



Doc. 11858

09 April 2009

The protection of human rights in emergency situations

Report¹

Committee on Legal Affairs and Human Rights

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Summary

Several Council of Europe member states, especially Georgia and Armenia, have recently resorted to declaring a state of emergency, involving serious human rights violations – a matter of concern, according to the Legal Affairs committee. Such declarations are permitted under the European Convention on Human Rights, but only “in time of war or other public emergency threatening the life of the nation”. They should never exceed what is required by the situation, and should always stay within international law. These drastic powers – which involve restricting the rights of individuals – should only ever be used as a last resort, the committee believes.

They should also be carried out with great care. A country’s legislature should have a central role in overseeing any such declaration and judges should be able to rule on its validity. Law-enforcement officials should be trained in human rights law and non-lethal crowd control. Restrictions on demos or marches should be kept to a minimum, while media clamp-downs should be avoided altogether if possible – on the grounds that reporting facts or expressing opinions can never be a “national security threat”.

For the committee, emergency powers should always be limited in time, featuring a “sunset clause”. Finally, Council of Europe bodies should closely scrutinise any declared state of emergency for signs of abuse, and to make sure that human rights are upheld.

1. Reference to committee: [Doc. 10985](#), Reference No. 3281 of 6 October 2006.



Contents	Page
A. Draft resolution	3
B. Draft recommendation	5
C. Explanatory memorandum by Mr Holger Haibach, rapporteur	6
1. Introduction	6
2. When can restrictions to human rights be justified in emergency situations?	7
2.1. Legitimate aim	7
2.2. Definitions	7
2.3. Restrictions and strict conditions	8
3. Consequences of the declaration of the state of emergency and applicable norms	9
3.1. The use of force	11
3.2. Restrictions to freedom of assembly	12
3.3. Restrictions to freedom of speech	13
4. The need to strengthen supervision of states of emergency	14
4.1. Time limit/duration and legislative oversight	15
4.2. Judicial supervision	15
4.3. Enhancement of international/ Council of Europe supervision	17
5. Prevention	18
6. Conclusions and proposals	18

A. Draft resolution

1. The Parliamentary Assembly is concerned by recent recourse to declarations of state of emergency in several member states, especially Georgia and Armenia, involving serious human rights violations.
2. It is the state's responsibility to take preventive measures to protect the interests of society "[i]n time of war or other public emergency threatening the life of the nation" (Article 15 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights). Emergency measures must not exceed what is strictly required by the situation and cannot be inconsistent with the state's other obligations under international law.
3. In very specific circumstances, the declaration of a state of emergency can be a legitimate legal method to respond quickly to such threats. But as it entails restrictions on the rights and freedoms of individuals, it must be used with utmost care and as a means of last resort only. Declaring a state of emergency must not become a pretext to unduly restrict the exercise of fundamental human rights.
4. Allegations of abuse of such derogations must be effectively and thoroughly investigated, and the government must be fully accountable.
5. In order to enhance national oversight of the use of emergency legislation, the Assembly is convinced that the legislature should have effective control of the decision-making process.
6. The Assembly notes that an abusively declared or improperly conducted state of emergency often results in excessive use of force, and, in particular, the stifling of the freedoms of assembly and of expression.
7. National authorities should ensure appropriate training for law-enforcement officials with respect to the non-derogable rights, in particular the rights to life, freedom from torture and inhuman and degrading treatment and to the principle of 'no punishment without law' – and the use of potentially lethal force only as a last resort when all other means fail. Security forces should have at their disposal the full panoply of non-violent and non-lethal means of crowd control and should remain subject to stringent administrative and judicial supervision (see, in this connection, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) and the Council of Europe's European Code of Police Ethics (2001)).
8. The Assembly is strongly of the opinion that the rules of engagement of the security forces in all Council of Europe countries, and in particular in those countries which, like the Russian Federation, have inherited certain rules from the Soviet period or have recently adopted similar legislation or regulations, should be thoroughly reviewed and modernised in the light of the requirements of the European Convention on Human Rights and the case-law of the European Court of Human Rights.
9. As concerns the freedom of assembly, restrictions on this right during an emergency must be limited as stipulated in the Guidelines on Freedom of Peaceful Assembly (2007) of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Co-operation in Europe (OSCE); restrictions on the time, place, or manner of assembly are by far preferable to an outright ban.
10. As concerns freedom of expression, the Assembly recalls the Council of Europe Guidelines on Protecting Freedom of Expression and Information in Times of Crisis (2007) and stresses that reporting facts and expressing opinions as such should never be regarded as constituting a threat to national security, except in strictly legally defined circumstances; any restrictions must be shown to be necessary in a democratic society to protect a legitimate national security interest and respect the proportionality principle. Such restrictions should be as clear and as limited as possible. The public should have constant access to independent media.
11. The Assembly condemns any attempt to set up legislation concerning demonstrations which would inevitably lead to emergency-like situations by excessively limiting the rights of freedom of movement or expression and by setting up inappropriate impediments to receiving authorisation for such demonstrations to take place.
12. The Assembly considers that the following safeguards – in addition to those stated in Article 15 of the European Convention on Human Rights – should always be provided for in a state of emergency:
 - 12.1. clear time limits and effective legislative oversight of any state of emergency – for example through a "sunset clause" with the possibility of extension subject to new parliamentary approval –, while ensuring that the opposition can play its role;
 - 12.2. judicial scrutiny of the validity of a state of emergency and its implementation.

13. The integrity of the judicial system – its competence, independence, and impartiality – should be safeguarded, especially as concerns access to a court and to an effective remedy.

14. At the international level, the oversight of declared states of emergencies by the Council of Europe's Secretary General and the Commissioner for Human Rights should be reinforced. Also, member states should consider adding more rights to the list of those that are currently non-derogable, as is the case in other international human rights mechanisms.

B. Draft recommendation

1. Referring to its Resolution ... (2009) on the protection of human rights in emergency situations, the Parliamentary Assembly is convinced that the Council of Europe must elevate the level of scrutiny applied to emergency declarations, provide for greater democratic oversight, increase the speed at which the Organisation's organs and human rights control mechanisms respond to fast moving events on the ground, and express a firm condemnation of abuses committed under the shroud of purported emergencies.

2. The Assembly invites the Committee of Ministers to look into ways to achieve, this by instructing its relevant committees to consider:

2.1. whether it would be appropriate to grant the Secretary General, upon receipt of a declaration of a derogation under Article 15 of the European Convention on Human Rights, the possibility to request supplementary information during and after the state of emergency, and to transmit this information to all Contracting Parties, the Chairperson of the Committee of Ministers, the President of the European Court of Human Rights, the Council of Europe Commissioner for Human Rights, as well as the Presidents of the Parliamentary Assembly and of the Congress of Local and Regional Authorities;

2.2. adding more rights to the list of those that are currently non-derogable under Article 15 of the European Convention on Human Rights, especially with respect to rights whose suspension is not essential even in a state of emergency, as is the case in Article 27 of the American Convention on Human Rights.

