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

### **Report<sup>1</sup>**

Committee on Legal Affairs and Human Rights

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### *Summary*

It is the State's responsibility to take measures to protect society in time of war or other public emergency. In such circumstances, Article 15 of the European Convention on Human Rights allows States Parties to derogate from certain of their obligations, subject to strict conditions, including the overarching principle of proportionality and the stringent test of what is "strictly required by the exigencies of the situation".

Three member States have or, until very recently, had derogations in force: Ukraine, France and Turkey. The Committee on Legal Affairs and Human Rights is concerned about certain provisions of the Ukrainian derogation and their implementation; it has concerns over various aspects of the recent state of emergency in France, including its questionably long duration, and welcomes its termination; and it finds that Turkey's response to the situation giving rise to the state of emergency is disproportionate on numerous grounds. It therefore proposes recommendations to all three States, intended to address these issues.

The committee also proposes recommendations to all member States on how to proceed with respect to possible future derogations; and to the Secretary General and the Committee of Ministers of the Council of Europe, intended to reinforce the Organisation's response to any future derogations.

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1. Reference to committee: [Doc. 14183](#), Reference 4263 of 23 January 2017.



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## A. Draft resolution<sup>2</sup>

1. 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, as the Parliamentary Assembly has previously noted in [Resolution 1659 \(2009\)](#) on the protection of human rights in emergency situations. Such situations may even require restrictive measures that exceed what is normally permitted under the European Convention on Human Rights (ETS No. 5, "the Convention"). Without appropriate guarantees, such measures create serious risks for democracy, human rights and the rule of law.
2. The Convention is adaptable to any and all circumstances, continuing to regulate the State's actions even in the event of national crisis. Article 15 of the Convention allows States to derogate from certain of their obligations in time of war or other public emergency threatening the life of the nation. In no circumstances, however, does it allow national authorities to act without constraint.
3. There can be no derogation at all from certain rights, as specified in Article 15; nor may derogations from other rights violate international humanitarian law or peremptory norms of international law, or procedural guarantees in such a way as to circumvent the protection of non-derogable rights. Fundamental safeguards of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency. Due democratic process, including separation of powers, as well as political pluralism and the independence of civil society and the media must also continue to be respected and protected.
4. Beyond these constraints, the overarching principle of proportionality limits the action that may be taken, via the stringent test of what is "strictly required by the exigencies of the situation". Normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order must be plainly inadequate before derogatory, emergency measures are permissible. A state of emergency that requires derogation from the Convention must be limited in duration, circumstance and scope. Emergency powers may be exercised only for the purposes for which they were granted. The duration of emergency measures and their effects may not exceed that of the state of emergency.
5. The State must, without any unavoidable delay, inform the Secretary General of the Council of Europe of the measures taken and the reasons for them, and of when such measures have ceased to operate and the Convention is again being fully applied.
6. Three States have or, until very recently, had derogations in force: in chronological order, Ukraine, France and Turkey.
7. Ukraine notified the Secretary General of its derogation on 9 June 2015. It stated that the "public emergency threatening the life of the nation" consisted of the "ongoing armed aggression of the Russian Federation against Ukraine, together with war crimes and crimes against humanity committed both by regular Armed Forces of the Russian Federation and by the illegal armed groups guided, controlled and financed by the Russian Federation". Ukraine's derogation concerns four specific laws adopted on 12 August 2014. It extends only to certain specified localities in the Donetsk and Luhansk oblasts. The notification specifies the Convention rights from which Ukraine derogates and indicates the nature of the circumstances in which the derogation may be withdrawn.
8. The Assembly reiterates its condemnation of the Russian aggression in Ukraine, in violation of international law and the principles upheld by the Council of Europe, and recalls the credible reports of violations of international human rights and humanitarian law by all sides to the conflict.
9. The Assembly is concerned about the provision in one of the Ukrainian laws permitting preventive detention for up to 30 days. Whilst this provision seems not to have been applied, its potential duration may be disproportionate. The Assembly is also concerned about the manner in which some of the other laws have been applied, in particular administration of and material conditions at the crossing points between government-controlled and non government-controlled territory, and the functioning of courts transferred from non government-controlled territory to government-controlled territory.
10. France notified the Secretary General of its derogation on 24 November 2015. The notification recalls that "on 13 November 2015, large-scale terrorist attacks took place in the Paris region" and asserts that "the terrorist threat in France is of lasting nature"; later notifications prolonging the derogation refer also to "an imminent danger resulting from serious breaches of public order". France's derogation relates to its application of Law No. 55-385 of 3 April 1955 on the state of emergency ("the 1955 Law"), which grants a range of

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2. Draft resolution adopted unanimously by the committee on 22 January 2018.

restrictive powers to the administrative authorities throughout metropolitan France and its overseas territories. The state of emergency has been prolonged on several occasions, sometimes with modifications made to the 1955 Law and its application. The notifications do not specify the Convention rights from which France derogated.

11. The Assembly reiterates its condemnation of these terrorist attacks, which target the very values of democracy and freedom, recalling that since November 2015, France has repeatedly suffered further such atrocities.

12. The Assembly notes with concern the various criticisms made of the state of emergency in France, including its use of subjective and insufficiently precise terms to define the scope of application and its reliance on posterior judicial review by the administrative courts, including on the basis of *notes blanches* provided by the intelligence services, instead of the prior authorisation by the ordinary courts required under criminal law. It is also concerned about the cases of improper behaviour by police during administrative searches and the application of emergency measures to situations not directly related to the grounds for the state of emergency. It notes that these matters have been carefully examined by the competent domestic courts. It welcomes the structured, continuous parliamentary oversight of the state of emergency and the close scrutiny given to it by national human rights structures, civil society and the media, to whose criticisms the government remained attentive.

13. On 30 October 2017, France adopted a new law on “reinforcing domestic security and the fight against terrorism” (“the 2017 Law”), including measures with a similar aim to some of those previously available under the state of emergency, subject to enhanced legal guarantees. This permitted the lifting of the state of emergency and the withdrawal of the derogation. The Assembly, recognising the legal and political complexities involved, welcomes the end of the state of emergency in France, whose duration had become questionably long. It encourages the French authorities to ensure that the 2017 law is applied in full compliance with Council of Europe standards, including those of the Convention.

14. Turkey notified the Secretary General of its derogation on 21 July 2016. The notification refers to the failed coup attempt of 15 July 2016 and its aftermath, which, “together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention”. Turkey’s derogation relates to the successive emergency decree-laws that have been passed under the state of emergency that was declared on 20 July 2016 and prolonged on several occasions since. Turkey has notified the Secretary General of all prolongations of the state of emergency and most, but not all of the decree-laws. It has not explained whether there were particular circumstances to justify the prolongations. The notifications do not specify the Convention rights from which Turkey derogates.

15. The Assembly reiterates its firm condemnation of the criminal attempt to overthrow Turkey’s democratically elected institutions and again fully acknowledges that these events were traumatic for Turkish society. It also reiterates its recognition of the multiple threats and challenges facing Turkey, the existence of a legitimate reason to declare a state of emergency, and Turkey’s right and duty to fight terrorism and address security issues in order to protect its citizens and its democratic institutions.

16. The Assembly recalls the conclusions it reached on the state of emergency in [Resolution 2156 \(2017\)](#) on the functioning of democratic institutions in Turkey. It also recalls the relevant positions taken by the Congress of Local and Regional Authorities of the Council of Europe, the Council of Europe Commissioner for Human Rights, the Conference of International Non-governmental Organisations and the European Commission for Democracy through Law (Venice Commission), among others. On this basis, it considers that Turkey’s response to the unquestionably serious situation described in the derogation is disproportionate on numerous grounds, in particular:

16.1. the powers granted to the government have been used for purposes going beyond what is strictly required by the exigencies of the situation giving rise to the state of emergency;

16.2. the duration of the state of emergency has exceeded what is strictly required;

16.3. emergency powers have been used, without effective parliamentary or judicial oversight, to make permanent changes both to the status and rights of natural and legal persons and to legislation, including in areas of particular political and legal significance;

16.4. the impact of emergency measures on natural and legal persons has been excessive, both in scope and by being indiscriminate as to the degree of alleged culpability and permanent in effect;

16.5. delays in implementing a timely effective remedy have unduly prolonged the impact of emergency measures on persons who may have been wrongly affected.

17. The Assembly also reiterates its concerns about the wider situation in Turkey concerning political pluralism, local democracy, the judiciary, the situation of human rights defenders and civil society and the media, notably in relation to application of anti-terrorism laws. This background heightens the Assembly's concerns in relation to the disproportionality of measures taken under the state of emergency.

18. The Assembly therefore recommends that:

18.1. Ukraine:

18.1.1. reconsider the utility and hence the necessity of maintaining the provision on 30-day preventive detention, which the Constitutional Court should be given the opportunity of examining;

18.1.2. make further efforts to enhance material conditions for people using the crossing points between government-controlled and non government-controlled territories;

18.1.3. make further efforts to ensure the proper functioning of and sufficiency of resources for courts transferred from non government-controlled areas;

18.1.4. ensure that parliamentary scrutiny of the emergency measures is sufficient and effective;

18.2. France:

18.2.1. review the 1955 Law, which remains on the statute books and could be used again in future, in light of recent criticisms and the availability of comparable measures under the 2017 Law, examining in particular concerns relating to definitions used in certain provisions, the effectiveness of judicial oversight, individual remedies for damage or misconduct committed by the authorities when implementing emergency measures and the possibility of using emergency measures for purposes without a direct link to the situation that gave rise to the declaration of a state of emergency;

18.2.2. to this end, conduct a careful review of the implementation in practice of the recent state of emergency, involving representatives of the executive and administrative authorities, the legislature, local authorities, the judiciary and civil society;

18.2.3. ensure that the 2017 Law is applied in full compliance with Council of Europe standards, in particular those of the Convention;

18.3. Turkey:

18.3.1. immediately inform the Secretary General of all outstanding decree-laws introduced under the state of emergency;

18.3.2. proceed without further delay with a critical examination by parliament of all outstanding decree-laws, with a view to rejecting any that are disproportionate, especially those having permanent effect or whose purpose is insufficiently related to the emergency situation;

18.3.3. review as a matter of the utmost urgency all dismissals of public officials based only on indirect or questionable evidence, with a view to the immediate reinstatement of those whose dismissal was not justified to a high standard of proof;

18.3.4. in order to ensure the timely availability of effective domestic remedies, expedite examination by the Inquiry Commission of outstanding applications, establishing clear standards for the examination and treatment of evidence and the legal basis for its decisions, and by the administrative and superior courts of any subsequent appeals; and expedite examination by the administrative courts of appeals by other public officials dismissed under the state of emergency;

18.3.5. refrain from issuing any further decree-laws unless strictly required by the immediate exigencies of the situation as defined in the original notification of derogation;

18.3.6. repeal all provisions of existing decree-laws with permanent effect or whose purpose is not directly related to the emergency situation, and use normal administrative and legislative processes for the reinstatement of any measures that may require it;

18.3.7. bring an end to the state of emergency at the expiration of the current period, withdrawing the derogation to the Convention and thereafter using the normal procedures to adopt any future measures that may be needed to address the security situation in the country, in conformity with Council of Europe standards, including those of the Convention as applied in full.

19. The Assembly recommends that all States Parties to the Convention:

19.1. exercise the utmost caution and restraint when adopting measures that might necessitate derogation from the Convention, and before doing so, explore every possibility for responding to the emergency situation using normal measures;

19.2. liaise with the Secretary General, as repository of the Convention, to ascertain whether derogating is necessary and, if so, strictly delimit the scope of any derogation;

19.3. should derogation be necessary, ensure that the Secretary General is notified immediately and in any case without any unavoidable delay not only of the measures taken and the reasons therefor, as required by the Convention, but also of the Convention rights affected; and explain the justification for any extension of a derogation in time, circumstance or scope in the relevant notification to the Secretary General;

19.4. should a state of emergency be declared, constantly review the necessity of maintaining it and any measures taken under it, with, at the expiration of every period, a presumption against extending the state of emergency or, if it is extended, in favour of repealing it or, if not repealed, further limiting the scope of measures taken under it;

19.5. on the basis of such review, periodically provide information to the Secretary General, including in the context of any inquiry under Article 52 of the Convention, on the evolution of the emergency situation and the implementation of the state of emergency, with a view to engaging in dialogue on the compatibility of the state of emergency with Convention standards;

19.6. ensure that the normal checks and balances of a pluralistic democracy governed by the rule of law continue to operate to the maximum extent possible, respecting democratic process and the authority of parliament and local authorities, the independence of the judiciary and national human rights structures and the freedoms of association and expression, especially of civil society and the media.

