

ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE NOTION OF STATE OF EMERGENCY

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Abstract

This article will critically evaluate the jurisprudence of the European Court of Human Rights specifically with regards to Article 15 of the European Convention on Human Rights and its development since its inception. There is no doubt that departure from normal human rights standards in certain circumstances is unavoidable. Provisions such as Article 15 of the Convention should be in place to protect the life and territorial integrity of a nation in times of war and other emergency situations. Article 15 incorporates, in effect, the principle of necessity common to all legal systems. It allows a government to derogate from the Convention standards in times of public emergency. This article will review the reasons for Article 15, the requirements of the right to derogate and the procedure of derogation. Further, it will consider the case of *A and Others v. the United Kingdom* which will indicate the new challenges that the European Court of Human Rights will have to address in the future.

Keywords: Article 15 of the European Convention on Human Rights, the Notion of State of Emergency, European Convention on human Rights, and European Court of Human Rights.

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İNSAN HAKLARI AVRUPA SÖZLEŞMESİ'NİN 15. MADDESİ VE OLAĞANÜSTÜ KAVRAMI

Özet

Bu makale Avrupa İnsan Hakları Mahkemesi'nin içtihatlarını özellikle Avrupa İnsan Hakları Sözleşmesi'nin 15. Maddesi ve yürürlüğe girdiği günden bu zamana gelişimi hususunda eleştirel olarak değerlendirmektedir. Belirli şartlar altında normal insan hakları standartlarından vazgeçmenin kaçınılmaz olduğu aşikârdır. Sözleşmenin 15. maddesindeki gibi hükümler savaş ve diğer olağanüstü durumlarda bir ulusun yaşam ve toprak bütünlüğünü korumak amacı ile yürürlükte olmaya devam etmektedir. 15. madde esas itibariyle tüm hukuk sistemleri için ortak bir zorunluluk ilkesini bünyesinde barınmaktadır. Bu madde olağanüstü durumlarda devletlere Sözleşmenin standartlarını askıya alma imkânı sağlar. Bu makalede 15. maddenin gerekçeleri, askıya alma koşulları ve usulü incelenecektir. Ayrıca, makale Avrupa İnsan Hakları Mahkemesi'nin gelecekte ele alması gereken yeni sorunları gösteren A ve Diğerleri v. *Birleşik Krallık* davası incelenmiştir.

Anahtar Sözcükler: Avrupa İnsan Hakları Sözleşmesi 15. Madde, Olağanüstü Hal Kavramı, Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi

1. Introduction

The European Convention on Human Rights (the Convention) has been described as much a political document as it is a legal one.¹ Over the years the European Court of Human Rights (the Court) has developed its understanding of three basic principles which form the convention values,

¹ M.W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law: Text and Materials*, Oxford U.P., 2008, 24; see also Council of Europe, 'Definition and Development of Human Rights and Popular Sovereignty in Europe (Science and Technique of Democracy)', Council of Europe Publication, 2011, p. 132.

democracy, the rule of law and human rights.² Since its establishment the European Court of Human Rights has had to strike a balance between upholding human rights and the sovereignty of the contracting parties.³ Indeed, this is nowhere more apparent than when in occasions the Court has had to decide whether a situation of “exceptional and imminent danger” actually existed. More often than not, in such instances of threat to the national security, the high contracting parties to the Council of Europe are granted a wide margin of appreciation to neutralize the threat and protect both itself and its citizens.⁴ According to the Courts jurisprudence, doctrines of judicial deference, such as the margin of appreciation act as a protectorate for state sovereignty.⁵ In certain instances, states choose to respond to threats to their national security by declaring a state of emergency, according to which they could derogate from certain laws, or temporarily suspend, in times of ‘war or public emergency threatening the life of the nation.’⁶ Most major international

² Council of Europe, *Collected Edition of the “Travaux Préparatoires of the European Conventions on Human Rights/Recueil des Travaux Préparatoires de la Convention Européenne des Droits de L’homme, Vol. I: Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949* (The Hague: Martinus Nijhoff Publishers, 1975), p. 266.

³ C. Gearty, ‘Democracy and Human Rights in the Court of Human Rights: a Critical Appraisal’ (2000) 51 *Northern Ireland Legal Quarterly* 381, 396; Bonner, D, ‘Managing terrorism While Respecting Human Rights? European Aspect of the Anti-Terrorism Crime and Security Act 2001’ (2002) 8 *European Public Law* 497-525.

⁴ The margin of appreciation doctrine was born into the Convention jurisprudence in the Commission’s Report in the *Cyprus cases* in 1958; see *Greece v United Kingdom*, Appl. no. 176/57 (1958-1959) 2 *Yearbook of the European Court of Human Rights*, 525, Generally see generally, H. Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Convention on Human Rights Jurisprudence*, The Hague: Kluwer, 1996; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR*, Intersentia Publishers, 2002.

⁵ *Handyside v. The United Kingdom*, Appl. no. 5493/72, 7 December 1976, para 47.

⁶ Normally, if a state was to deny the existence of an armed conflict be it of internal or international nature on its territory, then the situation comes under the law enforcement paradigm ruled by international human rights law (IHRL) mechanism. Moreover, the state concerned cannot simply claim that it is an internal matter and does not concern international law. T. Pfanner, ‘Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action’, *IRRC*, vol. 87, No. 957, March 2006, pp. 149-174; p. 165.

human rights treaties have some form of derogation provision.⁷ The notion of “emergency” has been described as an “elastic concept.”⁸ The mechanism of derogation has been described as ‘the legally mandated authority of states to allow suspension of certain individual rights in exceptional circumstances of emergency of war.’⁹ Yet, there are certain scholars that argue that the rule of law expressly prohibits an exception, either within or outside the legal order.¹⁰

A considerable number of states from different political and cultural backgrounds have made declarations of “state of emergency” for decades.¹¹ Indeed, some politicians even openly admit that such measures

⁷ With the exception of the African Charter of Human and Peoples Rights (ACHPR), the other two major regional treaties, the European Convention on Human rights (ECHR)⁷ and the American Convention on Human Rights (ACHR),⁷ both of which permit derogations, as does the ICCPR. Indeed, there are similarities between the aforementioned derogation articles. Article 4(1) of ICCPR states:

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 such 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.

⁸ The complexity of describing it is coherently encapsulated by Alexander Hamilton, writing in 1787, when he stated: ‘It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. Cited in Clinton Rossiter (ed.), ‘The Federalist No. 23’, at 153 (Alexander Hamilton), *The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union*, New York Packet, Tuesday, December 18, 1787, Text available at: <<http://www.constitution.org/fed/federa23.htm>>. See also H.P. Lee, *Emergency Powers*, Sydney: Law Book Co., 1984, p. 4; see also, e.g., *The International Law Association Paris Report* 61 (1984).

⁹ O. Gross, F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge U.P., 2006, p. 257.

¹⁰ D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge U.P., 2006, p. 2-3.

¹¹ For example in accordance with Article 28(3)(3) of its constitution Ireland was under an official state of emergency from the outbreak of the World War II in 1939 until 1976.

are not to meet one crisis but a multitude of them.¹² By the same token, some temporary emergency legislation continues to be renewed on regular intervals to provide temporal limitations on such powers.¹³ As a result, a common reaction to the emergency powers is the accusation that they are retained for longer than necessary.¹⁴

In recent times, terrorist attacks have prompted states to declare state of emergency, as in the aftermath of 11 September attacks.¹⁵ The US Government proclaimed state of emergency although no formal measure to derogate from UN International Convention on Civil and Political Rights (ICCPR) or any human rights treaty was made.¹⁶ In such cases, in general International Human Rights Law (IHRL) and national constitutional guarantees will be applied to the situation commonly

However, on the day that the state of emergency was lifted a new state of emergency was declared by the government in order to deal with the rising crisis in Northern Ireland which lasted until 1995, see F. Ni Alain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, Belfast: Blackstaff Press, 2000, pp. 17-77; see also the situation concerning Israel that has been under a state of emergency since its inception as an independent state in 1949. E.g., A. Mizock, 'The Legality of the Fifty-Two Year state of Emergency in Israel', 7 *Davis Journal of International Law and Policy* 223 (2001).

¹² For example according to Richard Cheney: Homeland security is not a temporary measure just to meet one crisis. Many of the steps we have now been forced to take will become permanent in American life. They represent an understanding of the world as it is, and danger we must guard against perhaps for decades to come. I think of it as the new normalcy. Richard Cheney addressing the Republican Governors Association, October 25, 2001, available at: <<http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20011025.html>>.

¹³ One the instances the Emergency Powers Act 1973 (EPA), was renewed in 1978, 1987 and 1996, in Northern Ireland before being replaced by the terrorism Act 2000. This act re-enacted the EPA 1996 provisions under Part VII, subject to annual renewal. This process ended on 31 July 2007, after 34 years of emergency provisions in Northern Ireland. For a review of the operation of counter-terrorism law in Northern Ireland, see the report of John Rowe QC, *Review of the Operation in 2000 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996* (Home Office, London, 2001).

¹⁴ D. Bonner, *Emergency Powers in Peace Time*, Sweet & Maxwell: London, 1985, p. 17.

¹⁵ President G.W. Bush, 'Declaration of National Emergency by Reason of Certain Terrorist Attacks' (14 September 2001), available at: <www.Whitehouse.gov/news/release/2001/09/20010914-4.html>.