C. Explanatory memorandum by Mr Holger Haibach, rapporteur

1. Introduction

“The frequent use of emergency powers to cope with crises, coupled with the success of these powers acclimatizes administrators to their use, and makes recourse to them in the future, all the easier. The danger is that succeeding generations of administrators inherit these powers as being efficient and unobjectionable, and in a particular emergency, do not give proper consideration to the possibility of less drastic measures being used. In addition, social attitudes develop so as to accept recourse to emergency measures as the norm and over time there grows an insensitivity to the human rights problems that are inevitably associated with public emergencies.”²

1. This report stems from a motion for a resolution (Doc. 10641) on the protection of human rights in emergency situations presented by Mrs Renate Wohlwend and others on 5 July 2005. In response to the violence that erupted on 13 May 2005 in the Uzbek city of Andijan – where government security forces forcefully dispersed a crowd of peaceful protestors, resulting in several hundred deaths³ – Mrs Renate Wohlwend and her colleagues noted that such acts of repression are contrary to the European Convention on Human Rights (hereinafter “the Convention” or “ECHR”) and to the obligations of member States of the Council of Europe. Moreover, they recalled that derogations in times of emergency are allowed under Article 15 of the Convention, but that “a balance must be struck between the threat facing the State and the rights of individuals as guaranteed under the ECHR.” The motion also called for clear instructions for state security forces in times of difficulty, so that any action taken be grounded in respect for human rights and the rule of law.
2. Recent events in Yerevan (Armenia) and Tbilisi (Georgia) have reinforced the need for such an examination. After ten days of peaceful protests, following the 19 February 2008 Armenian presidential election,⁴ outgoing President Robert Kocharian declared a state of emergency on 1 March when police attempted to remove opposition encampments from the streets and violent battles ensued.⁵ Similarly, on 7 November 2007, following five days of protests calling for the resignation of Georgian President Mikhail Saakashvili, President Saakashvili declared a 15-day state of emergency – which was ultimately lifted after just eight days⁶ – banning assemblies and non-state-run news media.
3. Both situations may have involved possible non-compliance with the Convention, including, the Article 3 (non-derogable) prohibition on torture (regarding alleged police brutality as inhuman and degrading), the Article 2 (non-derogable) right to life (regarding the resulting deaths), the Article 5 right to liberty and security (detentions not conducted according to law), the Article 10 freedom of expression (excessive censorship), and the Article 11 freedom of assembly and association (regarding subsequent restrictions placed on peaceful assemblies).⁷
4. This report contains an overview of key themes, issues, and proposals related to the preservation of human rights in emergency situations. In order to prepare this report, the committee held a hearing on 9 September 2008 with the following experts: Ms Finola Flanagan, member of the European Commission for Democracy through Law (“Venice Commission”) and Director General in the Office of the Attorney General, Dublin; Ms Kirsten Mlacak, Head of the Human Rights department, Office for Democratic Institutions and Human Rights (ODIHR), OSCE, Warsaw; Ms Anya Tsitsina, Europe Programme Assistant, International Crisis Group (ICG), Brussels and Mr Avetik Ishkhanyan, Chairman of the Helsinki Committee in Armenia, Yerevan.

2. Michael P. O’Boyle, “Emergency Situations and the Protection of Human Rights: A Model Derogation Provision for a Northern Ireland Bill of Rights,” Northern Ireland Legal Quarterly, 28:2 (1977) p. 164.

3. See OSCE/ODIHR report, “Preliminary Findings on the Events in Andijan, Uzbekistan, 13.05.2005,” 20.06.2005.

4. Human Rights Watch Press Release (HRWPR), “Armenia: Police Beat Protesters in Yerevan,” 02.03.2008; BBC News, “Eyewitness: Violence Erupts in Yerevan,” 01.03.2008, accessible at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7273299.stm>.

5. BBC News, “Eight Killed in Armenia Protests,” 02.03.2008, accessible at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7273497.stm>.

6. HRWPR, “Georgia: Government Used Excessive Force on Protesters,” 20.12.2007.

7. See HRWPR, “Armenia: Lift Ban on Peaceful Protest,” 27.03.2008. Police have been detaining and interrogating demonstrators participating in “public walks” – consisting of groups of pedestrians chatting, reading, and playing games.

2. When can restrictions to human rights be justified in emergency situations?

2.1. Legitimate aim

5. As the Committee of Ministers has recognised, States have an obligation “to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life.”⁸ Moreover, the European Court of Human Rights (hereinafter “the Court”) has added that the protection of the right to life “may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”⁹ This means that the rights of those with criminal intent may legitimately be restricted in the interests of society as a whole.¹⁰ Under specific circumstances, the declaration of a state of emergency is a quick and legitimately legal method of doing so. But by its very nature this also means that the rights and freedoms of all people – criminal or not – will be restricted in the process.

6. A balance must therefore be struck between public safety and fundamental rights, a measurement not conducive to concrete calculations.¹¹ Specific context and timing are key to assessing fairness of any measures during a state of emergency, and thus criticisms that hold in one situation, may not be appropriate in other, even apparently similar situations. However, it is a basic premise of international law (*jus cogens*) that any “right or freedom concerned may not be curtailed in its essence”¹². Emergency legislation should help preserve the rule of law, not flout it.

2.2. Definitions

7. In light of the necessary flexibility of restrictions on rights in emergency situations, all elements should be as clearly defined as possible. According to the Court, an “emergency situation” is defined as “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.”¹³ State of emergencies cannot be invoked to prevent merely local or relatively isolated threats to law and order, nor as a pretext for imposing vague or arbitrary limitations.¹⁴

8. The *Lawless* case outlines a three-pronged approach to the identification and assessment of such situations: “[T]he government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention ... provided that such measures are strictly limited to what is required by the exigencies of the situation, and also that they do not conflict with other obligations under international law ... it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case.”¹⁵

9. Specific elements were further described by the former European Commission of Human Rights: (1) the threat must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organised life of the community must be threatened and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.¹⁶

8. Article I of the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe at its 804th meeting on 11.07.2002.

9. *Osman v. United Kingdom*, Grand Chamber Judgment, App. No. 23452/94 (28.10.1998), § 115.

10. See Article 17 ECHR: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

11. See e.g. *Tyrer v. United Kingdom*, App. No. 5856/72 (judgment of 25.04.1978), § 31.

12. European Commission for Democracy through Law (Venice Commission), *Opinion on the Protection of Human Rights in Emergency Situations*, Opinion No. 359/2005 adopted at its 66th Plenary Session, 17-18.03.2006, § 8 [CDL-AD(2006)015].

13. *Lawless v. Ireland*, App. No. 332/57, judgment of 01.07.1961, § 28 (“The Law”)

14. UN Doc E/CN.4/1984/4 Annex, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984)*. Available at <http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>.

15. *Lawless*, § 22 (“The Law”).

16. *Denmark et al. v. Greece* (“The Greek Case”), Commission Opinion, Apps. No. 3321/67, 3322/67, 3323/67 and 3344/67 (05.11.1969), § 53; see in this connection European Commission for Democracy through Law (Venice Commission), *Opinion on the Protection of Human Rights in Emergency Situations*, Opinion No. 359/2005 adopted at its 66th Plenary Session, 17-18.03.2006, § 10 [CDL-AD(2006)015].

10. In other words, even given an individualised assessment of the circumstances of a state of emergency, the key questions are: (1) Is the state of emergency justified?; (2) Is the resulting response necessary and proportional to the threat?; and (3) Do the actions taken conflict with any of the State's other international obligations? (Namely, the International Convention on Civil and Political Rights Article 4, which contains its own set of non-derogable rights, similar to, but not completely equivalent to those contained in the ECHR).¹⁷ All these questions represent important restrictions and conditions placed on the actions of a government during a state of emergency.

