility for MPs to modify the normal procedures set out in the Parliament's rules of procedure; [para. 60]
3. To require the Parliament to develop and adopt business continuity plans to ensure that the Parliament is practically able to continue operating under all circumstances; [para. 61]

**C. Regarding Parliamentary Oversight During and After a State of Emergency, Siege or War:**

1. To specifically require states of exception to remain strictly necessary and proportionate, while requiring an assessment of whether ordinary mechanisms and legislation could over time be used to address or recover the emergency, rather than emergency measures, before pronouncing/deciding on an extension; [para. 63]
2. To consider requiring, as soon as a state of exception is declared, the establishment of an ad hoc parliamentary oversight committee in the legislature tasked with regularly scrutinizing the use of emergency powers by the executive during the whole duration of the state of exception, while ensuring that it is equipped with sufficient human and financial resources and capacities to carry out such functions, while also having the legal means to trigger some timely responses from the executive along with appropriate consequences for non-compliance; [para. 64]

3. To consider including in the Draft Code a specific mention of parliamentary oversight over the possible discriminatory impact of emergency measures on certain persons or groups, including women, persons with disabilities, older people, homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI persons, while designating the body that should be in charge and the modalities of such oversight; [para. 66]
4. After the lifting of the state of exception, to require a comprehensive ex-post review and assessment, at the initiative of the Parliament, looking not only at the use of emergency powers by the Government, and the scrutiny of those powers by Parliament during the state of exception, but also at how the national legal regime was prepared for the measures required by the state of exception with a view to maximize preparedness and legal framework for future crises/emergencies; [para. 68]
- D. To supplement the list of non-derogable and absolute rights contained in Article 140 (4) of the Draft Code by prohibiting, during a state of exception, *arbitrary* deprivation of liberty and any limitation to the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention; genocide, war crimes and crimes against humanity; discrimination solely on the ground of “race, colour, sex, language, religion or social origin”, any limitation or exception to the principle of non-refoulement; [para. 72] and
- E. To codify in the Draft Code the process by which the Parliament makes the decision to hold or postpone elections under a state of exception should be codified in law, including specific timelines, criteria, and requirements for public and expert consultation, while also providing specific timelines for rescheduling and conducting elections after such a state of exception ends. [para. 81]

***These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.***

***As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, the OSCE/ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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## I. INTRODUCTION

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1. In September 2024, the Head of the Committee on Legal Affairs, Appointments and Immunities of the Parliament of Moldova requested ODIHR to review the Draft Code on the Organization and Functioning of the Parliament of Moldova (hereinafter “the Draft Code”).
2. On 26 September 2024, ODIHR responded to this request, confirming the Office’s readiness to assess the compliance of the Draft Code with international human rights standards and OSCE human dimension commitments. Given the broad scope of the Draft Code, ODIHR also informed that several legal opinions on different components of the Draft Code will be prepared.<sup>1</sup> These legal analyses should be read together with the two ODIHR Opinions on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova published in 2024.<sup>2</sup>
3. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.<sup>3</sup>

## II. SCOPE OF THE OPINION

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4. The scope of this Opinion covers only Chapter V – Procedure for Declaring a State of Emergency, Siege or War of the Draft Code (i.e., Articles 137 to 141) and relevant provisions of the Constitution of Moldova governing states of exception. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal framework regulating states of exception in the Republic of Moldova.
5. The Opinion raises key issues and indicates areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements rather than on the positive aspects of the Draft Code. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE Participating States and beyond in this field. When referring to comparative good practices, ODIHR does not advocate for any specific model; any country example should be assessed with caution since it cannot necessarily be replicated in another country and should always be considered in light of the broader national

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1 These legal reviews are focusing on the legislative procedure (Chapter III), the constitutional revision procedure (Chapter IV), procedure for declaring a state of emergency, siege or war (Chapter V), inter-institutional relations with other powers (Chapters VI to IX and XI-XII of the Draft Code), parliamentary oversight (Title III of the Draft Code), parliament’s representative role and co-operation with civil society (Chapter X), and/or a combination of these and other issues as deemed appropriate. They are available at ODIHR database of legal reviews and legislation ([LegislationOnline](#)), specifically on [Moldova](#).

2 See ODIHR, *Opinion on Certain Provisions of the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova* (26 March 2024), in [English](#) and in [Romanian](#); and *Opinion on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova* (11 December 2024), in [English](#) and in [Romanian](#).

3 See, in particular, specific OSCE human dimension commitments relating to states of emergency, including the [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#) (1990), paras. 16.3 and 25; and [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#) (Moscow, 10 September–4 October 1991), (1991 OSCE Moscow Document), para. 28.

institutional and legal framework, as well as the country's legal system, social context and political culture.

6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>4</sup> (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*<sup>5</sup> and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
7. This Opinion is based on an unofficial English translation of the Draft Code, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail in case of discrepancies.
8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Moldova in the future.

### III. LEGAL ANALYSIS AND RECOMMENDATIONS

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#### 1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. Any country may encounter emergency situations stemming from natural disasters, epidemics, terrorist attacks, armed conflicts or other catastrophic events. In democratic systems, responding to such emergencies can be challenging because the constitutionally guaranteed rights and institutional checks and balances may slow down decision-making and impede prompt, effective action. For this reason, most states include emergency provisions in their constitution. These states of exception temporarily empower the executive to restrict or suspend certain rights, set aside some institutional checks and balances, and concentrate decision-making in order to enable quick and effective responses to crises and restore normalcy.<sup>6</sup>
10. However, given the inherent risk of abuse associated with states of emergency or other similar regimes – which typically concentrate power in the executive – robust legal and institutional safeguards are essential to ensure that emergencies or crises are not misused to undermine the rule of law or suppress human rights, or to consolidate power beyond the duration of the crisis. These include clear definitions of the emergencies that justify exceptional measures, time limitations, legislative or judicial oversight, and provisions for the restoration of normal constitutional order. In this context, parliaments play a crucial oversight role, not only by continuously assessing the necessity and justification for declaring and then maintaining a state of emergency or similar regimes, but also to control and review the emergency measures introduced by the executive to ensure that they are strictly justified, proportionate, and that they are eased or

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4 See [UN Convention on the Elimination of All Forms of Discrimination against Women](#) (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Moldova acceded to this Convention on 1 July 1994.

5 See [OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04](#) (2004), para. 32.

6 See International IDEA, Bulmer, E., *Constitution-Building Primer 18 Emergency Powers*, 2018, pp. 6-7.



terminated as soon as the situation allows. Finally, parliaments should also exercise post-emergency scrutiny to evaluate the use of emergency powers, evaluate the laws and other measures adopted during states of emergency or other similar regimes and prevent any lasting erosion of democratic norms.

11. While international human rights law does not regulate states of emergency *per se*, it addresses the issue indirectly through the framework of derogations permitted in times of public emergency “*threatening the life of the nation*”, elaborating the strict conditions to be met for states to temporarily suspend certain of their human rights obligations – while safeguarding the core principles of legality, proportionality, human dignity, the rule of law and balance of powers. At the same time, the procedure for declaring such states of exceptions, institutional mechanisms and implementation of a state of emergency itself remain primarily governed by domestic constitutional and legal frameworks.
12. The foundation for these international standards is found in Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which permits derogations only in narrowly defined and exceptional circumstances and only “*to the extent strictly required by the exigencies of the situation*”.<sup>7</sup> The UN Human Rights Committee’s (UNHRC) General Comment on Article 4 of the ICCPR provides that states of emergency are of “*an exceptional and temporary nature*” and shall be “*limited to the extent strictly required by the exigencies of the situation [in terms of] duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency*”.<sup>8</sup> The UNHRC also requires that states “*act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers*”, while noting that the official proclamation “*is essential for the maintenance of the principles of legality and rule of law at times when they are most needed*”.<sup>9</sup> This ensures that states do not exploit public emergencies as a pretext for undermining the rule of law or suppressing human rights.
13. The ICCPR also mandates that emergency measures shall not involve “*discrimination solely on the ground of race, colour, sex, language, religion or social origin*” (Article 4 (1)) and lists the articles for which there cannot be any derogation, even in times of emergency (Article 4 (2)).<sup>10</sup> Additionally, other rights have been recognized, mainly by the UNHRC, as not being subject to derogation, including the right to an effective remedy,<sup>11</sup> the fundamental principles of a fair trial,<sup>12</sup> the fundamental guarantees against arbitrary detention<sup>13</sup> and the principle of non-refoulement.<sup>14</sup> Moreover,

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7 See [UN International Covenant on Civil and Political Rights](#) (hereinafter, ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Moldova acceded to the ICCPR on 26 January 1993.

8 See [CCPR, General Comment no. 29 on Article 4 of the ICCPR](#), paras. 2 and 4.

9 See [CCPR, General Comment no. 29 on Article 4 of the ICCPR](#), para. 2.

10 i.e., Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), Article 8, paras. 1 and 2 (prohibition of slavery, slave-trade and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality in the field of criminal law, i.e., the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience and religion).

11 See [CCPR, General Comment no. 29 on Article 4 of the ICCPR](#), paras. 14-15.

12 See [CCPR, General Comment no. 29 on Article 4 of the ICCPR](#), para. 16 and [General Comment no. 32 on Article 14, Right to equality before courts and tribunals and to fair trial \(2007\)](#), para. 6. These would include the right to be tried by an independent and impartial tribunal (CCPR General Comment no. 32 (2007), para. 19); the presumption of innocence (CCPR General Comment no. 32 (2007), para. 6); the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to habeas corpus (CCPR, General Comment no. 29, para. 16; and General Comment no. 35, Article 9 (Liberty and security of person), para. 67).

13 See [CCPR, General Comment no. 35 to Article 9](#) (Liberty and security of person), paras. 66–67.

international humanitarian law shall be respected in all circumstances.<sup>15</sup> Finally, even in times of emergency, the fundamental safeguards of the rule of law must be maintained, in particular constitutionality and legality, effective parliamentary oversight, independent judicial control and effective domestic remedies.<sup>16</sup>

14. The *UN Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* further articulate a state's obligations during a state of emergency, emphasizing that such extraordinary measures must adhere to strict legal and procedural standards and requirements.<sup>17</sup> According to the principles, a state may invoke a public emergency under Article 4 (1) of the ICCPR only when the situation is exceptional, posing an actual or imminent threat to the life of the nation. The emergency must fundamentally endanger the physical safety of the population, the nation's political independence, its territorial integrity, or the existence or functioning of institutions indispensable to ensure and protect the rights recognized in the ICCPR (para. 39). Moreover, these principles also require timely and official proclamations of a state of emergency (paras. 42 and 62) and that "*the severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent*" (para. 51). In addition, the constitution and statutes regulating states of emergency should provide for prompt and periodic independent review by the legislature of the necessity of derogation measures (para. 55).

Article 4 (3) of the ICCPR requires states, when notifying the UN, to inform "of the provisions from which [a State Party] has derogated."<sup>18</sup> States are obliged to immediately notify other state parties through the UN Secretary-General about the provisions they have derogated from, the reasons for such actions, and the expected duration of the measures.<sup>19</sup>

15. Some non-derogable rights may be subject to limitations.<sup>20</sup> However, there are rights that are absolute, i.e., rights that can never be suspended or restricted under any circumstances, even in a context of an emergency.<sup>21</sup> For rights that are derogable and

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14 See [UN General Assembly, Resolution A/RES/51/75](#), 12 February 1997, para. 3. See also UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 12 and 20.