¹⁶ Bianchi & Naqvi, 'International Humanitarian Law and Terrorism', *op. cit.*, p. 42.

referred to by states in recent decades as counter-terrorism operations.¹⁷ IHRL in particular regulates state policies in counter-terrorism both in armed conflict and during periods of civil strife.¹⁸ It obliges states to respect and ensure general and specific civil and political rights as well as to respect, protect, and fulfil economic, social, and cultural rights. There are four principles regulating the state of emergency denoted in major human rights instruments; namely, the scope of the notion of state of emergency; the proportionality test to assess derogation; non-derogable rights and procedural obligations.¹⁹ It has to be emphasised that derogations should not be the main basis of a state's anti-terrorism policies and they are rarely used in Europe with the exception of the United Kingdom in recent decades derogating from Article 5 (1)(f) of the Convention, the right to liberty and security from 2001-2004 being a noteworthy example.²⁰

¹⁷ Generally see Chapter 16, the Administration of Justice, in United Nations, Office of the High Commissioner for Human Rights and the International Bar Association, A Manual on Human Rights for Judges, Prosecutors and Lawyers United Nations Publications, 2005, pp. 811-855; P. Alston et al., International Human Rights Law in Context: Law, Politics, Morals, Oxford U.P., 3rd ed., 2007, P. 375.

¹⁸ In relation to the armed conflict between the Non-State Armed Group Hezbollah in Southern Lebanon and Israel, the Lebanese Government did not declare a state of emergency according to Article 4 of the International Covenant for Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); however, it proclaimed a national state of emergency on 12 July 2006. A stark example is the state of Israel which remains under a state of emergency proclaimed on 19 May 1948, four days after its Declaration of Establishment (UN Doc CCPR/C/ISR/2001/2 (4 December 2001, para. 71); On ratifying the ICCPR, it made a declaration regarding the existence of this state of emergency and attached a reservation to Article 9 (Liberty and Security of Person), UN Doc A/58/40 (1 November 2003) vol. I, 64, para 12. The Human Rights Committee has expressed concern that the Israeli policies related to the state of emergency appear to have unofficially derogated from additional provisions of ICCPR; Stubbins-Bates, et al., Terrorism and International Law: Accountability, Remedies and Reform: A Report of the IBA Taskforce on Terrorism, Oxford U.P., p. 77.

¹⁹ A. Bianchi & Y. Naqvi, International Humanitarian Law & Terrorism, Hart Publishing, 2011, p. 43.

²⁰ As a result of these instruments states are bound by IHRL to act with due diligence to prevent violations of the right to life by NSAGs and accordingly regulate their counter-terrorism policies. See Declaration contained in a *note verbale* from the Permanent

Article 15 of the Convention contains the politically and legally mandated processes whereby states can suspend their international obligations in order to protect individual rights in time of emergency or crisis.²¹ However, bearing the responsibility of protecting their citizens does not give the states an excuse for human rights violations which may ultimately tantamount to crimes against humanity.²² In step with many other international human rights treaties, the derogation provisions of the Convention specify that certain rights are non-derogable and cannot be limited or suspended under any circumstances. In theory, derogations are not open-ended and are subject to certain procedural requirements. Modern constitutions often have special provisions for dealing with emergency situations.²³ Once a notice of derogation has been conveyed to the Council of Europe, states would have more discretion and flexibility to react to any kind of emergency without the constraints of the treaty obligations. In the past almost all derogations have been related to Article 5 (the Right to Liberty and Security of the Person) and 6 (the Right to a Fair Trial) of the Convention mainly because these articles contain little

Representative of the United Kingdom to the Council of Europe, 18 December 2001; see also *A and Others v Secretary of State for the Home Department*[2004] UKHL 56;

²¹ F. Ni Aolain, 'Transitional Emergency Jurisprudence: Derogation and Transition', pp. 24-51, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011, p. 24.

²² UN High Commissioner for Human Rights, Report of the HCHR and follow up to the world conference on Human Rights, E/CN.4/2002/18, 27 February 2002, para 2.

²³ For example, Article 16 of the 1958 French Constitution, which has been described as one of the 'broadest grants of emergency powers to the executive in a modern constitution'. It grants the President of the Republic unilateral authority to declare an emergency:

When the constitutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interpreted. M. Rosenfield (ed), *The Oxford Handbook of Comparative Constitutional Law*, Oxford U.P., 2012, P. 445; Gross & Ni Aolain, *Law in Times of Crisis*, *op. cit.*, p. 55; M. Tushnet, et.al., *Routledge Handbook of Constitutional Law*, Routledge, 2012, p. 87.

scope to applying limitations on the kind of grounds that are specified, for example, in Articles 8 to 11 of the Convention.²⁴

According to Ni Aolain, ‘despite the propensity of the crisis in many states, the legal and political rhetoric and practices accompanying emergency fixates on the unusual nature of both the threat faced and the *sui generis* nature of the response.’²⁵ In theory, the European system is locked into an exceptionality model by virtue of a derogation mechanism that requires the state to specify its opt-out from specific treaty measures, and offers the possibility of external scrutiny and measurements for such actions.²⁶ In reality, states that resort to exceptional powers are those states that have experienced (or are experiencing) the spectre of internal armed conflict or what they normally claim as anti-terrorist operation against internal or external actors. In the past, states such as Cyprus, the United Kingdom, Italy, Spain, and Turkey have been among the high contracting parties to the Convention that have had to resort to exceptional powers.

This article explores how the state of exception has been used in practice by the states within the Council of Europe and the legality of which has been considered by the Court through its jurisprudence. This article is divided into two parts. The first part deals with the substantive requirements and obligations set out in Article 15 of the Convention with special attention to the Jurisprudence of the Court since its inception. The second part of the paper concentrates on the controversial case of *A and Others v. the United Kingdom* in which the United Kingdom appeared before the European Court of Human Rights in regards to the indefinite detention of some foreign nationals (under the Anti-Terrorism Crime and Security Act 2001) suspected of terrorist activities in the United Kingdom. The question before the Court was whether the United Kingdom’s derogation from its Convention Obligations could be justified under

²⁴ R.C.A. White & C. Ovey, *European Convention on Human rights*, Oxford U.P., 5th ed., 2010, p. 113.

²⁵ Ni Aolain, ‘Transitional Emergency Jurisprudence’, *op. cit.*, p. 28.

²⁶ *Ibid.*

Article 15(1). In this section, the author argues that in the future the Court may have to deal with the issue of “permanent state of emergency” as clearly illustrated in the leading case of *A and Others v. United Kingdom*. However, such measures are subject to the control of the organs of the convention and their interpretation.

2. Substantive Requirements:

2.1. The scope of the notion of state of emergency

In certain exceptional circumstances Article 15 of the convention²⁷ enables contracting States to unilaterally derogate from some of the substantive Convention obligations.²⁸ International scholars have long recognized that ‘the response of a state to a public emergency is the acid test of its commitment to the effective implementation of human rights.’²⁹ There is controversy in relation to the scope of the notion of state of emergency, as to which body or institution has the authority to declare a state of emergency.³⁰ The monitoring body of ICCPR, the Human Rights Committee has expressed reservation regarding the erroneous nature of some declarations by states that do not appear to amount to a ‘public emergency that do threaten the life of the nation,’ falling short of articulating what conditions amount to the existence of a state of

²⁷ Article 15 – Derogation in time of emergency:

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.

²⁸ Harris, D. J., O’Boyle, M., Bates, E. P., Buckley, C. M., Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights, Oxford U.P., 2nd ed., 2009, p. 617.

²⁹ D. McGoldrick, ‘the Interface between public Emergency Powers and International Law’, *International Journal of Constitutional Law*, Volume 2, Number 2, 2004, pp. 380-429, p. 388.

³⁰ Bianchi & Naqvi, *International Humanitarian Law & Terrorism*, *op. cit.*, p. 44.

emergency.³¹ In this regard some observers have expressed the opinion that; ‘where there is an organised campaign of violence resulting in death at whatever low level among the security forces and civilians it is now hard to see how the Strasbourg authorities could avoid confirming a state’s claim that there is a public emergency within Art 15.’³²

The first instance of the enforcement of derogation under Art 15 took place was in the *Cyprus* case, where two applications were brought by Greece against the United Kingdom which at the time Cyprus was still under its rule.³³ In this case, the Commission considered that it was ‘competent to pronounce on the existence of a public danger which, under Art 15, would grant to the contracting party concerned the right to derogate from the obligation laid down in the Convention’. The Commission also observed that it was ‘competent to decide whether measures taken by a party under Article 15 of the Convention had been taken to the extent strictly required by the exigencies of the situation’.³⁴ Eventually, in this case, a political solution was applied and the Committee of Ministers decided not to take further action.

³¹ See, United republic of Tanzania (28 December 1992) UN Doc CCPR/C/79/Add. 12, para 7; Dominican Republic (5 May 1993) UN Doc CCPR/C/79/Add. 18, para 4; United Kingdom of Great Britain & Northern Ireland (27 July 1995) UN Doc CCPR/C/79/Add. 55, para 23; Peru (25 July 1996) UN Doc CCPR/C/79/Add. 67, para 11; Bolivia (5 May 1997) UN Doc CCPR/C/79/Add. 74, para 14; Colombia (3 May 1997) UN Doc CCPR/C/79/Add. 76, para 25; Lebanon (5 May 1997) UN Doc CCPR/C/79/Add. 78, para 10; Uruguay (1998) UN Doc CCPR/C/79/Add. 90, para 8; Israel (18 August 1998) UN Doc CCPR/C/79/Add. 93, para 11. In regards to Israel it is noted that in its third report (21 November 2008) UN Doc CCPR/C/ISR/3, it underscored its attempts to bring to an end the state of emergency (paras 157-62). In the opinion of the HRC in its List of Issues to be discussed with Israel (17 November 2009) UN Doc CCPR/C/ISR/Q/3, urged that state to specify in detail the content and timeframe for bringing to completion ‘the joint programme to complete the needed legislative procedures required ... to end the state of emergency’ (3).

