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(VENICE COMMISSION)

TURKEY

DRAFT OPINION

ON THE LEGAL FRAMEWORK GOVERNING CURFEWS

on the basis of comments by

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I. Introduction

1. The Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe wrote to the Venice Commission on 15 March 2016, requesting its opinion on the compatibility of the legal framework governing curfews in Turkey with European standards (see CDL-REF(2016)028).

2. A rapporteur group consisting of Mr J. Correia, Mr G. Jeribi, Ms H. Suchocka and Mr J. Velaers was set up to prepare this opinion. A delegation from the Venice Commission visited Ankara on 26 and 27 April 2016 for discussions with the competent authorities (the Ministry of Justice, the Ministry of the Interior, the Undersecretariat of Public Order and Security, the Constitutional Court) and representatives of the political parties and civil society. The Commission wishes to thank the Turkish authorities for the excellent manner in which the visit was organised and all those whom it met for their readiness to assist and for the information supplied.

3. This opinion is based on the French translation of the constitutional and legislative provisions to be examined, which was itself based on the English-language version of the provisions, as supplied by the Turkish authorities. Given that the translation might not be entirely faithful to the original, it is possible that some of the issues raised may be due to translation errors rather than to the content of the provisions themselves.

4. The present opinion was prepared on the basis of the contributions of the rapporteurs; it was discussed at the meeting of the Sub-Commission on fundamental rights... and was subsequently adopted by the Venice Commission at its ... plenary session (Venice, ...).

II. Preliminary remarks

A. Context

5. For several months now, Turkey has been experiencing an upsurge in violence and terrorism which is reflected in the scale and growing number of attacks against civilians and the security forces.

6. Since the summer 2015, moreover, South-East Turkey has seen an unprecedented increase in violence and full-scale acts of war between Turkish security forces and armed groups operating in the region, with severe consequences for the local population.

7. Since August 2015, as part of the security operations, some sixty curfews have been declared by governors or sub-governors in a number of towns and around twenty districts in the region (in Cizre, Silopi, Idil - Şîrnak, in Dargeçit - Mardin and in Sur - Diyarbakîr), for periods ranging from several days to several weeks, or even months in some cases. According to information received from the Ministry of the Interior in April 2016, the curfew had been imposed as follows: in Cizre – a total of 75 days (the measure was still in force), in Silopi – 75 days, in Sur – 87 days and in Idil – 11 days, with breaks during which the ban on going out was lifted; almost 200,000 people have been directly affected. Meanwhile, unofficial sources report cases of curfews maintained for long periods, continuously.¹

8. Despite these exceptional circumstances, however, the Turkish authorities have invoked, to impose the curfews, neither the provisions of the Turkish Constitution, nor international human rights treaties authorising, under certain procedural and substantive conditions, derogations from certain human rights obligations.

¹ See reports by: Amnesty International, Human Rights Watch, International Crisis Group, Fédération Internationales des Droits de l'Homme (FIDH), Human Rights Association of Turkey (IHD), Human Rights Foundation of Turkey (HRF), Diyarbakır Bar Association etc.

9. At the same time, numerous local and international sources have reported an alarming deterioration in the situation of the people living in the areas concerned in recent months. Depending on the source of information, between 100,000 and 200,000 inhabitants have left the region because of the clashes. According to unofficial observers,² 1 500 000 people in the region have been affected, directly or indirectly, by the current state of affairs. Large-scale damage to and loss of property and, most importantly, the hundreds of lives lost among civilians and the security forces during the clashes, together with the widespread allegations of violations of rights and freedoms, have sparked a widespread response both nationally and internationally.

10. Following his recent visit to Turkey, including the south-eastern areas worst affected by the fighting, the Council of Europe Commissioner for Human Rights noted that the most striking aspect of the anti-terrorist operations since August 2015 had been the “*round-the-clock, open-ended and increasingly long curfews declared in entire neighbourhoods or cities in South-Eastern Turkey.*”³ While recognising that Turkey had the right and a duty to fight terrorism and to protect the population, the Commissioner stressed the need to find a balance between security considerations and human rights. “*The Commissioner unequivocally condemned all terrorist actions and violence targeting Turkish citizens and the state, including by the PKK [“Kurdistan Workers’ Party”] and Daesh.*” At the same time, he urged Turkey to “*avoid straying from human rights and rule of law principles in this fight, which would also ultimately serve the interests of these very organisations.*”

11. On 10 May 2016, the United Nations High Commissioner for Human Rights in turn declared that he had “*received a succession of alarming reports about violations allegedly committed by Turkish military and security forces in south-east Turkey over the past few months.*” In his press release, the High Commissioner stated as follows: “*I strongly condemn violence and other unlawful acts committed by the youth groups and other non-state agents, allegedly affiliated with the PKK [Kurdistan Workers’ Party], in Cizre and other areas, and I regret any loss of life as a result of terrorist acts wherever they have occurred.*” He felt, however, that “*while Turkey has a duty to protect its population from acts of violence, it is essential that the authorities respect human rights at all times while undertaking security or counter-terrorism operations – and international law prohibiting torture, extrajudicial killings, disproportionate use of lethal force and arbitrary detention must be observed.*”⁴

² See reports published by: Amnesty International, Human Rights Watch, International Crisis Group, International Federation of Human Rights (FIDH), the Human Rights Association of Turkey (IHD), the Turkish Human Rights Foundation (HRF), Diyarbakır Bar Association, etc.

³ Council of Europe Commissioner for Human Rights, Statement following visit to Turkey, 14 April 2016, <http://www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat?inheritRedirect=true&redirect=%2Ffr%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>

⁴ “The High Commissioner said he had received reports of unarmed civilians – including women and children – being deliberately shot by snipers, or by gunfire from tanks and other military vehicles.

“There also appears to have been massive, and seemingly highly disproportionate, destruction of property and key communal infrastructure – including buildings hit by mortar or shellfire, and damage inflicted on the contents of individual apartments and houses taken over by security forces,” he said. “There are also allegations of arbitrary arrests and of torture and other forms of ill-treatment, as well as reports that in some situations ambulances and medical staff were prevented from reaching the wounded.”

On top of all this, he noted that there has been huge displacement triggered by the curfews and by subsequent fighting, shelling, killings and arrests in many places in the south-east.

“Most disturbing of all,” the High Commissioner said, “are the reports quoting witnesses and relatives in Cizre which suggest that more than 100 people were burned to death as they sheltered in three different basements that had been surrounded by security forces.”

“All these allegations, including those levelled at the groups fighting against the security forces, are extremely serious and should be thoroughly investigated, but do not appear to have been so far,” Zeid said. “The Turkish Government has not responded positively to requests by my Office and other parts of the United Nations to visit the region to collect information first-hand.”