2.3. Restrictions and strict conditions

11. Any discussion of emergency situations must begin with the understanding that Article 15 ECHR relieves parties to the Convention of their obligations under specific articles in times of crisis, expressing the essential principles of temporality and imminence in such a situation (echoed in the *Lawless* case, cited above). This Article reads:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that they are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

12. Thus, a state of emergency requiring derogations from the Convention is formally established when it is (1) announced publicly within the nation and (2) in a formal derogation the Secretary General of the Council of Europe is notified of the measures taken. One should keep in mind however, Court's Judge Lech Garlicki's caution that *“neither proclamation of national emergency nor invocation of Article 15 is required in order to take reasonable measures protecting national security, territorial integrity, public safety, or other important public interest.”*¹⁸ It is in the best interest of the cause of human rights in Europe that the Convention remains whole and in place. Thus, *“as long as such measures are provided by law, related to protection of an important public interest and necessary in a democratic society, the Court may be ready to accept their compatibility with the Convention standards.”*¹⁹

13. In terms of duration of a state of emergency, there is no specific case law, but commentators suggest that, *“if the intensity of the danger is of various developing phases or degrees, the measures taken during each phase must vary accordingly.”*²⁰ Moreover, in *De Becker v. Belgium*, the Commission stated that, *“[an] action taken under measures justified only by the emergency may not be continued after the emergency has ended.”*²¹ The operation of Article 15, is also of course, subject to the procedural limitation of keeping the Secretary General of the Council of Europe up-to-date on the situation – which helps to create a basis for

17. See also *Brannigan and McBride v. UK*, Grand Chamber Judgment, App. Nos. 14553/89 and 14554/89 (25.05.1993), § 72. ICCPR Article 4(2) states, “No derogation from articles 6, 7, 8 (§§ 1 and 2), 11, 15, 16 and 18 may be made under this provision.” This protects the following rights: Art. 6 – Right to life, Art. 7 – Prohibition on Torture, Art. 8 – Prohibition on Slavery, Art. 11 – Freedom from imprisonment due to a contractual obligation, Art. 15 – Freedom from trial concerning crimes that were not so at the time of action, Art. 16 – Recognition as a Person, Art. 18 – freedom of thought, conscience, and religion. It is also interesting to note that Article 27 (*Suspension of Guarantees*) of the [American Convention on Human Rights](#) provides that in emergency situations the following articles cannot be suspended: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

18. Lech Garlicki, “The European Court of Human Rights and National Emergencies” in “Constitutionalism in Times of Emergency,” *International Association of Constitutional Law*, 2007 at 321.

19. *Ibid.*

20. Aly Mokhtar, “Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights” *International Journal of Human Rights*, 8: 1 (Spring 2004) at 71.

21. *Ibid.* at 77.

subsequent review.²² However the effective operation of this limitation may be limited in that, unlike the International Covenant on Civil and Political Rights or the American Convention on Human Rights, it does not contain time constraints or parameters for this notification.

14. As to specific reasons, generally, the Court has taken a deferential position on the issue of justification, stating that, “By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide on both the presence of an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15... leaves those authorities a wide margin of appreciation.”²³ With this decision the Court looks for an appropriate balance between the flexibility in restrictions imposed by national authorities and the necessity to give as clear a definition as possible of a state of emergency, as indicated in paragraph 7 above.

15. However, the Court probes the proportionality by means of three tests.²⁴ First, ordinary law must be shown to be insufficient to deal with the emergency. Second, the measure should be specifically intended to end the emergency. And third, relatively severe measures are acceptable as long as adequate safeguards exist (e.g. procedural protections like *habeas corpus*, or the equivalent). Thus, as the Court said in *Brannigan and McBride v. United Kingdom*: “Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.”²⁵

16. As the final and most significant restriction on the ability to derogate in a state of emergency, Article 15 prohibits actions which would violate other obligations under international law (e.g. the ICCPR) and derogations from the right to life (Article 2), the prohibitions on torture (Article 3), slavery (Art. 4), and punishment without law (Article 7). These provisions ensure that the state of emergency is conducted **legally**, not only under the Convention but under all international agreements protective of human rights, and that the most fundamental human rights of all remain untouchable in all circumstances.

17. Thus, to recapitulate, the following conditions must always be respected during a state of emergency: (1) temporality, (2) imminence, (3) public declaration, (4) appropriate international notification, (5) proportionality, (6) legal conduct, and (7) the inviolability of non-derogable rights.²⁶

3. Consequences of the declaration of the state of emergency and applicable norms²⁷

18. The situations in Armenia and Georgia are emblematic of the consequences that can result from improperly conducted states of emergency. In Armenia, although the Council of Europe was notified of specific derogations under Article 15,²⁸ the police are accused of violently attacking fleeing protestors in a quasi-military operation with tanks, tear gas, beatings, detainments and “*very heavy*” and indiscriminate shooting, “*for more than an hour.*”²⁹ At least eight people were killed, including a 12-year-old boy.³⁰ The state

22. Note 18 *supra* at 326.

23. *Ireland v. United Kingdom*, App. No. 5310/71, judgment of 18.01.1978, § 207.

24. Edward Crysler, “Brannigan and McBride v. U.K.: A new direction on article 15 derogations under the European Convention on Human Rights?” *Nordic Journal of International Law*, 65: 1 (1996) at 105-6.

25. *Brannigan* § 43. See also §§ 78, 84. Note also the House of Lords decision in *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, 16.12.2004, where the highest judicial organ in the UK took the extraordinary decision to strike down a derogation under Article 15 ECHR. In this particular case, it was emphasised that derogation could not excuse indefinite detention without charge or trial because the measure went beyond the *proportional* response “strictly required by the exigencies of the situation.”

26. Geneva Centre for the Democratic Control of Armed Forces, “Backgrounder: States of Emergency,” (Newsletter October 2005) at 2.

27. The rapporteur wishes to express his appreciation for help he obtained from Professor Bill Bowring, Birkbeck College, University of London. A background paper prepared by Professor Bowring served as a principal source of the legislation cited in this section.

28. On 3 March, the government of Armenia notified the Council of Europe that it intended to derogate from the following provisions of the ECHR during the state of emergency: Article 8, § 1 (respect for private and family life); Article 10, § 1 (freedom of expression); Article 11, § 1 (freedom of assembly and association); Protocol 4, Article 2, § 1 (freedom of movement).

29. BBC News, “Eyewitness: Violence Erupts in Yerevan,” 01.03.2008, accessible at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7273299.stm>.

30. BBC News, “Eight Killed in Armenia Protests,” 02.03.2008, accessible at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7273497.stm>; Human Rights Watch Press Release (HRWPR), “Armenia: Police Beat Protesters in Yerevan,” 2 March 2008; BBC News, “Eyewitness: Violence Erupts” Note 29 *supra*.

of emergency – in place until 20 March – also allowed President Kocharian to ban assemblies and impose restrictions on the media³¹. Armenian news organizations were ordered to report only information provided by the government and local stations were advised no longer to broadcast foreign-produced programmes.³² Finally, the Armenian law on assemblies and demonstration was amended to tighten enforcement of the prohibition of spontaneous rallies and to limit independent judicial review of restrictions on assemblies. In a joint statement by the Council of Europe's Venice Commission and the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the amendments were found to be unacceptable as challenging the right to assembly³³ and it was only under pressure from the Venice Commission and the Parliamentary Assembly's Monitoring committee,³⁴ that Armenia lifted those restrictions.³⁵

19. The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, then visited Armenia to interview key players in the wake of the crisis and assess whether non-derogable human rights under the Convention were upheld during the state of emergency.³⁶ The Commissioner found that “some of the imposed restrictions [had] not contributed to stabilizing and defusing the tensions in the society post-elections and 1 March event, nor have they strengthened the democratic institutions and processes.” He also noted increase police abuses – possibly in violation of the non-derogable prohibition on torture.³⁷

20. In its [Resolution 1609 \(2008\)](#) adopted following the events, the Assembly made four main demands, including the setting up of an “independent, transparent and credible” inquiry into the March events and the release of all those who did not personally commit any violent acts or serious offenses. In a further resolution adopted in January 2009, [Resolution 1643 \(2009\)](#), the Assembly welcomes the establishment by the President of Armenia of a “fact-finding group of experts to inquire into the events of 1-2 March 2008” while pointing out that “it is the manner in which this group will conduct its work, as well as the access it will have to information by the relevant state institutions at all levels, that will ultimately determine its credibility”.³⁸

21. Meanwhile, Louise Arbour, the then UN High Commissioner for Human Rights, called the use of force in Tbilisi – including water cannons, batons, rubber bullets, and tear gas – “disproportionate” and emphasised the importance of human rights even in a state of emergency – pointing to Georgia's obligations under the ICCPR and its non-derogable provisions for the right to life and prohibition on torture (which are obviously also non-derogable under the Convention).³⁹ Moreover, assemblies and non-state-run news media were also banned.

