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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

DRAFTING GROUP ON HUMAN RIGHTS IN SITUATIONS OF CRISIS (CDDH-SCR)

Compilation of comments received on the Draft Recommendation of the Committee of Ministers on the effective protection of human rights in situations of crisis

Compilation des commentaires reçus sur le Projet de Recommandation du Comité des Ministres sur la protection efficace des droits humains en situation de crise

TABLE OF CONTENTS / TABLE DES MATIÈRES

FINLAND / FINLANDE	3
GREECE / GRECE	3
POLAND / POLOGNE	4
UNITED KINGDOM / ROYAUME-UNI	
SWITZERLAND / SUISSE	6
ENNHRI	6
VENICE COMMISSION / COMMISSION DE VENISE	8
BUREAU OF THE GENDER EQUALITY COMMISSION / BUREAU DE LA COMMISSION POUR L'ÉGALITÉ DE GENRE	

FINLAND / FINLANDE

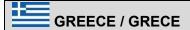
General comments:

The recommendation is strongly based on the fact that crisis legislation must be prepared in advance. This is a good and viable starting point, but I think the Recommendation should also take into account the possibility of enacting new legislation during the crisis. Such legislation safeguards better the principles of parliamentarism than a model in which the limits of legislation are extended e.g. by interpretation. In Finland, for example, section 23 of the Constitution enables provisional exceptions to fundamental rights even during a crisis.

In other words, the principle of legality mentioned in section I.1, and explained in paragraph 6 of the Explanatory Memorandum, contains a problematic assumption of the crisis legislation provided for only in advance.

Principles III.2 and VII.2 deal with the inclusion of minorities and civil society in decision-making. As far as the legislation, that is prepared quickly in a crisis situation is concerned, it is important to consult a wide range of stakeholders. I think that the principles or at least the Explanatory Memorandum should highlight the principle of proportionality, i.e. in this case the fact that participation/consultation should take place in a manner that is appropriate to the situation and its urgency. The situation is indeed different if we talk about legislative drafting in a peaceful situation in advance.

To sum up, even in an acute crisis situation, there might also be a need for regulation and conventional consultation practices might have to be made more flexible. As a counterweight, however, one can also emphasize the transparency of the preparation and the state's obligation to take care of crisis communication in an enhanced manner.



Comments:

Page 3 - Section II. 1

We are wondering whether the principles mentioned in paras. I.2 and II.1 should be the same. In any case, the principle of legality could be mentioned here.

Page 3 - Section III. 2

The term "minority groups" does not seem to be widely used in CM Recommendations and is rather vague. Moreover, the term "groups in a vulnerable situation" covers a wide range of situations. We would suggest therefore deletion of the words "minority groups".

Page 4 - Section IX. 2

We would prefer a more flexible wording. See also para. 49 of the explanatory memorandum.

Change:

2. Member States should, where necessary, clarify and/ or codify their national procedure in relation to derogation from the European Convention on Human Rights.



POLAND / POLOGNE

General comments:

1. The concepts of crisis and emergency could be clarified and unified further. It would be advisable to strive for a consistent use of concepts and definitions throughout the document so as not to compare such diametrically opposed situations as the COVID-19 pandemic, on the one hand, and the war in Ukraine, on the other.

Due to the lack of gradation of crises, the very concept of crisis may cover quite different, sometimes far opposite situations, for which it is very difficult to find a single standard, since the crisis itself is by definition a non-standard situation.

Gradation of crises is worth to considering when proposing concrete recommendations. For instance, during a pandemic, freedom of speech can and should be preserved, but in wartime the state should, for example, have the tools necessary to combat disinformation, which has nowadays grown into an important means of warfare. Moreover, it should be borne in mind that in wartime various sources of information will be subject to natural limitations, if only for technical reasons.