20. The Assembly recommends that the Secretary General of the Council of Europe:

20.1. as depository of the Convention, provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope;

20.2. open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;

20.3. on the basis of information provided in response to such an inquiry, engage in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the legal competence of the European Court of Human Rights.

**B. Draft recommendation<sup>3</sup>**

1. The Parliamentary Assembly refers to its Resolution ... (2018) "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights".
2. The Assembly recommends that the Committee of Ministers examine State practice in relation to derogations from the European Convention on Human Rights (ETS No. 5), 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 Resolution ... (2018), with a view to identifying legal standards and good practice and, on that basis, adopt a recommendation to member States on the matter.

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3. Draft recommendation adopted unanimously by the committee on 22 January 2018.

## C. Explanatory memorandum by Mr Raphaël Comte, rapporteur

### 1. Introduction

1. The present report stems from a motion for a resolution tabled on 13 October 2016 by former Parliamentary Assembly President Anne Brasseur, which recalled the derogations then in force in France, Turkey and Ukraine and the particular risk of human rights abuses occurring during states of emergency, and called on the Assembly to “study proportionality issues regarding derogations under Article 15 of the Convention” (namely the European Convention on Human Rights (ETS No. 5, “the Convention”). I was appointed rapporteur on 23 January 2017.

2. The aim of the report is to examine how these derogations were justified in the context of the underlying situations in the countries concerned; the notifications given to the Secretary General of the Council of Europe; the constitutional provisions regulating states of emergency; the legal measures introduced under the state of emergency to which the derogation was intended to apply; the legal and political context in which these measures were applied, including the degree of independent oversight and the availability of domestic remedies; and, in the case of France, how the state of emergency was brought to an end and the derogation withdrawn. The report will not consider whether measures taken in individual cases were proportionate. It will, however, make general recommendations both to States and to organs of the Council of Europe, with a view to encouraging good practice and, where necessary, possible reforms in the way that states of emergency and derogations are applied by States and overseen by the Council of Europe.

3. I carried out fact-finding visits to all three countries concerned during the preparation of the report: from 12 to 14 April 2017 in Ukraine; on 24 May 2017 and again on 4 and 6 September in France; and from 31 October to November 2017 in Turkey. I would like to thank all those I met for their time and contributions, and the national delegations of the countries concerned for their assistance in organising these visits.

### 2. The legal framework permitting derogations during states of emergency

4. The drafters of the European Convention on Human Rights were conscious of the fact that there may be situations in which the application of certain rights must be adapted to prevailing circumstances. The most far-reaching such mechanism is the possibility allowed to States Parties to derogate from their obligations under the Convention in time of emergency. Article 15 of the Convention sets out the conditions under which States may avail themselves of this possibility:

- 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;
- 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;
- any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It 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. A derogation does not mean that the situation covered by a state of emergency no longer falls within the jurisdiction of the European Court of Human Rights (“the Court”), nor that the Convention no longer applies to it at national level. Individuals retain the rights to an effective domestic remedy under Article 13 and to apply to the Court under Article 34. The domestic pronouncement of a state of emergency and the notification of derogation to the Secretary General of the Council of Europe may, however, affect the extent of the State’s obligations to respect and protect certain Convention rights.

6. When examining cases involving derogations, the Court will first consider whether the impugned act would violate a Convention right. Should this be the case, it will then consider whether the derogation satisfied the requirements of Article 15.<sup>4</sup> In particular, it will consider whether a “war or other public emergency threatening the life of the nation” exists; the measures taken were “strictly required by the exigencies of the

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4. *A. v. United Kingdom*, Application No. 3455/05, judgment of 19 February 2009, paragraph 161.



situation”; the derogation is not inconsistent with other international legal obligations; it does not concern non-derogable rights; and the notification requirement has been met. If these requirements are satisfied, the derogation will be valid and the State will not have violated its obligations.

7. Although several States Parties have been involved in extra-territorial armed conflicts, none has derogated in respect of them.<sup>5</sup> The Court has thus not had to interpret the meaning of “war” within Article 15, and has not determined, for example, whether such a “war” must “threaten the life of the nation” in the same way that an “other public emergency” must do.

8. The Court has stated that the expression “public emergency threatening the life of the nation” should be given its “natural and customary meaning” in accordance with a four-part test: i) an exceptional situation of crisis or emergency; ii) affecting the whole population (although not necessarily all of the territory<sup>6</sup>) of the State; iii) constituting a threat to the organised life of the community of which the State is composed; iv) for which the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.<sup>7</sup> Although the threat must be imminent, the authorities need not wait, for example, for an actual terrorist attack before derogation can be justified.<sup>8</sup> The emergency situation may be protracted, as in the case of terrorism in Northern Ireland, for which the Court found the United Kingdom’s derogation, lasting many years, to be acceptable. On the other hand, the Court has made clear that derogations are valid only within the territorial area for which they have been specified and only until the emergency to which they relate has ended.<sup>9</sup>

9. The Court has recognised that “[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15.1 leaves those authorities a wide margin of appreciation”.<sup>10</sup> On this basis, the Court has, with one exception, consistently deferred to national authorities’ assessment of whether or not a “public emergency threatening the life of the nation” exists.<sup>11</sup>

10. The Court has shown less deference on the question of necessity, recalling that “the States do not enjoy an unlimited power in this respect. The Court, which ... is responsible for ensuring the observance of the States’ engagements, is empowered to rule on whether the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision”.<sup>12</sup>

11. Some rights cannot be subject to derogation. Article 15.1 contains a list of such rights, in particular Articles 2 (right to life), except in respect of deaths resulting from lawful acts of war, 3 (prohibition of torture or inhuman or degrading treatment or punishment), 4.1 (prohibition of slavery or servitude) and 7 (no punishment without law). Other considerations, notably peremptory norms of international law, also condition the scope of permissible derogations. The Court has found derogating measures that were unjustifiably discriminatory to be disproportionate.<sup>13</sup> The United Nations Human Rights Committee has noted that “the category of peremptory norms [of international law] extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2 [International Covenant on Civil and Political Rights (ICCPR)]. States parties may in no circumstances invoke Article 4 ... as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial, including the presumption of innocence”. Furthermore, “[t]he provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”.<sup>14</sup>

5. *Hassan v. United Kingdom*, Application No. 29750/09, judgment of 16 September 2014 (Grand Chamber), paragraph 101.

6. For example *Aksoy v. Turkey*, Application No. 21987/93, judgment of 18 December 1996, paragraph 70.

7. *Lawless v. Ireland (No. 3)*, Application No. 332/57, judgment of 1 July 1961, paragraph 28; *Denmark, Norway, Sweden and the Netherlands v. Greece (the Greek case)*, Application No. 3321/76 and others, Commission report of 5 November 1969, paragraph 153.

8. *A. v. United Kingdom*, op. cit., paragraphs 176-177.

9. Respectively *Sadak v. Turkey*, Applications Nos. 25142/94 and 27099/95, judgment of 8 April 2004; and *de Becker v. Belgium*, Application No. 214/56, decision of 9 June 1958 (Commission).

10. For example *Ireland v. United Kingdom*, Application No. 5310/71, judgment of 18 January 1978, paragraph 207.

11. The exception concerns the European Commission on Human Rights’ rejection of the claim by the Greek “Colonel’s regime” that a state of emergency existed that justified its having taken certain measures following the 1967 military coup that had brought it to power: see the “Greek case”, Application No. 3321/67 and others, 5 November 1969.

12. For example *Ireland v. United Kingdom*, op. cit., paragraph 207.

13. *A. v. United Kingdom*, paragraphs 186 and 190.

14. See “General Comment No. 29: Article 4 ICCPR: derogations during a State of Emergency”, paragraphs 11 and 15.

Thus, for example, “[t]he procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights..., including [the right to life and the prohibition on torture].”<sup>15</sup> The same approach should be taken in relation to derogations from the Convention, to ensure consistency with other obligations under international law.

12. Article 15.3 of the Convention requires a derogating State to “keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor”. The jurisprudence of the Court and of the former European Commission of Human Rights requires notification “without any unavoidable delay”.<sup>16</sup> Delays of three and four months have been found to be excessive, but 12 days to be acceptable.<sup>17</sup> Whilst it is clear that the Court cannot apply Article 15 in the complete absence of due notification of derogation,<sup>18</sup> the consequences of unduly delayed notification are less clear. In *Greece v. United Kingdom*, having found that a three-month delay in notification did not invalidate the derogation, the Commission stated that it was “not to be understood as having expressed the view that in no circumstances whatsoever may a failure to comply with paragraph 3 of Article 15 attract the sanction of nullity or some other sanction”. In the “Greek case”, the applicant States argued that a four-month delay in notification should “strike with nullity” the derogations; whilst the Commission agreed that the requirements of Article 15.3 had not been met, it did not directly answer the question of whether the derogation should be nullified – although since it proceeded to examine the case under Article 15.1, by implication it could be said not to have accepted the applicants’ arguments.<sup>19</sup>

### 3. The position of the Assembly

13. The Assembly has devoted close attention to the issue of derogations in recent years, most extensively in [Resolution 1659 \(2009\)](#) on protection of human rights in emergency situations. The Assembly recalled that “it is the State’s responsibility to take preventive measures to protect the interests of society ‘in time of war or other emergency threatening the life of the nation’ ... In very specific circumstances linked specifically to Article 15 ..., 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”. Furthermore, “allegations of abuse of such derogations must be effectively and thoroughly investigated, and the government must be fully accountable”. In order to ensure effective oversight, the parliament “should have effective control” over the emergency legislative process. Essential safeguards also include clear time limits on the duration of emergency powers, for example a “sunset clause” with the possibility of extension subject to new parliamentary approval, and judicial scrutiny of the validity of the state of emergency and its implementation. The Assembly also noted 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”.

### 4. Current derogations from the Convention

14. There are at present two States Parties to the Convention which have notified the Secretary General of derogations, in chronological order, Ukraine and Turkey, and one, France, that has recently withdrawn its derogation.

#### 4.1. The Ukrainian derogation

##### 4.1.1. Notification of the Secretary General

15. Ukraine notified the Secretary General of its derogation on 9 June 2015 (date of registration). The notification states that “[o]ngoing armed aggression of the Russian Federation against Ukraine, together with war crimes and crimes against humanity committed both by regular Armed Forces of the Russian Federation and by the illegal armed groups guided, controlled and financed by the Russian Federation, constitutes a

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15. See “General Comment No. 35 on Article 9 of the ICCPR (liberty and security of person)”, paragraph 67.

16. *Greece v. United Kingdom*, Application No. 176/56, European Commission of Human Rights, 26 September 1958, paragraph 158.

17. *Greece v. United Kingdom*, op. cit.; “Greek case”, Application No. 3321/67 et al., Commission, 5 November 1969, paragraph 81; *Lawless v. Ireland (No. 3)*, Application No. 332/57, judgment of 1 July 1961, paragraph 47.

18. *Cyprus v. Greece*, Application No. 8007/77, Report of the Commission, 4 October 1983, paragraphs 66-68.

19. See further Higgins, “Derogations under Human Rights Treaties”, *British Yearbook of International Law* (1977) 48 (1) 281-319, at pp. 290-293.

public emergency threatening the life of the nation in the sense of ... Article 15, paragraph 1 of the Convention” as a result of which the Ukrainian authorities had had “to adopt legal acts, which constitute derogation from certain obligations of Ukraine under the ... Convention”.