“Noting alarm bells rung by other international human rights entities in recent weeks, the High Commissioner called for a prompt investigation and prosecution of all those suspected of being involved in violations of the right to life, including extrajudicial killings and disproportional use of lethal force. He also called on the Turkish authorities to allow the return of all those who have been forcibly displaced, and urged them to ensure that, in future, curfews are limited to the minimum duration necessary and with due concern for humanitarian considerations.”

(see

B. Scope of the present opinion

12. The Venice Commission wishes to underline, as it has done on previous occasions,⁵ that it strongly condemns all acts of terrorism. Such acts strike at the heart of the values enshrined in the European Convention on Human Rights (ECHR) and can never be justified. The Venice Commission further reiterates that a democratic state is entitled to defend itself when attacked and has a duty to protect its population from such acts. It is aware of the gravity of the situation facing the Turkish authorities, the complex nature of the challenges to be addressed in their fight against terrorism and the heavy responsibility weighing on them in this regard.

13. In the fight against terrorism, however, the common European values of freedom, democracy, respect for human rights and fundamental freedoms, and respect for the rule of law, must be guaranteed.⁶ While it is legitimate for any state to defend its security against any acts which threaten its population and its territory, the measures taken must be consistent with the principle of legality, justified by necessity and proportionate.

14. The scope of this opinion remains confined to the examination, in the light of the obligations under international law, in particular the ECHR and Council of Europe standards, of the legal framework governing curfew in Turkey and the legal basis for the decisions by which curfews have been imposed, since August 2015, in certain towns and districts in South-East Turkey. Among the legal issues which will need to be examined are the constitutional basis for curfew and how it is reflected in Turkish legislation, the legal basis on which administrative authorities (local governors) have declared a curfew, the restrictions on rights and fundamental freedoms, the relevant safeguards, and the compatibility of these arrangements with European standards.

15. Given its mandate and the request that has been submitted to it, the purpose of the Venice Commission's assessment is not to comment on the specific measures taken by the authorities in connection with the curfew, or on the extent to which they comply with the provisions of international conventions (in particular the ECHR and the ICCPR⁷) governing exceptional situations, like the one in South-East Turkey.

III. International legal framework

A. Curfew as an exceptional measure

16. Although the possibility of imposing curfews exists in all political regimes, there is no internationally recognised definition of the term. Curfews can, however, be defined by their distinguishing features, as found in different legal systems.

17. Firstly, curfews were originally conceived as an exceptional measure for exceptional circumstances, and are usually associated with a state of emergency or martial law. Curfews are part of the armoury of measures which may be taken by the state to preserve, maintain

<http://www.un.org/apps/news/story.asp?NewsID=53895&Kw1=Turkey&Kw2=&Kw3=#.V0qIBGdf3DA>, "Alarming reports of major violations in south-east Turkey – UN rights chief")

⁵ CDL-AD(2015)006, *Update of the 2007 Report on the democratic oversight of the security services and report on the democratic oversight of signals intelligence agencies*; CDL-AD(2008)004, *Report on the democratic control of the armed forces (2008)*; CDL-AD(2006)015, *Opinion on the protection of human rights in emergency situations (2006)*; *Human rights and the functioning of the democratic institutions in emergency situations (Science and technique of democracy, No.17) (1996)* CDL-STD(1996)017-e; *Emergency Powers - Science and technique of democracy, No. 12 (1995)*, CDL-STD(1995)012-e;

CDL-AD(2016)006, *Opinion on the draft constitutional law on "protection of the Nation" of France*; CDL-AD(2011)049, *Opinion on the draft law on the legal regime of the state of emergency of Armenia*

⁶ While consistently acknowledging in its case law the validity of the fight against terrorism, the European Court of Human Rights has repeatedly pointed out that this legitimate fight must be conducted in a way that respects the rights provided for in the ECHR (see *Öcalan v. Turkey*, Grand Chamber judgment of 12 May 2005); *Ramirez Sanchez v. France*, judgment of 27 January 2005

⁷ The International Covenant on Civil and Political Rights

and restore law and order and to protect the lives and property of its citizens in times of unrest, when there is a high likelihood of violence or when violence escalates (against the state, against the government itself or between different sections of the population).

18. Secondly, like any exceptional measure, curfews imply restrictions on the everyday rights and freedoms to which everyone is normally entitled for the period of time during which the curfew is in operation. Curfew restrictions *a priori* designed to prevent and control public disorder, riots and violence are generally considered to be both desirable and necessary or, at worst, a necessary evil. The catalogue of rights and freedoms liable to be affected by a curfew may vary in length depending on the particular context in which it is imposed and the specific measures associated therewith: the right to liberty and security of the person; the right to private and family life; the freedom of assembly; the freedom of association; the freedom of religion; the freedom to receive and impart information; the right to peaceful enjoyment of property; the right to education; or the prohibition of torture and inhuman or degrading treatment, as well as the right to life and to physical integrity.

19. At the very heart of the concept of curfew, the right to free movement is the first to be affected. In common parlance, *curfew* means “*an order or law that requires people to be indoors after a certain time at night*”,⁸ or an ordinance specifying a precise time in the evening after which certain rules apply, in particular the one which decrees that no one – whether civilians or any other category of unauthorised persons – may be outdoors, or that places where people gather in public must be closed. Anyone who appears on the streets is liable to face sanctions, including possibly arrest and imprisonment and may even, during more restrictive curfews (martial law), “*be shot to death simply for appearing on the streets without official knowledge and permission*”.⁹

20. In practice, beyond the commonly accepted meaning of the term, a curfew may vary according to: its duration (a certain number of hours per day or, far more rarely, a permanent, round-the-clock curfew); whether it is for a specified or unspecified period; geographical coverage (village, urban district or wider geographical area/territorial unit); the substance of the associated restrictions, which may not necessarily be confined to a ban on going out. Clearly, the impact which curfew has on the social, economic, cultural and political life of the community concerned and the exercise of fundamental rights will depend to a large extent on these factors. Hence the need for a suitable legal framework that can help both to address the problems engendered by any emergency situation and to reduce the risk of abuse of state authority, so as to ensure, via the law, the optimum balance between imposing an exceptional measure dictated by exceptional circumstances and considerations relating to human rights and freedoms.

21. Insofar as curfews are usually linked to a formal declaration of a state of emergency (or martial law), the rules are, in principle, clear. Most states lay down (often in their constitutions) special legal rules which apply in exceptional circumstances, stipulating the essential conditions and procedure for introducing a state of emergency/martial law, the measures which may be taken under this emergency rule, including curfew, and the safeguards associated with any restrictions on fundamental rights. The specific manner in which such measures are to be implemented is prescribed by legislation. As pointed out by the Venice Commission in its Report on emergency powers,¹⁰ “*If not unreasonable or arbitrary, a State may infringe upon what might otherwise be regarded as constitutionally protected rights if it is necessary to protect public health, safety and welfare in an emergency.*” In this context, states are bound to comply with the provisions of the international conventions governing derogations from fundamental rights to which they are entitled to have recourse in the event of an emergency.

