

**DRAFT OPINION OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON RECOMMENDATION 2180 (2020) OF THE PARLIAMENTARY ASSEMBLY ON “THE IMPACT OF THE COVID-19 PANDEMIC ON HUMAN RIGHTS AND THE RULE OF LAW”**

1. On 12 November 2020, the Ministers’ Deputies at their 1388<sup>th</sup> meeting agreed to communicate [Recommendation 2180 \(2020\)](#) of the Parliamentary Assembly of the Council of Europe (PACE) on “*The impact of the Covid-19 pandemic on human rights and the rule of law*” to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 15 January 2021. The Ministers’ Deputies agreed also to communicate it to the Steering Committee for Human Rights (CDDH), to the Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) and to the European Committee of Social Rights (ECSR).
2. The CAHDI examined the above-mentioned Recommendation and adopted the following comments by means of written procedure.
3. In Recommendation 2180 (2020), the Assembly underlined the need for guidance and harmonisation with regard to derogations from the European Convention on Human Rights (ECHR) and recommended to the Committee of Ministers to:
  - a. reconsider the recommendation that it examine State practice in relation to derogations from the Convention, in the light of the requirements of Article 15 and the case law of the European Court of Human Rights, the requirements of international law and the Assembly’s findings and recommendations in Resolutions 2338 (2020) and 2209 (2018), with a view to identifying legal standards and good practice and, on that basis, adopting a recommendation to member States on the matter.
  - b. give terms of reference to the appropriate inter-governmental committee or committees to review national experience of responding to the Covid-19 pandemic, with a view to pooling knowledge and experience and identifying good practice on how to ensure an effective response to public health emergencies that respects human rights and the rule of law. The results of this review could form the basis for future Committee of Ministers’ recommendations or guidelines.
4. From the outset, the CAHDI refers to its [Opinion on Recommendation 2125 \(2018\)](#) of the PACE – “State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights” in 2018. Although this CAHDI Opinion was drafted in general terms, and therefore, not in relation to the Covid-19 pandemic, it is still valid and relevant today.
5. The CAHDI also recalls the factsheet “[Derogation in time of emergency](#)” and the “[Guide on Article 15 of the Convention – Derogation in time of emergency](#)” of the European Court of Human Rights that both provide important guidance, including on the relevant case-law on Article 15 of the ECHR.

6. The CAHDI notes that, as mentioned in the PACE Recommendation 2180 (2020), 10 States derogated from the Convention in the context of the Covid-19 health crisis. The CAHDI further notes that only 2 States currently maintain the mentioned derogations. In this respect, the CAHDI refers in particular to paragraph 3 of its Opinion on Recommendation 2125 (2018) in which it underlined the following: “Article 15 of the ECHR allows States Parties to derogate, in exceptional circumstances, and in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the ECHR and only for such time as is strictly required by the exigencies of the situation.”

7. As for “the need for guidance and harmonisation” of practice of member States and the recommendation in paragraph 3(a) above, the CAHDI refers to its Opinion of 2018. In this Opinion, the CAHDI replied to similar proposals of PACE (to identify legal standards and good practice and to adopt “a recommendation to member States on the matter”) that - taking into account “the described competences of the European Court of Human Rights on this matter” – such steps “would not be necessary”. For the CAHDI, the different approaches of member States to the Covid-19 pandemic do not constitute a reason to revise this conclusion. Some of these differences merely reflect the diversity of regulations of emergency powers in national constitutions.

8. As to the recommendation in paragraph 3(b) above, the CAHDI notes that during its 59<sup>th</sup> meeting (Prague, 24-25 September 2020) it held an exchange of views on derogations under Article 15 of the ECHR in the context of the Covid-19 pandemic reflecting the debate that the issue of derogation had caused in many member States. In this respect, the CAHDI notes that even if most States consider that the ECHR rights, and in particular the limitations grounds included in most of them, are sufficiently flexible to accommodate emergency measures in response to the Covid-19 crisis, others have resorted to use formal derogations, assessing their measures required to manage the pandemic as too wide to fall within those grounds for limitation. The CAHDI also underlines that decisions taken at national level can be and are, in fact, challenged before national courts. The CAHDI further underlines that derogating from the Convention does not mean violating it, but following it, as these derogations are provided for by the text of the Convention itself and their use remains subject to supervision by the European Court of Human Rights. The possibility of States to derogate is an important feature of the Convention system, permitting its continued application even in the most critical times.

9. The CAHDI will pursue to examine the issue within the framework of its mandate.