15 See the four *1949 Geneva Conventions*, Common Article 1, which states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

16 See *CCPR, General Comment no. 29 on Article 4 of the ICCPR*, para. 2.

17 United Nations, *Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

18 See also para 7 of the *CCPR, General Comment no. 29 on Article 4 of the ICCPR*, where the CCPR considers this essential "not only for the proper discharge of its functions, and in particular for assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant."

19 See the *Siracusa Principles*, paras. 44 and 45.

20 For example, the right to freedom of religion or belief in Art. 18 of the ICCPR is non-derogable under Art. 4 para. 2 of the ICCPR but may be subject to limitations in accordance with Art. 18 (3) of the ICCPR.

21 Absolute rights include the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment (see Art. 2 para. 2 of the UN Convention against Torture and OSCE Copenhagen Document, para. 16.3), from slavery and servitude, from imprisonment for inability to fulfil a contractual obligation, the prohibition of genocide, war crimes and crimes against humanity, the prohibition against the retrospective operation of criminal laws, the right to recognition before the law, the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention (See e.g., Working Group on Arbitrary Detention, *Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies* (8 May 2020), para. 5; *Report of the Working Group on Arbitrary Detention to the UN Human Rights Council*, A/HRC/22/44, 24 December 2012, paras. 42-51; *General Comment no. 35* on Art. 9 of the ICCPR (Liberty and security of person), para. 67), and the principle of *non-refoulement* (see Art. 4 of the 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (CAT), which contains an absolute prohibition of refoulement for individuals in danger of being subjected to torture; see also CCPR, *General Comment no. 20 on Art. 7 of the ICCPR*, 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Art. 3 of the ECHR, see e.g., *Soering v. United Kingdom* (Application no. 14038/88, judgment of 7 July 1989), para. 88; and *Chahal v. United Kingdom* [GC] (Application no. 22414/93, judgment of 15 November 1996), paras. 80-1).

not absolute, any restriction must strictly adhere to the standards set out in international human rights instruments, i.e., (i) be “prescribed by law,” ensuring they are clear, accessible, and foreseeable; (ii) pursue a “legitimate aim” provided by international human rights law for the right in question; (iii) be “necessary in a democratic society,” meaning they address a pressing social need and are proportionate to the aim pursued; and (iv) be non-discriminatory.<sup>22</sup> These requirements apply equally to derogations enacted during states of emergency (para. 65 of the UN Siracusa Principles).

16. Other UN treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the Convention on the Rights of Persons with Disabilities (CRPD), do not contain explicit derogation clauses and remain applicable in emergency situations.<sup>23</sup>
17. Within the European human rights framework, the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) also permits derogations during public emergencies threatening the nation’s life (Article 15).<sup>24</sup> The European Court of Human Rights (ECtHR) has determined that three conditions are necessary: there must exist an exceptional situation of crisis or emergency; which affects the whole population; and which constitutes a threat to the organized life of the community. The ECtHR reinforced the principle that even during emergencies, states remain bound by the fundamental rights enshrined in international treaties, underscoring the principle that a state of emergency must not become a pretext for undermining the rule of law or subverting human rights.<sup>25</sup> The ECtHR permits States a wide “margin of appreciation” in their assessment of perceived security threats and responses to them.<sup>26</sup> Lastly, the ECtHR requires that a formal state of emergency be declared before any suspension of rights is made.<sup>27</sup> States must also report which rights have been suspended as a result of this declaration.<sup>28</sup>
18. The OSCE human dimension commitments further reinforce these principles. The 1991 OSCE Moscow Document 1991 introduces several requirements and conditions for the declaration of a state of emergency, which may be proclaimed “*only by a constitutionally lawful body*” mandated to do so, and when this is done by executive authorities, “*that decision should be subject to approval in the shortest possible time or to control by the legislature.*”<sup>29</sup> It should also be proclaimed “*officially, publicly, and in*

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22 See Limitation Clauses of the [Siracusa Principles](#).

23 States remain obligated to respect (refrain from interfering with the enjoyment of the right), to protect (prevent others from interfering with the enjoyment of the right) and to fulfil (adopt appropriate measures towards the full realization of) economic, social and cultural rights and to eliminate any discrimination irrespective of the resources they have. With respect to obligations in connection with economic, social and cultural rights under international human rights treaties, the principle of “progressive realization” qualifies the obligations in relation to the availability of resources and thus the prevailing circumstances. Still, State obligations associated with the core content of the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living and to eliminate any discrimination irrespective of the resources they have, remain in effect even during situations of emergency.

24 See the [Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms](#) (hereinafter ECHR) entered into force on 3 September 1953. See also also [Recommendation 2125 \(2018\)](#) on State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights.

25 See ECtHR, [Lawless v. Ireland](#), no. 332/57, 1 July 1961.

26 See ECtHR, [A. and Others v. The United Kingdom \[GC\]](#), no. 3455/05, 19 February 2009, paras. 171 and 173

27 See ECtHR, [Lawless v. Ireland](#) (No 3), no. 332/57, 1 July 1961, para. 28.

28 See Article 15 of the ECHR. See also [Resolution 2209 \(2018\)](#) on State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights.

29 See OSCE, [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#) (Moscow, 10 September-4 October 1991), (1991 OSCE Moscow Document), para. 28.3

*accordance with provisions laid down by law.*<sup>30</sup> Furthermore, it explicitly states that a “*de facto imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible.*”<sup>31</sup> In addition, OSCE participating States must inform ODIHR of their decision to declare or lift a state of emergency and of the derogations made from their international human rights obligations.<sup>32</sup> OSCE participating States also committed to ensure that “*the legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency*” and to “provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.”<sup>33</sup> The ECtHR also reaffirmed that measures taken under a state of emergency must balance national security concerns with individual rights, highlighting that judicial oversight plays a critical role in ensuring proportionality.<sup>34</sup>

## 2. BACKGROUND AND GENERAL COMMENTS

19. Chapter V of the Draft Code elaborates and operationalizes the provisions of the Constitution of Moldova regulating states of exception, including Articles 63 (1), 66 (m), 72 (3), 80 (3), 85 (4) and 142 (3) of the Constitution. Article 66.m of the Constitution states that the Parliament is vested with the power to declare the state of national emergency, martial law and war. Article 63 (1) of the Constitution provides that the 4-year term of office of the Parliament may be extended by organic law, in the event of war or national disaster, and the same applies to the mandate of the President (Article 80 (3)). The Constitution further states that the Parliament may not be dissolved during a state of emergency, martial law or war (Article 85 (4)) and that the Constitution shall not be amended during such times (Article 142 (3)). All other aspects of the states of emergency, martial law and war are left to be thwarted by organic statutes (article 72 (3m)).
20. The Organic Law 212/2004 on the Regime of the State of Emergency, Siege or War (hereinafter the “Organic Law 212/2004”)<sup>35</sup> provides additional elaboration. Article 12 (1) specifies that the declaration of a state of emergency, siege or war is made by a decision of the Parliament, while Article 13 details the content of such a decision. Articles 15 and 16 govern the extension and the lifting of the state of emergency, siege or war, respectively. Chapters III, IV and V then specifically deal with the procedural and institutional arrangements, scope and modalities of the three exception regimes.
21. Chapter V of the Draft Code elaborates the procedures for declaring states of emergency, siege, or war. It mandates rigorous justification for such declarations, parliamentary oversight, and adherence to international obligations. It emphasizes open debate, procedural clarity, and the prohibition of certain actions during emergencies, such as restrictions on the right to life or access to justice. Measures are bounded by necessity, and Parliament holds authority to extend, revise, or lift these states based on evolving circumstances. The Draft Code also includes the State’s obligation to notify international bodies and reporting on the impact and actions taken during emergencies. In addition, Article 12 of the Draft Code provides for temporary relocation of the

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30 *Ibid.*

31 See [1991 OSCE Moscow Document](#), para. 28.4

32 *Ibid.* para. 28.10, read together with CSCE, [Helsinki Document 1992](#), Part VI The Human Dimension, para. 5b.

33 See [1991 OSCE Moscow Document](#), para. 28.8

34 See *A. and Others v. The United Kingdom*, Application No. 3455/05.

35 See Republic of Moldova, [Organic Law 212/2004 on the Regime of the State of Emergency, Siege or War](#), 24 June 2004, as amended in 2013 (in Romanian).



Parliament in extraordinary circumstances. In addition, Articles 142 (3) of the Constitution and Article 126 of the Draft Code contributes to constitutional stability by prohibiting constitutional revision during a state of emergency, martial law or war.

22. While the Draft Code generally provides a sound framework for parliamentary functioning and emergency management, certain areas could benefit from expansion and refinement, as further elaborated below.
23. First, certain key aspects of the states of exceptions should preferably be regulated in the Constitution rather than in an organic statute. From a comparative perspective, the level of details provided in constitutions regarding emergency provisions varies widely. Some constitutions omit emergency provisions entirely,<sup>36</sup> while others defer to the legislature the task to regulate states of exceptions,<sup>37</sup> or include detailed and comprehensive framework for states of exception.<sup>38</sup> Constitutional arrangements that grant the legislature broad discretion to regulate states of exceptions may raise concerns, as this may allow a ruling majority to unilaterally modify the rules on states of exceptions with a view to ease the conditions for resorting to emergency powers to consolidate power.<sup>39</sup> By contrast, regulating key aspects of states of exceptions directly in the Constitution offers a higher level of legal protection, as these rules would require a constitutional supermajority to be changed, thus making it more difficult for an incumbent majority to enact unilateral changes. In addition, provisions regulating states of exceptions are intrinsically constitutional, as they impact fundamental rights, alter the system of separation and balance of powers, and are designed to protect the constitutional system and enable it to respond effectively to crisis. For these reasons, the Venice Commission generally recommends that emergency regimes be explicitly regulated in the constitution.<sup>40</sup>
24. In Moldova, the existing constitutional arrangement would enable an absolute majority in the unicameral legislature to determine the conditions, scope and effects of emergency powers. Given the potentially far-reaching consequences of a state of exception, it may be prudent to regulate some critical aspects of emergency powers directly in the Constitution rather than in organic statutes, to offer greater safeguards. Key features of emergency regimes that could be included in the Constitution may include: (i) the circumstances under which a state of exception can be declared, (ii) the actors authorized to make a proposal or initial decision to declare a state of exception, (iii) the threshold and timeline required for approval or confirmation by the legislature, (iv) the duration, termination and conditions for renewal of a state of exceptions, (v) the effects of a state of exception, and (vi) the means of the judiciary, the legislature and national human rights institution or ombudspersons to oversee the exercise of emergency powers by the executive. **Therefore, while acknowledging that constitutional amendments may not be envisaged at the moment, in the long term, it is recommended to consider further regulating critical aspects of states of exception in the Constitution rather than in organic statutes.**

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36 See, e.g., the [Constitution of Australia](#), the [Constitution of Belgium](#), the [Constitution of Canada](#), the [Constitution of Monaco](#), the [Constitution of Norway](#).

37 See e.g., Article 109 (19) of the [Constitution of the Republic of Uzbekistan](#); Articles 12 and 80 (4) (1) of the Constitution of the Kyrgyz Republic;

38 See, for examples, in the OSCE region, Articles 183 and 184 of the [Constitution of Cyprus](#); Articles 65.14, 78.17, 87.8, 129, 130, 131, 161 of the [Constitution of Estonia](#); Articles 122-128 of the [Constitution of North Macedonia](#); Articles 200-202 of the [Constitution of Serbia](#).

