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The protection of human rights in emergency situations

Reply to Recommendation¹: Recommendation 1865 (2009)
Committee of Ministers

1. The Committee of Ministers notes with interest Parliamentary Assembly [Recommendation 1865 \(2009\)](#) on “The protection of human rights in emergency situations”, which it has brought to the attention of the members states’ governments. It has also communicated it to the Steering Committee for Human Rights (CDDH) and to the Committee of Legal Advisers on Public International Law (CAHDI) for comments. The comments received are appended to this reply.
2. The Committee of Ministers agrees with the Parliamentary Assembly that as the declaration of a state of emergency entails restrictions on the rights and freedoms of individuals, it must be used with utmost care and as a means of last resort only. It must never become a pretext to restrict the exercise of fundamental human rights unduly.
3. The Committee of Ministers observes that under Article 15, paragraph 3 of the European Convention on Human Rights (ETS No. 5), a High Contracting Party derogating from its obligations under the Convention shall keep the Secretary General fully informed of the measures it has taken and the reasons therefore. He/she shall also be informed when the measures cease to operate. The Secretary General has the possibility to request supplementary information from the High Contracting Party concerned during and after the state of emergency and has made use of this possibility on several occasions in the past. The Secretary General can transmit the information received to other member states and to the relevant bodies within the Organisation.
4. As to the Assembly’s recommendation to add more rights to the list of those that are currently non-derogable under Article 15 of the Convention, especially rights whose suspension is not essential even in a state of emergency, the Committee of Ministers agrees with the CDDH, that in the light of the Court’s role in assessing the national margin of appreciation, it is not necessary to take such a step. It recalls that although it is not for the Court to say what measures are best adapted to situations of emergency because this comes under the direct responsibility of governments, the Court has nevertheless confirmed that “Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on 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. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”.²
5. Recalling the subsidiary nature of the Convention’s control mechanism, the Committee of Ministers agrees with the Assembly about the usefulness of a possibility for judicial scrutiny at national level of the validity of a state of emergency and its implementation. It also agrees that the legislature could have an important role to play in scrutinising the decision-making process.

1. adopted at the 1081st meeting of the Ministers’ Deputies (31 March 2010)

2. *Brannigan and McBride v. United Kingdom*, 26 May 1993, para. 43, series A No. 258; *A. and others v. United Kingdom*, 19 February 2009, application No. 3455/05, para. 173.



Appendix 1 to the reply

Comments by the Steering Committee for Human Rights (CDDH)

1. The Steering Committee for Human Rights (CDDH) notes with interest [Recommendation 1865 \(2009\)](#) of the Parliamentary Assembly on “The protection of human rights in emergency situations”, which deals with a crucial problem. At the moment of a declaration of a state of emergency, the level of surveillance at the national and at the European level must be effective in order to respect human rights, with the relevant Council of Europe control mechanisms fully playing their role.
2. The Committee has already looked into situations where fundamental rights are at risk of being violated, under the pretext of protecting them, particularly within the framework of drafting the Guidelines of the Committee of Ministers on Human Rights and the Fight against Terrorism, adopted on 11 July 2002. Following from Article 15 of the European Convention on Human Rights and the Court’s jurisprudence, it is intended that when the fight against terrorism intervenes in a state of war or public danger which threatens the life of the nation, it is possible to unilaterally adopt measures temporarily derogating from certain obligations which follow from international human rights instruments, but only to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. It is emphasised that states may never, whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition of torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law (Guideline XV).
3. The CDDH takes note of the suggestion of the Parliamentary Assembly to grant to the Secretary General, upon the receipt of a declaration of derogation in accordance with Article 15 of the Convention, the possibility to request additional information during and after the state of emergency, in order to pass this information on to other member states and affected bodies within the Organisation. It recalls that the legal framework for the exercise of this competence by the Secretary General already exists in paragraph 3 of Article 15 of the Convention.
4. The CDDH nevertheless recalls that the Court affirmed its competence for exercising control over the existence of a public danger threatening the life of the nation: “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”.³ The Court does not exercise this competence *in abstracto*, but only in the event of a concrete situation which has been brought to its attention following an individual or state application.
5. In addition, if it is not for the Court to say what measures are best adapted to situations of emergency because this comes under the direct responsibility of governments, the Court has nevertheless confirmed that “Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on 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. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”.⁴
6. Rather than extending the list of rights in relation to which no derogations can be made under Article 15 of the Convention, the CDDH wants to underline the crucial role of the Court in assessing the national margin of appreciation.

3. *Lawless v. Ireland*, 1 July 1961, series A No. 3, para. 22.

4. *Brannigan and McBride v. the United Kingdom*, 26 May 1993, para. 43, series A No. 258; *A. and others v. the United Kingdom*, 19 February 2009, application No. 3455/05, para. 173.

Appendix 2 to the reply

Communication by the Chair of the Committee of Legal Advisers on Public International Law (CAHDI)

In this recommendation, the Assembly invites the Committee of Ministers to look into ways to elevate the level of scrutiny applied to declarations of a state of emergency, in particular by considering the opportunity of granting the Secretary General, upon receipt of a declaration of a derogation under Article 15 of the European Convention on Human Rights (ETS No. 5), 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 of the Council of Europe.

Besides, the Assembly proposes considering of a possibility of 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.

The CAHDI received the text of this recommendation and the invitation for presenting its comments after its September meeting (Strasbourg, 10-11 September 2009). Since the next meeting of CAHDI is planned for 18 and 19 March 2010 the Committee will not be able to consider this request of comments before the deadline, namely 15 December 2009.

However, the President of CAHDI considers it important to underline that the questions raised by the [Recommendation 1865 \(2009\)](#) would in any case require an amendment of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).