16. In this context, I would recall that the Parliamentary Assembly has consistently condemned “Russia’s role in instigating and escalating [the] developments [in eastern Ukraine]”,<sup>20</sup> finding that “the military intervention by Russian forces in eastern Ukraine violate[s] international law and the principles upheld by the Council of Europe”<sup>21</sup> and noting the “credible reports of violations of international human rights and humanitarian law by all sides to the conflict, including persistent abductions, summary killings, arbitrary detention and torture of civilians in the areas under the control of the pro-Russian separatists and Russian troops”.<sup>22</sup>

17. The 9 June 2015 notice of derogation also specifies the laws whose implementation necessitates derogation from the Convention, as well as the rights from which derogation is necessary in each case.

18. The first, “On Amendments to the Law of Ukraine ‘On Combatting Terrorism’ regarding the preventive detention of persons, involved in terrorist activities in the anti-terrorist operation area for a period exceeding 72 hours”, allows (as the name suggests) persons suspected of involvement in terrorist activities who have been arrested in the “anti-terrorist operation area” exceptionally to be detained for a period exceeding 72 hours but not exceeding 30 days, on the decision of a prosecutor but without the decision of a court. Implementation of this law requires derogation from Articles 5, 6 and 13 of the Convention. The notification also explains that what is required by the relevant danger (Russian armed aggression and the actions of Russian-backed separatist groups) is limited to application of this law in exceptional cases for the purpose of prevention of grave crimes.

19. The second, “On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pretrial investigation under martial law, in state of emergency or in the anti-terrorist operation area”, temporarily transfers the powers of investigating judges, along with additional procedural rights, to prosecutors, on condition that it is impossible for the investigating judge to perform his/her duties under the Criminal Procedure Code. Implementation of this law requires derogation from Articles 5, 6, 8 and 13 of the Convention. The notification explains that the relevant danger requires application of this law only “where courts do not actually function in certain areas of the Donetsk and Luhansk oblasts”.

20. The third, “On Administering Justice and Conducting Criminal Proceedings in Connection with the Anti-Terrorist Operation”, changes the territorial jurisdiction over cases otherwise falling in the jurisdiction of courts located in the anti-terrorist operation area and investigative jurisdiction over criminal offences committed in the anti-terrorist operation area, where pretrial investigation is impossible. Implementation of this law requires derogation from Article 6 of the Convention. The notification explains that application of this law is limited to the extent to which courts and pretrial investigation bodies do not actually function in those areas.

21. The fourth and final law, “On Military and Civil Administration”, establishes “military and civil administrations” “as temporary State bodies functioning within the Donetsk and Luhansk oblasts, within the Anti-Terrorist Centre of the Security Service of Ukraine”. In addition to general duties to maintain law and order, the civil and military administrations were given powers to impose curfews, restrict or prohibit free movement of vehicles or pedestrians, and conduct identity checks and searches of persons and property. Implementation of this law requires derogation from Articles 5 and 8 of the Convention. The notification explains that the temporary restrictions on freedom of movement and the right to private life are limited to what is necessary “to prevent the threat of destruction of the nation because of the Russian Federation armed aggression”.

22. The notification then continues to indicate the intended duration of the derogation: “for the period until the complete cessation of the Russian Federation armed aggression, the restoration of constitutional order and orderliness in the occupied territory of Ukraine and until further notification to the Secretary General”. As to the geographical scope of the derogation, the notification indicates that this information will be communicated at a later stage, once determined according to Ukrainian law.

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20. [Resolution 2034 \(2015\)](#) on the challenge, on substantive grounds, of the still ungratified credentials of the delegation of the Russian Federation.

21. [Resolution 2133 \(2016\)](#) on legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities.

22. [Resolution 2063 \(2015\)](#) on the consideration of the annulment of the previously ratified credentials of the delegation of the Russian Federation (follow-up to paragraph 16 of [Resolution 2034 \(2015\)](#)).

23. Three further notifications have been given. On 4 November 2015, Ukraine notified the Secretary General of the precise localities in the Donetsk and Luhansk oblasts to which the derogation applied. The notification of 30 June 2016 stated that one year after introduction of the measures in question, the Ukrainian authorities had reviewed the security situation in the relevant areas. It then gave an overview of recent events and the current situation and stated that the Ukrainian authorities, “having established that the circumstances which led to submitting the derogation still prevail, found it necessary to continue to exercise ... the powers described” in the relevant legal acts, adding that “to the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention ... [Ukraine] has availed itself of the right of derogation ... and will continue to do so until further notice”. The notification concluded with a revised list of the localities to which the derogation applied. The most recent notification of 31 January 2017 was to the same effect as that of 30 June 2016.

24. It should be noted that the derogation does not apply to those parts of Donetsk and Luhansk oblasts that are outside the control of the Ukrainian authorities, or to Crimea, which the Assembly considers to have been illegally annexed by the Russian Federation.<sup>23</sup> The Ukrainian position on these territories, as explained in the notification of derogation, is that the Russian Federation is fully responsible for respect for and protection of human rights in these territories. The unstated implication is that these territories are no longer within Ukraine’s effective jurisdiction, as defined by Article 1 of the Convention. As a matter of law, this may ultimately be a matter for the European Court of Human Rights to determine.

25. At this stage, I would make certain comments on the form and content of Ukraine’s notification of derogation to the Secretary General. The notification is admirably clear on the factual background, the reasons why the situation in Ukraine should be considered a “public emergency threatening the life of the nation”, the measures taken whose implementation require a derogation and the articles of the Convention from which Ukraine is derogating.

26. I have concerns, however, about the delays involved. Firstly, in passing the parliamentary resolution on derogation, which was done on 21 May 2015, nine months after three of the four laws were adopted; secondly, in notifying the Secretary General, which was done more than two weeks after the parliamentary resolution on derogation was passed; and thirdly, notifying the Secretary General of the geographical scope of the derogation, which was done on 4 November, almost five months after the main notification was received. The explanation I received during my meetings in Ukraine was that the aftermath of the February 2014 “Revolution of Dignity”, in particular the flight of former president Viktor Yanukovich and the collapse of his government, followed by the imperative need to respond to the annexation of Crimea and the separatist military threat in eastern Ukraine, so disrupted the work of the government and parliament that earlier notification was not practically possible. It would be for the Court to determine whether measures taken under the relevant laws before receipt of notification by the Secretary General are covered by the derogation or not.

#### *4.1.2. Overview of the general legal situation and specific measures taken in the context of the derogation*

27. The Constitution of Ukraine regulates the declaration of a state of emergency, the limits to which emergency measures may interfere with human rights and roles of the parliament (Verkhovna Rada) and judicial system.<sup>24</sup> Ukraine has not, however, declared a state of emergency in relation to the derogation under Article 15 of the Convention. The provisions relating to a state of emergency foreseen by the Ukrainian Constitution therefore do not apply. That said, the Constitution contains other provisions relating to control of the human rights compatibility of measures taken in application of the laws mentioned in the notification of derogation.

28. The Constitutional Court shall resolve issues of conformity of laws and other legal acts with the Constitution and shall provide the official interpretation of the Constitution and the laws (Article 147). The Constitutional Court shall consider such issues upon request from the President, at least 45 deputies, the Supreme Court or the Ukrainian Parliament Commissioner for Human Rights (Article 150).<sup>25</sup> Laws or other legal acts considered unconstitutional by the Constitutional Court shall lose legal force from the day of adoption of the Court's decision; persons suffering damage due to acts or actions found to be unconstitutional shall be compensated by the State under a procedure established by law (Article 152).

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23. [Resolutions 2034 and 2063 \(2016\)](#).

24. Information taken from the official English translation of the Constitution available on the government portal, [www.kmu.gov.ua/document/110977042/Constitution\\_eng.doc](http://www.kmu.gov.ua/document/110977042/Constitution_eng.doc).

25. A pending law would also give individuals access to the Constitutional Court by way of a new “constitutional complaint” procedure.

29. Certain other provisions are also of interest in the present context. The public prosecution is entrusted with supervision of the observance by executive and administrative bodies of human rights and the observance of laws regulating them (Article 121). Everyone has the right to appeal for the protection of their rights to the Parliamentary Commissioner for Human Rights (Article 55).

30. It should be noted that the four laws which gave rise to the derogation contain additional and more detailed provisions not mentioned in either the resolution of the Verkhovna Rada of Ukraine on the Declaration “On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms” of 21 May 2015 or the notification to the Secretary General. Some of those in the Law on Amendments to the Law of Ukraine on Combating Terrorism may have consequences for full enjoyment of human rights.

31. One such provision states that persons not engaged in the anti-terrorist operation may stay in the area of such operation only with the permission of the chief of the operations headquarters. This may have consequences under Article 4.1 (freedom of movement) of Protocol No. 4 to the Convention (ETS No. 46), to which Ukraine is a Party. It can be noted, however, that Article 4 of Protocol No. 4 sets out qualified rights, and in principle the provision in question could be applied in accordance with the requirements of Article 4.3 without the need for derogation.

32. Another provision states that enterprises, organisations and institutions operating in the anti-terrorist operation area may be required to discontinue their activities partially or in full. This may have consequences under, for example, Articles 9 (freedom of religion), 10 (freedom of expression) and 11 (freedom of assembly and association). Again, it can be noted that these are qualified rights with which the authorities are in certain circumstances permitted to interfere, even in the absence of a derogation.

#### 4.1.3. Domestic safeguards

33. I was informed by the parliamentarians whom I met at the Verkhovna Rada that a range of parliamentary committees are involved in oversight of the emergency measures, especially the human rights committee, the committee on public order and the committee on national security and defence. These and other committees held a round table in early 2017 with government ministers, representatives of the police, security services and prosecutor’s office and the presidents of the Donetsk and Luhansk military and civil administrations to discuss the situation in the conflict and adjacent areas. Parliamentarians had also held meetings outside Kyiv, in the affected areas, including visits to the crossing points. One may still question, however, whether parliamentary control of the emergency measures is sufficiently structured and rigorous. The Ukrainian Parliament would do well to examine this matter further, in particular the preparation of periodic reports on the follow-up of emergency measures.

34. As regards judicial oversight, it is perhaps unfortunate that neither the government nor the parliament referred the emergency laws to the Constitutional Court. The military and civil administrations are under the jurisdiction of the local administrative courts, although I was not informed of any particular cases brought against them.

#### 4.1.4. Concerns relating to the emergency measures

35. The security situation in the parts of the Donetsk and Luhansk oblasts covered by the measures mentioned in the notification will doubtless satisfy the Court’s requirements for a “public emergency threatening the life of the nation”. The question is whether or not the specific measures taken are “strictly required by the exigencies of the situation”, in other words, proportional.

36. In this respect, the provision whereby a person suspected of terrorist activities may be held in preventive detention for up to 30 days “without a decision of the court” may be of concern. It can be recalled that in the case of *Aksoy v. Turkey*, the Court was of the view that although “the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long”.<sup>26</sup> The full text of the Law on Amendments to the Law of Ukraine on Combating Terrorism, however, also states that a copy of the decision on preventive detention shall be forwarded to the investigating judge or competent court with a request for an appropriate preventive measure, and that preventive detention may not be extended after that judge or court has examined the request. At first sight, this would appear to introduce some form of judicial control, although how this operates in practice, and thus whether or not it would be effective, is not clear. The

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26. Application No. 21987/93, judgment of 18 December 1996, paragraph 78.

Ukrainian authorities told me that at the beginning of the fighting, they had been unable to bring a person detained in the conflict area before a court for five days because of the security situation. In my view, such an exceptional situation could be dealt with in a less radical way, not requiring derogation from the Convention. Various national authorities and Ukrainian non-governmental organisations (NGOs) told me that, in fact, this provision had never been applied; as a result, the Ombudsperson had been unable to challenge it before the Constitutional Court, although she herself considered it to be unconstitutional and unnecessary. As there are legal concerns relating to the provision and it has never been necessary to use it, perhaps the best solution would be simply to repeal it, as has been suggested by, for example, the Ombudsperson, and rely on the existing provisions of the ordinary Criminal Procedure Code – as was in fact done in practice.