39 See e.g., International IDEA, Bulmer, E., *Constitution-Building Primer 18 Emergency Powers*, 2018, p. 10.

40 See Venice Commission, [Emergency Powers](#), CDL-STD(1992)015; and Venice Commission, [Opinion on the Draft Constitutional Law on "the Protection of the Nation"](#), CDL-AD(2016)006, para. 52.

25. Second, more detailed guidance on the criteria and thresholds for declaring emergencies, their duration, and the specific conditions that justify the suspension or limitation of fundamental rights, could enhance clarity and prevent potential misuse (Sub-Sections 3 and 6 *infra*).
26. Third, additional provisions on the modalities of decision-making (Sub-Section 4 *infra*), legislative oversight (Sub-Section 5 *infra*) and mechanisms for judicial review of decisions could strengthen checks and balances (Sub-Section 7 *infra*). In addition, the Draft Code should provide more guidance on how the legislature decides on the holding or postponing of elections during a state of exception (Sub-Section 6.2 *infra*).
27. Finally, it is noted that there seems to be some discrepancies between the provisions of the Constitution, the Organic Law 212/2004 on the Regime of the State of Emergency, Siege or War and the Draft Code.<sup>41</sup> It will be important is also important to ensure that all provisions of the Draft Code and of the Organic Law 212/2004 are consistent with the Constitution, while ensuring the consistency of the legal framework overall.

### 3. DECLARATION OF A STATE OF EMERGENCY, SIEGE OR WAR BY THE LEGISLATURE

28. As previously noted by ODIHR, oversight functions conducted by national parliaments remain an essential requirement of parliamentary democracy, especially at times when states of emergency or other states of exception are introduced and greater powers shift towards the executive.<sup>42</sup> **As also underlined by the Venice Commission, “[p]arliamentary scrutiny of acts by the authorities in connection with a state of emergency and the special procedures for such scrutiny are important guarantees of the rule of law and democracy”.**<sup>43</sup> As required by the 1991 OSCE Moscow Document, “in cases where the decision to impose a state of public emergency may be lawfully taken by the executive authorities, that decision should be subject to approval in the shortest possible time or to control by the legislature.”<sup>44</sup> In that respect, OSCE participating States committed to “provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.”<sup>45</sup> This means that the fundamental safeguards of the rule of law, in particular constitutionality and legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency or similar states of exception.<sup>46</sup>

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41 For instance, Article 63 of the Constitution envisages the possibility for the Parliament, by organic law, to decide to extend its mandate during a state of emergency, siege or war, while Article 137 (6) of the Draft Code provides that its mandate shall be extended in such cases.

42 See [OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#), p. 43.

43 See Venice Commission, [Opinion](#) on the Draft Constitutional Law on Protection of the Nation of France, CDL-AD(2016)006-e..

44 See [1991 OSCE Moscow Document](#), para. 28.2. See also Venice Commission, [Opinion](#) on the Draft Constitutional Law on Protection of the Nation of France, CDL-AD(2016)006-e.

45 See [1991 OSCE Moscow Document](#), para. 28.8.

46 See PACE, [Resolution 2209 \(2018\) State of emergency](#): proportionality issues concerning derogations under Article 15 of the ECHR, para. 3.



### 3.1. Procedure for Declaring a State of Emergency, Siege or War

29. The Constitution of Moldova grants the authority to declare a state of emergency, siege or war to the Parliament (Article 66.m of the Constitution). The Organic Law 212/2004 specifies who may propose such declaration.<sup>47</sup>
30. According to Article 137 (1) of the Draft Code, the President of the Republic or the Government can submit a proposal to the Parliament to declare a state of emergency, siege, or war. Such proposal must be made in accordance with Law No. 212/2004, and be accompanied by a draft normative act prepared under Law No. 100/2017. Proposals must include reasoned information justifying the declaration and any restrictions on rights and freedoms (Article 137 (2) of the Draft Code). If the Parliament is not in session, it must be convened in extraordinary session to address the proposal (Article 137 (3)), or within 24 hours in the case of armed aggression (Article 137 (4)), ensuring prompt legislative oversight. Article 138 outlines that the proposal for declaring a state of emergency, siege, or war shall be referred to a committee, which will examine the circumstances leading to the declaration and prepare a report for the Parliament. The committee will also draft a decision and submit it to the Parliament for approval. Article 139 outlines the procedures for parliamentary debates on the proposal to declare a state of emergency, siege, or war. Debates are held in open session unless the Parliament decides otherwise. The President or Government presents the proposal, followed by a round of questions from Members of Parliament, each lasting one minute, with answers limited to three minutes. The committee's report on the proposal, including conclusions and the circumstances leading to the declaration, is then presented. Parliamentary factions are allowed to express their positions for seven minutes. Finally, the Chairperson puts the draft decision to a vote. According to Article 140 (1) of the Draft Code, a state of emergency, war, or siege is declared by a decision of Parliament.
31. Overall, the proposed procedure for declaring a state of exception is welcome from the point of view of parliamentary control over the use of emergency powers. Under the proposed arrangement, the President of the Republic and the Government can propose a declaration of a state of exception to the legislature, but the ultimate decision to declare it rests with the Parliament. This requirement of legislative approval before a state of exception can come into force is found in several other jurisdictions.<sup>48</sup> Such arrangement may reduce the risk of abuse of emergency powers by the executive, but may also delay executive responses to the crisis.
32. At the same time, two important aspects of the proposed procedure could be improved. In case of armed aggression against the country, the Constitution obliges the President of the Republic to take immediate actions and to declare a state of war (Article 87 (3) of the Constitution). Under this scenario, a state of war can come into effect prior to the approval of the legislature. The Constitution and the Draft Code require the President of the Republic to inform the legislature of the declaration, and if the legislature is not in session, it must be convened in extraordinary session within 24 hours from the aggression.

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47 A state of emergency may be proposed by the President of the Republic of Moldova or the Government (Article 17), while a state of siege or a state of war may be declared by the Parliament upon the proposal of the President (Articles 28 and 43). In addition, in case of armed aggression against the country, the Constitution places a duty on the President of the Republic, to “*undertake the necessary steps to repulse the aggression*” and to declare a state of war; the President of the Republic must inform the legislature ‘without delay’ (Article 87.3 of the Constitution).

48 See, for example, Article 120 of the [Constitution of Armenia](#); Article 129 of the [Constitution of Estonia](#); Article 138 of the [Constitution of Portugal](#); Article 116.3 of the [Constitution of Spain](#).

33. However, neither Constitution, the Organic Law 212/2004 nor the Draft Code provides that the President's declaration of war must be confirmed by the Parliament within a specific timeline to remain in effect. Comparatively, in several jurisdictions, a state of exception comes into effect immediately upon an executive decision, but lapses after a certain period of time if it is not confirmed by the legislature. Post-declaration legislative approval balances the need for immediate executive actions with the requirement for legislative oversight, ensuring that the emergency regime cannot extend beyond its initial period without legislative approval. The time limit for securing post-declaration legislative approval varies across jurisdictions,<sup>49</sup> and in some jurisdictions, there is no specific time limit for post-declaration legislative approval but instead, the legislature may annul the declaration of a state of exception by the executive at any time.<sup>50</sup> In principle, to ensure effective parliamentary oversight and prevent abuse of emergency powers, this period should be relatively short. The absence of a sunset clause and of an explicit requirement for post-declaration legislative approval in the case of a presidential declaration of war under Article 87 (3) of the Constitution constitutes a significant gap and raises serious concerns. Therefore, to address this gap, and although acknowledging that this may require constitutional amendment, **it is recommended to explicitly require the Parliament to confirm any declaration of war by the President under Article 87.3 of the Constitution within a defined timeline for it to remain in effect beyond a specified initial (short) period.**
34. Secondly, according to Article 140 (1) of the Draft Code, a state of emergency, war or siege is declared by a decision of Parliament. Article 74 (2) of the Constitution provides that Parliament's decisions are adopted by vote of the majority of present members of Parliament. Article 115 (1.c) of the Draft Code provides that ordinary laws, resolutions and other acts require a simple majority vote (i.e., a majority of members of parliament (MPs) present at the sitting) to be enacted. Hence, this means that there is no quorum requirement for the Parliament to vote on a proposal to declare a state of emergency, siege or war; special or qualified majority is also not envisaged. This issue can be particularly important depending upon the effects of the phenomenon triggering the emergency. Given the dire consequences that may be triggered by a state of exception, in several jurisdictions, the decision to decide or approve a declaration of a state of emergency requires an absolute majority vote of all MPs<sup>51</sup> or a qualified majority vote in the legislature.<sup>52</sup> A rigorous requirement for a quorum can also act as a safeguard against any undue influence or pressure on parliamentarians as a means of discouraging them from attending to vote on a resolution. In addition, a higher threshold often

49 For instance, **Georgia** (Article 50 (31) provides that “unless Parliament convenes within five days or approves (extends) the presidential edict for declaration (extension) of a state of emergency, the declared state of emergency shall be cancelled. Martial law shall be cancelled if Parliament does not approve the presidential edict for declaration (extension) of martial law within 48 hours after it has convened.”); **Luxembourg** (a state of crisis can last maximum ten days and can be extended for 3 months (maximum duration provided in the Constitution) but only with prior authorization of Parliament); **Mongolia** (Article 33 of the Constitution requires the Parliament to consider within seven days the decree declaring a state of emergency or a state of war and shall approve or disapprove it – without such a decision, the presidential decree shall be void); **Malta** (as per Article 47 of the Constitution, House of Representatives' approval is required within 14 days); **Spain** (each extension of the 15-day state of alarm requires the approval by the Congress of Deputies); **Romania** (the Parliament, in accordance with Article 93 of the Constitution, needs to endorse the state of emergency decreed by the President within three days, and later any extension).

50 See for examples, Article 231 of the [Constitution of Poland](#).

51 See e.g., Article 129 of the [Constitution of Estonia](#); and Article 91 of the Constitution of Montenegro.

52 See e.g., Article 17 of the [Constitution of Croatia](#) (two-thirds majority of all Members of Parliament); Article 47 of the Constitution of Malta (not less than two-thirds of all the Members of the House); Article 125 of the Constitution of North Macedonia (two-thirds majority vote of the total number of Representatives).

requires support of the opposition, which may contribute to preventing the misuse of emergency powers for partisan ends and to ensure broad consensus.<sup>53</sup>

35. To strengthen parliamentary oversight and uphold the principle of separation of powers, **it is recommended, at minimum, to include an explicit quorum requirement for the adoption of a declaration of a state of exception, or alternatively, to require a higher threshold for the legislature to adopt the decision to declare a state of emergency, siege or war**, though acknowledging that this may require an amendment to the Constitution. This safeguard would ensure that any declaration of states of exception are subject to robust legislative scrutiny and reflect consensus among parliamentarians.

