

## OPINION OF THE CAHDI

### **on Recommendation 2125 (2018) of the Parliamentary Assembly of the Council of Europe – “State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights”**

1. On 15 May 2018, the Ministers' Deputies at their 1316<sup>th</sup> meeting agreed to communicate [Recommendation 2125 \(2018\)](#) of the Parliamentary Assembly of the Council of Europe (PACE) on “*State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights*” to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by the end of September 2018<sup>1</sup>. PACE [Resolution 2209 \(2018\)](#), on the same topic, is associated to it.
2. The CAHDI examined the above-mentioned Recommendation at its 56<sup>th</sup> meeting (Helsinki, Finland, 20-21 September 2018) and made the following comments concerning those aspects of Recommendation 2125 (2018) of particular relevance to the Terms of Reference of the CAHDI.
3. From the outset, the CAHDI agrees with the PACE on the need to respect the principle of proportionality when adopting and implementing national emergency measures under Article 15 of the European Convention on Human Rights (ECHR) as well as on the need to ensure that they do not conflict with other obligations under international law. Indeed Article 15 of the ECHR states that “*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*”. In this respect, the CAHDI underlines that 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. Some rights, however, do not allow any derogation by Article 15: the right to life, except in the context of lawful acts of war (Article 2 ECHR), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR), the prohibition of slavery and servitude (Article 4 paragraph 1 ECHR), and the rule of “no punishment without law” (Article 7 ECHR).<sup>2</sup> Similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death

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<sup>1</sup> The Ministers' Deputies specifically indicated in their decision that they “agreed to communicate it [Recommendation 2125 (2018)] to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 29 June 2018”. However, taking into account that the 56<sup>th</sup> meeting of the CAHDI would take place on 20 and 21 September, it was agreed to send the CAHDI opinion to the Secretariat of the Committee of Ministers on 30 September 2018. This PACE Recommendation 2125 was also communicated to the Steering Committee for Human Rights (CDDH) for information and possible comments.

<sup>2</sup> Paragraph 2 of Article 15 ECHR: “*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision*”.

penalty in peacetime) to the ECHR, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the ECHR and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the ECHR.

4. The CAHDI furthermore points out that if a State Party wishes to use its right of derogation in time of emergency under Article 15 paragraph 1 ECHR, the State in question shall “*keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor*”<sup>3</sup>. According to the case law of the European Court of Human Rights (ECtHR), Article 15 ECHR requires some formal and public act of derogation<sup>4</sup>. The practice of States Parties to provide translations and/or summaries of the relevant domestic legislation is welcomed. Under Article 15 paragraph 3 any Contracting Party “*shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*”
5. The CAHDI furthermore underlines that, as mentioned in the PACE Report, the ECHR continues to apply -with the indicated restrictions due to derogations in time of emergency- at national level in the country concerned. Therefore, the individuals under the jurisdiction of any such country continue to have the right to apply to the European Court of Human Rights in conformity with Article 34 of the ECHR.
6. The CAHDI also recalls that the ECtHR is competent to determine whether the measures taken by a State Party under Article 15 are strictly required by the exigencies of the situation and consistent with other obligations under international law. The European Court proceeds to such evaluation when examining the applicant’s complaints on the merits in a case submitted to it<sup>5</sup>.
7. The CAHDI finally underlines that the discretionary powers granted to the Secretary General of the Council of Europe by Article 52 of the ECHR to launch inquiries on “the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention” were in principle not conceived in the ECHR system to address the exceptional circumstances of a time of emergency. In this respect, it should be underlined that on the few occasions when the successive Secretaries Generals have used such powers, it was never in connection with measures adopted under Article 15 of the ECHR.

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<sup>3</sup> See ECtHR, *Hassan v. the United Kingdom* application no. 29750/09, Grand Chamber judgment of 16 September 2014. The Grand Chamber held at paragraph 103 that “*the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and provisions of international humanitarian law when interpreting and applying Article 5 in this case*”.

<sup>4</sup> See the Commission’s conclusion in the case of [Cyprus v. Turkey](#), applications nos. 6780/74 and 6950/75 (Commission report of 10 July 1976, § 527): “*Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Article 15 cannot apply.*” See also the Commission report of 4 October 1983 in the case [Cyprus v. Turkey](#), application no. 8007/77, paragraph 67.

<sup>5</sup> See ECtHR, [Sahin Alpay v. Turkey, application no.16538/17](#), final Chamber judgment of 20 March 2018, paragraph 78: “*. As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant’s complaints on the merits, and will do so below*”. See also ECtHR [Mehmet Hasan Altan v. Turkey, application no.13237/17](#), Chamber judgement of 20 March 2018, paragraph 94.

8. Finally, the CAHDI recalls that the Press Unit of the European Court of Human Rights has prepared a ["Factsheet – Derogation in time of emergency"](#) which is kept up-to-date and which contains a lot of information on this matter, including all relevant related case law.
9. Taking into account the above-mentioned considerations and the described competences of the European Court of Human Rights on this matter, the CAHDI consequently considers that the proposal of the PACE related to the identification of legal standards and good practice and the adoption of "a recommendation to member States on the matter" would not be necessary