37. The operation of the checkpoints on the contact line between the government-controlled area (GCA) and the non government-controlled area (NGCA) has been widely criticised. The checkpoint system severely restricts the freedom of movement of the tens of thousands of civilians who must cross the contact line daily. Problems relate especially to the strict permit system, lengthy queues (sometimes as much as 36 hours), material conditions for those forced to wait at the checkpoints and security risks.<sup>27</sup> There were reports in 2016 of acts of violent ill-treatment, including sexual and gender-based violence, and of extortion by personnel staffing the checkpoints.<sup>28</sup> Although the situation seems to have improved somewhat in 2017, and indeed the government representatives whom I met were aware of and anxious to address these concerns, problems at crossing points have persisted.<sup>29</sup> A recent report noted that there were still problems of long queues and failures to recognise crossing permits and inadequate waiting conditions (including lack of shelter and poor sanitary facilities); that said, incidents of verbal or physical abuse were very few in number, there were no reported incidents of sexual and gender-based violence or corruption, and no-one fell victim to hostilities in the vicinity of crossing points.<sup>30</sup>

38. As regards the transfer of the competence of courts in the NGCA to the GCA, I was informed by civil society representatives of various concerns. Some courts had not themselves been moved but instead their cases had been transferred to existing courts, greatly increasing the latter's caseloads. Of the courts that had been moved, I was told that many of their judges had left their posts, again generating case-load problems, and only around two thirds, on average, of these courts' staff had moved with them. Premises for relocated courts had not been specially prepared for their new use and were not always suitable. Some relocated courts' archives had not been transferred. Overall, it was felt that insufficient follow-up had been given to the implementation of this measure. Other practical problems included difficulties in contacting people living in the NGCA who were involved in litigation before the affected courts, and difficulties in implementing their decisions in that area.

## **4.2. The French derogation**

### *4.2.1. Notification of the Secretary General*

39. The French derogation arises from and has been maintained on account of the series of Daesh-related terrorist attacks that have occurred in France since November 2015.

40. France notified the Secretary General of its derogation on 24 November 2015. The French declaration began by referring to the fact that "on 13 November 2015, large-scale terrorist attacks took place in the Paris region", continuing to state that "the terrorist threat in France is of a lasting nature, having regard to information from the intelligence services and to the international context". The declaration noted that on 14 November 2015, the French Government had adopted Decree No. 2015-1475 to apply Law No. 55-385 on the state of emergency. Decrees Nos. 2015-1475, 1476, 1478 and 1494 defined measures that could be taken by the administrative authorities. Law No. 2015-1501 of 20 November 2015 extended the state of emergency for three months, beginning 26 November 2015. Finally, the declaration noted that "some" of the measures set out in these decrees and laws "may involve a derogation from the obligations under the Convention". The declaration specifies neither the measures that may involve a derogation, nor the Convention rights affected.

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27. The Ukrainian NGO "Foundation 101" has an ongoing project to monitor conditions at the checkpoints and the regular fact-sheets of the Norwegian Refugee Council's Country Programme in Ukraine also report on the matter.

28. See the OHCHR reports on the human rights situation in Ukraine for 16 May to 15 August 2016 and for 16 August to 15 November 2016.

29. See the OHCHR report for 16 May to 15 August 2017.

30. "Crossing the Line of Contact: Monitoring Report, August-September 2017", Right to Protection.

41. France has subsequently made five more declarations to the Secretary General, following extensions to the duration of the state of emergency: on 26 February 2016 (extension for three months); 25 May 2016 (extension for two months), which referred also to the significance of two forthcoming major sporting events; 22 July 2016 (extension for six months), which referred also to the 14 July terrorist attack in Nice and the terrorist murder of two police officials on 13 June; 21 December 2016 (extension for six months), which mentioned that since July, 12 terrorist attacks had been countered, and drew attention to the pre-electoral context (both presidential and legislative elections were to take place during this six-month period); and 13 July 2017 (extension until 1 November), which mentioned five separate attacks on military, security and police personnel during the first half of the year.

42. Each of these declarations has stated that “the terrorist threat, characterising ‘an imminent danger resulting from serious breaches of public order’, which justified the initial declaration and the first extension of the state of emergency remains at a very alarming level”, and that “the review of the measures taken under the state of emergency ... has confirmed the need for such measures in order to prevent any further attacks and to disrupt terrorist networks”. Each notification from the second onwards has also recalled that the emergency measures are “subject to effective judicial review, as well as to a particularly attentive parliamentary monitoring and control mechanism”, and that “the French Government will ensure the proper information of and consultation with locally elected representatives and intends to pursue the dialogue with civil society”.

43. Successive declarations also provided brief information on the evolution of the emergency measures. The notification of 25 May 2016 stated that the measures no longer included administrative searches in places suspected of being frequented by people who threaten order and public safety. On 22 July 2016, however, France declared that the administrative search power would be restored during the period of the extension, as part of a “renovation plan” to include also the “operation [sic; understood to mean copying] of computer data after authorisation of a judge”. On 21 December 2016, the notification stated that administrative searches would again be allowed and that the duration of house arrest would be limited to 12 months, with the possibility of judicial authorisation to extend for a further three months; this was reiterated in the 13 July 2017 notification.

44. The 13 July 2017 notification, whilst stating that an immediate exit from the state of emergency appeared premature, also announced the intention to “provide the State with new instruments to enhance the security of the people and property outside the special framework of the state of emergency”, referring to a draft law then under examination by the parliament. On 7 November 2017, a final declaration was made announcing that the state of emergency had ended on 1 November 2017 – the unstated implication being clearly that the derogation was no longer in force.

#### 4.2.2. Overview of the general legal situation and specific emergency measures

45. The French Constitution does not provide for a declaration of a state of emergency. Instead, the matter is regulated by Law No. 55-385 of 3 April 1955 (“the 1955 Law”).<sup>31</sup> This law stipulates that the state of emergency is declared by the Council of Ministers. Its extension beyond 12 days must be authorised by law, which must fix its definitive duration.

46. The 1955 Law also sets out the measures that may be taken under the state of emergency. These include the following: bans on the circulation of persons or vehicles (Article 5.1); the establishment of protection or security areas where the presence of individuals is regulated (Article 5.2); residence bans in relation to all or part of the country against any person seeking to hinder in any way the action of the public authorities (Article 5.3); restricted residence, or house arrest orders (“*assignation à résidence*”) against persons in respect of whom there are serious reasons to believe that their behaviour is a threat to security and public order (Article 6); dissolution of associations or groups participating in the commission of acts seriously undermining public order or whose activities facilitate or incite the commission of such acts (Article 6.1); temporary closure of concert halls/ theatres, pubs and meeting places of any kind (Article 8.1); prohibition of meetings likely to cause or maintain disorder (Article 8.2); obligation to surrender, for reasons of public order, certain firearms and ammunition legally held or acquired (Article 9); requisition of people, goods and services (Article 10); house search during both daytime and night-time (Article 11.I); and blocking websites which incite the commission of acts of terrorism or glorify such acts (Article 11.II). Some of these measures, such as restricted residence or house orders and searches, would normally fall within the competence of the judicial authority.

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31. See the [consolidated text of the law](#), last modified on 12 January 2018.

47. The 1955 Law has been amended and its application adjusted on several occasions since the state of emergency was first declared. Significant changes were made in the first law extending the state of emergency of 20 November 2015, which notably introduced parliamentary control, with compulsory, prompt notification by the authorities of all measures taken under the 1955 law; reinforced judicial control, by removing the requirement to bring complaints before an “advisory commission” prior to the administrative courts, and allowing examination of cases through an urgent procedure; and revised the conditions under which measures could be ordered (on which more below). The 20 May 2016 law extending the state of emergency did not renew the power to conduct administrative searches of property, on the basis that it no longer presented the same interest, especially in the light of the decision of the *Conseil constitutionnel* prohibiting the making of copies of digital information discovered during searches; any necessary searches could be conducted on the basis of prior judicial authorisation. Initially intended to last only until 20 July, the state of emergency was again renewed on 21 July following the 14 July terrorist attack in Nice. The 21 July law reinstated administrative searches with a new legal regime governing the treatment of digital information; prefects were empowered to order identity checks and searches of bags and vehicles without prior authorisation from the prosecutor; and regimes of judicial and parliamentary control were enhanced. The 19 December law extending the state of emergency limited house arrest to a maximum of 12 months, although the Minister of the Interior could request extension for periods of three months. The 11 July 2017 law specified the circumstances permitting identity checks, searches of bags and vehicles and exclusion orders.

#### 4.2.3. Domestic safeguards

48. An amendment of 21 July 2016 to the 1955 Law requires that the *Assemblée nationale* and the *Sénat* be informed without delay of the measures taken by the government during the state of emergency, and be provided by the administrative authorities with copies of all acts taken by the latter under the 1955 Law. The *Assemblée nationale* and the *Sénat* may demand any supplementary information in the course of their evaluation of the emergency measures. The French judicial system and parliament have been closely involved in scrutiny of the declaration of a state of emergency and the implementation of measures pursuant to it.

49. The *Conseil d'État*, in addition to a series of decisions concerning individual measures, has also issued binding consultative opinions on each of the five extensions of the state of emergency to date. The following points are particularly noteworthy. Firstly, the Opinion of 18 November 2015 noted the various limitations and safeguards circumscribing application of the emergency measures, including improvements to the 1955 Law – concerning, for example, the power to dissolve associations and groups, and transferring posterior control from “commissions” to administrative judges – made by the law extending the state of emergency.

50. Secondly, the Opinion of 2 February 2016 strongly underlined the fact that the state of emergency must remain temporary. It noted that a state of emergency is a crisis situation, by its nature temporary, and as a result cannot be indefinitely renewed. When, as seemed to be the case, the “imminent danger” that justified the declaration of a state of emergency is due to a permanent threat, recourse must be had to permanent instruments. The government must therefore prepare as of now the end of the state of emergency. The state of emergency loses its purpose as the events that gave rise to it recede into the past, or as instruments of a different nature are put into effect as a permanent response to the underlying threat. The Opinion found the particular extension to strike a fair balance between the protection of constitutional rights, on the one hand, and of public order and security, on the other, and to be compatible with France’s international commitments, including under the Convention. It also found the extension to be proportionate with respect to its geographical scope. The Opinion of 28 April 2016 came to similar conclusions on the lawfulness of the further extension, whilst reiterating the dicta of the 3 February Opinion on its temporary nature.

51. The Opinion of 18 July 2016, concerning the extension that followed the Nice attack, found that despite the introduction in March, June and July of various provisions reinforcing the administrative and judicial tools available in the fight against terrorism, the further application of emergency measures under the 1955 Law was in the circumstances necessary, appropriate, proportionate and thereby justified. It nevertheless recalled that the state of emergency could not be renewed indefinitely, and that under the rule of law, persistent or permanent threats should be dealt with by permanent measures, reinforced by provisions such as those introduced in March, June and July.

52. Finally, the Opinion of 8 December 2016 noted the reinforcement of safeguards concerning seizure of data during searches and house arrests. It considered the geographical scope of the extension of the emergency powers to be proportionate and the duration of the extension not to be inappropriate. It noted, however, that the succession of extensions could lead to house arrest of excessive duration, and found it



necessary to fix in the law a maximum limit of 12 months' uninterrupted house arrest. The Opinion allowed for renewed imposition of house arrest should new facts or supplementary information come to light. Finally, it reiterated the position on the temporary nature of the state of emergency.

53. The *Conseil constitutionnel* has also issued decisions on a series of “priority questions of constitutionality” relating to the state of emergency.