### 3.2. Grounds and Requirements for Declaring a State of Emergency, Siege or War

36. The Draft Code envisions three distinct types of exception regimes: state of emergency, state of siege or state of war, thereby reflecting the three categories envisaged in the Constitution.<sup>54</sup> However, the Draft Code does not specify the types of circumstances or phenomena that could trigger each of these states. At the same time, the grounds for declaring a state of emergency, siege or war are further defined in Article 1 of the Organic Law 212/2004.<sup>55</sup> While assessing the content of Organic Law 212/2004 goes beyond the scope of this Opinion, several observations can be made regarding the grounds and thresholds that should be met to declare different states of exceptions.
37. Defining an emergency in advance can be challenging, as emergencies are by nature sudden and unforeseen. If the definitions were too narrowly prescribed, it could hinder an effective response in novel situations. To address this, many constitutions and legislative provisions adopt a general approach, identifying core phenomena that may trigger a situation of crisis, such as war, and then using broader, more flexible language to encompass other potential emergencies.<sup>56</sup>
38. At the same time, a broad definition of circumstances that may lead to a declaration of states of exception creates a risk for potential misuse, further exacerbated by the difficulty that other constitutional actors may face in scrutinizing or reviewing the executive's justification for declaring an emergency. In cases related to national security, the executive and government officials often claim to be best positioned to assess the need for emergency powers due to their expertise in national security matters. However, the parliament is frequently unable to closely examine these claims, as disclosing sensitive national security information to a large, publicly convened assembly could jeopardize the very security in question. Article 139 (1) of the Draft Code attempts to mitigate this by allowing parliamentary sessions to be held in private. However, such a private sitting would not eliminate the risk to national security, given that many parliamentarians would still have access to sensitive materials; this is irrespective of the separate rules governing access to classified or secret information which falls under deferent rules for classification. Consequently, holding debates in

53 See International IDEA, Bulmer, E., Constitution-Building Primer 18 [Emergency Powers](#), 2018, p. 15. See also the Venice Commission, *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, CDL-AD(2019)05, para. 121.

54 E.g., in Article 66 (m) of the Constitution.

55 See Republic of Moldova, [Organic Law 212/2004 on the regime of the state of emergency, siege or war](#), 24 June 2004.

56 For instance, Article 15 of the ECHR permits derogation “in time of war or other public emergency threatening the life of the nation”, in this case, war serving as the primary example of what intend to be covered by the provision, while the phrase “other public emergency threatening the life of the nation” extends the scope to other situations, primarily focusing on the impact of the phenomenon, specifically its threat to the nation's life to clarify what constitutes an emergency.

closed session may not achieve the intended outcomes. While there may be some argument for reducing public concern through closed debates, robust public discourse is crucial. Public debate can highlight the severity of the situation and lend democratic legitimacy to the decision, thereby enhancing public confidence, especially when the definition of an emergency is broad. Additionally, if the matter is discussed in a closed session, there is less opportunity for the parliament to act as a check on executive power and, subsequently, an increased risk for misuse and lack of accountability on the part of the State.

39. While emergencies are often defined in broad terms, international human rights bodies have sought to clarify these definitions on the basis of their effects. For example, the UNHRC has stated that not every disturbance or catastrophe qualifies as a “*public emergency which threatens the life of the nation*”; rather the situation must reach a certain tipping point (the threat-severity threshold) to qualify as an emergency.<sup>57</sup> Relatedly the phrase “*threatening the life of the nation*” in Article 15 ECHR and related international human rights treaties also emphasizes the effect that a crisis should produce in order for it to qualify as an emergency. The International Law Association (ILA) *Paris Minimum Standards of Human Rights in a State of Exception* further clarify that “public emergency” should mean “*an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed.*”<sup>58</sup> Similarly, the ECtHR has considered that a “public emergency threatening the life of the nation” is equated to “*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.*”<sup>59</sup> The ECtHR acknowledged that national authorities have a wide margin of appreciation to assess the existence of an emergency and determine the necessary derogations, given their direct and ongoing involvement with urgent situations and knowledge of the country context.<sup>60</sup> However, this power is not unlimited, and the Court retains the responsibility to review whether the actions taken exceed what is “*strictly required by the exigencies*” of the crisis, ensuring European oversight of the domestic margin of appreciation.<sup>61</sup>
40. Article 138 of the Draft Code does not elaborate on the elements or circumstances that should be assessed by the Committee when examining the circumstances giving rise to the state of emergency, siege or war. Article 140 (2) of the Draft Code notes that “*a state of siege and a state of emergency may be established and maintained only to the extent required by the situations giving rise to them and in compliance with the obligations assumed by the Republic of Moldova under international law.*” While the compliance with the international law obligations implies the compliance with the principles outlined in the ICCPR and the ECHR, to the extent that the declaration of the state of emergency may also entail possible human rights derogations, the circumstances where the state of emergency may be declared must also fulfil the criteria of the condition of a “*public emergency threatening the life of the nation*” established by Article 4 of the ICCPR and Article 15 of the ECHR as interpreted by the

57 See [CCPR, General Comment no. 29 on Article 4 of the ICCPR](#).

58 See [the Paris Minimum Standards of Human Rights Norms in a State of Emergency](#) (1985) 79 American Journal of International Law 1072, 1072.

59 See ECtHR, [Lawless v. Ireland](#), no. 332/57.

60 See ECtHR, [Brannigan and McBride v. the United Kingdom](#), nos. 14553/89 and 14554/89, 26 May 1993, paras. 43. See also Venice Commission [Opinion](#) on Emergency Decree Laws N°s667-676 of Turkey, 9-10 December 2016.

61 See ECtHR, [Brannigan and McBride v. the United Kingdom](#), nos. 14553/89 and 14554/89, 26 May 1993. See also Venice Commission [Opinion](#) on Emergency Decree Laws N°s667-676 of Turkey, 9-10 December 2016.

UN Human Right Committee and the ECtHR, respectively, and reach a certain threat-severity threshold. In *the Greek Case*, the European Commission on Human Rights stated that an emergency must be actual or imminent; its effects must involve the whole nation; the continuance of organized life of the community must be threatened; and the crisis or danger must be exceptional.<sup>62</sup> It is recommended **to elaborate in Article 138 the elements to be considered by the committee to assess whether the threat-severity threshold is reached to justify the declaration of a state of emergency – explicitly requiring that the emergency be actual or imminent, temporary and exceptional, threatening the life of the nation, affecting the whole population and constituting a threat to the organized life of the community, while requiring measures that are not permissible under ordinary constitutional standards, applying the “strict necessity” test, including during the extension.**

41. It is important that the committee in charge carries out a preliminary assessment of the contemplated emergency measures with a view to establish whether: i) they can be accommodated by ordinary limitation clauses on rights, and ii) they undermine the rule of law and principles of democratic governance.<sup>63</sup> In respect to the first limb, the assessment must pay due regard to the fact that certain rights are non-derogable under any circumstances (see also Sub-Section 6.1 *infra*), and that emergency measures, just like interferences with human rights in normal times, are subject to the necessity, proportionality and non-discrimination requirements.<sup>64</sup> To facilitate this preliminary assessment, the committee in charge should engage in prompt consultations with civil society organizations, the national human rights institution and, whenever possible, international expert bodies. The outcome of the assessment and course of action pursued – to address the situation through a declaration of emergency, a derogation from one or more treaties, or to adopt new or adapt existing legislation – should be transparently justified in the report for submission to Parliament for consideration. **Article 138 of the Draft Code could further elaborate the elements that should be examined and assessed in the report submitted to the Parliament.** In addition, **to further strengthen the framework, it is recommended to specify in Article 140 (2) of the Draft Code that a state of emergency or siege can only be declared in situations equating to a public emergency which threatens the life of the nation and when strictly required by the exigencies of the situation.**
42. It should be acknowledged however that even with these safeguards in place, due to political pressure in times of emergency, coupled with the difficulties in providing adequate information to parliamentarians as to whether these conditions are met, such clarifications in the Draft Code on their own may be ineffective. It is thus fundamental to strengthen the oversight mechanisms at moments when the continued existence of an emergency is being considered (see Sub-Section 6 *infra*). For this reason, any refinement of the definition of what constitutes an “emergency” needs to be accompanied by further clarification as to the process surrounding review, renewal, and lifting of the state of emergency. Ultimately, a tighter definition of emergency can act as a safeguard ensuring that the formal declaration of emergency has its desired effect of quarantining exceptional powers to exceptional situations.

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62 See [the Greek Case \(1969\) YB 1](#). This inter-state application was never heard by the ECtHR as Greece withdrew from the Convention following the adverse ruling of the Commission.

63 See International Law Association, Committee on Human Rights in Times of Emergency, [Resolution 2/2024](#) (June 2024), p. 3.

64 See International Law Association, Committee on Human Rights in Times of Emergency, [Resolution 2/2024](#) (June 2024), p. 3.



### 3.3. Time Limits for the State of Emergency, Siege or War

43. Emergencies are by definition an exceptional and temporary condition. Therefore, emergency regimes must be provisional in nature.<sup>65</sup> Emergency measures should be limited in duration, lasting only as long as the emergency persists, and must not become permanent. As stated by the Venice Commission, “[t]he emergency regime should not be unduly protracted; if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy.”<sup>66</sup> Hence, states should ensure a regular review mechanism to assess the necessity of continuing a state of emergency.<sup>67</sup> The question of who should end a state of emergency, when and how, cannot be left to the judgement of an executive, which is exercising increased powers, and should fall under the responsibility of the Parliament.<sup>68</sup>
44. There are several indications within the Draft Code that states of exception are presumed to be temporary. Article 137 (6) of the Draft Code allows for the extension of Parliament’s mandate “until the state of emergency, siege, or war has ended”; Article 140 (2) restricts the establishment and maintenance of a state of emergency to what is “required by the situations giving rise to them” and mandates that any emergency declaration specify its duration; and Article 141 provides general provisions regarding the extension or cessation of a state of emergency.
45. However, the Draft Code does not currently include an explicit time limit for the initial duration of a state of emergency, nor for the duration of potential extension of emergency regime. While Article 18 of the Organic Law 212/2004 provides that a state of emergency may be instituted for a period *not exceeding 60 days*, with the possibility to be extended, it does not specify explicit time limit for the duration of potential extension and it is not clear whether the 60 days limit also applies to extensions. On the one hand, this is sensible as it is difficult to appreciate in advance how long an emergency may last. On the other hand, without an explicit time limit for extension, there is no limit to how long a state of emergency may last. It is therefore possible, for emergencies of extensive duration to be permissible under the current wording. Open-ended provisions are highly susceptible to abuse, as emergency powers often have a tendency to become prolonged and entrenched over time.
46. From a comparative perspective, most constitutions impose a time limit on any emergency regime, after which it automatically lapses unless formally extended by the Parliament. Practices regarding the initial duration of states of exception and possibility of extension, and duration of extension, vary across OSCE participating States.<sup>69</sup>

65 See the Venice Commission, *Opinion on the Draft Constitutional Law on “Protection of the Nation” of France*, CDL-ad(2016)006, para. 65.

66 See the Venice Commission *Opinion* on Emergency Decree Laws N°s667-676 of Turkey, para. 229.

67 See ODIHR, *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, page 49.

68 See Venice Commission, *Opinion* on the Draft Constitutional Law on Protection of the Nation of France, CDL-AD(2016)006-e..