22. Thus, while there are several nefarious consequences that may grow out of the mismanagement of an emergency situation, three stand out in particular: restrictions on the freedom of assembly, restrictions on the freedom of expression, and the excessive use of force.

31. See, in this respect, Assembly [Doc. 11579](#) on the Functioning of democratic Institutions in Armenia, report by the Committee on Honouring of Obligations and Commitments by Member States of the Council of Europe (Co-rapporteurs: Georges Colombier and John Prescott), 15.04.2008.

32. *New York Times*, Editorial: “Dark Days in Armenia,” 07.03.2008, accessible at <http://www.nytimes.com/2008/03/07/opinion/07fri2.html?hp>. See also Levon Ter-Petrossian, “Silence on Armenia,” *Washington Post*, 05.03.2008, A21.

33. Council of Europe Press Release (CoEPR), “OSCE, Council of Europe: amendments to Armenia's assembly law raise serious concerns,” 02.04.2008.

34. See Assembly Resolution 1620 (2008) on The Implementation by Armenia of Assembly Resolution 1609 (2008) and Assembly Doc. 11656; Assembly Doc 11579, “Report: The Functioning of Democratic Institutions in Armenia,” Mr Georges Colombier and Mr John Prescott, co-rapporteurs presented on 15.04.2008; OSCE/ODIHR and Venice Commission, “Draft Joint Opinion on the Amendments of 17.03.2008 to the Law on Conducting Meetings, Assemblies, Rallies, and Demonstrations of the Republic of Armenia,” 28.03.2008, Opinion no. 474/2008, CDL (2008)037; OSCE/ODIHR and Venice Commission, “Draft Joint Opinion on the Draft Law of April 2008 Amending and Supplementing the Law on Conducting Meetings, Assemblies, Rallies, and Demonstrations of the Republic of Armenia,” 16.05.2008, Opinion no. 474/2008, CDL (2008)050; OSCE/ODIHR and Venice Commission, “Draft Additional Joint Opinion on the Draft Law of April 2008 to on Amending and Supplementing the Law on Conducting Meetings, Assemblies, Rallies, and Demonstrations of the Republic of Armenia and proposals for amendment submitted on 09.06.2008,” 09.06.2008, Opinion no. 474/2008, CDL (2008)079.

35. Agence France Presse, “L'Arménie lève des restrictions au droit de manifestation,” 11.06.2008.

36. Report: Special Mission to Armenia by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe [CommDH(2008)11REV], 20.03.2008, accessible at <http://wcd.coe.int/ViewDoc.jsp?id=1283721&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

37. Note 36 *supra* at 9.

38. See also Assembly [Doc. 11786](#) (22.12.2008) and its addendum (26.01.2009) on the implementation by Armenia of Resolutions 1609 (2008) and 1620 (2008).

39. Stephanie Nebehay, “UN Rights Boss Rebukes Georgia for Use of Force,” Reuters, 08.11.2007.

3.1. The use of force⁴⁰

23. Despite the non-derogability of Articles 2 and 3 ECHR, the use of force remains a persistent problem in State responses to emergency situations and, as described above, violence is often the most tangible evidence of a state of emergency gone wrong.⁴¹

24. Methods of crowd control and other police actions must thus always be “*proportionate and appropriate*” in order to preserve the inviolability of the right to life.⁴² The case-law of the Court is clear on this point: force used to disperse protestors must be “*no more than is absolutely necessary*.”⁴³ This rule applies even in cases where the demonstration itself is not fully peaceful. The use of weapons must always be proportionate to force exerted by the civilians.⁴⁴ Additionally, the Court has found that States must provide adequate precautions for the safety of civilians when conducting anti-terrorist operations.⁴⁵ Moreover, the obligation to avoid or minimise the risk of loss of lives not only applies to security forces in planning and executing an operation, but also to the executive authorities and the legislature, who have to put into place an adequate administrative and legislative framework to regulate the use of force.⁴⁶

25. Various international bodies have commented on and recommended best practices for police and security forces in terms of the use of force. Two principle guidelines are the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)⁴⁷ and the Council of Europe’s European Code of Police Ethics (2001).⁴⁸

26. The UN Basic Principles recommend (among many other suggestions): the use of non-violent control means first; a clear warning and self-identification when intending to use force; the development of practices to allow for a “*differentiated use of force*” including “*self-defensive equipment... in order to decrease the need to use weapons of any kind*,” immediate medical aid for the wounded; and departmental rules regulating “*the control, storage, and issuing of firearms*.” Moreover, the Basic Principles call for transparency in reporting any incidents, responsibility of superior officers, and the punishability under the criminal code of manifestly unlawful violations of basic standards. Finally, the UN calls on the relevant agencies to conduct regular screening procedures to assess the fitness of their agents, give “*special attention to issues of police ethics and human rights*” and provide stress counselling to agents serving during crises.

27. The European Code of Police Ethics promulgated by the Council of Europe provides substantially similar recommendations. It adds however, that the police should be under civilian leadership⁴⁹ with operational independence from other state bodies.⁵⁰ The Code notes specifically that the police must be subject to “*efficient external control*”, that “*state control of the police shall be divided between the legislative, the executive and the judicial powers*”⁵¹ and that national police codes of ethics should be created “*and overseen by appropriate bodies*”.⁵² The Code also reiterates the simple principle controlling any discussion of the use of force, that appropriate police conduct “*is fundamental to the meaning of the rule of law and therefore to the whole meaning and purpose of police duty in a democracy*.”⁵³

28. In view of these principles, the rapporteur is worried about the reported existence of secret orders of the Russian Interior Ministry (Order No. 870 of 10 September 2002, which approves the “Manual for Planning and Preparation of Manpower of Internal Affairs Organs and Internal Troops of the Russian Interior Ministry to

40. See also Venice Commission, *Opinion on the Protection of Human Rights in Emergency Situations*, Opinion No. 359/2005 (Note 12 *supra*), Part V.

41. NB: *Turku Declaration of Minimum Humanitarian Standards (1995)*, Report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, UN Doc. E/CN.4/1995/116. Article 6: “Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited.”

42. See *supra* Note 12 §23.

43. *McCann & Others v. the United Kingdom*, App. No. 18984/91 (judgment of 27.09.1995), § 148.

44. *Güleç v. Turkey*, Chamber Judgment, App. No. 21593/93 (27.07.1998), §§ 70-71.

45. *Ergi v. Turkey*, Chamber Judgment, App. No. 23818/94 (28.07.1998), §§ 79-81.

46. See *Makaratzis v Greece*, Grand Chamber Judgment, App. No. 50385/99 (20.12.2004) § 62; *Nachova and Others v Bulgaria*, Grand Chamber Judgment, App. Nos. 43577/98 & 43579/98 (06.07.2005) §§ 96-97.

47. Available at http://www.unhchr.ch/html/menu3/b/h_comp43.htm

48. *The European Code of Police Ethics: Recommendation Rec(2001)10* adopted by the Committee of Ministers of the Council of Europe on 19.09.2001 and *explanatory memorandum*, Council of Europe Publishing, Strasbourg, 2002.

49. *Ibid.* § 13.

50. *Ibid.* § 14.

51. *Ibid.* §§ 59, 60.

52. *Ibid.* § 63.

53. *Ibid.*, explanatory memorandum at 18.