54. On 22 December 2015, it ruled that the Constitution does not exclude the possibility for the legislature to provide a state of emergency regime (despite the fact that it is not provided for in the Constitution). It also found that restricted residence orders under the 1955 Law did not involve deprivation of personal freedom within the meaning of the Constitution, and that the relevant provisions of the Law did not disproportionately interfere with the “freedom to come and go”.<sup>32</sup>

55. On 19 February 2016, the *Conseil constitutionnel* ruled that the temporary closure under the 1955 Law of concert halls/theatres, premises licensed for the consumption of alcohol and meeting places of any kind, given the conditions attached to exercise of this authority, was not a disproportionate interference with the freedom of expression.<sup>33</sup>

56. Also on 19 February 2016, it ruled that whilst the power under the 1955 Law to search information stored on computer systems was in conformity with the Constitution, the power to copy all information accessible during the search without judicial authorisation lacked proper legal safeguards and was unconstitutional.<sup>34</sup>

57. On 23 September 2016, the *Conseil constitutionnel* ruled that provisions allowing the storage of data seized following search of a computer system (adopted following its decision No. 2016-536 QPC), although now including the necessary judicial safeguards, were unconstitutional in that where they did not reveal commission of an offence, there was no fixed delay other than the end of the state of emergency for their destruction.<sup>35</sup>

58. On 16 March 2017, the *Conseil constitutionnel* found certain provisions set out in the law of 19 December 2016 extending the state of emergency relating to house arrest, whereby house arrest could be extended beyond 12 months by decision of a judge of the *Conseil d'État*, to be unconstitutional, on the basis that the *Conseil d'État* could subsequently be asked to rule on the legality of the same decision. The *Conseil constitutionnel* then in essence reiterated the position of the *Conseil d'État* on limiting uninterrupted house arrest to 12 months (see the Opinion of the *Conseil d'État* of 8 December 2016, above).

59. Finally, on 1 December 2017, the *Conseil constitutionnel* found that the practice of identity checks and searches of bags and vehicles in a generalised and discretionary manner would be incompatible with the freedom to come and go and the right to respect for private life, the legislator having allowed the application of such measures without their necessarily being justified by the particular circumstances underlying the threat to public order in the relevant areas. The resulting lack of balance between the constitutional objective of safeguarding public order and the rights and freedoms in question led the *Conseil constitutionnel* to declare these provisions unconstitutional and they were repealed with effect from 30 June 2018.

60. The French Parliament, in particular the Committee on Constitutional Laws, Legislation and General Administration of the Republic of the *Assemblée nationale*, has been closely following the implementation of the state of emergency. On 6 December 2016, it tabled a detailed, 244-page report on the parliamentary oversight of the state of emergency (see below).

#### 4.2.4. Concerns relating to the emergency measures

61. The International Federation for Human Rights (FIDH) published a detailed report on the state of emergency in June 2016.<sup>36</sup> This report criticises various aspects of the state of emergency and its implementation – for undermining individual liberties (notably by replacing prior judicial control by posterior review by administrative courts); use of anonymous, undated *notes blanches* provided by the intelligence services as the only evidence to justify the application of measures including house arrest and searches; weakening the principle of equality (since almost all the measures enacted concern only Muslims, in

32. Decision No. 2015-527 QPC.

33. Decision No. 2016-535 QPC.

34. Decision No. 2016-536 QPC. The *Conseil constitutionnel* issued a similar decision, No. 2016-567/568 QPC, on 23 September 2016 in relation to an earlier version of the same provisions, in force between 14 and 20 November 2015.

35. Decision No. 2016-600 QPC.

36. “Mesures antiterroristes contraires aux droits de l'homme: Quand l'exception devient la règle”.

circumscribed areas, which generates a feeling of discrimination exacerbated by the prolonged application of such measures under the extended state of emergency); a regression of the rule of law (due amongst other things to the Constitutional Court's acceptance that judicial oversight beyond posterior review by administrative courts is required only in relation to imprisonment, and the "quasi-impunity" of State officials implementing emergency measures); the negative consequences on individual rights (caused notably by night-time searches of homes by armed police, involving forced entry and, often, acts of violence and humiliation); and the impact of house arrest on individuals' health, family lives and employment). Put together, the quality of judicial oversight, nature of the evidence relied upon and impact and duration of the individual measures applied have in many cases raised legitimate concerns about their proportionality.

62. Several commentators have also been consistently critical of the repeated extensions and overall duration of the state of emergency. The FIDH report claims that the state of emergency has proved ineffective, with practically no visible consequences in the fight against terrorism: no terrorist network had been dismantled, and most of the prosecutions brought as a result of searches did not relate to the anti-terrorist legislation; at the same time, it placed the forces of order under great professional pressure, impeding their capacity to act against terrorism, and could not be sustained indefinitely. The December 2016 report of the *Assemblée nationale*, however, reaches far more positive conclusions when considering the emergency measures as part of the wider array of anti-terrorist tools available to the authorities. The issue of (continuing) effectiveness may be significant to the question of whether or not maintaining the emergency measures is strictly required by the exigencies of the situation. In this respect, it can be noted that there have been 10 new laws on anti-terrorism and security since 2012, including that of 3 June 2016, intended to create conditions for lifting the state of emergency (which in the event was prolonged in the aftermath of the 14 July 2016 Nice attack). The limited impact, in terms of concrete results, of specific emergency measures, combined with the reinforcement during the state of emergency of ordinary laws, gradually undermined the argument that ordinary (i.e. non-emergency) measures or restrictions were plainly inadequate.

63. A further criticism relates to the use of emergency powers in relation to protesters during the COP21 Climate Change Conference a week after the Paris attacks, and even during the 2016 demonstrations against reform of the labour code (known as "*Nuit debout*") and the dismantling of the unofficial migrant encampment at Calais later that year. The French authorities argued that application of emergency measures in the first two cases was made necessary by the need to preserve the capacity of the police and security forces, which would have been called upon to maintain public order during these events, for anti-terrorism operations. The *Conseil d'État*, followed by the *Conseil constitutionnel*, has ruled that whilst the state of emergency was in effect, the 1955 Law did not require a link between the danger underlying the state of emergency and the particular threat to public order or security that justified the use of an emergency measure. It is not clear whether this analysis is valid from the perspective of the Convention, which, in determining whether States have gone beyond "the extent required by the exigencies of the situation", requires that emergency measures be used for the purpose for which they were granted.<sup>37</sup> Indeed, the *Assemblée nationale* report asks whether it would not be "preferable" to reserve the use of such measures to exceptional cases with an undeniable link to the threat that led to the state of emergency, and suggests launching a reflection on how this could be done. From a Convention perspective, I share the concerns of the *Assemblée nationale*.

#### 4.2.5. *The end of the state of emergency and withdrawal of the derogation*

64. As noted, the 30 October 2017 law on "reinforcing domestic security and the fight against terrorism" was adopted so as to reinforce the arsenal of measures available to the French authorities under the ordinary law and permit the lifting of the state of emergency and the withdrawal of the derogation. In fact, the French Government followed the strict letter of Article 15 of the Convention, simply informing the Secretary General on 6 November 2017 of the end of the state of emergency upon the expiration of the last extension, without mentioning either the 1955 Law or that of 2017. The French authorities have explained to me that this formulation implies the end of the emergency measures, whose applicability was inherently linked to the state of emergency, and thus necessarily also of the derogation. Whilst this is an elegant and logical approach, the situation may have been more easily understood if the notification had explicitly stated that the 1955 Law was no longer in force, the Convention was again being fully applied and the derogation was withdrawn. But this is a minor criticism; formally speaking, the 6 November notification was satisfactory.

65. There have been criticisms of the 2017 Law, perhaps most significantly that it makes the state of emergency measures permanent by normalising and generalising what had been exceptional powers entrusted to the administration to address a limited emergency. Further criticisms include objectivity and lack of precision in the definition of circumstances that allow establishment of a "protection zone" to which access

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37. *Lawless v. Ireland* (No. 3), Application No. 332/57, judgment of 1 July 1961, paragraph 38.

and within which movement may be limited under the control of private security guards for an unspecified duration. The power given to prefects to close places of worship has also been criticised for using imprecise definitions. Whilst house arrest is not possible under the 2017 Law, new “individual surveillance measures”, allowing restrictions on freedom of movement – lesser than those available under the 1955 Law – may be imposed following adversarial administrative proceedings. Again, these have been criticised for use of imprecise, objective definitions.

66. Of course, I welcome the end of the state of emergency in France and the withdrawal of the derogation, which were clearly a matter of particular importance for the new President of the French Republic, Mr Emmanuel Macron, as he emphasised in his speech before the judges of the European Court of Human Rights on 31 October 2017. I also recall that many commentators, including the Council of Europe Commissioner for Human Rights as early as February 2016, had long been calling for an end to the state of emergency, and that President François Hollande was prepared to bring it to an end in July 2016, had it not been for the Nice attacks. Whilst recognising that the threat continued to make it necessary to take security measures, I tend to agree with those who consider that the state of emergency may have been maintained for longer than absolutely necessary. Perhaps above all, this situation shows that once a state of emergency is declared, it becomes far easier – and less politically risky – to justify its continuation than its end. It is, however, beyond the scope of the present report to take position on the 2017 Law, since it is neither an emergency measure, nor has it been considered to necessitate derogation from the Convention. I hope that the criticisms of the 2017 Law will prove unfounded and that it will always be applied in strict compliance with Council of Europe standards, including those of the Convention.

### **4.3. The Turkish derogation**

#### *4.3.1. Notification of the Secretary General*

67. The Turkish derogation arises from the attempted *coup d'état* of 15 July 2016, as detailed in the original notification to the Secretary General of 21 July 2016. The Assembly, along with leading Council of Europe officials including the President of the Assembly, the Chair of the Committee of Ministers, the Secretary General, the Commissioner for Human Rights and the President of the Venice Commission, firmly condemned the attempted coup and fully acknowledged its traumatic impact on Turkish society. I share these views. I also recall that Turkey suffered numerous terrorist attacks in 2016 and 2017, including the New Year's Day Istanbul nightclub shooting; these too I unreservedly condemn.

68. This notification described the attempted coup as an attempt “to overthrow the democratically-elected government and the constitutional order ... The coup attempt and the aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention ... The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations ... [M]easures may involve derogation from the obligations under the Convention ..., permissible in Article 15”. It was accompanied by translations of the relevant legal texts, including Articles 15, 119, 120 and 121 of the Constitution, Law No. 2935 of 25 October 1983 on State of Emergency and the Council of Ministers Decision No. 2016-9064.

69. Subsequent notifications have informed the Secretary General of extensions to the state of emergency and provided copies of documents, including the Joint Declaration of the Turkish Grand National Assembly and most of the 31 “decrees with force of law” (decree-laws) introduced by the government under its emergency powers. Most of these notifications were accompanied by explanatory “information notes”. They did not explain why it had been considered necessary to extend the state of emergency.

70. It should be noted that Turkey did not communicate information on decree-laws 688 (published on 29 March 2017), 689 (published along with decree-law 690 on 29 April 2017) and 691 (22 June 2017) to the Secretary-General until 27 December 2017, and on decree-law 692 (published 14 July 2017) until 3 January 2018. Only minimal information was communicated on decree-law 681, on the basis that it regulated issues such as national defence and administration of security forces which “are not related to the human rights field”. At the time of writing, no information had yet been communicated on decree-laws 695 and 696, published on 24 December 2017, or 697, published on 12 January 2018.

#### *4.3.2. Overview of the general legal situation and specific emergency measures*

71. The Constitution of the Republic of Turkey regulates the declaration and extension of a state of emergency, the introduction of emergency measures and human rights safeguards.

72. Article 120 states that “[i]n the event of the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months”.

73. This decision shall be published in the *Official Gazette* and submitted immediately to the Turkish Grand National Assembly for approval, which if in recess shall be summoned immediately. The Grand National Assembly may alter the duration of the state of emergency, extend the period for a maximum of four months each time at the request of the Council of Ministers, or lift it. During the state of emergency, the Council of Ministers, under the chairmanship of the President of the Republic, may issue decrees having force of law on matters necessitated by the state of emergency. These decrees shall be published in the *Official Gazette* and submitted to the Grand National Assembly on the same day for approval, according to a time limit and procedure set out in the Rules of Procedure (Article 121). They shall be debated and decided upon by the Grand National Assembly “immediately and within thirty days at the latest” (Article 128).