⁸ Merriam-Webster Dictionary

⁹ See, for a more detailed analysis of curfew, Paul R. Brass (2006) *Collective Violence, Human Rights, and the Politics of Curfew*, Journal of Human Rights, 5:3, 323-340, DOI: 10.1080/14754830600812324

¹⁰ *Emergency Powers*, op. cit., p.6

22. The situation is different where the state decides not to formally declare a state of emergency and allows a curfew to be imposed in “normal” times. In those circumstances, any restrictions on fundamental rights arising from such a decision will have to comply with the specific limitations clauses contained in the international instruments with respect to the rights in question (see below).

B. Emergency situations – international provisions on human rights

23. Emergency situations involve both changes to the way in which responsibilities and prerogatives are allocated among the various authorities and organs of state and derogations from normal human rights standards. It is crucial that these derogations be regulated by law as experience has shown that the most serious violations of human rights tend to occur during emergency situations.¹¹

24. This regulation is provided, in international law, by the derogation clauses with regard to emergencies contained in the main international human rights instruments: Article 15 ECHR, Article 4 ICCPR, Article 27 of the American Convention on Human Rights (ACHR). Derogation procedures thus afford the international institutions concerned a means of monitoring all acts performed by states, including any which violate fundamental rights for the purpose of protecting the life of the nation.

25. Accordingly, Article 15 of the ECHR affords to governments, in exceptional circumstances, the possibility of derogating,¹² in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention:

1. *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.*

2. *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.*

3. *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.*

26. Article 4 of the ICCPR states:

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*

¹¹ *Emergency powers*, op. cit., p.4

¹² In the early 1990s, citing threats to its national security and the need to combat them through more robust measures, and invoking Article 15 ECHR, Turkey submitted a number of declarations empowering the Government to take stringent measures in derogation from ECHR guarantees such as banning publications, shutting down printing presses, suspending or requiring permission for strikes, ordering the evacuation of villages or residential areas or ordering persons to settle in a place outside the state of emergency zone, and transferring public officials to other posts. After limiting the scope of its notice of derogation with respect to Article 5 ECHR (right to liberty and security) in 1993, Turkey withdrew these declarations in January 2002.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

27. As pointed out in General Comment No. 29 on Article 4 ICCPR,¹³ measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and, before a state moves to invoke them, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the state party must have officially proclaimed a state of emergency.¹⁴ *“The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers [...]”*.

28. In addition, Article 18 ECHR states that *“The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed”*, while Article 17 prohibits activities or acts *“aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”*.

29. Among the standards and references taken into account by the Venice Commission in its assessment, mention could also be made of Recommendation 1713 (2005) of the Parliamentary Assembly of the Council of Europe,¹⁵ which, noting that *“the need for security often leads governments to adopt exceptional measures”*, stresses that *“these must be truly exceptional, as no State has the right to disregard the principle of the rule of law, even in extreme situations”*. The same recommendation provides that *“[e]xceptional measures in any field must be supervised by parliaments and must not seriously hamper the exercise of fundamental constitutional rights”*.

30. More recently, in its Resolution 2090(2016),¹⁶ while recognising the importance of the fight against terrorism, the Parliamentary Assembly warned against the risk that *“counterterrorism measures may introduce disproportionate restrictions or sap democratic control and thus violate fundamental freedoms and the rule of law, in the name of safeguarding State security.”*

31. In this context, the Venice Commission refers to its *“Rule of Law Checklist”*,¹⁷ which also includes the following criteria for invoking exceptions in emergency situations:

Are exceptions in emergency situations provided for?

i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?

ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?

¹³ ICCPR, *General Comment No. 29. States of emergency (Art.4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001

¹⁴ See, for further information on the characteristics that a situation must have to qualify as a state of emergency and the principles that states are required to respect in states of exception, CDL-AD(2016)06, §§ 27-28

¹⁵ Parliamentary Assembly of the Council of Europe, Recommendation 1713 (2005), *Democratic oversight of the security sector in member states*, 23 June 2005, <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11000&lang=en>

¹⁶ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22481&lang=en>

¹⁷ CDL-AD(2016)007, *Rule of Law Checklist*, 11-12 March 2016

iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?

iv. What is the procedure for determining an emergency situation? Is there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder? "

32. The Commission has likewise considered these issues in its thematic work and its opinions on national legal rules governing emergency situations.¹⁸

33. It appears from all the above-mentioned rules that, as regards the use of exceptional measures such as curfews:

- states are allowed in principle to adopt exceptional measures in the fight against terrorism;
- an essential condition is the declaration of a state of emergency. The review of the manner in which the state of emergency was introduced is carried out with reference to the constitutional and legislative provisions governing the exercise of emergency powers;
- the measures taken must nevertheless: be prescribed by law, meet the criteria of necessity (be directed at a real and imminent danger) and proportionality; be temporary in nature (cease when there is no longer a threat); be supervised by a parliamentary assembly; not seriously hamper the exercise of fundamental constitutional rights; ensure full respect for inviolable rights; be amenable to judicial scrutiny.

C. Exceptional measures outside the derogation mechanism

34. The decision by a state not to avail itself, under Article 15 ECHR,¹⁹ of its right to derogate from Convention rights, is tantamount to accepting the Convention in its entirety, it being understood that no obstacle, whether in domestic law or international law, may stand in the way of its application.²⁰

35. Such a decision also paves the way for "normal" supervision of the state's compliance with all of its obligations under the Convention, in relation to all the Convention rights and not only the non-derogable ones. According to the right in question, the Convention imposes on states not only negative obligations to refrain from certain acts but also a whole range of positive obligations, both substantive and procedural.

36. Accordingly, any exceptional measure taken by a state (such as curfew) and the restrictions on fundamental rights which arise therefrom will be considered in relation to the provisions of the Convention, as they apply in "normal" times, and will have to meet the conditions laid down in the limitation clauses specific to each of the rights concerned: are they prescribed by law (in accordance with the requirements for accessibility, clarity and predictability)? Do they pursue a legitimate aim and are they necessary in a democratic society? Do they meet the proportionality test?

IV. The national legal framework applying to curfews. Analysis

A. Constitutional provisions

a) Curfew in the context of emergency rule

37. In Turkish law, curfew is expressly mentioned as one of the measures that may be deployed in the context of two exceptional situations governed by the Constitution, involving

¹⁸See footnote n° 5;

CDL-AD(2016)006, *Opinion on the draft constitutional law on "protection of the Nation" of France*; CDL-AD(2011)049, *Opinion on the draft law on the legal regime of the state of emergency of Armenia*

¹⁹ Similar consequences will arise if a state decides not to avail itself of Article 4 ICCPR

²⁰ See *Khashiyev and Akayeva v. Russia* (Applications Nos. 57942/00 and 57945/00), judgment of 24 February 2005, § 97

the possibility of overriding some of its provisions, particularly those relating to fundamental rights: (1) states of emergency declared after widespread acts of violence and serious public disorder; and (2) martial law.