Actions in Emergency Circumstances”), which refer to the possible ‘destruction’ of rioters and to internment in ‘filtration stations’ without court authorisation. The existence of such secret orders has been revealed by the Public Commission of Investigation of the Events in Blagoveshchensk, where several hundred citizens were violently beaten by the local militia in December 2004. The existence of ‘filtration stations’ was known to be used in the USSR. In 1990 and in 1991, their existence had been reported in the framework of the Afghan war and of the Transcaucasian conflict. Such filtration stations are also reported to have been used in the Northern Caucasus and to have been the site of numerous human rights violations, including torture and enforced disappearance⁵⁴.

29. It is particularly troubling to note that the “special measures” foreseen in the secret orders are very similar to the way the security forces have reacted in Andijan. It tends to indicate that certain former Soviet Union countries might still have these kind of secret orders.

30. The rapporteur is therefore adamant that the rules of engagement of security forces in all Council of Europe countries, and in particular in those countries which have inherited the rules in question from the Soviet period, be thoroughly reviewed and modernised as necessary in light of the requirements of the ECHR.

3.2. Restrictions to freedom of assembly

31. Because Article 11 ECHR is derogable, restrictions on the freedom of assembly are common in emergency legislation of Council of Europe member States. For example:

- The Federal Constitutional Law “On the State of Emergency” (of 30 May 2001, as amended up to 2005, No.3-FKZ) of the Russian Federation⁵⁵ provides in Article 11 for a “*ban on or restriction of meetings, rallies, demonstrations, marches, picketing and other mass events.*”
- Ukraine’s Law No.1550-III “On the Legal Regime of the State of Emergency” (March 2000)⁵⁶ Article 15 allows for the institution of martial law wherein “*the issue of the prohibition of activities of political parties and public organisations [may be addressed], if they endanger the sovereignty, the national security, the national independence, territorial integrity of Ukraine, and the life of individuals.*”
- Article 46 of Georgia’s 1995 Constitution, as amended in 2004, provides that “*freedom of peaceful assembly*” may be restricted in a state of emergency.
- A 1955 French law on state of emergency (in terms of public order and safety) – used for the first time in France on 8 November 2005 in response to rioting in a number of French cities – bans public meetings for up to 12 days in emergency situations.
- Turkey’s State of Emergency Law of 25 October 1983 (Act No. 2935)⁵⁷ Article 11 provides for the “prohibition of, postponement of, or imposition of a requirement to obtain permission for assemblies and demonstrations in both enclosed and open spaces; regulation of the time and place of permitted assemblies and demonstrations; and supervision, and if deemed necessary dispersal, of all kinds of permitted assemblies.”

32. However, all member States are bound by the general obligation, as parties to the ECHR, to respect the fundamental freedoms of the people under their jurisdiction. It is thus imperative for the preservation of those principles that any lawful derogations be as circumspect as possible – in other words, that the presumption of freedom of assembly should be maintained as far as possible even during an emergency situation and that any restrictions thereof be instituted lawfully.⁵⁸ As the European Court of Human Rights has stated, “*Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.*”⁵⁹

54. Indeed, ‘filtration stations’ were used in Chechnya to “treat” large numbers of persons arrested summarily, mistreated, kept for some days or weeks, after which most were released, but some disappeared for good; see Mr Bindig’s reports: [Doc. 10774](#), [Doc. 10283](#) and [Doc. 9732](#). See also the two Public Declarations concerning the Chechen Republic by the European Committee for the Prevention of Torture (CPT), CPT/Inf (2001) 15 and CPT/Inf (2003) 33, available at: <http://www.cpt.coe.int/documents/rus/2001-07-10-eng.htm>; and Mr Marty’s report on *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* of 12 06.2006 (Assembly [Doc 10957](#)).

55. English translation at ODIHR Legislationline, <http://www.legislationline.org>.

56. Vidomosti Verkhovnoyi Rady (VVR), 2000, issue 23, p. 176, English translation at ODIHR Legislationline, <http://www.legislationline.org>.

57. Published in the Official Gazette on 27.10.1983; No. 18204.

58. OSCE/ODIHR, *OSCE Guidelines on Freedom of Peaceful Assembly* (Warsaw, 2007) at pp. 21, 28.

33. To this end, there are several international norms surrounding the right to assemble. The most recent and thorough analysis comes from the OSCE/ODIHR/Venice Commission in their Guidelines on Freedom of Peaceful Assembly (2007).⁶⁰ That document notes specifically (emphasis added): “Any [lawful] restrictions [under the ECHR] must be designed to ensure that both the responsibilities of those in the [security] services concerned are properly discharged and that any need for the public to have confidence in their neutrality is maintained.”⁶¹ The document also notes that there are effective alternatives to strict prohibition of assemblies which might nevertheless protect public safety: the time, place and manner in which an event is conducted may all be regulated without preventing that this fundamental right is exercised at all.⁶²

34. The case law of the Court has also emphasised that *post hoc* arrest and prosecution for unlawful conduct during an assembly is preferable to any prior restraints of Assembly on the freedom.⁶³ The Guidelines reiterate that generally “legislation relating specifically to freedom of assembly should not contain any general provisions regarding criminal or administrative liability unless the offences deal with freedom of assembly specifically” and that one should not be prosecuted merely for attending an assembly.⁶⁴

35. Thus, as the Venice Commission has said, “Article 11 ECHR is a ‘qualified’ right and the state is therefore entitled to justify what is a *prima facie* interference with the right... A system of permits and its application, however, must not affect the right of assembly as such: prohibition of an assembly must always be capable of justification having regard to the express terms of Article 11(2) ECHR [the provision allowing for interference] as interpreted by the case law of the European Court of Human Rights.”⁶⁵

36. The rapporteur welcomes in this context the adoption of the Armenian Law on Amending and Supplementing the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations in line with Council of Europe standards, but notes that, despite the adoption of this Law, the Assembly has still asked “*that freedom of assembly should also be guaranteed in practice in Armenia*” by insisting “*that the Armenian authorities should ensure that no undue restrictions are placed on rallies organised by the opposition in compliance with the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations, especially with regard to the venues requested*”.⁶⁶

3.3. Restrictions to freedom of speech

37. Also common in the emergency legislation of member States are provisions for restrictions on the freedom of expression:

- Russia’s law on emergencies⁶⁷ provides that where a state of emergency is introduced following “mass riots”, authorities may respond by imposing “restriction[s] of freedom of the press and other media of mass information.”
- Article 15 of the Ukrainian law on martial law⁶⁸ enables authorities “to control the operation of communication enterprises, printing enterprises, publishing houses, television and radio broadcasters, theatres, concert and entertainment enterprises, institutions and organisations, to use local radio stations, television centres and printing works for the needs of military and the performance of the explanatory work among troops and population; to regulate the operation of civil television and radio centres, to prohibit the operation of the individual and collective amateur receivers and transmitters, and the transmission of the information via computer networks; [and] in case of the violation of requirements or the failure to comply with the measures of the legal regime of the military law, to seize the radio

59. *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Chamber Judgment, App. Nos. 29221/95 & 29225/95 (02.10.2001), § 97.

60. See *supra* Note 58; these guidelines were also adopted by the Venice Commission in June 2008.

61. *Ibid.* at 38.

62. *Ibid.* at 45.

63. See *supra* Note 59 § 94.

64. See *supra* Note 58 at 47.

65. CDL Opinion 290/2004 on the Law on conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia (CDL-AD)2005(040)), §§ 10-11. See also, e.g. *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Grand Chamber Judgment, App. No. 23885/94 (08.12.999), § 44; *United Communist Party of Turkey and Others v. Turkey*, Grand Chamber Judgment, App. No. 19392/92 (30.01.1998), § 46; *Sidiropoulos and Others v. Greece*, Chamber Judgment, App. No. 26695/95 (10.07.1998), § 40.