³² Harris, O’Brian and Warbrick, *Law of the European Convention on Human Rights*, *op. cit.*, p439.

³³ *Greece v United Kingdom*, (1958-59) 2 *European Convention Yearbook* 178 and 189.

³⁴ *ibid*

2.2. There must be a public emergency threatening the life of a nation

In *Lawless v Ireland* the European Court of Human Rights defined an “emergency situation” as: ‘an exceptional situation of crisis or emergency which affects the whole of the population and constitutes a threat to the organised life of the community of which the state is composed’.³⁵ The danger must be in a way that the normal measures permitted by the Convention are proven inadequate to deal with the situation.³⁶ The *Lawless* test sets a high threshold for a state of emergency, holding that states require tangible evidence of large-scale threat to their constitutional order. The Court extensively deliberated on conditions that would qualify as amounting to a state of emergency threatening the life of the nation, however, it concluded: ‘That a state of emergency was a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question.’³⁷ In this case, the Court held, that the existence of the public emergency deduced by the Irish government was ‘reasonably deduced’.³⁸ The Irish

³⁵ In this case, the court held, that the existence of the public emergency construed by the Irish government was ‘reasonably deduced’. The Irish Government relied on three important factors, namely: the existence of the Irish Republican Army (IRA); which was operating outside the territory of the state; and the steady and alarming increase in the activities of the aforementioned organization running up to the period before the emergency was declared. *Lawless v Ireland*, Judgments of 14 November 1960, 1 *EHRR* 15 (para 28).

³⁶ In the Greek case, the European Commission of Human Rights established that there ought to be four characteristics in order a public emergency is considered as threatening the life of the nation: (i) it must be actual and imminent; (ii) its effects needs to involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; (iv) the danger must be exceptional. *The Greek case*, (App no 3321/67; 3322/67; 3323/67; 3344/67), Commission’s Report of 5 November 1969, 12 *Yearbook of ECHR*, paras. 152-154.

³⁷ Some of the five minority members of the Commission proposed an even more rigorous reading of the concept of “public emergency” see e.g. the dissenting opinion of the Commission member Susterhenn that ‘public emergency’ must be construed as ‘tantamount to war’ or as analogous to circumstances of war. *Ibid*, p. 56.

³⁸ *ibid*.

Government relied on three important factors, namely: the existence of the Irish Republican Army (IRA); which was operating outside the territory of the state; and the steady and alarming increase in the activities of the aforementioned organisation running up to the period before the emergency was declared.³⁹ It is worth noting that Lawless was the first critical judicial step taken towards placing the resort to emergency powers by states within an international review framework.⁴⁰ In this case, the Irish government had vehemently contested the right of the Court and Commission to scrutinise the government's actions, stating that while the government used the framework of derogation it was nonetheless entirely at its discretion to determine that a state of 'public emergency' existed and what measures were needed to overcome the exigency and in what proportion. Yet, the Court stated categorically that 'it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled'.⁴¹ Hence, by doing so the Court set out a framework according to which the state of exception in international law is defined: '[I]n the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of nation" is sufficiently clear ... they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.'⁴² The Court based its judgment on the basis of three factual elements which in the Court's opinion justified the Irish government's Proclamation of 5 July 1957, and resort to the derogation mechanism according to Article 15, 'namely: in the first place, the existence in the territory of the

³⁹ *ibid.*

⁴⁰ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 31.

⁴¹ *Lawless v Ireland*, para 22.

⁴² *Lawless v Ireland* (No. 3), para 28. In his concurring opinion, Judge Maridakis stated: 'By "public emergency threatening the life of the nation" it is to be understood a quite exceptional situation which imperils or might imperil the normal operation of public policy established in accordance with the lawfully expressed will of the citizens, in respect alike of the situation inside the country and of relations with foreign powers.'

Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that the IRA was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.⁴³ The decision of the Court and the Commission in this case reflects strong regard to the Irish government's assessment of the situation.⁴⁴ It is questionable, however, on the facts of the case, that the Court's answer to the primary question as to the existence of a public emergency in Ireland could be sustained.⁴⁵ According to Ni Aolain, the commission in *Lawless*, 'extended the notion of a measure of discretion, applying it not only to the question of whether the measures taken by the government were "strictly required" by the exigencies but also to the determination of whether a "public emergency threatening the life of the nation" existed.'⁴⁶ In this regard the Commission noted:

Having regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion – a certain margin of appreciation – must be kept to the government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogation from its normal obligations under the Conventions.⁴⁷

The above statement grants high contracting parties certain amount of flexibility in calling for the state of emergency in the first place.⁴⁸ However, certain scholars have been critical of the Court in applying the

⁴³ *Lawless v Ireland*, para 28.

⁴⁴ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 32.

⁴⁵ O. Gross, 'Once More unto the Beach: the Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', *Yale Journal of International Law* 23 (1998) 437, pp. 462-464.

⁴⁶ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 32.

⁴⁷ E ComHR, *Lawless v. Ireland*, 19 December 1959 (Appl. No. 332/57) Para 90.

⁴⁸ *Lawless v Ireland*, p. 40.

margin of appreciation to Article 15 of the Convention.⁴⁹ Furthermore, since the collapse of the Soviet Bloc and as a result of accession of Central and East European states to the Council of Europe,⁵⁰ some states and judges have expressed reservations regarding application of margin of appreciation to some of transitional, post-communist states, which may lead to ‘an erosion of the integrity and coherence of rights protection within the system.’⁵¹ It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still relevant.⁵² As noted by Judge Martens in his concurring opinion in *Brannigan and McBride v. UK*:

The view of the Court as to the margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then members of Council of Europe might be assumed to be societies which ... had been democracies for a long time ... Since the accession of Eastern and Central European states that assumption has lost its pertinence.⁵³

In contrast, in an earlier case, the European Commission of Human Rights came to the conclusion that the test in Article 15 had not been satisfied,⁵⁴ despite the fact that the state concerned had been given the benefit of the margin of appreciation.⁵⁵ This case concerned the application brought by a

⁴⁹ O. Gross and F. Ni Aolain, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’ (2001) 23 *Human Rights Quarterly* 625, pp. 630-34.

⁵⁰ Generally see A. Febbrajo & W. Sadurski, *Central and Eastern Europe after transition: Towards a New Socio-Legal Semantics*, Ashgate, 2013.

⁵¹ W. Sadurski, ‘Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgments’, *Human Rights Law Review* 9 (2009) 397, pp. 430-431.

⁵² G. Martinico & O. Pollicino, *The Interaction between Europe’s Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar Publishing, 2012, p. 167.

⁵³ *Brannigan and McBride v. United Kingdom*, 25 May 1993 (Appl. No. 14553/89; 14554/89), concurring opinion of Judge Martens, para 3.

⁵⁴ *The Greek case*, (1969) II Yearbook, para 32.

⁵⁵ Arai-Takahashi, *The Margin of Appreciation Doctrine*, *op. cit.*, P. 176.

number of Scandinavian countries against the regime set up by the Greek colonels in 1967. The Commission held that the Greek case was different in nature, insofar as, the respondent state's government seized power through a military *coup d'etat* on 21 April 1967 and subsequently suspended parts of the constitution and invoked Article 15 of the Convention.⁵⁶ The Commission considered that the burden firmly rested upon the respondent state which was meant to show that the conditions justifying the measures of derogation through Article 15 had been and continued to be met.⁵⁷ The Commission considered three elements, namely; the threat of a communist takeover; the crisis regarding the constitutional government; and the breakdown of public order in Greece.⁵⁸ In this case the Commission came to the conclusion that the respondent state had not satisfied the requirement that a public emergency was threatening the life of the Greek nation at the time of the military takeover.⁵⁹ The Commission adopted a different approach to the Court in regard to Article 15, while referring to the margin of appreciation, it stated that it was more concerned; whether such an emergency existed in fact, than merely considering the Greek government to be able to provide sufficient reason to believe that public emergency existed. In this case the Commission as a general rule managed to establish that there ought to be four characteristics in order a public emergency is considered as threatening the life of the nation:

- 1) It must be actual and imminent;
- 2) Its effects needs to involve the whole nation;
- 3) The continuance of the organised life of the community must be threatened;
- 4) The danger must be exceptional.⁶⁰

⁵⁶ *Greek case, op. cit*, para 32.

⁵⁷ *Ibid*, para 72.

⁵⁸ *Ibid*, para 45.

⁵⁹ *Yearbook of the European Convention on Human Rights*, 1969, Kluwer International Publishers, 1971, The Greek Case, p. 196, para 30.

⁶⁰ *Greek case, op. cit*, para 153.