38. The fact that the Turkish Constitution contains express provisions dealing with the state of emergency, setting out clear conditions, rules and procedures for the formal declaration of such state and the general principles by which the authorities must abide during the state of emergency, should be welcomed. The Venice Commission has already pointed out that the constitutionalisation of emergency rule helps to strengthen safeguards against abuses,²¹ in terms both of the requirements for its declaration or extension and the measures authorised during its application.

39. The Venice Commission was not asked to provide a detailed study on the constitutional and legislative framework governing such powers in Turkey or to assess whether the related legal systems were compatible with international standards and principles. However, it has to be said that, in principle,²² it is for such emergency situations that curfew is provided for in Turkey as it is the legislation governing such situations which refers expressly to it.

40. It is important therefore that when the Commission examines the legal basis for the recent curfew measures, it begins by determining the legal arrangements for such a measure provided for by the Turkish Constitution, namely those made in the context of emergency situations.²³ More specifically, for a measure which, by its very nature, results in restrictions to fundamental rights, the question which arises is that of the safeguards with which it is combined to ensure full compliance with the constitutional principles and international obligations accepted by Turkey in this sphere. It should be pointed out that under Article 90 of the Constitution, once they have entered into force, international treaties ratified by Turkey carry the force of law. In cases of conflict, the provisions of treaties on fundamental rights take precedence over Turkish legislation.

b) Rules applying to restrictions on fundamental rights

41. The Commission begins by noting that there are specific provisions in the Turkish Constitution governing potential restrictions to fundamental rights depending on whether these restrictions are applied in a normal situation (Article 13) or an exceptional one (Article 15).

42. Article 13 of the Constitution reads as follows: “*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter or spirit of the Constitution, the requirements of the democratic order of society or the secular Republic or the principle of proportionality*”.

43. In exceptional situations, drawing on Article 15 of the ECHR, Article 15 of the Constitution lays down the general principle whereby “*in times of war, mobilisation, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partly or entirely suspended, or measures derogating from the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.*

Even under the circumstances described in the first paragraph, the individual's right to life, and the integrity of his body and mind shall be inviolable except where death occurs through acts in compliance with the law of warfare...”

²¹ *Emergency powers*, op .cit.; see also CDL-AD(2015)006, §46

²² See § 52 of this opinion

²³ In the context of this opinion, the Venice Commission will look mainly into the constitutional and legislative framework relating to the states of emergency.

c) *State of emergency – constitutional framework*

44. The constitutional principles governing states of emergency are enshrined in Articles 119 to 121 of the Constitution.²⁴ Articles 119²⁵ and 120²⁶ set out the material and formal conditions for the declaration of a state of emergency including its duration and geographical scope while Article 121²⁷ establishes the rules on its approval.²⁸

d) *Parliamentary supervision*

45. A noteworthy positive point illustrating the exceptional nature of such decisions is that the formal arrangements for declarations of states of emergency by the Council of Ministers meeting under the chairmanship of the President of the Republic require parliamentary approval in addition to prior consultation with the National Security Council. States of emergency may be declared in one or more parts of the country or the entire country for a limited duration not exceeding six months. Declarations must therefore be approved by the Grand National Assembly, which may also decide to change the duration of the state of emergency, to extend it by a period of up to four months, or to lift it (Article 121).

e) *Judicial review*

46. The Constitution also provides that once a state of emergency has been declared, the Council of Ministers, chaired by the President of the Republic, may issue any decrees with the force of law required by the situation. While the clause of Article 121 requiring approval of such decrees by the parliament should be welcomed, it should also be noted that decrees issued during a state of emergency may not be challenged in the Constitutional Court on the ground of unconstitutionality with regard to their form or substance (see Article 148 of the Constitution). It is also worth pointing out that under Article 91 of the Constitution, rights and freedoms may, as a matter of exception, be governed by decrees during periods of martial law and states of emergency. Since the instrument declaring a state of emergency takes the form of a parliamentary resolution, it also escapes any constitutional review.

²⁴ Article 122 of the Constitution sets out the constitutional rules applying to the martial law.

²⁵ Article 119 relates to the declaration of states of emergency following a natural disaster or a serious economic crisis.

²⁶ **“Declaration of a state of emergency because of widespread acts of violence or serious public disorder**
Article 120 - *In the event 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 public disorder 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 ”.*

²⁷ **“Rules regarding states of emergency.**

Article 121 - *In the event of a declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be immediately submitted to the Grand National Assembly of Turkey for approval. If the Grand National Assembly of Turkey is in recess, it shall be immediately assembled. The Assembly may alter the duration of the state of emergency, may extend the period for a maximum of four months each time at the request of the Council of Ministers, or may lift the state of emergency.*

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of a state of emergency under Article 119 and the manner in which fundamental rights and freedoms are to be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation are to be taken, what sorts of powers are to be conferred on public servants and what kinds of changes are to be made in the status of officials in so far as they are applicable to each kind of state of emergency separately, and the procedures applying under emergency rule shall be regulated by the Law on States of Emergency.

During states of emergency, the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue any decrees having force of law necessitated by the state of emergency. These decrees shall be published in the Official Gazette and submitted to the Turkish Grand National Assembly on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in its Rules of Procedure.”

²⁸ In the same way, Article 122 establishes the material and formal requirements for the declaration of martial law and refers to the relevant law (on martial law) for a description of the arrangements for its implementation.

47. Furthermore, as confirmed by the authorities, since they are the preliminary stage of a legislative process, decrees of the Council of Ministers issued during a state of emergency do not fall within the jurisdiction of the administrative courts.

48. At the same time, while other administrative “decisions/acts” adopted by the authorities²⁹ under a state of emergency are subject to the usual judicial review, under a state of emergency, stays of execution of the administrative act concerned may not be issued (Article 33 of the State of Emergency Law, based on Article 125 of the Constitution).³⁰

49. In the light of this information, it is uncertain whether a decree intended to impose curfew measures can be subject to a review of legality. The Commission refers to the comments it made in its Opinion on the draft Constitutional Law on “Protection of the Nation” of France³¹ as to the primary importance of judicial supervision of derogating measures and decisions taken by the authorities during a state of emergency. It recommends that the Turkish authorities set up a suitable system to enable an effective review of the legality, including the necessity and proportionality, of all measures taken by the authorities under states of emergency.

f) *Means of application – requirement of legality*

50. On the subject of determining the obligations that may be imposed on the public during a state of emergency (once it has been officially declared) and the measures to be adopted to meet the needs of the situation, the applicable procedures and the changes in the authorities’ responsibilities during the exceptional regime, Article 121 refers to the relevant law (the State of Emergency Law). All obligations and measures connected with a curfew must therefore be *prescribed by law*.