69 For example, 15 days for a state of siege in **Greece** (which may be extended every fifteen days, only upon resolution passed by the Parliament, Article 48 of the Constitution), 15 days for a state of emergency or siege in **Portugal** (for states of siege or of emergency, Article 19 (5) of the Constitution), 30 days for a state of emergency in **Spain** (proclaimed by the Government by decree agreed in Council of Ministers, after prior authorization by the Congress, with possibility of extension for a further 30 days, with the same requirements), 30 days in **Czechia** (initial duration for a period of no more than 30 days, which may be annulled by the Assembly of Deputies, with possibility of 30-day extension only with the prior consent of the Assembly of Deputies, Article 6.3 of Appendix B of the Constitution of Czechia), two months for a state of emergency in **Cyprus** (the proclamation of emergency shall cease to operate at the expiration of two months from the date of confirmation by the House of Representatives unless the House, at the request of the Council of 87 Ministers decides to prolong the duration of the state of emergency, Article 183 (6) of the Constitution), up to 60 days for a state of emergency in **Albania** (at the request of the Council of Ministers, by decision of the Assembly, with possibility of extension only with the consent of the Assembly every 30 days for a period of time not longer than 90 days, Article 173 of the Constitution), up to 90 days for proclamation of a state of emergency in **Poland** (proclaimed by the President of the Republic, on request of the Council of Ministers, and 60 days possible extension with the consent of the Sejm, Article 230 of the Constitution of Poland), up to 90 days in **Serbia** (declaration by decision of the National Assembly for a maximum of 90 days, with possibility to



47. The ILA *Paris Minimum Standards of Human Rights in a State of Exception*, for example, state that “[t]he duration of an emergency (except in cases of war or external aggression) shall be for a fixed term established by the constitution.” While acknowledging that extensions are possible, they emphasize that “[e]very extension of the initial emergency period must be supported by a new declaration made before the expiration of each term, establishing another period as set by the constitution.” Additionally, “[e]very extension of the emergency period shall require prior approval from the legislature.” Similarly, the Venice Commission has declared that “[u]nder no circumstances should the constitutionalisation [of emergency powers] result in a ‘blank cheque’ in favor of the legislator, even less so in favor of the majority in power, which would otherwise have the power to introduce very substantial derogations from the protected freedoms, including after the declaration of the state of emergency. For this reason, it seems necessary to avert this risk by enshrining in the Constitution not only the possibility of declaring (and prolonging) any exceptional regime, including the state of emergency, but also the formal, material and time limits which must govern such regimes.”<sup>70</sup>
48. The ECtHR has suggested that emergencies under Article 15 of the ECHR do not need to be temporary and that the duration of the emergency is considered as part of the assessment of proportionality.<sup>71</sup> However, this interpretation may blur the distinction between normalcy and emergency, as it abandons the goal of restoring normalcy. Such an approach also risks weakening the protective function of Article 15, as normalcy and emergency should be clearly distinguished, even if not entirely.<sup>72</sup>
49. In light of the foregoing, **it is recommended to specify in the Draft Code the maximum duration for the initial period of any state of exception declared by the Parliament, or cross-reference the provisions of the Organic Law 212/2004, and for the maximum duration of potential subsequent extensions of any state of exception.**
50. In addition, in many jurisdictions, a state of exception can be terminated earlier than its scheduled expiration if the crisis or emergency has resolved. Early termination may be decided by the executive and, in some countries, by the legislature.<sup>73</sup> Article 141 (1) of the Draft Code provides that the legislature can shorten the duration of a state of emergency, siege or war depending on how the situation develops. In addition, the legislature must lift an emergency regime if the situation that led to the declaration of the state of exception has been lifted (Article 141 (4) of the Draft Code). These two provisions are welcome as they suggest that a state of exception should only be maintained as long as necessary.
51. With respect to the procedure for extending the state of emergency, it is assumed that this would require the same majority as the one for the initial declaration, i.e., a majority of the MPs who are present, without quorum requirement. However, given the risks inherent in the prolongation of a state of emergency, the legal drafters could consider requiring a qualified majority for the purpose of extending a state of

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extend for another 90 days, Article 200 of the Constitution), up to three months for a state of emergency in **Estonia** (the *Riigikogu* may, acting on a proposal of the President or of the Government of the Republic and by a majority of its members, declare a state of emergency in the entire national territory for a period not exceeding three months, Article 129 of the Constitution of Estonia).

70 See Venice Commission *Opinion* on the Draft Constitutional Law on Protection of the Nation of France, para. 54.

71 See ECtHR, *A. and Others v. The United Kingdom*, no. 3455/05.

72 In earlier decisions such as *Lawless v. Ireland* and *Brammigan and McBride v. UK*, the Court appeared more attuned to the temporary and exceptional nature of emergencies. Similarly, in *A and Others v. Secretary of State*, the House of Lords stressed the importance of time limits and safeguards to prevent normalization of emergency powers.

73 See for examples, Article 231 of the *Constitution of Poland*.

emergency, in order to ensure a broader political consensus for each extension of an emergency regime, and consequently, gradually increase the power of the opposition to end the emergency regime.<sup>74</sup> **The Draft Code should specify the required majority and quorum requirement for subsequent extensions of state of exception, while considering the introduction of increasing voting threshold for subsequent extensions. Additionally, it should require a separate justification for each extension, clearly outlining why the conditions that originally warranted the state of exception remain present and necessitate its continuation.**

52. Article 141 (4) of the Draft Code stipulates that “*a state of war will be lifted after the cessation of military action and the conclusion of peace.*” This could potentially be problematic for two reasons. Firstly, modern conflicts often do not conclude with the cessation of military action or the signing of a formal peace agreement. Instead, ‘frozen conflicts’ may persist, allowing a state of war to endure for an extended period. Secondly, elements of a state of war may continue even after hostilities cease. To address such circumstances, the Irish Constitution was amended to extend the definition of ‘time of war’ to include periods following the termination of a war, armed conflict, or armed rebellion. This extension remains in effect until both houses of the bicameral legislature resolve that the national emergency resulting from the conflict or rebellion has ended.<sup>75</sup> However, the Irish example is also illustrative of how such periods of time can be abused. In Ireland’s case, its state of emergency stemming from the outbreak of World War II in 1939 was extended until 1976. While there may be a valid case for permitting powers associated with a state of war to continue after the formal cessation of hostilities, strict controls must be put in place to prevent abuse. **A reasonable time limit should also be considered for the duration of state of war with mechanisms for potential extensions and regular review** (see also Sub-Section 3.1 *infra*).

### 3.4. Publicity, Transparency and Information of the International Community

53. A state of emergency should be guided by human rights and democratic principles, including transparency and accountability. Access to information, openness and transparency are necessary conditions for democratic governance. In the Moscow Document (1991), OSCE participating States committed, in the context of a state of emergency, to “*make available to [their] citizens information, without delay, about which measures have been taken.*”<sup>76</sup>
54. From the moment a state of emergency is declared or proclaimed, the state should, without delay, make information available to the public about the measures that have been taken and the implications that could result. Article 140 (5) of the Draft Code which provides that decisions declaring a state of emergency, siege or war “*shall be published without delay*” is therefore welcomed. **It should be emphasized that information must be easily accessible, including for persons with disabilities.**
55. Article 140 (6) of the Draft Code also outlines the duty of the Parliament, through the Ministry of Foreign Affairs, to “notify the Secretary General of the United Nations and the Secretary General of the Council of Europe of the measures adopted which have the effect of restricting the exercise of certain fundamental rights and freedoms in accordance with the international obligations of the Republic of Moldova.” This is in

74 See International IDEA, Bulmer, E., Constitution-Building Primer 18 [Emergency Powers](#), 2018, p. 15. See also the Venice Commission, *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, CDL-AD(2019)05, para. 121.

75 Article 28.3.3° of the [Constitution of Ireland](#).

76 See [1991 OSCE Moscow Document](#), para. 28.3.

line with Article 4 (1) of the ICCPR and Article 15 (1) of the ECHR. However, to also comply with OSCE commitments, **the Draft Code should also require state authorities to inform the OSCE Office for Democratic Institutions and Human Rights of their decision to declare (and to lift) a state of exception and of the potential derogations made from their international human rights obligations.**<sup>77</sup>

#### RECOMMENDATION A

1. To explicitly require the Parliament to confirm a presidential declaration of war under Article 87.3 of the Constitution within a defined timeline for it to remain in effect beyond a specified initial (short) period;
2. To provide for an explicit quorum requirement for the adoption of a decision declaring a state of exception, or alternatively, to require a higher threshold for the legislature to adopt such a decision, though acknowledging that this may require an amendment to the Constitution;
3. To elaborate, in Article 138 of the Draft Code, the elements to be considered by the committee to assess whether the threat-severity threshold is reached to justify the declaration of a state of emergency – explicitly requiring that the emergency be actual or imminent, temporary and exceptional, threatening the life and organized life of the nation, while requiring measures that are not permissible under ordinary constitutional standards, applying the “strict necessity” test;
4. To supplement Article 138 of the Draft Code to further elaborate the elements that should be examined and assessed in the report submitted to the Parliament to inform the decision declaring a state of exception, including a justification of the outcome of the assessment and course of action pursued – to address the situation through a declaration of emergency, a derogation from one or more treaties, or to adopt new or adapt existing legislation – while ensuring that the committee in charge engage in prompt consultations with civil society organizations, the national human rights institution and, whenever possible, international expert bodies;
5. To specify in the Draft Code the maximum duration for the initial period of any state of exception declared by the Parliament, or cross-reference the provisions of the Organic Law 212/2004, and for the maximum duration of potential subsequent extensions of any state of exception;
6. To specify the required majority and quorum requirement for subsequent extensions of state of exception, while considering the introduction of increasing voting threshold for subsequent extensions; Additionally, it should require a separate justification for each extension.
7. To supplement Article 140 (6) of the Draft Code to require information of the OSCE Office for Democratic Institutions and Human Rights of the decision to declare (and to lift) a state of exception and of the potential derogations made from their international human rights obligations.
8. To specify that information of the public about the declaration of a state of exception and emergency measures shall be made available immediately,

<sup>77</sup> See [1991 OSCE Moscow Document](#), para. 28.10, read together with CSCE, [Helsinki Document 1992](#), Part VI The Human Dimension, para. 5b.

while emphasizing the need for information to be accessible to individuals, including those with disabilities.

#### 4. DECISION-MAKING AND CONTINUITY OF OPERATION OF THE PARLIAMENT DURING A STATE OF EXCEPTION

56. It is acknowledged that in many emergency situations, it will not be possible for parliaments to meet as usual, and thus ways need to be found to ensure proper legislative oversight while still allowing urgent decisions to be taken in an effective manner. During a state of emergency, states should refrain as much as possible from considering legislation that is not urgent, while parliamentary functions are not fully operational and when certain civic and political rights are restricted.<sup>78</sup> In particular, constitutional provisions, or legislation that may impact fundamental freedoms and human rights or change the balance of powers or the system of checks and balances, should not be adopted or amended in such periods.<sup>79</sup> Despite the urgency of certain decisions, however, care should be taken to involve as much as possible experts and civil society, including from minorities, and other diverse groups, while ensuring gender balanced participation, to ensure the inclusive process.
57. Article 137 (3) of the Draft Code requires that if not sitting, the Parliament should be convened in extraordinary session to consider the proposal to declare a state of exception. In addition, Articles 137 (5) and 137 (6) ensure that the Parliament will continue its mandate during a state of exception, which is essential to ensure parliamentary oversight throughout the state of exception, and assess, over time, the continuous necessity and proportionality of the state of exception, and emergency measures. While the above-mentioned provisions are welcome, the Draft Code does not specify the decision-making procedures during the state of exception.
58. In order to ensure the continuity of the functioning of the Parliament during a state of exception, and strengthen legislative oversight, **the Draft Code could require the legislature to sit automatically if a state of emergency is declared, or could enable the legislature to meet during the state of exception without formal convocation by the executive,<sup>80</sup> or require the legislature to remain in session throughout the emergency regime.<sup>81</sup>** It is also essential that the Draft Code introduces **the possibility to hold the parliamentary session in a different location, including online, and the related procedure for online voting,** if the parliament building is unreachable during an emergency regime. Furthermore, if the legislature cannot assemble because of the ongoing emergency, **the Draft Code could foresee alternative temporary working and decision-making modalities.<sup>82</sup>**

78 ODIHR, *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, page 74. See also *ODIHR Guidelines on Democratic Lawmaking for Better Laws*, para. 250

79 ODIHR, *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, page 74. See also *ODIHR Guidelines on Democratic Lawmaking for Better Laws*, para. 250.