In the case of *Ireland v United Kingdom*⁶¹ both the Court and the Commission were in no doubt that the public emergency threatening the whole of nation was a reality based on the terrorist activities of the Irish republican Army (IRA).⁶² The Court adopted the application of ‘margin of appreciation’ doctrine, in which the Court allowed a wide ‘margin of appreciation’ to the national authorities in deciding that ‘both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it.’⁶³ This was in spite of the fact that, neither of the parties at the time, were able to point out the fact that, the threat was only limited to a particular part of the territory of the United Kingdom.⁶⁴ This approach was based on the rationale that the declaration of a state of emergency was the main prerogative of governments which in turn have the ultimate responsibility of protecting ‘the life of the nation’.⁶⁵ Consequently, by reason of their ‘direct and continuance contact with the pressing needs of the moment, the national authorities are in principle in a better position than an international judge to decide on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.’⁶⁶ The issue of derogating in times of a state of emergency was dealt with in the House of Lords decision of *A and Others v Secretary of State for the Home Department* (2004).⁶⁷ Having reviewed the case-law of the European Court of Human Rights in this regard, the majority of the Law Lords accepted the British Government’s declaration as to existence of the public emergency based on the principle of ‘demarcation of functions or ... “relative institutional competence”’.⁶⁸ However, Lord

⁶¹ *Ireland v United Kingdom* (App no 5310/71) (1978) 2 EHRR 25; S. Marks, ‘Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights’, 15 *Oxford JLS* 69 (1995) 72, p. 81.

⁶² *Ireland v United Kingdom*, para. 163.

⁶³ *Ibid*, para 207.

⁶⁴ *Ibid*, paras 11 &13.

⁶⁵ Bianchi & Naqvi, *International Humanitarian Law & Terrorism*, *op. cit.*, p. 46.

⁶⁶ *Ireland v United Kingdom*, *op. cit.*, para 207.

⁶⁷ *A (FC) et al (FC) (Appellants) v Secretary of State for the Home Department* [2004] UKHL 56.

⁶⁸ *Ibid*, para 29, per Lord Bingham.

Hoffman, in his dissenting opinion expressed the view that the terrorist threat posed was rather negligible than to require a declaration of a state of emergency, since ‘terrorist violence, as serious as it is, does not threaten our institutions of government or our existence as a civil community’.⁶⁹

The current position of the Court is set out in the case of *Aksoy v. Turkey*, where it considered the public emergency issue threatening the life of the nation and places the onus on each contracting party to assess what constitutes a public emergency and what measures to take accordingly to deal with it. Therefore, in this case in step with its previous case-law the Court granted Turkey a wide margin of appreciation.⁷⁰ Some observers have opined that ‘where there is an organised campaign of violence resulting in deaths at a relatively low level among the security forces and civilians it remains hard to see how the Court avoid confirming a state’s claim that there is a public emergency within Article 15 assuming there is no evidence of bad faith on the latter’s part.’⁷¹ Furthermore, in its General Comment, no. 29 on states of emergency, which specifically deals with Article 4 of the ICCPR, the United Nations Human Rights Council (HRC) reiterated the need for states to consider if declaring a state of emergency outside the situation of an armed conflict is absolutely necessary.⁷²

⁶⁹ Ibid, para 96, per Lord Hoffman.

⁷⁰ *Aksoy v Turkey*, appl. no. 21987/93, Judgement of 18 December 1996; In regards to the wide margin of appreciation, the Convention organs have generally been satisfied if a respondent government has shown some plausible basis for believing that the derogatory measures were necessary.

⁷¹ Harris, O’Brian and Warbrick, Law of the European Convention on Human Rights, *op. cit.*, p. 631.

⁷² According to General Comment no 29, ‘if States parties consider invoking article 4 in other situations than armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.’ UN Human Rights Committee, General Comment no 29, States of Emergency (Article 4), ICCPR/C/21/Rev. 1/Add. 11, 31 August 2001, para 3.

2.3. The proportionality of derogation: The measures taken must be strictly required by the Exigencies of the Situation

If it is established that the first condition of Article 15, namely, existence of an emergency is satisfied, the second issue to address is whether the measures which are subject of the application were proportionate and ‘strictly required by the exigencies of the situation.’⁷³ In other words, the declaring state ‘does not have *carte blanche* as to what measures it might take.’⁷⁴ The interpretation of the language of Article 15(1) suggests that a more demanding test than for example Article 10(2) (Freedom of Expression) of the Convention for the state concerned would be necessary to show a “pressing social need” for its derogation.⁷⁵ Having regard to the wide margin of appreciation, the Convention organs have generally been satisfied if a respondent government has shown some plausible basis for believing that the derogatory measures were necessary.⁷⁶

A notable case in the early days of the Convention in relation to Article 15 involved an authoritarian reversion. In the *Greek* case the Commission was not satisfied that a public emergency existed and the measures taken went beyond what the situation required.⁷⁷ The case taken against Greece was of some significance since there were grave and systematic violations of human rights there.⁷⁸ In this case the Commission had to grapple with

⁷³ The Human Rights Committee noted in its General Comment on states of emergency that ‘the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.’ UN Human Rights Committee, General Comment no 29, States of Emergency (Article 4), ICCPR/C/21/Rev. 1/Add. 11, 31 August 2001, para 4.

⁷⁴ Harris, O’Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 631.

⁷⁵ *Ibid.*

⁷⁶ Arai-Takahashi, *The Margin of Appreciation Doctrine*, *op. cit.*, p. 172.

⁷⁷ EComHR, *The Greek case*, 5 November 1969 (*Denmark v. Greece*, Appl. No. 3321/67; *Norway v. Greece*, Appl. no. 3322/67; *Sweden v. Greece*, Appl. no. 3323/67; *Netherlands v. Greece*, appl. no. 3344/67), para 48-50.

⁷⁸ See Resolution 346 (1967) of 23 June 1967, 10 *Yearbook of European Convention on Human Rights* (1967), pp. 94-96; in which the Consultative Assembly of the Council of Europe expressed ‘its grave concern at the present situation in Greece and at the many

the validity of derogation by a revolutionary government which had seized power through a military *coup d'etat* on 21 April 1967 and had proceeded to suspend parts of the constitution.⁷⁹ The Commission held that the Convention applied in the same manner to a revolutionary government as to a constitutional one.⁸⁰ In relation to the definition of a “public emergency threatening the life of the nation”, the Commission adopted the definition provided by the Court in the *Lawless* case.⁸¹ In order to answer whether there was a public emergency in Greece the Commission had to examine the elements of indicated by Greece as constituting state of emergency.⁸² This was in spite the fact that the Greek Communist Party had begun to prepare for armed insurrection in 1966, it had allegedly assembled weapons and was poised to seize power.⁸³ However, the Commission mindful of the government’s “margin of appreciation” concluded that the burden of proof lay on Greece to prove that according to the conditions of derogation under Article 15 such an emergency existed. The Commission concluded that on the basis of the facts presented by the respondent state there was no compelling evidence that there was on 21 April 1967 a public emergency threatening the life of the Greek nation.⁸⁴ However, ‘where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and the Court have been less exacting in their requirements.’⁸⁵

serious reported violations of human rights and fundamental freedoms’ and also expressed the wish that the governments of the High Contracting Parties to the Convention on Human Rights ‘refer the Greek Case either jointly or separately to the European Commission of Human Rights in accordance with Article 24 of the Convention.’

⁷⁹ White & Ovey, *European Convention on Human rights, op. cit.*, p. 117.

⁸⁰ See Opinion of the Sub-Commission, EComHR, *The Greek case*, para 49.

⁸¹ *Ibid*, para 71-72.

⁸² *Ibid*, para 44.

⁸³ *Ibid*, para 53.

⁸⁴ *Ibid*, para 76.

⁸⁵ Gross & Ni Aolain, *Law in Times of Crisis, op. cit.*, p. 275.

In 1969, the Court followed the opinion of the Commission in the *Lawless* case, in which it held that detention without trial was justified under Article 15, not only were they satisfied by the measures required according to the exigencies of the situation but also pointed to a number of safeguards designed to prevent abuses.⁸⁶ The Court in *Ireland v United Kingdom* placed considerable emphasis on the margin of appreciation to be accorded to the state.⁸⁷ The Court stated:

By 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 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.⁸⁸

In this case the Court was of the opinion that the system of extra judicial deprivation of liberty was justified by the circumstances perceived by the United Kingdom from 9 August 1971 to March 1975 in the six counties of Northern Ireland.⁸⁹ Further, the Court held that:

Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.⁹⁰

The Court went on to note that ‘when the Irish Republic was faced with a serious crisis in 1957, it adopted the same approach and the Court did not

⁸⁶ *Lawless v Ireland*, Judgment of I July 1961, Series A No.2; (1979-80) 1 EHRR 13.

⁸⁷ *Ireland v United Kingdom*, Judgment of 18 January 1978, Series A No. 25; (1979-80) 2 EHRR 25.

⁸⁸ *Ibid*, para 207.

⁸⁹ *Ibid*, para 214.

⁹⁰ *Ibid*, para 212.

conclude that the "extent strictly required" had been exceeded.⁹¹ Hence, it has been argued that 'extrajudicial deprivation of liberty, even for the purposes of interrogating witnesses which is contrary to Article 5(1) and the removal of procedural guarantees to regulate deprivation of liberty otherwise in violation of Article 5(4) were necessary to meet the emergency situation.'⁹²

The determination of whether measures taken are strictly required by the exigencies of the situation need to satisfy three elements. First, are the derogations necessary to cope with the threat to the life of the nation? Second, the proportionality test is whether the measures taken are not greater than those required to deal with the emergency? Finally, how long the derogating measures have been applied? There is no case-law in which duration of the measures has been great importance, but 'it is certainly arguable that measures, which at their inception were clearly required, could cease to be so if it could no longer be established that they were strictly required by the situation.'⁹³

In contrast, it could be argued that in the case of *Brannigan and McBride* the Court showed a greater willingness to question the safeguards, which the state had put in place for suspension of rights required by the Convention provision in respect of which the derogation is filed.⁹⁴ The Court agreed with the UK Government's argument that in a common law system it was not practicable to introduce a judicial element into the detention process at an early stage.⁹⁵ The Court also accepted that

⁹¹ Ibid, para 212.