66. See Parliamentary Assembly [Resolution 1620 \(2008\)](#) on the implementation by Armenia of Assembly Resolution 1609 (2008), see also [Doc. 11656](#), §§ 10 and following.

67. See Note 55. *supra*.

68. See Note 56. *supra*.

transmitters, the television, video and audio equipment, computers and, if necessary, other telecommunication facilities from enterprises, institutions and organisations of all ownership forms, and individual citizens ...”

- On 17 October 1997 Georgia enacted a Law “On State of Emergency.”⁶⁹ Under Article 4 of the law authorities can “*subject media to their control*” and “*introduce special rules on the use of communication facilities*”
- Similarly, the 1955 French law cited above enables the police to control the movement of information.
- In emergency situations, Turkish authorities⁷⁰ may prohibit or require permission for “the publication (including issuance of reprints and editions) and distribution of newspapers, magazines, brochures, books, etc.; [the] importation and distribution of publications published or reprinted outside regions declared to be under a state of emergency; and confiscat[e] books, magazines, newspapers, brochures, posters and other publications of which publication or dissemination has been banned [as well as] control and, if deemed necessary, restriction or prohibition of every kind of broadcasting and dissemination of words, writings, pictures, films, records, sound and image bands (tapes)...”

38. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (UN, 1996) emphasise that such restrictions are often not necessary – that reporting of facts and expression of opinions should not be regarded as constituting a threat to national security (including mere advocacy of change of government policy or of the government itself) where that advocacy does not incite immediate and substantial violation of the law or create a serious and imminent threat that a substantial violation of the law will actually occur.⁷¹ A similar point has been made by the European Court of Human Rights: “*It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised.*”⁷²

39. Johannesburg Principle 11, “General Rule on Access to Information”, also states that: “Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.”

40. The Council of Europe has examined in on this subject as well. In its Guidelines on Protecting Freedom of Expression and Information in Times of Crisis (2007),⁷³ the Committee of Ministers insists on the following: (1) the personal safety of media professionals must be ensured in times of crisis, (2) there should be guaranteed freedom of movement to media in crisis areas, (3) military and civilian authorities should provide a regular flow of information to media (and do so without discrimination), and (4) national legislatures must provide guarantees against the misuse of defamation legislation and allow journalists to protect their source material. Also, the Committee of Ministers has insisted that vague terms not be used when imposing legal restrictions on freedom of expression and that there should be criminal or administrative liability for officials who try to use the media to manipulate public opinion.

4. The need to strengthen supervision of states of emergency

41. The principle way of avoiding the disastrous consequences which may result from a mismanaged state of emergency is to ensure that all member States have adequate safeguards in their national law systems – i.e. that they follow the international norms of conduct as discussed above – and that those safeguards are actually put into place through effective supervision of measures and institutions. The three most basic supervisory elements are the constitutional limitation of the duration of the state of emergency, judicial oversight, and the last resort of international supervision.

69. 17.10.1997, 972-IS.

70. See Note 57. *supra*.

71. UN Doc. E/CN.4/1996/39. See esp. “Principle 1: Freedom of Expression, Opinion, and Information”.

72. *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Note 65 *supra*.

73. *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, Appendix 11 (Item 5.3) to the Report of the 1005th Meeting of the Ministers’ Deputies, 26.09.2007.

4.1. Time limit/duration and legislative oversight

42. Time limits are the first line of defence to prevent states of emergency from growing out of proportion. This is linked to the importance of healthy attitudes within the population itself; and the development of a civil society and effective opposition groups to hold leaders accountable. It is critical that the average citizen shall not be lulled into the complacent view that life under emergency measures is normal or average. If time limits are properly enforced they also send a clear message that the measures taken are out of the ordinary.

43. The concept has been recognised by many member States, such as Russia and Ukraine, which limit duration to 30 days⁷⁴, with the limit ranging from two weeks to one year in other member States.⁷⁵ These limits are often renewable⁷⁶, and this renewability provides a simple way of imposing legislative oversight on the process – going hand in hand again with the notion of a healthy civil society and a vocal opposition as the best defence of human rights. But control through civil society requires public access to information, which must therefore not be overly restricted even during the emergency situation itself.

44. Many States, like Germany, declare states of emergency through the most directly democratically legitimate branch of government, the legislative, but many others, like France, Russia, Lithuania, Slovakia, and Romania, leave the decision on the state of emergency and its proclamation to the head of state.⁷⁷ Instituting constitutional limitations, like a sunset provision with extension subject to periodic, regular parliamentary approval is, as the Venice Commission has noted, one element “*important for the realisation of the rule of law and democracy.*” The Venice Commission has further observed that: “*The question of by whom, how and when emergency rule is to be terminated cannot...be left to executive enjoying its increased power. It must be the function of the Parliament. This implies a continuity of parliamentary life during the period of emergency.*”⁷⁸ The Venice Commission’s conclusion that parliamentary limitations must be provided for, cannot be stressed more highly. Even legislation carefully drafted to protect human rights, needs to be implemented in that spirit. Requiring parliaments to have a central voice in the operation of a state of emergency works to protect the integrity of that legislation.

4.2. Judicial supervision

45. The continuation of the rule of law, which is the aim of all guidelines for human rights in emergencies, is necessarily contingent on judicial review and a working judicial system generally. In many countries there is no judicial review of the establishment of the emergency situation, only of the actions taken under it. However, as established above, the Court has consistently asserted that it is competent to assess the legitimacy of the proclamation of states of emergency under Article 15, and thus it follows from the Court’s subsidiary role that national judiciaries should be able to assert the same oversight. Judicial approval of the constitutionality of a state of emergency provides yet another stop gap against illegitimately declared emergencies (likely to threaten rights) and also firmly establish judicial jurisdiction over all facets of the actions taken.⁷⁹

46. Effective judicial safeguards and oversight are essential in any emergency situation if someone is to be held to account for any violations of the rights discussed above and many others which may be violated in an emergency situation.⁸⁰ The preservation of a working judicial system is especially important given that some emergency legislation in Council of Europe member States may pose problems in this arena.⁸¹ Fortunately, it is the area of law and legal protections during emergency situations where the international community has made itself most clear.

47. In 2001, the UN Human Rights Committee drafted a new General Comment on Article 4 to the International Covenant on Civil and Political Rights in response to recommendations by Leandro Despouy, then United Nations Special Rapporteur on Emergency Situations.⁸² General Comment 29 emphasises in

74. See *supra* Note 55, Article 9 and Note 56, Article 7, respectively.

75. Venice Commission, *Report on Emergency Powers*, Science and Technique of Democracy No. 12, 1995. Available at <http://www.venice.coe.int>

76. *Ibid.*

77. *Ibid.*

78. *Ibid.*

79. *Ibid.* See also in this respect Inter-American Court of Human Rights, *Advisory Opinion OC-9/87* of 06.10.1987 on Judicial guarantees in states of emergency (art. 27 (2), 25 and 8 American Convention on Human Rights).

80. See e.g. ODIHR, *Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan – September/October 2005* (Warsaw, 21.04.2006) (on difficulties faced by monitors of trials stemming from the incident in Andijan referenced at the beginning of this paper).