80 See, for example, Article 70 (4) of the *Constitution of Vanuatu*.

81 See, for example, Article 44 (3) of the *Constitution of Georgia*; Article 27 (5) of the *Constitution of Mongolia*; Article 92 (4) of the *Constitution of Romania*.

82 For example, the Constitution of **Sweden**, foresees the possibility to establish a 'War Delegation' of Parliament to temporarily replace the legislature when the country is at war (see Chapter 15, Article 2 of the *Constitution of Sweden*). As another illustrative example, the Constitution of Cape Verde provides that if the legislature cannot meet during a state of emergency or under martial law, the

59. In addition, the Draft Code lacks details on the modalities of decision-making during the state emergency, siege or war. Article 126 of the Draft Code solely prohibits constitutional revisions during a state of emergency, war or siege but does not prescribe how decisions can be made by the legislature during a state of exception.
60. In light of the foregoing, **it is recommended to supplement the Draft Code to specify the modalities of decision-making during the state emergency, siege or war, while considering specific mechanisms and procedures for the Parliament to continue to effectively function during such times**, including to ensure effective oversight the use of emergency powers by the executive during a state of exception (see Sub-Section 5 *infra*). In particular, it is important **to include in the Draft Code provisions for the use of virtual/remote or hybrid proceedings, as an exceptional case when physical meetings are not feasible, as well as the use of ICT solutions, including with respect to online voting**. The legal drafters should also **determine whether different rules relating to agenda-setting and debate procedures may be needed, including in terms of quorums**, to allow for parliamentary business to proceed quickly and effectively if it pertains to the crisis **or at least give MPs an opportunity to modify the normal procedures set out in the Parliament's rules of procedure, for that purpose.**<sup>83</sup> **This could be added to the Draft Code.** To enhance transparency and accountability, announcements should also be made by the Parliament about how the situation will impact the usual law-making process.
61. Finally, it is also recommended that **the Draft Code specifically require the development and adoption of business continuity plans** to ensure that the Parliament is practically able to continue operating under all circumstances.

#### RECOMMENDATION B

4. When a state of emergency is declared, to require the legislature to sit automatically, or to meet without formal convocation by the executive, or to remain in session throughout the emergency regime, while introducing the possibility to hold the parliamentary session in a different location, including remotely (as an exceptional case), while providing the related procedure for online voting.
5. To supplement the Draft Code to specify the modalities of decision-making during the state emergency, siege or war, while considering specific mechanisms and procedures for the Parliament to continue to effectively function during such times, including in terms of use of virtual/remote or hybrid proceedings, online voting, as well as potential different rules relating to agenda-setting and debate procedures, including in terms of quorums, or at least provide the possibility for MPs to modify the normal procedures set out in the Parliament's rules of procedure.
6. To require the Parliament to develop and adopt business continuity plans to ensure that the Parliament is practically able to continue operating under all circumstances.

powers of the legislature shall be assumed by the so-called 'Permanent Commission' composed of the president of the national assembly, vice presidents and secretaries of the executive board and one representative of each parliamentary group (Article 164.2 of the Constitution of Cape Verde). See e.g., [Rules of Procedure of the European Parliament](#), Rules 244 to 247. See also [2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#), p. 69.

83 See e.g., [Rules of Procedure of the European Parliament](#), Rules 244 to 247. In Poland, a hybrid system combines the Speaker and a small number of MPs, delegated by their parties, attending in the Chamber with those joining virtually displayed on video screens.



## 5. PARLIAMENTARY OVERSIGHT DURING AND AFTER A STATE OF EXCEPTION

62. As underlined in the 2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic,<sup>84</sup> during emergency legal regimes, the role of the parliament is essential to oversee the declaration, prolongation and termination of a state of emergency, as well as the application of emergency powers, while ensuring participation of the opposition in such oversight mechanisms to ensure wide consensus. It should be underlined that the 2024 EU Enlargement Report specifically noted that “*No effective parliamentary oversight mechanism was adopted to cover the activities of the Commission for exceptional situations between February 2022 and December 2023*”.<sup>85</sup> This underlines the importance to embed a proper, effective parliamentary oversight mechanism in the Draft Code itself.

### 5.1. Oversight Over the Continuous Necessity of Maintaining the State of Exception and Over the Necessity and Proportionality of Emergency Measures Adopted by the Executive

63. Articles 137-139 of the Draft Code elaborates the procedure for declaring a state of emergency, a state of siege or a state of war, Article 140 focuses on the content of the decision, while Article 141 governs the possible extension or termination of the state of exception. Article 141 (1) of the Draft Code provides that the “*Parliament may, depending on how the situation develops, extend or shorten the duration of a state of emergency, state of siege or state of war, and may extend or restrict its scope*”, which suggests some form of adaption of the temporal, geographical and material scope of the state of exception depending on the evolving circumstances. Parliamentary oversight mechanisms should be in place to regularly review (e.g., every 30/60 days) and ensure the temporariness, appropriateness and proportionality of the continuity of the emergency legal regime (and implementing measures), and that they are eased or terminated as soon as the situation allows.<sup>86</sup> In addition, **there are no specific requirements in the Draft Code to ensure that the state of exception should remain strictly necessary and proportionate, and an assessment of whether ordinary mechanisms and legislation could over time be used to address or recover the emergency, rather than emergency measures. The Draft Code could be supplemented in this respect.**
64. The Draft Code is also silent in terms of effective parliamentary oversight mechanism to ensure the strict necessity and proportionality of implementing measures over time, throughout the state of exception, especially in the context of basic freedoms and human rights, as well as to systematically review decisions and legislation adopted during such time upon the lifting of the legal regime (see Sub-Section 5.3 in this respect). The Draft Code could prescribe, as soon as a state of exception is declared, **the establishment of an *ad hoc* parliamentary oversight committee in the legislature tasked with regularly scrutinizing the use of emergency powers by the executive during the whole duration of the state of exception.**<sup>87</sup> To ensure effective oversight, such committee could be headed by the opposition, and should at minimum be composed of all parties in parliament in proportion to their number of seats in

<sup>84</sup> See [OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#).

<sup>85</sup> European Commission, [2024 Communication on EU Enlargement policy \(Republic of Moldova 2024 Report\)](#), October 2024, p. 22.

<sup>86</sup> See [2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#), p. 50.

<sup>87</sup> See, for example, Constitution of Brazil, art. 140.



parliament, or even equal representation of the majority and opposition,<sup>88</sup> while also ensuring gender balance composition.

## 5.2. Specific Oversight Over the Potential Discriminatory Impact of State of Exception

65. According to Article 4.1 of the ICCPR, derogating measures shall “*not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority*”. While direct discrimination on such grounds in the emergency legislation or administrative orders, emergency legal frameworks and measures (or lack thereof) have often resulted in indirect discrimination, resulting in unequal treatment or particular negative impact on certain groups when put into practice,<sup>89</sup> especially those who are already at-risks or marginalized such as Roma and Sinti, national minorities, asylum-seekers, victims of trafficking in human beings, older people, persons with disabilities, etc.<sup>90</sup> Women are frequently at greater risk of gender-based violence, including sexual violence and exploitation, particularly in conflict zones or displaced communities.<sup>91</sup> In this respect, Strengthening prevention and response mechanisms for gender-based violence is critical, alongside legal reforms to protect women from exploitation and harm, including during state of exception.
66. It is thus recommended **to consider including in the Draft Code a specific mention of parliamentary oversight over the possible discriminatory impact of emergency measures on certain persons or groups, including women, persons with disabilities, older people, homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI people.** This could be done by specifically task the above-mentioned *ad hoc* parliamentary oversight committee to undertake such functions or to designate the gender and human rights committees to take over such tasks. While broad and inclusive in person consultations may not be feasible during the state of exception, the Parliament should still seek to ensure inclusive public hearings and consultations to the extent possible, including through the use of online platforms, while promoting inclusive approaches to addressing public crises, with the participation of civil society organizations catering to different population segments, including the most marginalized. These aspects could be reflected in the Draft Code.
67. As further outlined in the *ODIHR Preliminary Opinion on the Draft Code on the Organization and Functioning of the Parliament of Moldova (regarding Parliamentary Oversight, Title III)*, **the said committee should be equipped with sufficient human and financial resources and capacities to carry out such functions, while also having the legal means to trigger some timely responses from the executive along with appropriate consequences for non-compliance.**

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88 ODIHR, *OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, p. 49. See also *ODIHR Guidelines on Democratic Lawmaking for Better Laws*, para. 250.

89 See also *2009 MC Decision 7/09 on Women's Participation in Political and Public Life*; and the 2005, 2014 and *2018 MC Decisions on Violence Against Women* (15/05; 7/14 and 4/18).

90 See *2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, especially Section II.3.A.

91 See OHCHR, *Women's human rights and gender-related concerns in situations of conflict and instability*, and *2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, especially Section II.3.B.

### 5.3. Post-Emergency Oversight

68. Article 141 (6) of the Draft Code provides that “[f]ollowing the lifting or prolongation of the state of emergency, the Government shall submit to the plenary session of the Parliament a report on the measures taken, the budgetary expenditures, the impact of the measures taken on human rights and freedoms, and their remedy”. It is not clear whether the Parliament will hold a debate nor whether other follow-ups are envisaged. While it is welcome that the Draft Code requires a report to be prepared by the Government, it is advised that the **a more comprehensive ex-post review and assessment, at the initiative of the Parliament, be undertaken, looking not only at the use of emergency powers by the Government, and the scrutiny of those powers by Parliament during the state of exception, but also at how the national legal regime was prepared for the measures required by the state of exception with a view to maximize preparedness and legal framework for future crises. It is recommended to supplement the Draft Code in this respect.**

#### RECOMMENDATION C

1. To specifically require states of exception to remain strictly necessary and proportionate, while requiring an assessment of whether ordinary mechanisms and legislation could over time be used to address or recover the emergency, rather than emergency measures, before pronouncing/deciding on an extension.
2. To consider requiring, as soon as a state of exception is declared, the establishment of an *ad hoc* parliamentary oversight committee in the legislature tasked with regularly scrutinizing the use of emergency powers by the executive during the whole duration of the state of exception, while ensuring that it is equipped with sufficient human and financial resources and capacities to carry out such functions, while also having the legal means to trigger some timely responses from the executive along with appropriate consequences for non-compliance.
3. To consider including in the Draft Code a specific mention of parliamentary oversight over the possible discriminatory impact of emergency measures on certain persons or groups, including women, persons with disabilities, older people, homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI people, while designating the body that should be in charge and the modalities of such oversight.
4. After the lifting of the state of exception, to require a comprehensive ex-post review and assessment, at the initiative of the Parliament, looking not only at the use of emergency powers by the Government, and the scrutiny of those powers by Parliament during the state of exception, but also at how the national legal regime was prepared for the measures required by the state of exception with a view to maximize preparedness and legal framework for future crises/emergencies.