⁹² Harris, O'Boyle & Warbrick, Law of European Convention on Human Rights, *op. cit.*, p. 632.

⁹³ White & Ovey, European Convention on Human rights, *op. cit.*, p. 119.

⁹⁴ *Brannigan and McBride v United Kingdom*, Appl. no. 14553/89; 14554/89, 25 May 1993, para 66.

⁹⁵ The judgment in the case of *Brannigan and McBride* was much criticised by Amnesty international where it was alleged that the judgment did not sufficiently address the concerns regarding the safeguards necessary not only to protect against unnecessarily prolonged detention of suspects but also to protect detainees who might be detained *incommunicado* during the first forty-eight hours. Amnesty International in *Brannigan and McBride*, *op. cit.*, paras 42 and 61.

extended detention was necessary to investigate successfully terrorist crimes when some of the terrorist suspects would have had training in resisting interrogation and where extensive forensic checks may have been required.⁹⁶ The Court held that the UK Government had not exceeded its margin of appreciation through derogation from its obligations under Article 5(3) of the Convention, since individuals suspected of terrorist offences were held to be kept for up to seven days without judicial control.⁹⁷

Hence, the Court concluded that it was satisfied with the effective safeguards that the UK Government had implemented in its operation in Northern Ireland provided a significant measure of ‘protection against arbitrary behaviour and incommunicado detention.’⁹⁸ These safety measures included the fact that the initial arrest remained challengeable habeas corpus in the ordinary courts as well as a right to see a solicitor after forty-eight hours of detention and a detainee was entitled to have informed a relative or friend about her/his detention and have access to a doctor.⁹⁹ In the case of *Marshall v. UK*, decision as to admissibility of the case it was held that the continuing presence of such safeguards was adequate enough not to compromise the effectiveness of habeas corpus as an effective remedy.¹⁰⁰ In the above case the applicant had relied on the improved security situation in Northern Ireland to challenge the continuing validity of the United Kingdom's 1988 derogation.¹⁰¹

⁹⁶ The Court concluded that the position of the British government had been supported by the various independent inquiries into the situation in Northern Ireland, however there was little analysis of the evidence or assessment of its worth in the judgment. Generally see Marks, ‘Civil Liberties at the Margin,’ *op. cit.*, p. 71.

⁹⁷ Harris, O’Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 632.

⁹⁸ *Brannigan and McBride v United Kingdom*, *op. cit.*, para 62.

⁹⁹ *Ibid*, para 64.

¹⁰⁰ *Marshall v. United Kingdom*, Fourth Section Decision as to the Admissibility of Appl. no. 41571/98, 10 July 2001.

¹⁰¹ In this case it was not disputed that the remedy of *habeas corpus* was available to the applicant had he chosen to use it to challenge the lawfulness of his initial arrest or detention. It is to be observed that although the applicant disputes the effectiveness of the remedy, he had not alleged a violation of Article 5(4) of the Convention.

This tougher stance by the Court is supported by its approach in the *Aksoy* case, in which it declined to accept that the situation had required the suspects to be held for 14 days, without judicial intervention and noting that the Turkish government had failed to give any reason why judicial intervention was impracticable.¹⁰² The Court went on to reiterate:

It is for the court to rule whether, inter alia, 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. In exercising this supervision, the court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and circumstances leading to, and duration of, the emergency situation.¹⁰³

The case of *Aksoy* is a rare example of the Court determining that the conditions of Article 15 had not been satisfied by the respondent state.¹⁰⁴ In *Aksoy*, the applicant had alleged that he was victim of torture during his detention at the hands of the Turkish security forces.¹⁰⁵ As in the *Lawless* case, the Court attached importance to the provision of safeguards against abuse, or excessive use of emergency powers and evidently adopted a much tougher stance on the issue.¹⁰⁶ The Court ruled that Turkey was entitled to derogation from Article 5 of the Convention, which deals with the right to liberty and security of person, due to ‘the unquestionably serious problem of terrorism in south-east of Turkey and the difficulties faced by the state in taking effective measures against it.’¹⁰⁷ But it was not ‘persuaded that the exigencies of the situation did justify the holding of the applicant in detention for the period of fourteen days or more in incommunicado, without judicial control, access to relatives and doctors

¹⁰² *Aksoy v. Turkey*, appl. no. 21987/93, Judgement of 18 December 1996, para 56.

¹⁰³ *Ibid*, para 68.

¹⁰⁴ Mowbray, European Convention on Human rights, *op. cit.*, p. 862.

¹⁰⁵ *Aksoy v. Turkey*, *op. cit.*, para 23.

¹⁰⁶ *Aksoy v. Turkey*, *op. cit.*, para 68.

¹⁰⁷ *Aksoy v. Turkey*, *op. cit.*, para 84.

simply on suspicion of involvement in terrorist offences.¹⁰⁸ The Court also went on to say that the Turkish government had failed to give “detailed reasons” justifying the action.¹⁰⁹ *Aksoy* is a significant case because for the first time the Court found a High Contracting Party had been in violation of Article 5(3), and that it had concluded that measures taken by a state pursuant to a ‘public emergency’ were not ‘strictly required by the exigencies of the situation.’¹¹⁰ Furthermore, the Court was of the opinion that in such cases prompt judicial intervention may lead to the detection and prevention of serious ill-treatment.¹¹¹ The Court in its subsequent judgments has continued to maintain the same approach by reiterating that in cases of prolonged extra-judicial detention under Article 5(3) it will expect to be furnished with ‘precise reasons relating to the actual facts’ of the case before it which demonstrates that ‘judicial scrutiny of the applicants’ detention would have prejudiced the progress of the investigation’ in progress.¹¹²

The Court was presented with a rather different situation in the case of *Sakik and Others v Turkey*, in which the Turkish government had sought to rely on derogation in response to an application alleging violations of

¹⁰⁸ *Aksoy v. Turkey, op. cit.*, para 84.

¹⁰⁹ *Ibid*, para 78; on the international level, according to HRC: ‘The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers ... this condition requires that states parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If states purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.’ Human Right Committee, General Comment 29, *op. cit.*, para. 4.

¹¹⁰ In fact this was in contravention of the Turkish Criminal Code (Articles 243 and 245) which makes it an offence for a government employee to subject someone to torture or ill-treatment, in force at the time throughout Turkey, penalised the use of torture and ill-treatment for the extraction of confessions; *Aksoy v. Turkey, op. cit.*, para 24 and 43.

¹¹¹ Harris, O’Boyle & Warbrick, *Law of European Convention on Human Rights, op. cit.*, p. 633.

¹¹² *Demir and Others v. Turkey*, Appl. nos. 21380/93, 21381/93, 21383/93), 23 September 1998, para 52.

Article 5 of the Convention due to the length of detention in the police custody.¹¹³ The case concerned the arrest and detention of six former members of the Turkish National Assembly who were prosecuted by a national security court.¹¹⁴ The issue at hand was the legality of extended detention of 14 days and all detainees had been charged with terrorist offences.¹¹⁵ In a departure from its normal approach the Court showed a much less deferential attitude to the state's views than its previous jurisprudence.¹¹⁶ The Court held that the applicable derogation that had been submitted in August 1990, did not apply to the country as a whole and specifically did not apply to the city of Ankara the capital of Turkey where the applicants were arrested, detained and subject to trial.¹¹⁷ The court made it clear that derogation would be strictly interpreted and could not extend to the part of the state which has not been mentioned in the notice of derogation.¹¹⁸ This case has been described as: 'particularly illuminating as the Court made substantial inroads on meaningfully assessing the question of emergency justification.'¹¹⁹

In the case of *A and Others v. UK*, the Court was asked to consider whether a derogation in relation to Article 5(1) of the Convention allowing detention without trial of a number of foreign nationals with alleged connection with Al-Qaeda terrorist organization was based on a public emergency threatening the life of the nation.¹²⁰ The Strasbourg Court upheld the House of Lords landmark decision in this case,¹²¹ and held that the extended power of detention administered by the British government was disproportionate and therefore not "strictly required" due to the fact that it only targeted foreign nationals alleged of being members

¹¹³ *Sakik and Others v. Turkey*, appl. no. 87/1996/706/898-903, 26 November 1997.

¹¹⁴ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 40.

¹¹⁵ *Sakik and Others v. Turkey*, *op. cit.*, para

¹¹⁶ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 40.

¹¹⁷ *Sakik and Others v. Turkey*, *op. cit.*, para 36.

¹¹⁸ *Ibid.*

¹¹⁹ Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 40.

¹²⁰ *A and Others v. the United Kingdom*, appl. no. 3455/05, 19 February 2009.

¹²¹ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

of an international terrorist organization.¹²² The British government had claimed that the public emergency stemmed from the terrorist attacks on New York, Washington and Pennsylvania on 11 September 2001, in which a considerable number of British citizens had lost their lives.¹²³ In spite of the fact that Britain was an ally of the United States in the so-called war on terror which inevitably made it a visible terrorist target, at the time, there had been no terrorist attacks on the United Kingdom attributable to Al-Qaeda.¹²⁴ Furthermore, it is significant to point out that no other states within the council of Europe had felt the need to derogate from Convention rights in relation to those events.¹²⁵ The House of Lord with a majority of eight to one had decided that there was indeed a public emergency threatening the life of the nation, the incarceration without trial of the alleged foreign terrorists would be a proportionate response to the threat faced, but limiting that action only to foreign nationals was

¹²² The extended power of arrest and detention in the *Anti-terrorism, Crime and Security Act 2001* is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of fifteen months and then expires unless renewed by Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by order, repeal the provision. *A and Others v. the United Kingdom*, appl. no. 3455/05, 19 February 2009, para 11.