74. Certain “fundamental rights, individual rights and duties” and “political rights and duties” cannot be regulated by decrees having force of law except during periods of martial law and states of emergency. Furthermore, decrees having force of law that are not submitted to the Grand National Assembly on the day of their publication shall cease to have effect on that day (Article 91).

75. The partial or entire suspension of fundamental rights and freedoms or introduction of measures that “derogate the guarantees in the Constitution” are permitted during a state of emergency, provided that obligations under international law are not violated. The right to life (except in respect of deaths occurring through lawful acts of war) and “integrity of material and spiritual entity” are “inviolable”; certain religious freedoms as well as the prohibition on retroactivity of criminal laws and the presumption of innocence are also (in effect) non-derogable (Article 15 of the Constitution).

76. The Constitutional Court shall examine the constitutionality of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. There is a right of individual application to the Constitutional Court for complaints of violations of the rights contained in the European Convention on Human Rights by the authorities.<sup>38</sup> It must be noted, however, that “no action shall be brought before the Constitutional Court alleging unconstitutionality ... of decrees having the force of law issued during a state of emergency” (Article 148).

77. The 31 decree-laws to date (Nos. 667-697, as at 12 January 2018) are extremely detailed and cover a wide range of issues, including the following:<sup>39</sup>

- dismissals of civil servants and members of the court staff, public services, armed forces, coast guard and national police (gendarmerie), with ancillary provisions including prohibition on employment by public bodies, eviction from accommodation, cancellation of passports (including spouses’ passports), loss of rank, loss of rights connected to employment, etc.; also, establishment of special procedures within public authorities for the administrative dismissal of such persons (decree-laws 667, 668, 669, 670, 672, 673, 675, 679, 683, 686, 688, 689, 692, 693, 695 and 697);<sup>40</sup>
- closure of private health institutions and organisations, private education institutions and organisations as well as private dormitories and lodgings for students, foundations and associations and their commercial enterprises, foundation-run higher education institutions, unions, federations and confederations where it is found that “they belong to, are connected to or are in communication with the Fethullah Terrorist Organisation (FETÖ/Parallel State Structure)” or other terrorist organisations identified by the authorities as a threat to State security. All movables, real estate assets, receivables and rights, and all documents and papers of foundations closed down are seized and transferred to the General Directorate of Foundations (decree-laws 667, 668, 670, 675, 677, 679, 687, 689 and 693);

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38. Introduced in 2010, the European Court of Human Rights has found this to be an effective domestic remedy that must exhausted before an application is brought: see *Hasan Uzun v. Turkey*, Application No. 10755/13, judgment of 14 May 2013.

39. This list is not intended to be an exhaustive list of all of the measures introduced by way of decree-laws. It should also be noted that a number of decree-laws reinstated dismissed officials and allowed reopening of entities that had been closed.

40. It should be noted that the decree-laws established two separate procedures for dismissing public officials: 667 created special procedures for specific authorities; whereas other decree-laws dismissed those named in appended lists.

- closure of private radio and television stations, newspapers and periodicals and seizure and transfer to the government of their assets (decree-laws 668, 670, 675, 683 and 689);
- criminal procedure, including issues relating to duration of police custody, detainees' access to a lawyer, detention review procedure, arrest warrants, search and seizure, rights of the defence, legal professional privilege and confidentiality of lawyer–client communications, the circumstances in which persons are described as “suspects”, proceedings relating to human trafficking, provision of legal aid, extension of pretrial detention periods, including a possible maximum of seven years in terrorism-related cases, establishing immunity for criminal acts committed by civilians who resisted the coup attempt and actions that can be deemed as the continuation of it, and special uniform requirements for provisionally detained or imprisoned persons attending court (decree-laws 667, 668, 671, 674, 675, 676, 684, 690, 694 and 696);
- parliamentary immunity, in particular the possibility of investigating and prosecuting crimes allegedly committed before or after elections (decree-law 694);
- the judicial system, including the military courts, judicial appointments, internal organisation of courts, courts' jurisdictions, recruitment examinations, the High Council of Judges and Prosecutors, judges' health-care benefits and the number of judges on the Court of Cassation and the Council of State (decree-laws 668, 669, 671, 673, 674, 680, 690, 694 and 696);
- the penitentiary system, including the membership of prison monitoring boards and temporary leave from prisons (decree-laws 673 and 674);
- local authorities, including replacement “by the authorities” of mayors or local council members who have been suspended from office on terrorism-related grounds, transfer of competences and related budget to the regional governor by decision of the governor, confiscation of municipal property by decision of the governor (decree-laws 674 and 677);
- the armed forces, including the Supreme Military Council, the Gendarmerie, the Coast Guard, the War College and military high schools and training schools, disciplinary proceedings and sanctions, military service for certain former police officers and the creation of 32 000 new posts (decree-laws 668, 669, 681, 682, 691 and 694);
- the intelligence services, including by placing them under the direct control of the President (decree-law 694);
- the civil service, including selection examinations, retirement and the internal organisation of the Ministries of Justice and Defence (decree-laws 670, 673 and 694);
- the education system, including direct appointment of university rectors by the President, appointment of teachers, “dismissal” of students studying abroad, appointment of associate university professors and recognition of foreign diplomas (decree-laws 668, 673, 675, 677, 679, 683, 689 and 690);
- media regulation, including closure of the Presidency of Telecommunication and Communication and transfer of its competences to the Information and Communication Technologies Authority (ICTA), Prime Ministerial authority over the ICTA, loosening controls and spending restrictions on political broadcasting during electoral and referendum campaigns, broadcasting restrictions, licencing, regulatory sanctions and certain commercial and advertising practices (decree-laws 671, 680, 687 and 690);
- labour law, in particular suspension of the right to strike (decree-law 678);
- data protection, including in relation to inquiries into missing children and cybercrime (decree-laws 670 and 680);
- public procurement (decree-law 678);
- bankruptcy (decree-laws 669 and 673);
- criminal law, in particular penalties for drug smuggling and gambling offences (decree-law 694);
- migrant smuggling, in particular seizure of vehicles used by smugglers (decree-law 690);
- immigration law, in particular carrier liability for persons without permission to enter or transit the country (decree-law 694);
- family law, in particular recognition of foreign decisions concerning marriages (decree-law 690);

- building regulations, in particular an obligation to provide information on structures that may affect flight safety (decree-law 691);
- the use of winter tyres (decree-law 687, according to a statement by the Ministry of Transport<sup>41</sup>).

#### 4.3.3. Domestic safeguards

78. As noted above, the Constitution gives the Turkish Grand National Assembly an essential role in the declaration and prolongation of a state of emergency and in the adoption of emergency measures by way of “decrees having force of law” (hereafter “decree-laws”). The way in which the Grand National Assembly has fulfilled this function in relation to the present state of emergency shall be examined further in the “concerns” section below.

79. As to judicial oversight, the Constitution limits the role of the Constitutional Court. The Constitutional Court has thus rejected a request by opposition parliamentarians for an *in abstracto* review of the decree-laws. It has departed from its case law by which it would first examine whether regulations made under the title “decree-laws” were “limited to the reasons and goals behind the state of emergency”, including whether they had permanent effects. It would then conduct a constitutionality review of those that failed this test. Instead, the court now considers it to be “clear that decree laws issued under a state of emergency cannot, under any name, be subject to constitutionality review”.<sup>42</sup> The Venice Commission had supported the previous jurisprudence, in so doing noting that “[t]he Constitution may give to the Government very large emergency powers. However, those powers cannot be limitless – otherwise the Constitution would contain a mechanism of self-destruction, and the regime of the separation of powers would be replaced with the unfettered rule of the executive”. The Constitutional Court has yet to rule on whether it is precluded also from examining individual applications *in concreto*.<sup>43</sup> This uncertainty has now been resolved by the creation of a special Inquiry Commission (see below). Following adoption of decree-law 685, those dismissed by the special administrative procedures established by Article 3(1) of decree-law 667 had the possibility of challenging their dismissal before the administrative courts, within 60 days of entry into force of decree-law 685.

80. In the absence of effective judicial control over dismissals of officials and closures of bodies listed in appendices to various decree-laws, decree-law 685 of 23 January 2017, as amended by decree-laws 690 of 29 April and 694 of 25 August, established a special Inquiry Commission on the State of Emergency Measures. Presented as a result of the dialogue between Turkey and the Council of Europe, this commission is intended as an effective domestic remedy. Its role is to assess and give decisions on applications submitted within 60 days of 17 July, the date on which the Commission began to receive applications, or of the date of subsequently adopted decree-laws. It is composed of three public officials assigned by the Prime Minister, one judge or prosecutor holding office in the Ministry of Justice assigned by the Minister of Justice, one chief of civil administration assigned by the Minister of the Interior and two judges from the Court of Cassation or the Council of State assigned by the Supreme Board (Council) of Judges and Prosecutors. The Commission’s members were appointed on 16 May 2017 and it commenced functioning on 22 May 2017. It shall operate for two years as from the date of publication of decree-law 685, with the possibility of one-year extensions by the Council of Ministers. By late December 2017, over 103 000 cases were pending before the Commission. Decisions in favour of applicants must be executed by the administration within 15 days. Applicants may challenge unfavourable decisions before the administrative courts, with further challenge possible before the Constitutional Court. The European Court of Human Rights has found the Inquiry Commission to constitute “in principle an accessible remedy”, for which there was “no reason to believe that it did not offer a reasonable chance of success ... [E]ven if the commission in question is, strictly speaking, a non-judicial organ, its decisions nevertheless remain subject to judicial review”.<sup>44</sup>

#### 4.3.4. Concerns relating to the emergency measures

81. Whilst there can be no doubt that the failed coup attempt of July 2016 satisfied the constitutional requirements for declaration of a state of emergency, there are many serious concerns about its implementation.<sup>45</sup>

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41. “Explaining ‘winter tyre’ from the Ministry of Transport”, *Turkey Telegraph*, 25 September 2017.

42. Press Release No. Plenary Assembly 4/16, 4 November 2017.

43. It is for this reason that the European Court of Human Rights had ruled applications inadmissible for non-exhaustion of domestic remedies: see *Zihni v. Turkey*, Application No. 59061/16, decision of 8 December 2016.

44. *Köksal v. Turkey*, Application No. 70478/16, admissibility decision, 12 June 2017.

82. As of late February 2017, despite the provisions of the Constitution, 14 of the then 19 decree-laws that had been published more than 30 days previously had still not been examined by the Turkish Grand National Assembly, and two more were pending within the 30-day limit: only five out of 21 (Nos. 667, 668, 669, 671 and 674) had been examined. As a result, many decree-laws had taken effect before being subject to any parliamentary scrutiny. At the time of my visit in November 2017, the Grand National Assembly had still not examined any more decree-laws; no progress had been made in the intervening months even on decree-laws previously published, let alone the 10 subsequent ones. In this connection it can be noted that the Grand National Assembly managed to approve all of the government's decisions to prolong the state of emergency within a few days, often on the very same day.

83. The number of individuals and bodies affected by the emergency measures is strikingly large:<sup>46</sup>

- more than 150 000 public servants have been dismissed from their jobs and banned from public service,<sup>47</sup> including more than 33 000 teachers and other employees of the Ministry of Education, more than 24 000 police officers and other employees of the Ministry of Interior, more than 8 000 members of the armed forces, more than 6 000 doctors and other employees of the Ministry of Health, more than 5 000 academics and other higher education employees and more than 3 000 employees of the office of the Prime Minister and connected institutions.<sup>48</sup> As recently as 24 December 2017, a further 2 756 officials were dismissed by decree-law, and a further 262 on 12 January 2018, almost 18 months after the failed coup attempt;
- almost 170 000 people under criminal investigation, of which over 55 000 arrested (in mid-December 2017<sup>49</sup>);
- 4 560 judicial officers dismissed<sup>50</sup>, including (at least) 173 higher court judges and 17 members of the High Council of Judges and Prosecutors, and almost 4 000 suspended;
- 177 media outlets closed, including many Kurdish media, as well as Kemalist and left-wing outlets; as a result 2 500 journalists had lost their jobs;
- around 2 100 schools, student dormitories and universities closed;
- around 1 800 associations and foundations were closed down, including 370 civil society organisations accused of links to “terrorism”, 199 of which are Kurdish. All of their property and other assets, as well as documentation, were seized and transferred to the General Directorate of Foundations.