- 2. Poland suggest adding to the text of the Recommendation the concept of human dignity which is the source of human rights and freedoms and a key value of international human rights protection.
- 3. It would also be useful to bear in mind that in the document we are actually dealing with human rights violations in various crises rather than with the crises themselves, the latter being more of a warning signal to policymakers indicating that the possible failure to take certain actions could lead to a crisis situation turning into a crisis. It could be made more evident in the document.
- 4. The document could also take into account the issues related to freedom of speech and the role of the media which today are not only a tool for the transmission of information, but also for the creation of narratives some of which can be particularly dangerous in the event of a crisis (vide anti-vaccine ideologies, the war in Ukraine and the so-called hybrid actions with regard to the Russian minority, freedom of speech and the role of the media; the problems of fake news and disinformation that could make it more difficult to effectively deal with the crises, etc.).
- 5. For an even better (more complete) protection of human rights, it appears necessary to clearly relate the formulated recommendations to the crisis, so as not to create a pretext for actions restricting human rights in those situations that do not fulfil the characteristics of a proper crisis, but may be used as a pretext for interfering with human rights and for unjustified, unnecessary and disproportionate actions.

We invoke in this regard the view expressed by the Constitutional Court (Polish) in the case of K 50/07, where it was stated that the Polish legal order knows only two extreme situations, i.e. the situation of normal functioning of the state, when ordinary constitutional measures are sufficient, and the situation of special threats (crises), when such measures prove insufficient

and when it is necessary to introduce one of the states of emergency, which by definition always imply a serious crisis.

6. We also would like to emphasize the need for heightened human rights due diligence in conflict-affected areas by companies operating in these areas. It also seems worthwhile to refer to the 2016 Council Recommendation on Business and Human Rights (Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business) in the preamble of the document.

Changes:

Page 2

Recalling member States' obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights (ETS No. 5, the Convention) and its protocols, as applicable, and where relevant their obligations arising from the European Social Charter (ETS No. 35, the Charter) or the European Social Charter (revised) (ETS No. 163, the revised Charter), and other European and international human rights instruments and international law, including international humanitarian law and international human rights law;

Page 2

Expressing its concern at the impact on human rights of recent crises that have affected or continue to affect member States, such as the Covid-19 pandemic, and Russia's war of aggression against Ukraine and deteriorating humanitarian situation in the Gaza Strip and Nagorno-Karabakh region;

Page 3 – Section III. 2

2. Member States should ensure the timely, meaningful and inclusive consultation and participation of representatives of minority groups and groups in a vulnerable situation (in particular children, persons with disabilities and older persons) in the design, implementation and evaluation of emergency measures.



Comments:

Page 3 - Section II. 2

On II.2 in the recommendation document, we wondered if there was any room for softening the statement that member states "should conduct human rights impact assessments" when considering emergency legislation? For example, to "should endeavour to". An alternative would be to add something like "unless urgency prevents this" – this would reflect the fact that in a truly urgent crisis requiring emergency legislation, there may not be time to conduct a human rights IA before introducing this.

Page 3 - Section III. 2

On III.2 in the recommendation document, it is stated that Member States "should ensure the timely, meaningful and inclusive consultation and participation of representatives of minority groups and groups in a vulnerable situation in the design, implementation and evaluation of emergency measures". We think this is a really sensible objective but again, wonder if there is room for some slight nuance to reflect that there may not be time to do this in seriously urgent emergency scenarios. Again we would suggest the inclusion of the words "should endeavour to" or "unless urgency prevents this"?

General comment:

To summarise the above, the UK certainly agrees these elements in the recommendation are important and as far as possible should be considered and built into our domestic planning, but we are also conscious that sometimes urgent action can be required to minimise impacts and suffering on the population (perhaps meaning that in some instances there is not time to fully conduct some of the assessments /engagement mentioned above).



SWITZERLAND / SUISSE

Comments:

Page 3 - Section I. 2

We suggest adding the principle of proportionality.