51. It can also be welcomed that a clause in Article 121 requires that any restriction or suspension of rights or freedoms must be in conformity with the principles of Article 15 of the Constitution. This is tantamount to saying that such measures must only be taken “to the extent that the situation requires” – and therefore it is duly pointed out that the principle of proportionality also applies during any exceptional regime – and in accordance with the international obligations entered into by the Turkish state, all of which implies of course that the authorities must announce any derogations to the provisions of the ECHR and the ICCPR protecting fundamental rights. In addition, the State of Emergency Law itself refers to the requirements of Article 15 of the Constitution, which contains a list of non-derogable rights which apply even during exceptional circumstances³² representing a key constitutional safeguard for the protection of the rights in question.³³

B. Legislative provisions governing curfew

52. Article 11(a) of Law No. 2935 of 25 October 1983 on States of Emergency (hereinafter the “State of Emergency Law”) provides expressly that the measures taken to protect general security, safety and public order and to prevent the spread of acts of violence may include the “imposition of a limited or full curfew”. In the same way, Article 3 (I) of Law No.

²⁹ According to article 33, these authorities are : the Ministry of Interior, the regional governor for the state of emergency and city governors.

³⁰ “The law may introduce other restrictions with regard to stay of execution orders in the event of states of emergency, martial law, mobilisation and states of war, and for reasons of national security, public order and public health” (article 125 of the Constitution).

³¹ CDL-AD(2016)06, §§71-74, see also *Emergency powers*, op. cit., and *General Comment No. 29/2001 of the UN Human Rights Committee on States of Emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add.11, paragraph 14.

³² “Even under the circumstances described in the first paragraph, the individual's right to life, and the integrity of his body and mind shall be inviolable except where death occurs through acts in compliance with the law of warfare; no-one shall be compelled to reveal his/her religion, conscience, thoughts or opinions or be accused on account of them; offences and penalties shall not be made retroactive, nor shall anyone be held guilty until so proven by a court ruling”.

³³ Venice Commission, *Emergency powers*, op. cit.

1402 of 13 May 1971 on Martial Law mentions curfew as one of the measures that may be authorised where necessary. However, there is no text which defines curfew or the material or formal requirements for it to be imposed, the means of implementation or the limits on its application.

53. In view of the serious consequences of a state of emergency, this does not seem acceptable. The Venice Commission recommends that the authorities review the provisions mentioned above without delay and take the necessary steps for a clear, precise and detailed set of rules including all the conditions and guarantees associated with exceptional measures to be provided for by Turkish legislation with regard to curfews.

54. The Venice Commission notes at the same time that the Turkish Code of Criminal Procedure³⁴ cites the “violation of a curfew measure taken on the basis of Law No. 5442 of 10 June 1949 on Provincial Administration” (Article 91(4)(e)³⁵) as an offence for which police custody may be ordered. Nonetheless, no express reference to curfew is made in Law No. 5442 of 10 June 1949 on Provincial Administration (hereinafter the “Provincial Administration Law”).

C. Legal basis of the curfews imposed in South-East Turkey

a) Position of the authorities

55. In the management of the disturbances that have arisen in South-East Turkey since July 2015, no reference has been made, when imposing curfews, to the constitutional and legislative provisions on exceptional situations.

56. However, according to a written communication sent to the rapporteurs by the Turkish authorities,³⁶ the necessary legal conditions were met to declare a state of emergency under Articles 119, 120 and 121 of the Constitution and the State of Emergency Law or even to declare martial law under Article 122 of the Constitution and there was a sufficient majority in parliament to adopt such decisions. Instead of this, the authorities preferred to apply curfews on the basis of Article 11 of the Provincial Administration Law.

57. The authorities claim to have made this choice to avoid even the partial suspension of the ECHR (in accordance with Article 15 of the ECHR and Article 15 of the Constitution) and “to avoid any backsliding in the field of fundamental rights and freedoms” and preserve the gains made on the road to democracy and demilitarisation. Accordingly, they explain that, under these circumstances, it is for the benefit of the local population that curfews are applied “as a flexible way to maintain ... civil initiative and to protect fundamental rights and freedoms”. According to the authorities, the imposition of curfews forms part of the government’s positive obligations in the human rights field in urban areas where hundreds of militants from the terrorist organisation are deployed and are targeting the security forces from among the masses where hundreds of booby traps have been installed. The note states that the Republic of Turkey’s first priority in the fight against terrorism is to differentiate members of the armed terrorist organisation from civilians and to prevent civilian casualties. Therefore, the curfews essentially serve this purpose.³⁷

58. In the authorities’ view, this choice makes it easier to protect the lives and property of persons during fighting with armed groups because, since only local authorities may apply curfews, they are decided on and implemented according to need. The authorities also consider that for measures intended to protect fundamental rights, this choice makes for more flexibility and proportionality. In this connection the authorities state that curfews are

³⁴ Law No. 5271 of 4 December 2004 amended.

³⁵ Paragraph 4 of Article 91 of the Code of Criminal Procedure was introduced by an amendment of 27 March 2015 to the Code pursuant to Article 13 of Amending Law No. 6638.

³⁶ Information note regarding curfews, 24 April 2016, p.3

³⁷ Information note regarding curfews sent to the Venice Commission by the Turkish authorities, 24 April 2016, p.4

implemented only in parts of cities or districts where security operations are taking place and only for the duration of the operations. At the same time, they point out that constant efforts have been made to meet the basic needs of the people concerned, particularly to provide access to food and healthcare.

59. More specifically, the Turkish authorities refer to the following provisions of the Provincial Administration Law as the legal basis for curfew decisions (see CDL-REF(2016)028):

- Article 11(a), authorising the governor to take the “necessary measures to prevent crimes from being committed and protect public order and security”, relying for this on the state’s general and special law enforcement forces;
- Article 11(c), providing that it is one of the tasks of the governor (*vali*) “to secure peace and security, personal immunity, safety of private property, public well-being and the authority of preventive law enforcement”;
- Articles 32(b) and 32(ç) assigning the same powers, in similar terms, to sub-governors (*kaymakam*), at provincial district level;
- Article 66, which provides that in the event of social disturbances threatening public order or the public security or safety of persons and property, those who go against the measures taken by the governor or sub-governor to secure public order are liable to a prison sentence of 3 months to 1 year.

60. According to the Turkish authorities, even if curfew is not mentioned by the Provincial Administration Law, the fact that Article 91(4)(e) of the Code of Criminal Procedure refers to it as a measure which may be implemented under the Provincial Administration Law would tend to indicate that curfew decisions may be adopted on the basis of this law alone, without any formal declaration of a state of emergency.