¹²³ The events of 11 September 2001, resulted in the Security Council Resolution 1373 of 28 September 2001, which provided the UN to go one step further and adopt an 'exceptionless' definition of terrorism into a legally binding instrument, the Convention for the Suppression of the Financing of Terrorism. T. Weigend, 'The Universal Terrorist: the International Community Grappling with a Definition', *Journal of International Criminal Justice* 4 (2006), 912-932, p. 920; see also 'The International Convention on the Suppression of the Financing of Terrorism', adopted by the General Assembly of the United Nations according to resolution 54/109 of 9 December 1999, entered into force on 10 April 2002, 39 *ILM* 270 (2000).

¹²⁴ Sadly this materialized in a terrorist attack on London on 07 July 2005, resulting in the death of fifty-two people and injuring more than 770; see BBC News Special Report, 'London attacks', available at: <http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london_blasts/what_happened/html/>.

¹²⁵ By contrast, in spite of the horrific Madrid train bombings of 11 March 2004, which killed 191 people and left at least 1,800 injured, in the aftermath of this event Spain did not pronounce a 'state of emergency'; see also White & Ovey, *European Convention on Human rights*, *op. cit.*, p. 118.

discriminatory in light of the fact that the British government had filed its derogation on the basis of Article 5 of the Convention and not Article 14 (the right to freedom from discrimination).¹²⁶ In concurring with the House of Lords the Strasbourg held:

In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.¹²⁷

As it has been mentioned above, normally the Strasbourg organs have granted states with a wide margin of appreciation with the respect of derogation 'precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review.'¹²⁸ It is interesting to point out that the House of Lords in *A and Others* case, refused to follow the Strasbourg jurisprudence to the extent that the government was not afforded the equivalent of a "wide" or "large" margin of appreciation on the issue of whether the measures taken by the British government in response to the derogation were "strictly required."¹²⁹

2.4. Non-derogable rights

Article 15(2) clearly elucidates that certain rights under the Convention cannot be derogated upon under any circumstances even in times of a state

¹²⁶ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, para 136.

¹²⁷ *A and Others v. the United Kingdom*, appl. no. 3455/05, 19 February 2009, para 174.

¹²⁸ Opinion of the Commissioner of human Rights, Mr Alvaro Gil-Robes on Certain aspects of the UK 2001 derogation from Article 5 (1) of the European convention on Human Rights, CommDH (2002)7/28 August 2002, para 9.

¹²⁹ Harris, O'Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 637.

of emergency. Whatever the gravity of the emergency and however convincing the case, a state might make that a derogation was strictly required, under no circumstances may a state depart from its obligations under Articles 2 (the right to life), 3 (freedom from torture or inhumane or degrading treatment or punishment), 4(1) (freedom from slavery, servitude, or forced or compulsory labour) and 7 (freedom from retroactive criminal offences and punishment).¹³⁰ Article 2 on the right to life itself does not include intentional deprivation of life in the execution of a sentence of a court following a conviction for a crime for which this penalty is imposed;¹³¹ nor does it include deprivation of life in defence of any person from unlawful violence.¹³² In order to secure a lawful arrest or to prevent the escape of a person lawfully detained,¹³³ and in action lawfully taken for the purpose of quelling a riot or insurrection.¹³⁴ Under certain circumstances, it may be necessary in a democratic society to interfere with the individual rights of a citizen, when there is an identifiable need to carry out secret surveillance of terrorist suspects.¹³⁵ In similar vein, it may be 'necessary in a democratic society' for a state to interfere with freedom of expression in order to maintain public order to a

¹³⁰ Compared to other regional human rights instruments, the Convention provides the most limited list of such guaranteed rights, namely, the right to life (with the exception of deaths resulting from lawful acts of war), freedom from torture, slavery and protection against retrospective criminal penalties. See Article 15(2) of the Convention; see also Bianchi & Naqvi, 'International Humanitarian Law', *op. cit.*, p. 48.

¹³¹ See comments on *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ["European Convention on Human Rights"] concerning the abolition of the death penalty*, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime; states parties may retain the death penalty for crimes "in time of war or of imminent threat of war". Any state party to the European Convention on Human Rights can become a party to the Protocol. 46 of the 47 members of the Council of Europe have ratified Protocol 6; Russia has signed but not yet ratified the Protocol.

¹³² Article 2(2)(a).

¹³³ Article 2(2)(b).

¹³⁴ Article 2(2)(c).

¹³⁵ *Klass and Others v. Germany*, Appl. No. 5029/71, 6 September 1978, para 59; see also *Erdem v. Turkey*, Appl. no. 38321/97, 5 July 2001, para 64.

greater extent in time of emergency than it would be under normal circumstances.¹³⁶ As early as 1978 the Court unequivocally stated:

Some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention As the Preamble to the Convention states, ‘Fundamental freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which (the Contracting States) depend’.¹³⁷

In 1990, in a case concerning arrest and detention of alleged terrorists in Northern Ireland under criminal legislation the Court set out its “general approach” as: ‘the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights.’¹³⁸ Thus, the Court would ‘take into account the special nature of terrorist crime and exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose.’¹³⁹ At this stage, it is significant to point out that in the occasion of an apparent “public emergency” a High Contracting party fails to derogate under Article 15, ‘the Court will proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable.’¹⁴⁰

Furthermore, where Protocol 6 has been ratified, the prohibition of derogations in respect of the rights guaranteed by what is contained in Article 3 of Protocol 6 applies.¹⁴¹ It is significant to consider that Article 2

¹³⁶ Harris, O’Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 620.

¹³⁷ *Klass and Others v. Germany*, Appl. No. 5029/71, 6 September 1978, para 59.

¹³⁸ *Fox, Campbell and Hartley v. United Kingdom*, Appl. no. 12244/86; 12245/86, 12383/86, 30 August 1990, para 28.

¹³⁹ *Ibid.*

¹⁴⁰ Harris, O’Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 621.

¹⁴¹ *White & Ovey*, *The European Convention on Human Rights*, *op. cit.*, p. 114.

of Protocol 6 allows contracting parties to make a provision in their domestic law for the death penalty in relation to acts committed in time of war or imminent threat of war.¹⁴² Additional Protocol 13, for its part, prohibits the use of the death penalty in all circumstances.¹⁴³ No derogations may be made in regard to the prohibition of slavery and servitude in Article 4(1); or in respect of the requirement that there be no punishment without law under Article 7; nor in respect of the right to be tried or punished twice under Article 4 of Protocol 7.

Although there is no detailed reference to the above provisions in Article 15, other provisions of the Convention might have an impact on the legality of the measures of derogation Article 14 (freedom from discrimination in respect of protected Convention rights) is one example.¹⁴⁴ In *Ireland v United Kingdom*, the Court examined the allegation put forward by the Irish Government that internment was only applied discriminately to republic/nationalist suspects in conjunction with Article 5 and not loyalist/unionist suspects.¹⁴⁵ The Court held that there were objective and reasonable differences between the nature of republican/nationalist and loyalist/unionist violence, notably the greater extent of the former.¹⁴⁶ Hence, there was no breach of Article 14 in conjunction with Article 5, therefore, no need to consider the separately

¹⁴² In such a case, the state concerned must notify the Secretary-General of the Council of Europe of the relevant provisions of the law governing the death penalty: Article 2 of Protocol 6.

¹⁴³ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002, provides for the abolition of the death penalty in all circumstances, including time of war or of imminent threat of war. Any state party to the European Convention on Human Rights can become a party to the Protocol. 43 members of the Council of Europe have ratified Protocol 13; Russia and Azerbaijan have not signed the protocol, Poland and Armenia have signed but not yet ratified the Protocol.

¹⁴⁴ Harris, O'Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 639.

¹⁴⁵ *Ireland v United Kingdom*, Application no. 5310/71, 18 January 1978, paras 225-32.

¹⁴⁶ *Ibid*, para 231.

under Article 15.¹⁴⁷ In the case of *A and others v Secretary of State for the Home Department*, the majority of the House of Lords¹⁴⁸ held that even in the context of the existing public emergency there had been a violation of Article 14 read with Article 5 given the discriminatory treatment on the basis of nationality between suspected foreign terrorists and UK nationals suspected of the same crime.¹⁴⁹

Moreover, the ICCPR guarantees the right to recognition as a person before the law, the right to freedom of conscience and religion and the right not to be incarcerated merely on grounds of inability to fulfil a contractual obligation.¹⁵⁰ Although national and international courts have been rather reluctant to question the existence of a state of emergency declared by states but they have rather been forthright in upholding the status of non-derogable rights.¹⁵¹ It has been noted elsewhere that ‘... both the European and American Courts of Human Rights have rejected arguments from states that killing by state forces or the use of force against suspects are in any way justifiable because of a situation of war or the threat of terrorism.’¹⁵² Nonetheless, in the context of conflict and emergencies, states may opt to administrative detention for security reasons, in that an individual is held by executive charge without criminal

¹⁴⁷ Judge Matscher, who dissented on this issue, raised but did not answer the question whether a breach of Article 14 could be strictly necessary within the terms of Article 15; see separate opinion of Judge Matscher; *Ireland v United Kingdom*.

¹⁴⁸ Since 1 October 2009, the Supreme Court of the United Kingdom, generally see B. Dickson, *Human Rights and the United Kingdom*, Oxford U.P., 2013.

¹⁴⁹ *A and others v Secretary of State for the Home Department*, [2004] UKHL 56, para 46.