## 6. EFFECT ON FUNDAMENTAL RIGHTS

### 6.1. Non-Derogable and Absolute Rights

69. Article 140 (4) of the Draft Code lists a number of human rights that may not be limited or suspended during a state of exception, including the right to life, except when death is the result of lawful acts of war, to be free from torture and inhuman or degrading treatment or punishment, not to be convicted for offenses which are not recognized as such under national or international law or the right to free access to justice.
70. As already noted, international human rights standards foresee the possibility, under certain strict conditions, for derogations from international human rights obligations in times of public emergency threatening the life of a nation. Derogations may only last for as long as, and may only have a scope that is “*strictly required by the exigencies of the situation*”. Their necessity and proportionality must be subject to domestic and international supervision. Even in genuine cases of emergency situations, the rule of law must prevail.<sup>92</sup>
71. International human rights instruments explicitly list a number of human rights that are non-derogable in times of public emergency threatening the life of a nation. The scope of non-derogable rights provided under Article 140.4 of the Draft Code largely aligns with established international obligations as set out in the ICCPR and the ECHR.<sup>93</sup> However, it is not fully comprehensive, which could undermine the protection of fundamental rights during emergency situations. A significant gap in Article 140 (4) of the Draft Code is its omission of the prohibition on slavery and forced labor, a right expressly protected as non-derogable under Article 4 of the ECHR and Article 8 of the ICCPR. These provisions recognize the prohibition on slavery and forced labor as fundamental, even in times of emergency. The failure to include this right in the Draft Code leaves open the possibility of exploitative practices during crises. Notably, Article 4 (3) of the ECHR clarifies that the prohibition on forced labor does not extend to compulsory military service or other services required “during an emergency or calamity”.<sup>94</sup> Therefore, including the prohibition of slavery and forced labor, even in times of emergency, does not affect any form of conscription or national military mobilization that may be required as a result of a state of war. **It is recommended that the prohibition of slavery or forced labor be explicitly included in the list of non-derogable rights contained in Article 140 (4) of the Draft Code.**
72. Additionally, some other rights beyond those expressly listed in international instruments, have been recognized as not being subject to derogation, including the right to an effective remedy since it is inherent to the exercise of other (non-derogable) human rights,<sup>95</sup> the fundamental principles of a fair trial,<sup>96</sup> the fundamental guarantees

<sup>92</sup> See the third paragraph of the [Preamble of the UN Universal Declaration of Human Rights](#) of 10 December 1948.

<sup>93</sup> More specifically, the right to life, as articulated in Article 140 (4), adheres to international norms by allowing an exception only for lawful acts of war. This is consistent with the limitations recognized under Article 15 (2) ECHR and Article 6 of the ICCPR, ensuring conformity with established principles governing states of emergency. Similarly, the absolute prohibition of torture and inhuman or degrading treatment or punishment is in line with Article 15 (2) ECHR and Article 7 ICCPR, underscoring the universal recognition of the inviolability of human dignity, even during crises. Furthermore, the prohibition of retroactive criminal law, which ensures that individuals cannot be convicted for acts that were not criminal at the time they were committed, reflects a core principle of legality enshrined in both the ECHR and ICCPR.

<sup>94</sup> Article 4.3 states that, the term “forced or compulsory labour” shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.’

<sup>95</sup> See UNHRC, [General Comment no. 29 on Article 4 of the ICCPR](#), paras. 14-15.

against *arbitrary* detention<sup>97</sup> and the principle of *non-refoulement*, which is absolute and non-derogable.<sup>98</sup> There are also rights that are absolute, i.e., rights that can never be suspended or restricted under any circumstances, even in a context of an emergency. Absolute rights include the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment,<sup>99</sup> from slavery and servitude, from imprisonment for inability to fulfil a contractual obligation, the prohibition of genocide, war crimes and crimes against humanity, the prohibition against the retrospective operation of criminal laws, the right to recognition before the law, the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention,<sup>100</sup> and the principle of *non-refoulement*.<sup>101</sup> State obligations associated with the core content of the right to health, but also the rights to food, housing, social protection, water and sanitation, education, an adequate standard of living and to be free from discrimination also remain in effect even during situations of emergency.<sup>102</sup> Finally, international humanitarian law shall be respected in all circumstances.<sup>103</sup> **It is recommended to supplement Article 140 (4) of the Draft Code with a broader list of rights that should be respected in all cases, even during a state of exception, in particular the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention, the prohibition of genocide, war crimes and crimes against humanity, discrimination solely on the ground of “race, colour, sex, language, religion or social origin”, the principle of non-refoulement, etc.**

73. One particularly noteworthy feature of Article 140 (4) is its recognition of free access to justice as a non-derogable right. While this right is not explicitly listed as non-

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96 UNHRC, *General Comment no. 29 on Article 4 of the ICCPR*, para. 16; and *General Comment no. 32 on Article 14 of the ICCPR* (2007), para. 6. These would include the right to be tried by an independent and impartial tribunal (UNHRC, *General Comment no. 32* (2007), para. 19); the presumption of innocence (*CCPR General Comment no. 32* (2007), para. 6); the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to habeas corpus (UNHRC, *General Comment no. 29*, para. 16; and *General Comment no. 35, Art. 9 (Liberty and security of person)*, para. 67).

97 UNHRC, *General Comment no. 35, Art. 9 (Liberty and security of person)*, paras. 66-67, which includes the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.

98 See UN General Assembly, *Resolution A/RES/51/75*, 12 February 1997, para. 3. See also UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 12 and 20; ECtHR, *Chahal v. United Kingdom* [GC] (Application no. 22414/93, 15 November 1996), para. 80; and *Saadi v. Italy* [GC] (Application no. 37201/06, 28 February 2008), para. 137).

99 Art. 2 para. 2 of the UN Convention against Torture specifically states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>99</sup> See also OSCE Copenhagen Document, para. 16.3.

100 See Working Group on Arbitrary Detention, *Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies* (8 May 2020), para. 5; *Report of the Working Group on Arbitrary Detention to the UN Human Rights Council*, A/HRC/22/44, 24 December 2012, paras. 42-51; *General Comment no. 35* on Art. 9 of the ICCPR (Liberty and security of person), para. 67.

101 See Article 4 of the 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (CAT), which contains an absolute prohibition of refoulement for individuals in danger of being subjected to torture. See also CCPR, *General Comment no. 20 on Art. 7 of the ICCPR*, 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Art. 3 of the ECHR, see e.g., *Soering v. United Kingdom* (Application no. 14038/88, judgment of 7 July 1989), para. 88; and *Chahal v. United Kingdom* [GC] (Application no. 22414/93, judgment of 15 November 1996), paras. 80-1.

102 See UN OHCHR, *Emergency Measures and Covid-19: Guidance* (27 April 2020). See also CESCR, *General Comment no. 3 on the Nature of States Parties’ Obligations* (1990), para. 10; and *General Comment no. 14* (2000), para. 43. These minimum core obligations include minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger (CESCR, *General Comment no. 12 on the Right to Adequate Food* (1999), paras. 6 and 8); essential primary health care, including essential drugs (CESCR, *General Comment no. 14* (2000), para. 43); essential basic shelter and housing, including sanitation (CESCR, *General Comment no. 3* (1990), para. 10; and *General Comment no. 15* (2003), para. 37) and the right not to be arbitrarily evicted from one’s house (CESCR, *General comment no. 7* (1997), para. 8); access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease (CESCR, *General Comment no. 15* (2003), para. 37).

103 See the four 1949 *Geneva Conventions*, Common Art. 1, which states that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

derogable under Article 15 of the ECHR or Article 4 of the ICCPR, its inclusion in Article 140 (4) is welcome. The UNHRC states in its General Comment No. 29 that “[e]ven if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective”.<sup>104</sup> The elements of the right to a fair trial, such as the presumption of innocence, and rights that are required to ensure the protection of expressly non-derogable rights, including the right to an effective remedy is directly link to the right to be protected from torture and inhuman treatment. In addition, while derogations from Article 14 (right to a fair trial) may be permissible if strictly necessary due to an emergency situation arising from armed conflict, such derogations do not apply to the fair trial rights of prisoners of war under the Third Geneva Convention.<sup>105</sup>

74. Furthermore, even in times of emergency, overall respect for rule of law principles must be ensured.<sup>106</sup> As expressly stated in the Moscow Document (1991), states of emergency “may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms”.<sup>107</sup> The ECtHR has also emphasized that even in a state of emergency, “any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness”.<sup>108</sup> This means that the fundamental safeguards of the rule of law, in particular constitutionality and legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency.<sup>109</sup> Due democratic process, including separation of powers, as well as political pluralism and the independence of civil society and the media must also continue to be respected and protected.
75. Finally, permissible derogation measures must limit the derogated rights only to the extent strictly required by the exigencies of the situation (Article 4 (1) of the ICCPR) and still need to be **strictly necessary and proportionate. It is recommended to specify these requirements in the Draft Code.**

#### RECOMMENDATION D

To supplement the list of non-derogable and absolute rights contained in Article 140 (4) of the Draft Code by prohibiting, during a state of exception, **arbitrary deprivation of liberty and any limitation to the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention; genocide, war crimes and crimes against humanity; discrimination solely on the ground of “race, colour, sex, language, religion or social origin”, any limitation or exception to the principle of non-refoulement.**

104 See also ECtHR, [Leander v. Sweden](#), no. 9248/81, para. 79.

105 See Article 105 of the [Third Geneva Convention](#).

106 See e.g., CCPR, General Comment no. 29, para. 2.

107 Moscow Document (1991), para. 28.1.

108 See e.g., ECtHR, [Hasan Altan v. Turkey](#) (Application no. 13237/17, judgment of 20 March 2018), para. 210; [Şahin Alpay v. Turkey](#) (Application no. 16538/17, judgment of 20 March 2018), para. 180.

109 See e.g., PACE, [Resolution 2209 \(2018\) State of emergency: proportionality issues concerning derogations under Art. 15 of the European Convention on Human Rights](#), para. 3.



## 6.2. Prohibition of the Dissolution of the Parliament and Impact on Elections

76. Article 137 (5) of the Draft Code, which reiterates Article 85 (4) of the Constitution, provides that parliament may not be dissolved during states of emergency, siege, or war. Paragraph 6 provides that the mandate of the Parliament shall be extended until the state of emergency, siege, or war has ended,<sup>110</sup> thereby mirroring Article 63 of the Constitution, although the latter mentions the ability to extend rather than making it compulsory. Paragraph 7 provides that Members of Parliament may not be drafted while exercising their parliamentary mandate. Paragraph 8 states that if a state of emergency coincides with an electoral period, the decision to hold elections shall be made by the Parliament.
77. The prohibition on the dissolution of the Parliament during a state of exception is overall in line with international good practices. For instance, the Paris Minimum Standards,<sup>111</sup> and the Venice Commission<sup>112</sup> both state that legislatures should not be dissolved during an emergency. A dissolution of the parliament would unduly impede the legislature's ability to carry out its constitutional function of holding the executive to account for the use of emergency powers and drafting laws. It thus acts as a safeguard against executive potential abuse of emergency powers. However, a difficulty arises when an emergency is perpetuated. If elections are delayed for an undue amount of time, the legislature's democratic mandate could gradually decay. This risk is further exacerbated in a parliamentary system where the government is drawn from the parliament as a temptation may exist to perpetuate an emergency situation in order to preserve the government's legislative majority.
78. The requirement for the Parliament to decide whether elections should proceed during a state of emergency can be consistent with international standards, provided it is implemented in a manner that upholds democratic principles, electoral integrity, and fundamental rights. Article 25 (b) of the ICCPR provides for the fundamental right to take part in periodic elections.<sup>113</sup> Article 15 of the ECHR as well as Article 4 of the ICCPR allows derogation from the obligations to guarantee most fundamental rights, including electoral rights, in time of war or other public emergency threatening the life of the nation. A state of emergency is a legal regime established to address an extraordinary situation that poses a fundamental threat to the state. While its duration may vary depending on the nature and persistence of the threat, it is, by design, intended to be a temporary measure, maintained only for as long as strictly necessary to restore conditions under which normal constitutional order can be sustained.<sup>114</sup> Emergency measures should respect certain general principles which aim to minimize the damage to fundamental rights, democracy and the rule of law. The measures are thus subject to general conditions of necessity, proportionality and temporariness.<sup>115</sup> A suspension of electoral rights must therefore meet a proportionality test to minimise the risk that elections are postponed for partisan ends rather than for the objective needs of the situation.<sup>116</sup>

110 Article 63.3 of the [Constitution](#) provides that “[t]he mandate of the Parliament shall be prolonged until the legal assembly of the newly elected structure.”