61. The Venice Commission has been informed that the curfew orders adopted by some governors and sub-governors in South-East Turkey were all based on provisions of the Provincial Administration Law. For example, in September 2015, the governor of Sirnak issued a statement to the press in which he said that in order to capture members of the separatist terrorist organisation and protect people’s lives and properties, a curfew was declared in Cizre District in accordance with Article 11(c) of Law No. 5442 on Provincial Administration and would be valid from 4 September 2015 from 8 p.m. until further notice.

b) Relevant case law

62. The Turkish authorities refer, in the information forwarded to the rapporteurs, to a number of decisions given by the administrative courts and the Constitutional Court,³⁸ along with the European Court of Human Rights following complaints of alleged violations of fundamental rights under curfew measures. In requesting interim measures, the applicants also contested the lawfulness of curfews. In the authorities’ view, these decisions show that curfews are subject to judicial review and even strengthen the validity of the legal basis referred to.

63. The Commission notes that the Turkish courts, taking account of the seriousness of the situation, the violence involved and the risks to which the people were exposed, considered that curfews could not be regarded as unfounded and rejected the complainants’ requests.

64. The Constitutional Court for its part considered the information provided by the applicants to be insufficient and refused to order the interim measures they had requested while urging the authorities to examine the situation and to assist the people in difficulty according to the needs identified. In its judgment of 11 September 2015,³⁹ the Court, having noted the reasons given for imposing a curfew (to apprehend members of the terrorist

³⁸ See for example the decision of the Diyarbakir Administrative Court, 3. Idare Mahkemesi, Esas No: 2015/803, Karar No: 2015869, Turkish Constitutional Court, interlocutory decision on a provisional injunction, case no. 2015/19907, 26/12/2015.

³⁹ Turkish Constitutional Court, Mehmet Girasun and Others (case no. 2015/15266), 15/09/2015, §14

organisation and protect lives and property during terrorist attacks), found that “it could not be argued that the declaration of a curfew by the governor for the reasons referred to above was unfounded”. In all its subsequent decisions on curfews, the Court has systematically referred to this finding, holding that there was no reason to depart from it.

65. The Commission would like to point out, however, that when they met the representatives of the Constitutional Court, the rapporteurs were told that the Court had not yet examined the merits of the questions of legality that had been raised and that the rejection of interim measures should in no way be interpreted to mean that the Court had given the green light to curfews.

66. The European Court, for its part, which has received a few dozen requests for interim measures in connection with curfew measures in Turkey since December 2015, has decided to give priority treatment to a number of complaints.⁴⁰ While in some cases the Court has indicated interim measures, calling on the Turkish authorities to take all necessary measures to protect the life and physical integrity of injured applicants, in several others it has rejected the requests for reasons including the lack of detailed information on the actual circumstances alleged by the applicants. Here again, it is important to state that at this stage, the European Court has not yet examined the legality of the curfew decisions in question.

c) *Analysis*

i. *States’ margin of discretion when deciding on emergency powers*

67. The Venice Commission has already pointed out in previous opinions⁴¹ that in international law, states have a margin of discretion to assess whether a public emergency exists and derogations are needed. It is for the national authorities to assess, in view of the seriousness of the situation and taking account of all the relevant factors, if and when there is a public emergency threatening the existence of the nation and if a state of emergency needs to be declared to combat it. Likewise, it is for the state authorities to decide on the nature and extent of the derogations needed to overcome the emergency. However, although states have a wide margin of discretion in this area, their powers are not unlimited and the European Court of Human Rights exercises some supervision over these powers.⁴²

68. From 1987 onwards, the provinces of South-East Turkey were repeatedly placed under a state of emergency and in 1990, 1991, 1992 and 1993, the Turkish authorities even notified the Secretary General of the Council of Europe that because of “the intensity and variety of terrorist actions” conducted by the PKK in South-East Turkey, they would be derogating from some of the rights enshrined in the ECHR pursuant to Article 15. In its judgment of 18 December 1996 in the *Aksoy v. Turkey* case, the European Court of Human Rights found that the extent and, in particular, the impact of PKK terrorist activity in South-East Turkey had undoubtedly created, in the region concerned, a public emergency threatening the life of the nation.⁴³

69. The Venice Commission notes that although they refer to “the PKK terrorist activities” in South-East Turkey to justify curfews, the Turkish authorities have chosen not to argue that the situation is a “public emergency threatening the life of the nation” and hence not to claim that this is an exceptional situation which would warrant a temporary, limited and supervised derogation to their obligation to safeguard the rights and freedoms enshrined in the ECHR.

⁴⁰ See press release issued by the Registrar on 5 February 2016.

⁴¹ CDL-AD(2016)006, France, §59, CDL-AD(2011)049, Armenia, §11, report on emergency powers, page 22

⁴² See ECHR, *Brannigan and McBride v. the United Kingdom* (5/1992/350/423-424), 26 May 1993, §43; *Aksoy v. Turkey*, judgment of 18 December 1996, §68; *A and Others v. the United Kingdom*, judgment of 19 February 2009, §173.

⁴³ *Aksoy v. Turkey*, (21987/93), judgment of 18 December 1996, § 70

70. Therefore, the current legal situation differs from that of the 1980s and 1990s and reflects a political choice, made by the Turkish authorities despite their claims that all the prerequisites would be met for them to declare emergency rule. At the same time, there is no obligation for a state to make use of the possibility under the constitution and international treaties to derogate from its fundamental rights obligations in times of war or emergency. On the contrary, it should be a welcome development when a state shows its commitment to complying with these obligations even in difficult times.

71. The Venice Commission has duly noted this choice and the reasons given by the authorities, and has taken particular note of the emphasis they placed, when justifying their choice, on the use of curfews as a means of protecting individuals' rights.

ii. Curfew in "normal" situations - legal implications

72. The Commission notes, however, that curfew measures are provided for expressly in the Constitution and the legislation in force in Turkey. In Turkey therefore curfew amounts to an institution based on legal principles, prescribed by the law (two laws governing the specific legal systems that apply in two exceptional situations which have their basis in the Constitution) and dependent on the declaration of a state of emergency or martial law. The power to declare and implement these two states is defined thoroughly and in detail. There is therefore neither any kind of legal vacuum nor any ambiguity which could give rise to differing interpretations.

73. In addition, since the curfew system is by its very nature an exception and a derogation to certain fundamental rights, the texts governing it must be interpreted narrowly, in terms both of substance and of competence and scope.

74. In these circumstances, the Commission questions whether it is legally acceptable to derogate from a special law referring to curfew (the State of Emergency Law, which forms part of a special system set up by the Constitution) by means of a general law (the Provincial Administration Law) assigning decision-making powers on the subject to provincial governors, despite the fact that Article 120 of the Constitution gives the power to decree a state of emergency in one or more regions or throughout the country to the Council of Ministers, meeting under the chairmanship of the President of the Republic, and that Article 11 of the State of Emergency Law lists curfews among the measures that may be taken "whenever a state of emergency is declared".