¹⁵⁰ ICCPR, Article 4(2); see also Article 27(2) of the American Convention on Human Rights (ACHR) which provides the most comprehensive list of non-derogable rights: rights of the family, right to a name, rights of the child, right to nationality, right to participate in government and the judicial guarantees essential for the protection of such rights

¹⁵¹ See the case of *Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40); *McCann et al v. United Kingdom* (App n. 18984/91) ECHR 27 September 1995 paras 194, 200-01; *Zambrano Velez v. Ecuador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 166 (4 July 2007) paras 84-85, 96, 101.

¹⁵² Bianchi & Naqvi, ‘International Humanitarian Law & Terrorism’, *op. cit.*, p. 49.

charges being brought against the internee.¹⁵³ In light of the fact that the ICCPR does not seem to rule out the possibility that administrative detention could be lawful under IHL, but it is not clear whether states have to derogate in order to detain suspects under the ICCPR.¹⁵⁴ In contrast to the ICCPR, administrative detention is not included in the Convention and it points to the need to derogate when taking such measures.¹⁵⁵ It is also worth mentioning that as for customary IHRL, it is widely claimed that the right to habeas corpus is non-derogable.¹⁵⁶ Moreover, there is the prospect that some rights or specific elements of rights which are not stipulated by Article 4(2) of the ICCPR could be derogated from. Dennis has expressed reservation and concludes that ‘the proposition that there are other non-derogable rights in the ICCPR in addition to the catalogue of non-derogable rights provided in Article 4(2) of the ICCPR is doubtful.’¹⁵⁷ Hence, even though Article 4(1) of the

¹⁵³ Generally see J. Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence’ 858 *IRRC* 375-6.

¹⁵⁴ In contrast, Hampson has noticed that ‘the reservation made by India at the time of the ratification and the derogation of the UK may imply that administrative detention is thought to be not normally lawful.’ F. Hampson, ‘Detention the “War on Terror” and International Law’ in H. Hensel (ed.) *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, Ashgate, 2005, 131-70, p. 143.

¹⁵⁵ According to Article 5 of the Convention the following are the permitted grounds of detention: ‘a person after conviction by a competent court’; ‘for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law’; ‘for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’; ‘detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants’; ‘to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’.

¹⁵⁶ D. Cassel, ‘Pretrial and Preventive detention of Suspected Terrorists: Options and Constraints under International Law’, 98 *J. Crim. and Criminology* (2008) 811, p. 829.

¹⁵⁷ M. Dennis, ‘Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Round?’ *ILSA Journal of International & Comparative Law* 495 (Spring 2006), pp. 478-79.

ICCPR indicates which of the specific articles are non-derogable, the HRC has pointed out to state parties that there are some other articles from the said Covenant which would be difficult to justify derogating from such as Articles 14 (the right to justice and fair trial) and 25 (the right to political participation) of the ICCPR.¹⁵⁸ According to the HRC this indicates that ‘state parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norm of international law.’¹⁵⁹

2.5. Procedural Requirements

The Convention does not expressly require an effective domestic parliamentary scrutiny of the decision to enter a derogation under Article 15, nor has the Court ever considered this issue.¹⁶⁰ In relation to procedural requirements of Article 15, there are two issues that need to be addressed. Firstly, is it an essential requirement that there is an official proclamation of the public emergency threatening the life of the nation? Secondly, according to Article 15(3), there is clearly notification requirement, what would be the consequence of any failure to comply with those requirements?

The specific requirement of Article 15(3) is that the high contract party relying on the right of derogation shall keep the Secretary General of the Council of Europe fully informed about the measures the state has undertaken and the reasons for doing so.¹⁶¹ The main purpose is that the Secretary General would circulate the information to other members of the Council of Europe about the notice of derogation.¹⁶² In *Cyprus v Turkey*¹⁶³

¹⁵⁸ See e.g. UN Doc. CCPR/C/SR.160, para 51 (Syria); UN Doc. CCPR/C/SR.430, para 32 (Peru); UN Doc. CCPR/C/SR.528, para 11 (Chile). Some scholars have suggested that the list of non-derogable rights contained in Article 4(2) of ICCPR should be extended, see McGoldrick, ‘the Interface between Public Emergency Powers’, *op. cit.*, p. 416.

¹⁵⁹ General Comment no. 29, *op. cit.*, para 11.

¹⁶⁰ Harris, O’Brian and Warbrick, ‘Law of the European Convention on Human Rights’, *op. cit.*, p. 640.

¹⁶¹ *Ibid.*

¹⁶² E.g. Derogation contained in two *Notes verbales* from the Permanent Representation of Turkey, dated 12 September 1980, registered at the Secretariat General on 12 September 1980. See also Derogation contained in a letter from the Permanent Representative of the

the Commission stated that some formal and public declaration of state of emergency by the state concerned was necessary as a precondition for reliance on Article 15(1).¹⁶⁴

Article 15(3) requires a state to serve notification both on the introduction of derogations and of the lifting of them.¹⁶⁵ In *Ireland v UK*, the British government explained that its notification communicated on 20 August 1971 had been delayed until after the implementation of internment on 9 August 1971, with the intention that any individual whom it intended to detain might have noticed and escaped. The Court by relying on *Lawless v Ireland* agreed with the United Kingdom that the twelve day delay in notification of the Secretary General of the Council of Europe was accepted as ‘it had been made without delay.’¹⁶⁶ However, in the Greek case the Commission came to the conclusion that Greece had not ‘fully met the requirements of Article 15(3)’¹⁶⁷, since it required the state to identify the provisions from which it was derogating and Greece had failed to inform the Secretary General the text of some of its emergency legislation and had not provided further information, in particular in relation to measures for the detention of persons without a court order.¹⁶⁸ Moreover, Greece had not informed the Secretary General of the reasons for the measures of derogation for more than four months after they had

United Kingdom, dated 12 November 1998, registered at the Secretariat General on 13 November 1998 – or. Engl. – and withdrawn by a letter from the Permanent Representative of the United Kingdom, dated 4 May 2006, registered at the Secretariat General on 5 May 2006.

¹⁶³ *Cyprus v Turkey*, *op. cit.*, para 527.

¹⁶⁴ Having particular requirement under Article 4 of the ICCPR requires a public proclamation of emergency.

¹⁶⁵ For example see the withdrawal of the Drogration by the UK Government with effect from 14 March 2005, following the House of Lords’ judgment in the case of *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56; White & Ovey, ‘the European Convention on Human rights’, *op. cit.*, p. 121.

¹⁶⁶ *Lawless v Ireland*, *op. cit.*, para 47.

¹⁶⁷ EComHR, *The Greek case*, 5 November 1969 (*Denmark v. Greece*, Appl. No. 3321/67; *Norway v. Greece*, Appl. no. 3322/67; *Sweden v. Greece*, Appl. no. 3323/67; *Netherlands v. Greece*, appl. no. 3344/67), para 46.

¹⁶⁸ *Ibid*, para. 180.

been taken.¹⁶⁹ Moreover, the Commission considered the derogation to be invalid because it was satisfied that a public emergency threatening the life of the nation did not actually exist and it noted that late notification would not justify action taken before the actual notification.¹⁷⁰ In the case of *Aksoy*, the Court raised the question that the Turkish Derogation notice did not appear to contain sufficient information about the measure in question, but held that it was necessary to ascertain whether Turkey had complied with the formal requirements since the power to detain a suspect for fourteen days without charge was disproportionate in any event.¹⁷¹

It has been noted that failure to notify of the derogation measures in reasonable time might be evidence of bad faith which would ultimately be taken into consideration in deciding whether Article 15(3) was satisfied.¹⁷²

The only exception has been Turkey's unwillingness to accept responsibility under the Convention towards the actions of its armed forces in northern Cyprus, which prompted it not to make a formal declaration in that regard.¹⁷³ Turkey argued that it did not have any jurisdiction over northern part of Cyprus which is administered by the Turkish Republic of Northern Cyprus.¹⁷⁴ However, the Commission held that Turkey was indeed accountable for the actions of its troops in Cyprus and even it extended 'to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.'¹⁷⁵ It is worth noting that since the *Greek* case, it is

¹⁶⁹ Ibid, para. 46.

¹⁷⁰ White & Ovey, 'the European Convention on Human rights', *op. cit.*, p. 122.

¹⁷¹ Aksoy, para 86.

¹⁷² R. Higgins, 'Derogations under Human Rights Treaties', *British Yearbook of International Law* (1976) 48(1): 281-319.

¹⁷³ See *Loizidou v. Turkey* judgment of 18 December 1996 (merits), Reports of Judgments and Decisions 1996-VI, p. 2223, paras 16-17.

¹⁷⁴ *Cyprus v. Turkey*, Appl. no. 25781/94, 10 May 2001, para 54; see also the decision of the European Court of Human Rights in the case of *Al-Skeini and Others v. United Kingdom* is now a leading decision in relation to the territorial scope of the Convention, which provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' *Al-Skeini and Others v. United Kingdom*, Appl. no. 55721/07, 7 July 2011, para 130.

