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State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights

Reply to Recommendation¹: Recommendation 2125 (2018)
Committee of Ministers

1. The Committee of Ministers has carefully examined Parliamentary Assembly [Recommendation 2125 \(2018\)](#) on “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”. It has communicated the Recommendation to the Steering Committee for Human Rights (CDDH) and to the Committee of Legal Advisers on Public International Law (CAHDI) and taken account of their comments in the present reply.

2. The question of a State exercising the right to derogate from its obligations under the Convention and the relevant Protocols is undoubtedly a crucial one. The possibility for States to do so, in the circumstances, to the extent and in the manner stipulated in Article 15, is an important feature of the system, permitting the continued application of the Convention and its supervisory machinery even in the most critical times. It can be said that, in general, States have made sparing use of this facility. As indicated in the relevant factsheet prepared by the Registry of the European Court of Human Rights², during the lifetime of the Convention eight States have derogated from some of their obligations under this instrument.

3. The Convention does not leave States a free hand in the matter. On the contrary, the right to derogate is clearly circumscribed by the text of Article 15. Furthermore, and crucially, both the scope and the form of a State's derogation are subject to the scrutiny of the European Court of Human Rights. That scrutiny has been detailed and robust, and has given rise to an elaborate jurisprudential framework relating to the issue, which is described in the recent case-law guide published under the authority of Court's Jurisconsult³. Bearing in mind specifically paragraph 19.6 of the Parliamentary Assembly's [Resolution 2209 \(2018\)](#) on the same subject as its [Recommendation 2125 \(2018\)](#), the Committee notes the importance of ensuring the continued functioning of democratic institutions and processes in the member States in times of emergency, as has also been reflected in recent judgments of the Court. These emphasise that even in such circumstances, 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 society⁴. What these recent judgments also illustrate is the ability of the Court to deal expeditiously with cases involving emergency situations and derogations under Article 15. Granted priority by the Court on account of the deprivation of the applicants' liberty, the applications were decided in little over a year. In this way, the Court's assessment regarding the derogation was made at a relatively early stage.

1. Adopted at the 1330th meeting of the Ministers' Deputies (28 November 2018).

2. *Derogation in time of emergency*, August 2018.

3. *Guide on Article 15 of the European Convention on Human Rights*, August 2018.

4. See cases *Mehmet Hasan Altan v. Turkey*, no. 13237/17 (paragraph 210) and *Şahin Alpay v. Turkey*, no. 16538/17 (paragraph 180), both judgments of 20 March 2018.



4. In addition to scrutiny at the international level, the importance of judicial safeguards and remedies at the domestic level is to be underlined. As can be seen in the Court's case-law, the assessment made by the highest domestic courts of the validity of measures applied pursuant to a derogation under the Convention, or an analogous procedure under domestic law, is of particular significance. The concepts of subsidiarity and shared responsibility in safeguarding human rights, most recently reaffirmed in the Copenhagen Declaration, remain relevant in the context of Article 15 as well. Of potential relevance too is Protocol No. 16, in force since 1 August 2018. For the States parties to that instrument, the possibility now exists for their highest courts to seek an advisory opinion from the European Court on questions of principle that concern the interpretation or application of the rights and freedoms protected by the Convention and its relevant protocols.

5. The Committee recalls that it has addressed, in the context of the fight against terrorism, the issue of derogating from Convention obligations, reminding States that circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist (see the Guidelines on human rights and the fight against terrorism, guideline no. XV). It also recalls its reply to Parliamentary Assembly [Recommendation 1865 \(2009\)](#) on the protection of human rights in emergency situations ([CM/AS\(2010\)Rec1865-final](#)). It reiterates the statement therein that, given the impact on individual rights and freedoms, the declaration of a state of emergency must be used with utmost care and as a means of last resort only, and never be a pretext to restrict the exercise of fundamental human rights unduly.

6. In light of the considerations set out above, and sharing the views that were conveyed to it by the CDDH and the CAHDI, the Committee does not see at the present time any clear need to envisage a recommendation to the member States on the matter.