Page 3 - Section I. 3

Cette recommandation paraît trop étroite par rapport au contenu du rapport explicatif et en contradiction avec l'article 4 alinéa 3 de la Charte européenne de l'autonomie locale. Nous suggérons de la retravailler afin de mieux rendre compte des éléments mentionnés dans le rapport explicatif.

Page 3 – Section II. 1

Les principes de la légalité et de la prédictibilité paraissent également pertinents dans ce contexte.

ENNHRI

Change:

Page 3 – Section I. 2

2. Member States should ensure that the exercise of emergency powers is governed by the principles of legality, necessity, proportionality, temporariness, and predictability.

Comment:

The exercise of emergency powers should also be governed by the principle of proportionality sensu stricto and it should be underlined explicitly in this paragraph.

Page 3 - Section II. 1

Change:

1. Member States should ensure that emergency measures are consistent with human rights obligations and that any related restrictions respect the principles of necessity, proportionality, and temporariness. Member States should ensure that the use of emergency measures complies with the principle of the rule of law.

Comment:

More emphasis should be put on the rule of law compliance, as there have been breaches of the rule of law regarding the use of emergency measures in the times of covid/pandemic.

Page 4 - Section VI. 1 & 2

Change:

- 1. Member States should enable independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, to continue to carry out their mandate and should refrain from any action that would hinder their activities.
- 2. Member States should ensure the timely, meaningful and inclusive consultation and participation of independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, in crisis-related decision-making processes.

Page 4 - Section VIII. 2

Change:

2. Member States should exercise great caution when considering activating and applying measures which may affect media freedom.

Comment:

MS should exercise great caution not only when measures applied affect media freedom (for sure), but also when they may pose a threat to media freedom, so when such a possibility occurs.

Page 4 – Section IX. 2

Change:

2. Member States should clarify and/ or codify their national procedure in relation to to ensure compliance with derogation from the European Convention on Human Rights.

VENICE COMMISSION / COMMISSION DE VENISE

General comment on the title:

The drafts (both draft Rec and draft Explanatory Memorandum) use the expression "situations of crisis" but later largely, if not exclusively, both also discuss "emergency powers" and "emergency measures". Explanatory Memorandum also seems to distinguish between "states of emergency or similar exceptional legal regimes" (§). Report by the Venice Commission on 'Respect for democracy, human rights and the rule of law during states of emergency: reflection" uses the notion of "state of emergency" only (for definition, see § 5 of the report). Should the Recommendation/Explanatory Memorandum also use the notion of "state of emergency" instead of the notion "situations of crisis"? Or at least define in more detail what "situations of crisis" are all about and to what extent, if any, they differ from "state of emergency"?

General comments on the Appendix:

Page 3 - Section I

This section I (1-3) could bring out more clearly that Member States should primarily respond to a situation of crisis by using ordinary measures/powers, and only resort to emergency powers when ordinary powers are clearly insufficient. This idea is thrown into relief in some paragraphs of Explanatory memorandum (see e.g. § 10), but it could be spelled out more clearly in this Appendix, too.

Page 3 – Section I.2

Section I.2 largely, but not exclusively, appears to reiterate those "principles governing the state of emergency" that Venice Commission has identified in its report "CDL-AD(2020)014, Report on 'Respect for democracy, human rights and the rule of law during states of emergency: reflections', European Commission for Democracy through Law (Venice Commission), 19 June 2020, see § 6-16). However, this section is silent on such principles as "Overarching principle of the Rule of law" (see VC's report, § 8-9), "Effective (parliamentary and judicial) scrutiny" (§ 14) and "Loyal co-operation among state institutions" (§ 16). Moreover, VC has emphasised "Predictability of emergency legislation" (§ 15). Perhaps, the "Framework of emergency powers" in Appendix to recommendation - or at least Explanatory Memorandum – could be more fully in line with those "principles governing the state of emergency" that Venice Commission has identified in its report?