81. See e.g. Note 55 *supra*, where Russian law permits a “total or partial suspension in the territory [under a state of emergency], of the powers of executive authorities and local self-administration bodies.”

relevant part, that states of emergency cannot be used to cover violations of peremptory norms of international law – including for example, Common Article 3 of the Geneva Conventions. The General Comment also highlights that the provision of an effective remedy is a non-derogable fundamental obligation – i.e. procedural rights; particularly stating that, although not listed in Article 4, the following are non-derogable:

- the elements of the right to a fair trial recognised by international humanitarian law, especially the presumption of innocence⁸³
- the right to an effective remedy for any violation of the Covenant, including in particular the right to challenge the legality of deprivation of liberty in a court⁸⁴

These two rights thus suggest that denial of access to counsel is a violation as well; and in its General Comment 32 (adopted in 2007) the non-derogability of the right to a fair trial is reiterated, the Committee stating that, “*the requirement of competence, independence, and impartiality of a tribunal... is an absolute right not subject to any exception.*”⁸⁵

48. Mr Despouy’s own Draft Guidelines for the Development of Legislation on States of Emergency (1991) highlight the significant point that “*in most circumstances the only right [in the judicial sphere] which should be affected is the right to a prompt trial. Given the presumption that states of emergency should be of relatively short duration, if the exigencies of the emergency make it difficult to try certain suspects under normal procedures, the solution which usually will have the least possible impact on their rights is to postpone the trial until it can be conducted with full respect for all guarantees of due process.*”⁸⁶

49. Similarly, the International Law Association’s Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984)⁸⁷ are notable in that they include specific judicial protections including communication with an attorney, review of case by a judicial body within 30 days, right to *habeas corpus* and various provisions regarding the right to a fair trial. Moreover, the document places a large emphasis on the independence, security, and power of the judiciary in times of emergency. For example, it states that:

*“The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.”*⁸⁸

50. As regards the European Convention on Human Rights specifically, derogations under Article 15 may legally extend to Article 6 ECHR (right of access to a court) and Article 13 ECHR (right to an effective remedy), but in accordance with the international norms cited above, they must not extend past what is strictly required, and a domestic supervisory mechanism – preferably the courts as they normally exist – must remain operational, as the Court has said, “*whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws.*”⁸⁹ The UN Human Rights Committee adds that even if a State

82. See U.N Human Rights Committee, *General Comment Number 29: States of Emergency (article 4)*, UN Doc.CCPR/C/21/Rev1/Add.11, 31.08.2001, § 6. It should be noted that all Council of Europe member States are also parties to the ICCPR.

83. *Ibid.* § 14.

84. *Ibid.* §§ 14 and 16.

85. U.N Human Rights Committee, *General Comment Number 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23.08.2007, § 19.

86. UN Doc. E/CN.4/Sub.2/1991/28 Annex I (at 30): “Draft Guidelines for the Development of Legislation on States of Emergency” prepared by a Meeting of Experts on the Drafting of Model Legal Provisions Governing States of Emergency, 12-14.03.1991, Geneva at p. 42.

87. See Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, Pinter Publishers: London, 1989.

88. *Ibid.* at 90. See also Note 86 *supra* at 34, 46 (ratification of state of emergency by the legislature and an independent judiciary, respectively). The commentary notes here: “... the legislature, because of its double role of law-makes and most representative branch of government, should have responsibility for ratification of a declaration of emergency. Recognition of this role would prevent the Executive from unilaterally talking measures which may have far reaching consequences for the legal order it has created,” and that an independent judiciary is “intended to preserve the role of the judicial branch as a principal guarantor of legality, which is essential to ensure that the Rule of Law prevails during a state of emergency.”

89. *Leander v. Sweden*, App. No. 9248/81, judgment of 26.03.1987, § 79.

“may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation... to provide a remedy that is effective.”⁹⁰ Thus, to summarise, the integrity of the judicial system should be safeguarded as far as possible.

51. Furthermore, it is necessary that all alleged violations of human rights that reportedly occurred during or in the aftermath of a state of emergency undergo an effective and thorough investigation. This was one of the requirements of the Parliamentary Assembly as regards the March 2008 events in Armenia; the co-rapporteurs welcomed, on 24 October 2008, the creation of a fact-finding group to look into these events and the circumstances that led to them⁹¹. Also, governments should be made accountable for human rights violations they could have prevented.

4.3. Enhancement of international/ Council of Europe supervision

52. International supervision of emergency situations may also be enhanced, with the Council of Europe taking the lead. Most importantly, the Parliamentary Assembly and the Committee of Ministers should make it clear that the international community expects member States to take the institutions of basic safeguards seriously – especially emphasising the non-derogation from Articles 6 and 13 of the European Convention on Human Rights when at all possible. The Assembly could especially take the lead in monitoring such situations and continue publicly expressing its opinions on State conduct because critical resolutions can exert effective political pressure on member States. The recent resolution adopted following the events in Armenia is a good example⁹². Leaving most of the necessary criticism up to the Committee of Ministers risks burying abuses in the Committee’s oft-required conciliatory stance, or delaying necessary action in response.⁹³

53. Other possible reforms could include increasing oversight of declared states of emergencies by the Council of Europe’s Commissioner for Human Rights⁹⁴ or Secretary General. The Secretary General is in a particularly unique position as the recipient of the notification of derogations under Article 15. This passive role may be extended in future so as to allow the Secretary General not only to receive a notification of declaration of derogation under Article 15 ECHR but also to request supplementary information during and after the state of emergency, when and if necessary.⁹⁵ He should then transmit this information to all Contracting Parties, the Chairperson of the Committee of Ministers, the President of the European Court of Human Rights, the Council of Europe Commissioner for Human Rights, as well as the Presidents of the Parliamentary Assembly and of the Congress of Local and Regional Authorities.⁹⁶

54. Similarly, the advisory jurisdiction of the Court could be expanded to something comparable to that of the Inter-American Court of Human Rights, allowing it expedite expressions of disapproval in on-going situations (perhaps following referral of cases by the Human Rights Commissioner or Secretary General) – thereby stemming the tide of abuses before it gains full strength. This contrasts with the situation where judgments often occur years after abuses have already wrecked lives. Finally, member States might consider adding more rights to the list of those that are currently non-derogable.⁹⁷

55. To make the process complete, the Council of Europe should enhance its scrutiny for a certain time period after the state of emergency has been lifted, since it appears that violations occur even after this. It is, for instance, worrying that the Armenian Law on staging meetings, rallies, marches and demonstrations - as amended following the March 2008 state of emergency - has been used since then by the Yerevan City Hall to turn down dozens of applications to stage a rally sponsored by the opposition. The Assembly had specifically asked in its Resolution 1609 (2008) that the recent amendments on this Law be revoked, in line with the recommendations of the Venice Commission.

90. Note 84 *supra*, § 14.

91. See Assembly Press Release “Assembly co-rapporteurs welcome creation of fact-finding group in Armenia”, dated 24.10.2008.

92. See Assembly [Resolution 1609 \(2008\)](#) on the functioning of democratic institutions in Armenia.

93. Note 87 *supra* at 69.

94. As he did by visiting immediately Armenia from 12 to 15 .03.2008, see his report ComDH(2008)11.

95. Such a practice already exists as regards declarations attached to former Article 25 (individual petitions). It was for example the case with Turkey in 1987 (Information Sheet No. 21 – 11.1986/10.1987 – H/INF(87)1).

96. See in this respect [Assembly Recommendation 103 \(1956\)](#) on the interpretation to be given to paragraph 3 of Article 15 of the Convention for the Protection of Human Rights, as well as [CM Resolution \(56\) 16](#).

97. R. St. J. MacDonald, “Derogations under Article 15 of the European Convention on Human Rights,” *Columbia Journal of Transnational Law*, 26:225 (1997) at 254-266 *passim*.

56. Most simply, the Council of Europe must create new ways, or find ones within its existing framework to elevate and broaden the level of scrutiny applied to emergency declarations, increase the speed at which the various Council organs can respond to fast moving events on the ground, and express a fundamental and firm intolerance for abuses committed under the shroud of emergencies.

5. Prevention

57. During the expert hearing, held by the committee on 9 September 2008, the question of the prevention of the use (and abuse) of state of emergency provisions was raised.