75. If such a derogation were to be considered acceptable because of a political choice made by the authorities, two key questions would have to be addressed nonetheless to ensure that the decisions concerned were taken in accordance with the requirements of the rule of law and respect for fundamental rights:

(1) it would have to be ensured firstly that all the conditions and safeguards established by the Constitution and the State of Emergency Law to delimit curfews in the context of exceptional regimes are also satisfied when a curfew is applied at "normal" times on the basis of the legislation referred to by the authorities;

(2) secondly, it would be essential to ascertain that, as a measure restricting fundamental rights, a curfew decided on in "normal" times fulfils the requirements of the Constitution and those resulting from Turkey's international obligations in relation to fundamental rights.

76. The Commission would point out that in the context of the choice made by the authorities, the provisions of Article 13 of the Constitution apply to all restrictions to rights and freedoms, together with the requirements of the ECHR and the ICCPR. Furthermore, respect for these rights and freedoms and any infringements thereof should also be assessed in the light of the authorities' positive obligations vis-à-vis these rights.

1. *Conditions and safeguards applying to recent curfew measures*

77. As already stated, the rules on states of emergency which authorise curfews in Turkey provide for the following array of safeguards (see Chapter IV.A.a above): a collective decision-making process within the Council of Ministers under the chairmanship of the President of the Republic; consultation of the National Security Council; a maximum duration of six months; publication in the official gazette; immediate referral for approval to the Grand National Assembly, which may also decide to lift the state of emergency and hence to cancel the curfew; notification of the international institutions concerned. Otherwise, decrees with force of law may also be issued by the Council of Ministers under the Chairmanship of the President of the Republic and submitted for approval to the Grand National Assembly, which therefore has the possibility of rejecting them and, in this way, to cancel any recourse to curfew measures.

78. The above safeguards are totally missing from the Provincial Administration Law, Article 11 of which assigns governors and sub-governors very broad powers as part of their duty “to secure peace and security, personal integrity, safety of private property [and] public well-being”. No information is included in this law about the material conditions required or any procedure which must precede decisions to implement a curfew and still less about any assessment of the proportionality of such a measure and its limits and means of application, let alone any requirement to notify international institutions. It is worth noting that recourse to a derogation under Article 15 of the Constitution would have also opened up the possibility of international supervision of any derogating measures adopted.

79. As to the “time” criterion, requiring that any such measure must be limited and temporary, whereas on the ground there were curfews of varying length (lasting from a few hours up to, in extreme cases, permanent curfews lasting several weeks), there is a similar lack of any provision on this subject in the Provincial Administration Law. Nor is the length of curfews set down in governors’ decisions.

80. In the same way, all prior parliamentary approval of the adoption of curfew measures is excluded; neither were there any indications, according to the information obtained by the rapporteurs on their visit to Turkey, concerning any subsequent review of such measures (as the parliamentary committee in charge of such requests had not yet been able to visit the areas covered by curfews).

81. The Commission fully understands that in practice, such an important decision will not be taken unilaterally by the governor. As has been confirmed by the authorities, governors (as the local representatives of the state) will generally consult with the Ministry of the Interior and other government bodies (particularly the security department) before taking any such decision. Their discussions undoubtedly cover the necessity of curfew measures, their extent (in geographical area and time) and the measures needed for their application. The authorities see this as an application of the principles of subsidiarity and proportionality, which are quite clearly very important in the case of exceptional measures. In the Commission’s opinion, however, these are isolated discussions, which cannot replace the general implementing conditions prescribed by the law or be equivalent to the supervision exercised by the parliament over exceptional measures, making it possible in particular for a parliamentary debate to be held on any such measures planned by the executive before their approval.

82. In the same way, it is true that governors’ decisions include a brief description of the reasons justifying curfew measures, which the Commission cannot question, just as it is true that such decisions are announced to the public, published and subject to judicial review, just like any other administrative measure taken under ordinary rules in accordance with Article 125 of the Constitution.⁴⁴ The fact remains nonetheless that this decision, which gives

⁴⁴ “Recourse to judicial review shall be available against all actions and acts of administration”.

rise to restrictions to fundamental rights protected by the Constitution, is taken formally by a state official on the basis of a law which does not expressly assign that official any powers with regard to curfews. Despite this, penalties which may extend to imprisonment can be imposed for non-compliance.

83. In the light of the foregoing, the Venice Commission cannot conclude that the guarantees associated with curfews in the special legislation governing the use of this measure (based on the provisions of the Constitution which apply to exceptional regimes) are met when this measure is applied on the basis of the Provincial Administration Law.

2. *Curfew as a restriction on fundamental rights*

84. As already stated, the main implication of curfews is a restriction on freedom of movement. This freedom is guaranteed by Article 23 of the Turkish Constitution.⁴⁵ Freedom of movement is also guaranteed by Article 2 of Protocol No. 4 to the ECHR,⁴⁶ which Turkey has signed (on 19 October 1992) but not yet ratified, and by Article 12 of the ICCPR, which it has ratified. General Comment No. 27 on Article 12 of the ICCPR sets out the conditions under which freedom of movement may be restricted, which include the following:

- the law itself has to establish the conditions under which the rights may be limited;
- laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution;
- restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected;
- the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.

85. In the light of these comments and the criteria resulting from the ECHR's case law, the legal basis of the curfew measures implemented in South-East Turkey may be called into question. Firstly, in the Venice Commission's view, it cannot be concluded that the restrictions on the right to freedom of movement imposed by the recent curfew measures are "prescribed by the law".⁴⁷

86. The Commission considers instead, in view of its findings (see above), that the legislative provisions used as a basis to impose the curfew raise serious problems in terms of the quality and foreseeability of the law and, more generally speaking, legal certainty for the population concerned.⁴⁸ The fact relied on by the authorities that because of the

⁴⁵ "Everyone has the right to freedom of residence and movement. Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of offences" (Article 23 of the Turkish Constitution, unofficial translation).

⁴⁶ "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

⁴⁷ The Commission itself pointed out in its Opinion on the Protection of Human Rights in Emergency Situations that while the protection of national security and public safety may justify restrictions on some fundamental rights or even derogations from some obligations in this field, "restrictions of human rights and freedoms, and derogations must, however, be regulated by law and preferably have a foundation in the Constitution. ... The law must indicate in which cases limitations may be justified and preferably should define the states of emergency that may justify derogating measures, in order to create guarantees against abuse of the power to take restricting or derogating measures for other aims or to a larger extent than is allowed under domestic law and the ECHR.", CDL-AD(2006)015, §35.