Page 3 - Section II

"C. Emergency measures", § 10-14 of Explanatory Memorandum, could distinguish more clearly between various forms of human rights restrictions (limitations and exceptions which can be used both in ordinary times and during times of emergency, on the one hand, and derogations which can only be used in times of emergencies, on the other hand (See also Report by the VC, § 38-45). Furthermore, the drafts could spell out more clearly that derogation is the most severe form of human rights restrictions and, accordingly, it is only to be used during times of emergency to the extent that limitations of human rights prove to be insufficient to address emergencies. Hence, derogation from human rights does not supersede or suspend other human rights restrictions in times of crisis, and it can only be applied if those other human rights restrictions fail to address sufficiently emergencies. Moreover, the power of Member States to derogate from some, but certainly not all, human

rights under the ECHR (see ECHR, Art 15) does not entail their power to suspend completely the application of those (derogable) human rights. Derogations should, therefore, be seen as a particular and most severe form of restriction on human rights rather than as their (temporary) circumvention. Finally, the Appendix – or at least Explanatory Memorandum – should spell out clearly that there are human rights that that are non-derogable even in times of emergency (such as the prohibition against torture or other inhuman treatment, see in more detail derogation clauses in the ECHR (Art 15) and the ICCPR (Art. 4). According to VC, the common core of non-derogable right comprises the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws. 20 Fundamental judicial guarantees are also increasingly seen as non-derogable. 21 Derogations also entail procedural obligations (notification to the depository of the relevant human rights treaties) that should make external oversight easier. (See VC Report, § 41).

Page 4 – Sections IV-V

Section E (§ 27-31) on the role of Parliaments and section F (§ 29-31) on the role of the judicial system could emphasize more clearly the importance of effective parliamentary and judicial scrutiny of both the declaration and possible prolongation of the state of emergency, on the one hand, and the activation and application of emergency powers, including those entailing restrictions of human rights, on the other hand. Moreover, these sections should clearly spell out that Parliaments and courts should never completely be prevented from exercising their constitutional functions during the state of emergency. Parliament should by all means continue to meet and function during the emergency, if necessary under previously adopted special rules, which could provide, for instance, that only a small number of MPs should be physically present (selected from every party, voting on behalf of the entire parliamentary group); voting over the internet could also be provided. Similarly, the judicial system must continue to ensure the right to fair trial and judicial review over emergency measures. The functioning of the judiciary should not be restricted except when absolutely necessary or when the functioning is factually impossible (see also VC Report, § 85-89).

Page 4 – Section IX

See my comment on draft Exp Memo in this context.

BUREAU OF THE GENDER EQUALITY COMMISSION / BUREAU DE LA COMMISSION POUR L'ÉGALITÉ DE GENRE

Changes:

Page 2

Recalling the Council of Europe's commitment to the promotion of gender equality and women's rights and acknowledging the disproportionate impact of crisis on women and girls in terms of exacerbating existing gender inequalities and creating new ones that leave women and girls at increased risk of violence, discrimination and social exclusion, with groups of women and girls in vulnerable situations particularly affected;

Expressing its concern at the impact on human rights of recent crises that have affected or continue to affect member States, such as the Covid-19 pandemic and Russia's war of aggression against Ukraine and the ensuing economic downturn;

Recalling the Athens Declaration by the Chairmanship Presidency of the Council of Europe's Committee of Ministers on 4 November 2020 entitled "Effectively responding to a public health crisis in full respect for human rights, democracy and the rule of law", which underlined the essential importance of human rights in times of crisis;

Pages 3-4 - Section III. 1

- 1. Member States should apply the principles of equality, including gender equality, and non-discrimination throughout the response to a crisis.
- 2. Member States should ensure the timely, meaningful and inclusive consultation and participation of under-represented parts of the population, including women, representatives of minority groups and groups in a vulnerable situation in the design, implementation and evaluation of emergency measures.
- 3. Member States should take appropriate measures to prevent and combat violence against women and girls, hate crime and hate speech in situations of crisis.