84. The Vice-chair of the Committee on Human Rights Inquiry of the Turkish Grand National Assembly told me that “FETÖ is a ‘sui generis’ criminal organisation ... more dangerous than other terrorist organisations because of its organized structure and its capacity of deception ... a terrorist organization that locates itself within the State, hides itself and aims to harm the State from within ... If any of the public officials is found to have no loyalty [to the State], the State has the power to dismiss those public officials... Because of the clandestine working method of FETÖ, prior to 15 July, it was not possible for people to guess that these people would hide themselves until they bombed the parliamentary complex with F16s, run over people with tank and kill the people who oppose them. Especially before December 2013, this group was seen as an educational and charity organisation”. This argument was said to justify, for example, the number of people against whom measures have been taken, the sufficiency of use of Bylock or the Bank Asya (see below) as evidence of criminal behaviour, the revocation of passports and seizure of property.

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45. Including in Assembly documents, notably the Monitoring Committee's report on “The functioning of democratic institutions in Turkey” (Doc. 14282), the report of the Committee on Legal Affairs and Human Rights on “Securing access of detainees to lawyers” (Doc. 14267), the report of the Committee on Culture, Science, Education and Media on “Attacks against journalists and media freedom in Europe” (Doc. 14229) and the report of the visit of the ad hoc sub-committee of the Political Affairs Committee to Turkey in November 2016 (AS/Pol (2016) 18 rev); memoranda issued by the Commissioner for Human Rights, notably on the human rights implications of the emergency measures (7 October 2016), “Urgent measures are needed to restore freedom of expression in Turkey” (15 February 2017) and “Human rights in Turkey – the urgent need for a new beginning” (10 March 2017); and various Venice Commission opinions, notably on the Emergency Decree Laws Nos. 667-676 (CDL-AD(2016)037, 12 December 2016) and on the measures provided in the recent Emergency Decree Laws with respect to freedom of the media (CDL-AD(2017)007, 13 March 2017).

46. Figures from Assembly Doc. 14282, unless indicated otherwise.

47. “Turkey's OHAL Commission Makes First Decisions On Dismissed Public Sector Staff”, Stockholm Centre for Freedom, 22 December 2017.

48. “No End in Sight: Purged Public Sector Workers Denied a Future in Turkey”, EUR 44/6272/2017, Amnesty International, May 2017, quoting IHOP (Human Rights Joint Platform) figures from February 2017.

49. “Turkey's OHAL Commission Makes First Decisions On Dismissed Public Sector Staff”, Stockholm Centre for Freedom, 22 December 2017, quoting figures from the Ministries of Justice and the Interior respectively.

50. “More than 35 judges, prosecutors dismissed in Turkey”, Anadolu Agency, 5 October 2017.

85. The concept of “connection to the Gülen movement” is loosely defined and does not necessarily justify casting doubt on the loyalty of public servants. Criteria applied to establish a connection have included use of Bylock, an encrypted messaging service (which may have had up to 220 000 users),<sup>51</sup> financial transactions at the (legally regulated) Bank Asya or attendance at certain (legally established) private schools. All these activities were, however, perfectly legal. An innocent person – and everyone has the right to the presumption of innocence – could not have known that such activities would expose them to suspicion of criminal conspiracy at a later date. Furthermore, although the Turkish notification stated that “the purpose of the declaration of the state of emergency is not to restrict fundamental freedoms but to eliminate the FETÖ terrorist organisation”,<sup>52</sup> many people and bodies who would appear to have no connection to this movement, or whose connection is to unrelated causes (including Kurds and Kurdish organisations, academics advocating a peaceful settlement of the Kurdish issue, left-wing activists, and trade unions and their members) have been affected by the decree-laws.

86. The relevant decision-making processes lacked procedural guarantees. Those affected had no prior notification and no opportunity to respond to allegations made against them. They were not given reasons for the decision, or access to their files or the evidence on which the decision was based. Furthermore, decisions were not justified on the basis of individual reasoning related to the immediate case. Such procedural failures have become ever less defensible as time has passed since the failed coup attempt and continued recourse to exceptional, emergency procedures has become less justifiable.

87. The rights of the defence have been restricted for persons detained under the emergency powers in relation to a range of terrorism-related offences, allowing police custody without judicial intervention for up to seven days (previously 30 days, until reduced early last year) that may be extended by a further seven on the decision of a prosecutor, denial of access to a lawyer for up to five days (until the relevant provision was repealed by decree-law 684) and restrictions on the right to a lawyer of the detainee’s choice. Prison staff may be present during consultations between lawyers and their clients in custody, which may be recorded. Numerous other restrictions have been introduced by way of permanent amendment to the Code of Criminal Procedure.

88. Concerning the impact of these measures on civil society, the Council of Europe Conference of International NGOs’ Expert Council on NGO Law found “serious substantial and procedural concerns with respect to the [decree-law 667] as well as the other emergency decrees affecting NGOs. With respect to substantial concerns, the language of Article 2, paragraphs 1-3 of the Decree goes beyond the legitimate measures envisaged in Article 11 of the [Turkish] Law on State of Emergency ... the impugned measures in Article 2, paragraphs 1-3 of the Decree (dissolution and confiscation of the asset of NGOs) fall short of the requirement of proportionality, given that the same effect could have been accomplished by temporary freeze of activities and asset of NGOs. In particular given the perceived problems with available legal remedies”.<sup>53</sup>

89. The mass dismissals have been accompanied by other measures having a significant impact on the affected persons, as well as their family members, beyond the loss of job and income. These include, for example, cancellation of passports, including those of spouses, confiscation of assets, eviction from publicly owned housing and loss of health-care coverage. Those dismissed are permanently barred from any job connected with public services or tenders; dismissed armed forces personnel are forbidden from working in security-related jobs and, in practice, those dismissed find it impossible to obtain work on account of their alleged status as “terrorists”. All of those dismissed suffer the full range of consequences, whatever the extent of any alleged connection to the failed coup. The Assembly’s Monitoring Committee has described the result as “civil death” and the impact on family members as “collective punishment”.

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51. In the context of a judgment concerning alleged unlawfulness of detention, the Constitutional Court has – remarkably – found that “the competent authorities’ assessment that the use of Bylock *or having it in electronic/mobile devices constitutes a strong indication of having committed an offence* cannot be considered as unfounded or arbitrary” (emphasis added). See Press Release No. Individual Application 15/17, 30 June 2017. A July 2017 legal opinion by two eminent barristers, William Clegg QC (also a criminal law judge) and Simon Baker, supported by an expert forensic report, concluded that “there is no evidence at all from which any reasonable person could conclude that [Bylock] was exclusively used by members of FETÖ/PDY”. In December 2017, the Turkish authorities discovered that 11 480 persons unwittingly had their smartphones automatically directed to the Bylock server by a separate online application; the Ankara Public Prosecutor has since announced that some 1 000 people who had been detained because of their alleged use of Bylock would be released. Under decree-law 697 of 12 January 2018, 1 823 dismissed officials were reinstated for the same reason.

52. Information note on the State of Emergency declared in Turkey following the coup attempt on 15 July 2016, communicated to the Secretary General of the Council of Europe on 24 July 2016.

53. Conf/Exp(2017)2, 30 November 2017.



90. Given the opposition of the Venice Commission to the use of emergency powers to make permanent changes to legislation, it is difficult to accept that many of the provisions of the decree-laws were strictly required by the need to respond to the emergency situation. Some of the issues concerned are of exceptionally wide-ranging legal and political significance, for example undermining of parliamentary immunity, revision of criminal procedure, establishing immunity for criminal offences, changes to the judicial system, limiting the independence of municipal authorities, restricting the right to strike and transferring control over the intelligence services. Others are relatively speaking too minor and lacking in urgency to justify circumvention of normal legislative procedure by recourse to emergency powers, for example advertising of food supplements (decree-law 690), seizure of migrant smugglers' vehicles, recognition of foreign decisions on marriages, carrier liability (decree-law 694), building regulations or even, apparently, use of winter tyres. Furthermore, the government continued to issue decree-laws with permanent effect to dismiss officials and close associations and institutions as well as to reform ordinary legislation in a wide variety of areas, more than a year after the attempted coup d'état; indeed, some of the most far-reaching have been amongst the most recent, for example decree-laws 694 of 25 August 2017 and 696 of 24 December 2017. In the meantime, the argument that "normal measures or restrictions permitted by the Convention are plainly inadequate" became less defensible by the day.

91. The resulting practice of government by emergency decree, often in apparently unrelated areas, has bypassed effective scrutiny by parliament and the Constitutional Court. This seems to have occurred with an apparent unwillingness to exercise independent control of State authorities that should, in a democracy, act as checks and balances on the government. As previously noted, parliament has failed to examine the great majority of decree-laws within the delay set by its own Rules of Procedure, some remaining unexamined for over a year; and the Constitutional Court has reversed its own previous case law that would have allowed it to review the constitutionality of emergency measures with permanent effect.

92. Although the European Court of Human Rights dismissed in June 2017 an application on the basis that the Inquiry Commission represented an effective remedy to be exhausted, it must be noted that many criticisms have been directed at the Commission. These include that its members come from the same authorities which dismissed the officials in question, putting in doubt their independence and impartiality; its members are automatically dismissed should a terrorism-related investigation be opened concerning them – given the very broad scope of anti-terrorism law in Turkey and the potential for its arbitrary abuse, this places the members' positions on the Commission at the mercy of the authorities; the secretariat of the Commission, responsible for administrative and preparatory work, is appointed by the Prime Minister, putting its independence in question; the basis of contested decisions is unclear, making them difficult to contest; there is no possibility of adversarial proceedings and there are no hearings, making it difficult for applicants to articulate their cases; the workload, working methods (each decision requires the participation of four of the Commission's seven members) and time-frame available would seem to make it almost impossible "to give individualised treatment to all cases", as intended by the Venice Commission.<sup>54 55</sup> It should also be noted that a decision of the Inquiry Commission in favour of an applicant does not restore the prior situation (*restitutio in integrum*), as those concerned may not return to their former posts. Last but certainly not least, although tens of thousands of people were dismissed as long as 17 months ago, the Commission was established in January 2017 and it began functioning in May, it did not announce its first decisions until late December – and by mid-January 2018, no further information on these decisions had been published. This leaves, in principle, little more than a year to resolve over 100 000 applications; in the meantime, the applicants continue to suffer the harsh consequences of the draconian measures taken against them.

93. I note that a certain number of dismissals and closures have been overturned by subsequent decree-laws. Whilst this must of course be welcomed from the point of view of the people and entities concerned, it does not address the fundamental problems of disproportionality and subversion of democratic process and the rule of law. The continuing use of emergency executive powers, set against the growing concerns in relation to domestic remedies, is not a proper way of resolving earlier abuses of those same powers. What is needed is a return to normality and recognition that emergency powers are exceptional and temporary and their use should not have permanent effects.

94. The above analysis makes several references to the duration of the state of emergency and the justifiability of continued recourse to emergency powers. In this connection, the Venice Commission has stated that, "as already indicated in [its March 2017] opinion adopted in respect of Turkey, the Commission is

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54. "Opinion on Emergency Decree Laws Nos. 667-676 Adopted after the Failed Coup of 15 July 2016", CDL-AD(2016)037, Venice Commission, 12 December 2016.