⁴⁸ See also § 53 of this opinion.

country's recent history, the population is already familiar with and used to curfews cannot in anyway compensate for this gap in the regulations.

87. The Venice Commission also points to the importance of the principle of proportionality. This requirement must apply both to curfew decisions and to their implementation, and to related measures capable of affecting other rights and freedoms, which may consist of additional restrictions that may be imposed on the population during the curfew, such as the closure of schools or businesses, restrictions on the provision of public services or bans on public events, or of security operations carried out in this context by the authorities. Like curfews themselves, all of these measures must be proportionate to the threat and its immediacy, must not last any longer than the threat itself and must only apply to the regions affected by it.

88. The Commission points out that in the context of the choice made by the authorities, the only restrictions to rights and freedoms that are authorised are those provided for by the law and which can be justified in the terms set out in the relevant provisions of the Constitution and international instruments relating to fundamental rights.

89. In the absence of specific provisions in the legislation referred to, the Commission wishes to recall how important it is to ensure that rules are in place for the "security operations" carried out during curfews, the use of force and the deployment of armed forces and the supervision of their operations (decision-making powers, consideration of the need for and proportionality of the scale and length of operations and the apportionment of tasks between the gendarmerie, the police and army units). In particular, such rules are crucial to the state in the context of its obligation to protect the right of citizens to life and physical integrity, which is a non-derogable right guaranteed by Article 2 of the ECHR and Article 17 of the Turkish Constitution.⁴⁹ As it did in its Opinion on the Protection of Human Rights in Emergency Situations, the Commission would like to point out again that "the obligation to avoid or minimise the risk of losses of lives not only applies to security forces in planning and executing an operation, but also to the executive authorities and the legislature, who have to put into place an adequate administrative and legislative framework to regulate the use of force".⁵⁰

90. Questions might also be raised about the direct consequences of an extended curfew on the right to liberty protected by Article 5 of the ECHR and Article 19 of the Turkish Constitution and the compatibility of the restrictions on these rights with Article 5.1 of the ECHR.⁵¹

91. It is not for the Venice Commission to comment on the implementation of curfew decisions, the impact of their implementation on the other rights and freedoms of the population or the allegations of abuses and violations during curfews. The Commission would like to point out nonetheless that, because of their positive obligations with regard to these rights, it is for the authorities to take appropriate measures to ensure that they are protected and effectively exercised, and to protect citizens from abuses on both a practical and a legal level.⁵²

⁴⁹ Reference to article 17 of the Constitution is also made by Turkish courts in recent decisions relating to curfews (see Decision of the administrative Tribunal of Diyarbakir, Esas n° : 2015/803 ; Karar n° : 2015869).

⁵⁰ Opinion on the Protection of Human Rights in Emergency Situations (CDL-AD (2006)015, §27; see the judgment of the European Court of Human Rights of 20 December 2004 in the case of *Makaratzis v. Greece*, paragraph 62; see also the judgment it gave on 6 July 2005 in the case of *Nachova and Others v. Bulgaria*, §§ 96 and 97.

⁵¹ See its findings on house arrest (*Mancini v. Italy*, *Lavents v. Latvia*, *Nikolova v. Bulgaria* (no. 2), *Dacosta Silva v. Spain*).

⁵² As has been pointed out by the European Court, states must take steps to secure the tangible material and legal conditions for the full enjoyment of fundamental rights, see in particular *Öneryıldız v. Turkey*, 18 June 2002; *Ouranio and Others v. Greece*, 20 October 2005.

92. The legislative provisions relied on for the adoption of the recent curfew measures do not provide any legal framework for the adoption and application of curfews or indicate what measures or other steps should be adopted (where appropriate, pursuant to other legislation) to protect the civilian population before, during and after them. Thus, it is difficult to ascertain how the authorities intend to ensure that the potential limitations on rights and freedoms are compatible with the clauses of the relevant provisions of the Constitution and international treaties.

V. Conclusions

93. The Venice Commission has taken note with concern of the developments occurring since summer 2015 in South-East Turkey, where there have been particularly violent confrontations and major losses of human lives, including a large number of civilian losses, along with considerable material damage.

94. The Commission also recognises the scale and complexity of the challenges facing the Turkish authorities given the seriousness and the number of terrorist attacks which have been carried out recently in the country. Their efforts and their commitment to combating terrorism are legitimate.

95. The Commission would like to point out, however, that although it is a state's duty to muster all its resources to combat the terrorist threat and protect its citizens from such attacks, it is also crucial in a democratic society to strike the right balance between security needs and the exercise of rights and freedoms, showing due regard for the requirements of the rule of law.

96. Despite the seriousness of the situation they were facing, the Turkish authorities chose not to declare a state of emergency to engage in the security operations they considered necessary in the areas concerned, whereas these operations and the related measures (such as curfew) inevitably entail restrictions to rights and freedoms, which sometimes have extremely serious consequences.

97. The Venice Commission has taken note of the authorities' choice, which they justify through their desire to protect rights and freedoms in all circumstances including in a context in which, as they themselves state, all the prerequisites to declare a state of emergency were met.

98. The Commission therefore notes that the curfews imposed since August 2015 have not been based on the constitutional and legislative framework which specifically governs the use of exceptional measures in Turkey, including curfew. To comply with this framework, any curfew measure should be associated with emergency rule, as provided for in Articles 119 to 122 of the Constitution. This would also be in keeping with the approach of the Commission, which has stressed in its work that de facto emergency powers should be avoided and it is better to declare them officially along with their accompanying lists of obligations and guarantees including the obligation to inform international organisations of any derogations from fundamental rights and the reasons for these, thus subjecting their application to the supervision of these organisations or to parliamentary debate and approval..

99. In the Venice Commission's opinion, the Provincial Administration Law, on which decisions imposing curfews were based, and the decisions themselves do not meet the requirements of legality enshrined in the Constitution and resulting from Turkey's international obligations in the area of fundamental rights.

100. To remedy this situation, the Venice Commission invites the Turkish authorities to implement the following recommendations in particular:

- to no longer use the provisions of the Provincial Administration Law as a legal basis for declaring curfews and to ensure that the adoption of all emergency measures including curfews is carried out in compliance with the constitutional and legislative framework for exceptional measures in force in Turkey, showing due regard for the relevant international standards and complying with national rules and international obligations with regard to the protection of fundamental rights;
- to review the legal framework on states of emergency to ensure that all exceptional decisions and measures such as curfew taken by the authorities when a state of emergency is formally declared are subject to an effective review of legality including, in particular, consideration of their necessity and proportionality;
- to introduce all the necessary amendments to the State of Emergency Law so that there is a clear description in the law of the material, procedural and temporal arrangements for the implementation of curfews, particularly the conditions and safeguards to which they must be subject (including parliamentary and judicial supervision).

101. The Venice Commission remains at the disposal of the Turkish authorities for any assistance they may require.