111 See the [Paris Minimum Standards of Human Rights Norms in a State of Emergency](#) (1985).

112 See the [Compilation of Venice Commission Opinions and Reports on State of Emergency](#), 16 April 2020.

113 See also Article 3 of the [First Additional Protocol to the ECHR](#); paragraph 7.1 of the [1990 OSCE Copenhagen Document](#).

114 Examples include natural disasters, civil unrest, epidemics, massive terrorist attacks, economic crisis, war and military threats.

115 See the Venice Commission's [Respect for Democracy, Human Rights and the Rule of Law](#), 26 May 2020.

116 Venice Commission, [Respect for Democracy, Human Rights and the Rule of Law during States of Emergencies: Reflections](#), para.101. See also ODIHR and Venice Commission [Joint Opinion](#) of Draft Amendments to the Electoral Code and Related Legislation in Armenia, 9 October 2023, para. 24



79. Postponing elections during states of emergency, siege or war can be justified as holding elections in such circumstances may limit political participation, due to limitations of movement, and other applicable fundamental rights, but also entail difficulties to monitor the conduct of the election; respectively, the level of possible or perceived fraud or manipulation of election results can increase greatly. As noted by ODIHR “[b]alancing guarantees of fundamental rights and freedoms against security-driven restrictions and limitations are even more complex during an election. Such considerations are particularly relevant when any restrictions imposed on rights and freedoms could have a direct impact on the process and the results.”<sup>117</sup> As stressed by the Venice Commission, “[t]he holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties.”<sup>118</sup>
80. Article 137 (6) of the Draft Code refers to the constitutional provision on the extension of the mandate of the Parliament. This Article 63 (3) of the Constitution only provides that the mandate of the Parliament shall be prolonged until the legal convocation of the newly elected composition, but does not provide details on the conditions and timeline of such extension. It is noted that Article 63 (1) of the Constitution envisages the possibility to extend the mandate beyond the four-year mandate, by organic law, in the event of war or national disaster, thereby not ruling out the possibility to have parliamentary elections during a state of exception.<sup>119</sup>
81. In addition, while the provision entrusting parliament with the decision to hold elections during a state of exception introduces a democratic safeguard, it lacks crucial details regarding the decision-making process, timelines, and criteria. This provision of the Draft Code does not specify how the Parliament is to assess the feasibility of holding elections during a state of emergency, whether through a clear set of criteria, consultations with relevant stakeholders, or a prescribed timeline. The absence of such procedural clarity risks arbitrary or politicized decisions, undermining trust in the process. Moreover, without defined timelines of the state emergencies (see Sub-Section 3 above), there is a danger that elections could be indefinitely delayed, depriving citizens of their right to political participation and leaving governance in a protracted state of uncertainty, therefore undermining the international obligations of democratic elections. **To align with international obligations, the process by which the Parliament makes the decision to hold or postpone elections under a state of exception should be codified in law, including specific timelines, criteria, and requirements for public and expert consultation. Specific timelines for rescheduling and conducting elections after such a state of exception ends should be provided. This would ensure that decisions are not only necessary and proportionate but also perceived as legitimate and impartial.**
82. In addition, while delegating the decision to the Parliament can be seen as a protective measure, it must be paired with clearly defined reasonable timelines and mechanisms for judicial or independent oversight to prevent potential abuse and ensure compliance

117 See [ODIHR Guidelines for Public Security Providers in Elections](#).

118 See the [Code of Good Practice in Electoral Matters](#), para. 60.

119 ODIHR deployed an Election Observation Mission for Moldova’s 5 November 2023 local elections, held under a prolonged state of emergency declared in response to Russia’s invasion of Ukraine. The Commission for Exceptional Situations, operating under this regime, issued decisions that affected electoral rights, including restrictions on candidacies and last-minute deregistrations on national security grounds, sometimes pre-empting parliamentary action. In the [Final Report](#) ODIHR expressed concern that the unchecked use of such powers undermined legal certainty, due process, and the principle of proportionality, and noted that holding elections without effective parliamentary oversight may violate international standards.

with international electoral and human rights standards. Without these critical procedural details, the provision risks being insufficient to guarantee that decisions made under a state of emergency will uphold the fundamental rights and democratic principles enshrined in international law.

83. It is important to note that even if elections could be organized during a state of exception, adequate amendments should also be made to the legal framework governing elections, in order to provide mechanisms for elections during emergencies, allowing for instance the election management body to decide or adapt on some modalities depending on the concrete situation during elections, while also providing a number of special safeguards in electoral legislation.<sup>120</sup>

#### RECOMMENDATION E

To codify in the Draft Code the process by which the Parliament makes the decision to hold or postpone elections under a state of exception should be codified in law, including specific timelines, criteria, and requirements for public and expert consultation, while also providing specific timelines for rescheduling and conducting elections after such a state of exception ends.

### 7. JUDICIAL OVERSIGHT

84. Article 2 of the ICCPR obliges States Parties to ensure that individuals have access to effective remedies for violations of their rights, determined by competent judicial, administrative, or legislative authorities. The principles of legality and the rule of law, as well as the “*fundamental requirements of fair trial*”,<sup>121</sup> must be safeguarded under a state of exception to ensure the protection of non-derogable rights and effective remedies.
85. Similarly, OSCE participating States have committed to ensuring that “*the legal guarantees necessary to uphold the rule of law will remain in force during a state of public emergency*” and to “*provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations.*”<sup>122</sup> Judicial oversight of emergency measures, in line with these commitments, is essential to ensure that emergency powers are exercised lawfully and proportionately, preserving fundamental rights and freedoms. The judiciary also plays a vital role in maintaining checks and balances during states of emergency, siege or war by overseeing the use of emergency powers. The judiciary is responsible for determining the legality of a declaration of a state of exception and scrutinizing the validity of specific emergency measures and decisions taken both by the executive and the legislature. The judiciary also provides individuals with effective remedies when government actions violate their human rights, reinforcing accountability. To prevent the infringement of non-derogable rights, it is essential to protect the right to judicial review of the lawfulness of emergency measures. This requires a judiciary that is both independent and impartial, safeguarding the rule of law and ensuring that emergency powers are not misused.

120 See e.g., 18th European Conference of Election Management Bodies, [Main regulatory solutions for the elections during an emergency period](#), 29 October 2021.

121 See, [UNHRC, General Comment no. 29 on Article 4 of the ICCPR](#), paras. 14 and 16, stating explicitly that only court may convict a person for a criminal offence and shall decide without delay on the lawfulness of detention, and that presumption of innocence must be respected.

122 See [1991 OSCE Moscow Document](#), para. 28.8.

86. The UN Special Rapporteur contended that “[w]hen a state of emergency affects the exercise of certain derogable human rights, administrative or judicial measures shall be adopted to the extent possible with the aim of mitigating or repairing the adverse consequences this entails for the enjoyment of the said rights”.<sup>123</sup> On this, the Venice Commission opined that “since in a parliamentary democracy the executive is normally composed of party leaders and other leading party figures, [...] legislative control may not be sufficiently effective in practice to curb the abuse of executive power. Therefore, in a State based on the rule of law, legislative control must be supplemented by appropriate and effective means of judicial control”.<sup>124</sup>
87. Article 140 (4) (d) of the Draft Code appears to protect the right to access to justice by making it a non-derogable right. However, the Draft Code lacks provisions enabling the appeal or judicial review of parliamentary decisions regarding the declaration of a state of emergency, siege, or war. Although this goes beyond the scope of this Opinion and may require amendments to other pieces of legislation, **to reinforce accountability and uphold the rule of law, the Draft Code should be amended to expressly allow for judicial review of declarations of state of exceptions and of emergency measures. This amendment would ensure that declarations of emergency regime and emergency measures are subject to judicial oversight, thereby preventing potential misuse of power and protecting fundamental rights.**

#### RECOMMENDATION I

To reinforce accountability and uphold the rule of law, the Draft Code should be amended to expressly allow for judicial review of declarations of state of emergency, war or siege and of emergency measures.

### 8. PROCEDURE FOR ADOPTING THE DRAFT CODE

88. OSCE participating States have committed to ensuring that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8).<sup>125</sup> Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, para. 18.1).<sup>126</sup> The ODIHR Guidelines on Democratic Lawmaking for Better Laws (2024) underline that “*all interested parties and stakeholders should have the opportunity to access the lawmaking process, be informed about it and be able meaningfully to participate and contribute*”.<sup>127</sup> The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input and may be a useful source of good practice.<sup>128</sup>

123 See [Report](#) by the UN Special Rapporteur on the question of Human Rights and the State of Emergency (1997), para 91 (3). Although not directly applicable, the American Convention on Human Rights explicitly prohibits the suspension of “the judicial guarantees essential for the protection of such rights” which are underogable (Article 27 § 2 of the ACHR)

124 Venice Commission [Opinion](#) on Emergency Decree Laws N°s667-676 of Turkey. See also [Opinion](#) on the draft law on the legal regime of the state of emergency of Armenia, para. 41.

125 See [1990 OSCE Copenhagen Document](#).

126 See [1991 OSCE Moscow Document](#).

127 See [Guidelines on Democratic Lawmaking for Better Laws](#), OSCE/ODIHR, 16 January 2024, Principle 7.

128 See [Rule of Law Checklist](#), Venice Commission, CDL-AD(2016)007, Part II.A.5.

89. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.<sup>129</sup> To guarantee effective participation, consultation mechanisms should allow for input throughout the process, meaning not only when the draft is being prepared but also when it is discussed before Parliament, be it during public hearings or during the meetings of the parliamentary committees.
90. It is also important to conduct an evidence-based gender and diversity analysis of the measures adopted in response to past emergencies and states of exception and review documentation of the gender- and diversity-specific human rights impacts of the emergency measures to inform preparedness and response plans for future emergencies and the content of the Draft Code. The emergency legal framework and implementing measures should be designed with the aim of mitigating specific risks and vulnerabilities and respecting the rights of all, including women, persons with disabilities, older people, homeless people, individuals in detention and institutions, migrants, victims of trafficking, asylum-seekers, displaced persons and refugees, children and youth, minorities, LGBTI people.<sup>130</sup>
91. **ODIHR therefore recommends that the Draft Code be subject to transparent, inclusive, and extensive consultations throughout the adoption process.**

*[END OF TEXT]*

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<sup>129</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, inter alia, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), paras. 40-41.

<sup>130</sup> See *2020 ODIHR Report on OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic*, especially Section II.3.A. See also the *Guidance Notes on Covid-19 Response* published by the UN OHCHR offer useful practical recommendations and examples of good practices, especially on persons with disabilities, older persons, persons in detention and institutions, migrants, displaced persons and refugees, children and youth, minorities, gender, women's rights and rights of LGBTI persons.