58. As mentioned by one of the experts, practice has shown that the warning signs (e.g. human rights abuses by security forces, restrictions on freedom of speech, judicial corruption, etc.) can usually be observed early enough for relevant international actors to take action which could prevent the situation from escalating to the extent of declaring a state of emergency⁹⁸.

59. The experts agreed on three basic requirements to avoid the misuse of emergency provisions: a functioning democracy, the protection of human rights and the rule of law. These are indeed the areas of excellence of the Council of Europe and on which it should concentrate its efforts.

60. It has also been stressed that special attention should be paid to the judiciary, which must be independent, as well as to the freedom of speech. When the right to independent and fair trial is non-existent, other rights become ineffective.

61. Since it appears that declarations of a state of emergency are often around the time of elections and especially in democracies in transition, special scrutiny should be given in these sensitive times. OSCE-ODHIR already offers expertise in such situations and is able to deploy observation missions for a longer period before and after elections than the Parliamentary Assembly does. In this field, co-operation between both Organisations already exists but might need to even be reinforced when a state of emergency is declared before, during or shortly after elections.

62. The analysis of draft legislation is also of utmost importance. Member States should be encouraged to submit relevant draft legislation to the Venice Commission and to take its opinions fully into account⁹⁹. Obviously, this is particularly important as regards the national legislation on state of emergency as well as legislation elaborated following emergency situations.

6. Conclusions and proposals

63. Declaring a state of emergency may be a legitimate State action, but such an action must be conducted with the utmost care. Governments must exercise emergency powers with the understanding that states of emergency are intended to preserve democracy and the rule of law. It is not an excuse to flout those norms.

64. Thus states of emergency (and derogations from the ECHR, if necessary) should only be invoked in the direst of circumstances where the existence of the nation is threatened. The measures taken should never extend beyond what is strictly required by the situation, and states should note that an ECHR derogation does not excuse other obligations to protect human rights under international law. The principles of temporality, imminence, public declaration, international notification, proportionality, legality, and the inviolability of non-derogable rights must always be respected.

65. National authorities should take care to properly train their first responders on legally acceptable behaviour – i.e. respect for the non-derogable rights to life and freedom from torture and inhuman treatment – and the use of force as an extreme last resort. Security forces should also have as many non-violent and non-lethal means of crowd control as possible. Police forces should always remain operationally independent of the government, subject to administrative and judicial sanctions for misconduct, and the public should be assured of their neutrality in any emergency operation.

98. It has, for instance, been the case as regards events of 7.11.2008 in Georgia. Prior to that day, civil society was increasingly critical about excessive use of force by police forces (eg unlawful arrests, biased investigations, etc.). See [Georgia: Sliding towards Authoritarianism?](#), Crisis Group Europe Report N°189, 19.12.2007, p. 23 and the written contribution by Anya Tsistina, Europe Program Assistant, International Crisis Group, 09.09.2008.

99. As pointed out by the OSCE/ODIHR expert at the hearing before the committee, such analysis can take place in co-operation with the OSCE/ODIHR. This was, for instance, the case as regards the Armenian Law on staging meetings, rallies, marches and demonstrations.

66. There is a presumption of freedom of assembly in all situations and all restrictions upon that qualified right instituted pursuant to an emergency must be lawfully initiated. Thus, restrictions on time, place, or manner of assembly are preferable to a outright ban.

67. Reporting facts and expressing opinions as such should not be regarded as constituting a threat to national security. Thus any restrictions of the freedom of expression must be shown to be necessary in a democratic society to protect a legitimate national security interest. Such restrictions should be as clear and limited as possible. The public should have constant access to independent media, and those who manipulate the media in times of public crisis should face sanctions.

68. Safeguards on the national level are of the highest importance. States should be able to deal with crises without threatening their own people, and be able to respond to the threat of human rights violations, preferably without international intervention.

69. There should be clear time limits and effective legislative oversight of any state of emergency – perhaps through a sunset provision with extension subject to periodic, regular parliamentary approval – and civil society or voices of opposition should not be unduly suppressed. Judicial approval of the constitutionality of a state of emergency may also be appropriate. The integrity of the judicial system – its competence, independence, and impartiality – should be safeguarded as far as possible, with special attention given to preserving access to the courts and to an effective remedy.

70. The Council of Europe should consider expanding its oversight role to supplement these good practices in member States. The organs of the Council of Europe can contribute to elevating the level of scrutiny over emergency situations both politically and in the sphere of international law. Should national safeguards prove insufficient to protect the human rights of individuals under emergency rule, the ultimate aim should be that governments who are violating the human rights of their people should be held firmly and fast accountable.

71. Finally, the Assembly should invite the Committee of Ministers to look into ways and means to achieve this, by instructing its relevant committees to:

- consider granting the Secretary General, upon receipt of a notification of declaration of derogations under Article 15 ECHR, the possibility to request supplementary information during and after the state of emergency, and to transmit this information to all Contracting Parties, the Chairperson of the Committee of Ministers, the President of the European Court of Human Rights, the Council of Europe Commissioner for Human Rights, as well as the Presidents of the Parliamentary Assembly and of the Congress of Local and Regional Authorities;
- consider adding more rights to the list of those that are currently non-derogable under Article 15 ECHR, especially with respect to rights whose suspension is not essential even in a state of emergency, as in Article 27 of the American Convention on Human Rights.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc. 10985, Reference No. 3281 of 6 October 2006

Draft resolution and draft recommendation adopted unanimously by the committee on 24 March 2009

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro **Marcenaro**, Mr Rafael **Huseynov** (Vice-Chairpersons), Mr José Luis Arnaut, Mrs Meritxell Batet **Lamaña** (*alternate: Mr Arcadio Díaz Tejera*), Mrs Marie-Louise Bemelmans-Videc, Mrs Anna **Benaki**, Mr Erol Aslan Cebeci, Mrs Ingrida **Circene**, Mrs Ann Clwyd (*alternate: Mr Christopher Chope*), Mrs Alma Čolo (*alternate: Mrs Milica Marković*), Mr Joe Costello, Mrs Lydie Err, Mr Renato **Farina**, Mr Valeriy **Fedorov**, Mr Joseph Fenech Adami (*alternate: Mrs Marie-Louise Coleiro Preca*), Mrs Mirjana Ferić-Vac, Mr György **Frunđa**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mrs Svetlana Goryacheva (*alternate: Mr Alexey Aleksandrov*), Mrs Carina Hägg, Mr Holger **Haibach**, Mrs Gultakin Hajibayli, Mr Serhiy **Holovaty**, Mr Johannes **Hübner**, Mr Michel **Hunault**, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mrs Iglia **Ivanova**, Mrs Kateřina Jacques, Mr András Kelemen, Mrs Kateřina **Konečná**, Mr Franz Eduard **Kühnel**, Mr Eduard Kukan (*alternate: Mr József Berényi*), Mrs Darja Lavtižar-Bebler, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Aleksei Lotman, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto **Martins**, Mr Dick **Marty**, Mrs Ermira **Mehmeti**, Mr Morten Messerschmidt, Mr Akaki **Minashvili**, Mr Philippe Monfils, Mr **Alejandro Muñoz Alonso**, Mr Felix **Müri**, Mr Philippe Nachbar, Mr Valery Parfenov, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Valeriy **Pysarenko**, Mr Janusz Rachoń, Mrs Marie-Line Reynaud (*alternate: Mr René Rouquet*), Mr François Rochebloine, Mr Paul **Rowen**, Mr Armen **Rustamyan**, Mr Kimmo **Sasi**, Mr Ellert Schram, Mr Dimitrios Stamatīs (*alternate: Mr Emmanouil Kefaloyiannis*), Mr Fiorenzo Stolfi, Mr Christoph **Strässer**, Lord John **Tomlinson**, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem **Türköne**, Mr Viktor **Tykhonov**, Mr Øyvind

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N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin