

Strasbourg, 01/02/10

CAHDI (2010) 2

**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW  
(CAHDI)**

**39<sup>th</sup> meeting  
Strasbourg, 18-19 March 2010**

**Communication by the Chair of the CAHDI  
to the Secretariat of the Committee of Ministers of the Council of Europe related to  
Recommendation 1865 (2009) of the Parliamentary Assembly of the Council of Europe  
entitled “The protection of human rights in emergency situations”**

## Background

Recommendation 1865 (2009) of the Parliamentary Assembly of the Council of Europe on “The protection of human rights in emergency situations”<sup>1</sup> has been transmitted by the Ministers’ Deputies to the CAHDI for information and possible comments. Nonetheless, this request has reached the CAHDI’s Secretariat only after the 38<sup>th</sup> meeting of the Committee and the answer should have been formulated before the date of 15 December 2009.

The Chair of the CAHDI, in consultation with the Vice-Chair, has then decided to transmit to the Ministers’ Deputies the following communication :

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### **“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 (European Treaty Series, 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 18-19 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).”

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<sup>1</sup> See Appendix I to the present report.

## APPENDIX I

### Recommendation 1865 (2009)

#### Protection of human rights in emergency situations

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1. Referring to its Resolution 1659 (2009) on the protection of human rights in emergency situations<sup>2</sup>, the Parliamentary Assembly is convinced that the Council of Europe must elevate the level of scrutiny applied to declarations of a state of emergency, 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 states of emergency.

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 (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;

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.

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*Assembly debate* on 27 April 2009 (11th Sitting) (see Doc. 11858, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Haibach). *Text adopted by the Assembly* on 27 April 2009 (11th Sitting).

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<sup>2</sup> See Appendix II to the present document.

## APPENDIX II

### Resolution 1659 (2009)

#### Protection of human rights in emergency situations

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1. The Parliamentary Assembly is concerned by recent recourse to declarations of a state of emergency in several member states, in particular 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 "in time of war or other public emergency threatening the life of the nation" (Article 15 of the European Convention on Human Rights (ETS No. 5), 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 linked specifically to Article 15 of the European Convention on Human Rights, the declaration of a state of emergency can be a legitimate legal method to respond quickly to such threats. However, 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 this 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 non-derogable rights, in particular the rights to life, freedom from torture and inhuman or degrading treatment and to the principle of "no punishment without law", as well as to the use of potentially lethal force only as a last resort when all other means fail. Security forces should have at their disposal the appropriate panoply of means of crowd control that are non-violent and less likely to be lethal and should remain subject to stringent administrative and judicial supervision (see, in this connection, the United Nations 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 member 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. Taking into account the Guidelines on Freedom of Peaceful Assembly (2007) of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), restrictions on the time, place or manner of assembly during an emergency are by far preferable to an outright ban.

10. As concerns freedom of expression, the Assembly recalls the Guidelines of the Committee of Ministers of the Council of Europe 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 circumstances strictly defined by law; 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.

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*Assembly debate* on 27 April 2009 (11th Sitting) (see Doc. 11858, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Haibach). *Text adopted by the Assembly* on 27 April 2009 (11th Sitting). See also Recommendation 1865 (2009).