55. See for example "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?", Kerem Altıparmak, Human Rights Joint Platform, February 2017.

not convinced that the further prolongation of the state of emergency was/remains necessary. In its view, “the longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools”.<sup>56</sup>

95. In conclusion, I consider that the Turkish response to the attempted coup and the ongoing terrorist threat has been disproportionate on several grounds:

- the powers granted to the government under the state of emergency have in many cases been used for purposes and against objects unrelated to the situation giving rise to the state of emergency; as a result, the scope of measures taken under the state of emergency exceeds what is strictly required by the exigencies of the situation;
- the duration of the state of emergency – in particular, the continued use of emergency powers to regulate situations that can no longer be considered to represent an exceptional danger to the constitutional order – exceeds what is strictly required by the exigencies of the situation;
- for many of the measures taken, there is no reason to think that the normal measures or restrictions available under the ordinary law and permitted by the Convention would have been plainly inadequate – instead, what should be temporary powers have been improperly used to introduce permanent changes to the legal status of natural and legal persons and to legislation;
- the severe impact of many of the measures, in particular summary administrative dismissal of public officials along with related measures and the dissolution of associations and institutions and the closure of media outlets along with seizure and transfer of their assets, is indiscriminate and exceeds what is strictly required by the exigencies of the situation – all the more so as time passes and the probability that the objects of these measures represent any real, imminent threat diminishes;
- in this context, the lack of a timely remedy in practice for dismissed officials and closed associations and institutions exacerbates disproportionality, as the severe adverse consequences of these measures are prolonged.

96. The use of emergency powers to pass these decree-laws must also be seen in the context of the wider situation in Turkey. For example, the limitations on parliamentary immunity introduced through decree-law 694 followed similar changes made by the constitutional amendment on 20 May 2016. The Venice Commission noted that of 139 deputies concerned by the constitutional amendment, 111 were from opposition parties, including up to 90% of HDP (a Kurdish-based party) deputies. The application of decree-law 674 concerning local democracy has also mainly affected the HDP, with a “vast majority” of dismissed mayors being members of, or close to, the HDP.<sup>57</sup> These mayors have reportedly been replaced by persons who are members of or close to the ruling AK Party.<sup>58</sup> According to the Congress of Local and Regional Authorities, previous waves of arrests and dismissals of mayors in south-eastern Turkey were also “connected to the Kurdish question”<sup>59</sup> and raised “serious questions with respect to Turkey’s commitment to local democracy”.<sup>60</sup>

97. The dismissal of so many judges and prosecutors has had a serious impact on the capacity of the courts and a chilling effect on the willingness of judges to act independently and impartially in proceedings involving the State. The Venice Commission has concluded that the dismissals “may have adverse effects on the independence of the judiciary and the effectiveness of the separation of powers within the State”.<sup>61</sup> The President of the Union of Turkish Bar Associations, commenting on the climate of paranoia and fear amongst judges and prosecutors, has said that “[j]ustice is now vested in a judge’s personal bravery”.<sup>62</sup> In [Resolution 2121 \(2016\)](#) on the case for drafting a European convention on the profession of lawyer, the Assembly observed that “amendments to the law on the High Council of Judges and Prosecutors in 2014 raised the issue of the lack of independence of the judiciary and undue interference by the executive”. The deterioration of the situation since the failed coup is reflected in the Venice Commission’s October 2016 reference to “the past and even more fragile current state of the Judiciary in Turkey”.<sup>63</sup>

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56. CDL-AD(2017)021, 9 October 2017.

57. “Fact-finding mission on the situation of local elected representatives in Turkey”, CG32(2017)13final, Congress of Local and Regional Authorities, 29 March 2017.

58. CDL-AD(2017)021.

59. CG32(2017)13final.

60. “The situation of Leyla Güven and other local elected representatives in detention in Turkey”, CG(26)6FINAL, 27 March 2014.

61. CDL-AD(2016)037.

62. “Turkey’s purges are crippling its justice system”, *The Economist*, 20 May 2017.

63. CDL-AD(2016)027.

98. The procedure to appoint new judges to replace those dismissed, under the authority of the High Council of Judges and Prosecutors, has also been criticised. In December 2016, the General Assembly of the European Network of Councils for the Judiciary (ENCJ) voted unanimously to suspend the observer status of the High Council of Judges and Prosecutors for non-compliance with the ENCJ's statutes. The President of the Union of Turkish Bar Associations, whom I met, mentioned the lack of a minimum score in the entrance exam and the preponderant weight given to performance in subsequent unrecorded oral interviews involving politically biased questions: as a result, candidates with the "right" political profile who performed badly in the written tests were nevertheless recruited. Judges are also being appointed directly from the justice academy, without completing their training. 5 000 of 15 000 first instance judges have less than one year's experience, and another 5 000 have less than five years. It can also be noted that the Council of State has yet to issue any decision in an appeal by a judge or prosecutor against dismissal further to Article 3.1 of decree-law 667.

99. At the same time, lawyers are also coming under increasing pressure when acting in politically controversial cases or in proceedings against the State. I refer to my colleague Ms Sabien Lahaye-Battheu's recent report on "The case for drafting a European convention on the profession of lawyer", which notes that "by 13 September 2017, 1 343 lawyers were subject to criminal prosecution and 524 had been arrested since the coup", for further information.<sup>64</sup>

100. Human rights defenders, civil society activists and journalists are also in an increasingly difficult situation dating back long before the failed coup. Further information on the already alarming situation of human rights defenders prior to the failed coup can be found in the January 2016 report of my colleague, Ms Mailis Reps.<sup>65</sup> A large number of NGOs have been closed by decree-laws, including many dealing with issues such as children's and women's rights.

101. The authorities' powers to regulate internet access have also been criticised by the Venice Commission;<sup>66</sup> during my visit, I was told that over 90 000 websites and over 120 000 URLs, including Wikipedia, *Charlie Hebdo* and international news agencies, had been blocked. A report by Freedom House concluded that "Internet freedom sharply declined in Turkey in 2017 due to the repeated suspension of telecommunications networks and social media access, as well as sweeping arrests for political speech online".<sup>67</sup> Freedom of speech generally was under attack even before the numerous closures of television and radio stations, newspapers, journals and other publications under the state of emergency. In [Resolution 2121 \(2016\)](#), the Assembly had shared "the concerns of the Council of Europe Commissioner for Human Rights about the alarming scale of recourse to an overly wide notion of terrorism to punish non-violent statements and criminalisation of any message that merely coincides with the perceived interests of a terrorist organisation". Commentary on the country's leadership has also become increasingly difficult. In 2000, there were four prosecutions for insult to the President; in 2015, there were 1 975; and in 2016, 4 187. Yet the European Court of Human Rights has long been clear that "the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual".<sup>68</sup> In 2007, the Assembly called on member States to apply defamation laws "with the utmost restraint since they can seriously infringe freedom of expression".<sup>69</sup>

102. This leads me to three further conclusions. First, the prolonged exercise of emergency powers, already apparently disproportionate in themselves, becomes even more problematic when seen against this wider context. Second, the fact that a wide range of highly restrictive security-related measures was already available to the government undermines the case for normal measures being plainly inadequate. And third, that the exercise of uncontrolled, disproportionate emergency powers in such a context creates further challenges for Turkey's compliance with Council of Europe standards on democracy, human rights and the rule of law. The failure of the Turkish authorities to see the situation from this perspective – giving proper weight to not only security imperatives, but also human rights obligations – is a source of further concern.

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64. [Doc. 14453](#), paragraphs 16 and 17.

65. [Doc. 13943](#), "Strengthening the protection and role of human rights defenders in Council of Europe member States", paragraphs 23-26.

66. CDL-AD(2016)011.

67. "Freedom on the Net 2017".

68. *Lingens v. Austria*, Application No. 9815/82, Commission report, 8 July 1986.

69. [Resolution 1577 \(2007\)](#) "Towards decriminalisation of defamation".

## 5. Oversight of derogations by the Council of Europe

103. Article 15 of the Convention requires only that a derogating State “keep the Secretary General fully informed of the measures which it has taken and the reasons therefor”. It gives no particular role to the Secretary General, nor does it require any dialogue between the derogating State and the Secretary General or other Council of Europe organs and bodies. In practice, however, the Secretary General has played a more engaged, proactive role. In 1997, for example, the Secretary General requested further information from Albania on the reasons for adoption of the emergency measures, the texts of the relevant laws and measures and – despite this not being a formal requirement of Article 15 – the articles from which derogation was proposed. In 2005, the Secretary General declined to accept as notification of derogation France’s *note verbale* concerning the state of emergency declared in Paris following the November riots. In 2015, the Ukrainian authorities consulted the Secretariat General when preparing the notification of derogation. One should also recall the role already played after a State has derogated by the Parliamentary Assembly, the Commissioner for Human Rights and the Venice Commission, in particular.

104. The French *Défenseur des droits*, Mr Jacques Toubon, very helpfully shared with me his proposals for enhancing Council of Europe supervision of derogations, which can be summarised as follows:

- the Secretary General should initiate a dialogue between the Council of Europe and the derogating State Party to the Convention, involving relevant national authorities and appropriate specialised bodies of the Council of Europe, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the European Commission against Racism and Intolerance (ECRI), the European Committee on Crime Problems, the Consultative Council of European Judges, the Consultative Council of European Prosecutors and the European Commission for the Efficiency of Justice;
- the Secretary General should open an Article 52 inquiry asking for information on how the state of emergency is administered and emergency measures applied, by reference to Article 15 and the case law of the Court. In my view, since derogations are exceptional measures taken in extreme circumstances, which should be very rare, the Secretary General should systematically open such an inquiry every time a State party notifies him/her of a derogation;
- in response, the State concerned should provide a periodic review of the emergency measures taken (and, I would add, of the reasons for them, including any new measures, as well as for any extensions of the state of emergency/derogation), to form the basis of a dialogue between the branches of domestic government and Council of Europe organs, including the Committee of Ministers and the Venice Commission;
- the Council of Europe should identify good practices as a basis for recommendations to member States on domestic and international supervision of derogating measures;
- the Council of Europe should formulate recommendations to member States on the information to be included in the notification of derogation made to the Secretary General.

105. The rationale underlying these proposals is clear and convincing: the Council of Europe should develop an articulated, multi-level strategic response to derogations, which represent a particular challenge to the coherence and quality of human rights protection in Europe. To a large extent, this would formalise, systematise and further develop things that have already happened in practice. Of course, any developments in this sense would have to be fully respectful of the potential role of the Court, should it be called upon to examine derogating measures in the context of an individual application. I see considerable merit in many of Mr Toubon’s proposals, which should be further examined by the Committee of Ministers and the Secretary General.

106. Whilst the Assembly has examined, in one way or another, all of the derogations of recent years, it has not yet developed a systematic response to such situations. Its report on the derogations notified by Georgia in 2006 and by Armenia in 2008 was originally a response to other events taking place elsewhere in 2005; and the present report examines the situation in three different countries, which has somewhat complicated its preparation. The legal and political importance of derogations to the Convention justifies the Assembly examining each and every one in separate reports.

## 6. Conclusions and recommendations

107. A state of emergency is a particular situation of exceptional danger to public and the constitutional order. In response to such a situation, a State may have recourse to emergency measures, but only where normally available measures are plainly inadequate. The exercise of such powers must be strictly limited in time, place and circumstance. Any measures taken under the state of emergency must be strictly proportionate, including in the extent to which they are applied in practice, to the exigencies of the situation giving rise to the state of emergency. They should not have permanent effects extending beyond the period of emergency. Action to protect the constitutional order must be lawful and not itself undermine fundamental constitutional guarantees; States must ensure a maximum of parliamentary and judicial scrutiny over the exercise of emergency powers. To this extent, a State party may derogate from some obligations under the European Convention on Human Rights in order to exercise emergency powers, although without excluding oversight by the European Court of Human Rights.

108. It is therefore a matter of great concern that there has been increasing recourse to derogations in recent years. Such an exceptional act must not become banal. The Assembly must insist that member States exercise the utmost caution when adopting measures that may necessitate derogation from the Convention.

109. The current and most recent examples of derogation give rise to a range of concerns of varying gravity, and suggest also examples of good practice that could be proposed for the future. A summary of my findings and my recommendations are set out in the draft resolution and draft recommendation.