¹⁷⁵ *Cyprus v Turkey*, Decision of 26 May 1975, DR 125, para 8.

generally believed that notices of derogation appear to be adequate for the purpose of Article 15 (3) and are generally delivered without delay.¹⁷⁶

2.6. Other international obligations

A third precondition for derogation under Art 15 is that the measures taken by the high contracting state must not be inconsistent with their other international obligations, such as the international Covenant on Civil and Political Rights (ICCPR). In other words, Convention seeks ‘to preserve a highest common denominator of low-level human rights observance.’¹⁷⁷ The procedural requirement is an important part of the derogation scheme.¹⁷⁸ The HRC has regularly reiterated the requirements of Article 4(3) of ICCPR, as not a “mere formality”.¹⁷⁹ The HRC in its first General Comment on Article 4 stated that ‘it was important that state parties, in times of national emergency, inform other states parties of the nature and extent of the derogations they have made and of the reasons therefore, and further, to fulfill their reporting obligation under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.’¹⁸⁰

This particular feature of Article 15 has rarely been proved to be problematic in the past, however, in *Brannigan and McBride* the applicants had claimed that according to Art 4(1) of the ICCPR Covenant, in which, it is explicitly required that an emergency should have been “officially proclaimed” by the government, the applicants argued that the United Kingdom had never declared a state of emergency related to Northern Ireland.¹⁸¹ The European Court of Human Rights considered that

¹⁷⁶ J. Oraa, *Human Rights in States of Emergency in International Law*, Oxford U.P., 1992, p. 85.

¹⁷⁷ Marks, ‘Civil Liberties at the Margin,’ *op. cit.*, p. 81.

¹⁷⁸ Bianchi & Naqvi, ‘International Humanitarian Law & Terrorism’, *op. cit.*, p. 51.

¹⁷⁹ UN Doc CCPR/C/SR.496, para 19 (El Salvador); UN Doc CCPR/C/SR.335, para 24 (Uruguay).

¹⁸⁰ Office of the High Commissioner for Human Rights, ICCPR General Comment No. 1: Article 4 (Derogations) Adopted by the 13th Session of Human Rights Committee, on 31 July 1981(UN Doc. A/36/40).

¹⁸¹ *Brannigan and McBride v United Kingdom*, *op. cit.*, para 72-73.

there was no foundation for the applicants' argument.¹⁸² The Court dismissed this argument and observed that the statement of the Home Secretary to Parliament regarding derogation was formal in character and made the position of the government clear and was "well in keeping with the notion of an official proclamation."¹⁸³

3. The Case of *A and Others v. the United Kingdom*

3.1. Background

This paper will now consider the judgment made by the European Court of Human Rights in the case of *A and Others v United Kingdom* in 2009 which may shed some light on the approach adopted by the Court for the future cases in relation to the so-called "permanent state of emergency."¹⁸⁴ The issue before the Court was concerning a number of foreign nationals detained in the United Kingdom under the Anti-terrorism, Crime and Security Act 2001.¹⁸⁵ The Court had to consider if UK's derogation in relation to Art 5(1) of the Convention permitting detention of foreign nationals suspected of international terrorist activities based on a public emergency in the light of 11 September 2001 terrorist attacks on the United States was justified.¹⁸⁶

In its derogation statement the British government referred to the tragic loss of life of her citizens on 11 September 2001 in the United States, emphasising that the attackers did not seem deliberately to target British citizens.¹⁸⁷ Indeed, there were victims from 70 countries,¹⁸⁸ many of

¹⁸² Ibid.

¹⁸³ Ibid, see also the British Home Secretary's statement to the British Parliament, Douglas Hurd, HC Debs. Standing Comm B, cols 234-5, 22 Dec 1988.

¹⁸⁴ *A and Others v. The United Kingdom*, Appl. no. 3455/05, 19 May 2009, para 15.

¹⁸⁵ Available at: <<http://www.legislation.gov.uk/ukpga/2001/24/contents>>.

¹⁸⁶ *A and Others v. The United Kingdom*. *Op. cit.*, paras 9, 10 & 11.

¹⁸⁷ The derogation was made by giving notice to the Secretary-General of the Council of Europe under Article 15(3) of the Convention. SI 2001/3644; it was laid before the parliament on 12 November 2001, coming into effect on the following day. It designates the proposed derogation as one

¹⁸⁸ It is important to note that many of these states including Germany, Netherlands, France and Italy were equally affected but did not issued derogation orders in relation to the right of liberty and security under the Convention. Indeed, some of the terrorists

whom came from the states within the Council of Europe.¹⁸⁹The UK Government had argued all along that the mere fact that Britain is standing shoulder to shoulder with the United States in its ‘War on terrorism’ would automatically make it a prime target for the international terrorism.¹⁹⁰ These attacks were, in fact, duly condemned by the international community and the United Nations Security Council of the UN through Resolutions 1368 (2001) and 1373 (2001).¹⁹¹ However, the terrorist attacks on London on 7 July 2005, would appear to be a much sounder basis for derogation.¹⁹² As a result, the governments of Blair and

involved in the attacks on the US were initially based in Germany, which has not issued a derogation order from Art 5 of the Convention. See generally A. Clapham, ‘Terrorism, National Measures and International Supervision’, in A. Bianchi and Y. Naqvi (eds.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, pp. 283-306, p. 284.

¹⁸⁹On 24 January 2002 the Council of Europe’s Parliamentary Assembly adopted Resolution 1271 (2002) which resolved, in paragraph 9: ‘in their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights,’ also in paragraph 12, it also called on all member States to: ‘... refrain from using Article 15 of the European convention on Human Rights (derogation in times of emergency) to limit the rights and liberties guaranteed under its article 5 (right to liberty and security). Apart from the United Kingdom no other member of the Council of Europe chose to derogate from Article 5 of the Convention.

¹⁹⁰In his speech address to the Labour Party conference in October 2001, delivered a month after the terrorist attacks in New York and Washington DC, Tony Blair the then Premier of the United Kingdom painted an apocalyptic picture of the Western world under imminent threat from further terrorist attacks, a constant danger that would have to lead to profound changes in our view of human rights in general and personal liberty in particular: ‘It was the events of September 11 that marked a turning point in history, where we confront the dangers of the future and assess the choices facing humankind ... Here in this country and in other nations round the world, laws will be changed, not to deny basic liberties but to prevent their abuse and protect the most basic liberty of all: freedom from terror.’ Text available at: <<http://www.guardian.co.uk/politics/2001/oct/02/labourconference.labour6>>.

¹⁹¹United Nations Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001.

¹⁹²It is worth noting that the London bombing attacks were carried out by three second-generation British citizens, Hasib Hussein, Mohammad Sidique Khan, and Shehzad Tanweer, and one long-term British resident Jermaine Lindsay. C. Walker, ‘Keeping Control of Terrorists without Losing Control of Constitutionalism’ *Stan. L. Rev.* 1395 (2007), p. 1397; see also Intelligence & Sec. Comm., Report into the London

Brown sought substantially to increase the government's powers to detain terrorist suspects prior to the persons concerned being charged with any specific offence.¹⁹³ Nevertheless, 'it would seem difficult to argue successfully that a situation in another non-bordering state gave rise to state of emergency in a state.'¹⁹⁴

It is often argued that 'terrorism has changed fundamentally since 11 September 2001, and consequently, the experience and guidelines which for instance the European Court of Human Rights has elaborated no longer carry the same relevance.'¹⁹⁵

3.2. Anti-Terrorism, Crime and Security Act 2001 (ATCSA)

As mentioned above, as a result of 11 September 2001 attacks the British government introduced Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State extended powers to detain indefinitely persons not holding British citizenship who could not be expelled in the ordinary way (because they would face inhumane or degrading treatment) if he suspected that they were international terrorists.¹⁹⁶ Upon the Secretary of State issuing a certificate under Section 21(1) of the Act indicating his belief that the person's presence in the UK was a risk to the national security and that he suspected the person of being an international terrorist then this certificate is subject to an appeal to the Special Immigration Appeals Commission (SIAC),¹⁹⁷ established under the Special Appeals Commission Act 1997, as a result of the adverse ruling

Terrorist Attacks on 7 JULY 2005, 2006, Cm. 6785, at 2, Report of the Official Account of the Bombings in London on 7TH July 2005, 2006, H.C. 1087, at 13, 17.

¹⁹³ I. Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, Oxford U.P., 6th ed., P. 738.

¹⁹⁴ M. Dixon, R. McCorquodale, *Cases and Materials on International law*, Oxford U.P., 2011, p. 217.

¹⁹⁵ H-O. Sano, S. Lagoutte, P. Scharff-Smith, *Human Rights in Turmoil: Facing Threats, Consolidating Achievements*, Brill, 2006, p. 154.

¹⁹⁶ Section 23 of ATCSA.

¹⁹⁷ See generally House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Seventh Report of Session Of 2004-05: House of Commons, Vol. 1 Report, Together with the Formal Minutes, Stationary Office Books, 2005.

by the European Court of Human Rights in *Chahal v United Kingdom*.¹⁹⁸ Indeed, some academics have argued that as regards the United Kingdom and the post 9/11 threat, since the only state to which the suspect could be deported would typically be one where there was a real risk of such ill-treatment contrary to Article 3 of the Convention, deportation there would breach the Home Secretary's obligation to act in accordance with Convention rights.¹⁹⁹

Furthermore, SIAC has the power to cancel the certificate if it believes that such certificate should not have been issued in the first place.²⁰⁰ There can be an appeal on a point of law from a ruling by SIAC. In addition, the certificate has to be reviewed by SIAC under regular intervals. However, it is open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.²⁰¹ The power to detain conferred by section 23 of the Act involved derogation from the right to liberty guaranteed by Article 5(1) of the Convention. Subsequent to Human Rights Act 1998, Art 5 had effect as part of the law in the UK 'subject to any designated 'derogation or reservation'. In this regard Bonner notes:

¹⁹⁸ Indeed, some academics have argued: 'As regards the United Kingdom and the post 9/11 threat, since the only state to which the suspect could be deported would typically be one where there was a real risk of such ill-treatment contrary to Art. 3 of the Convention, deportation there would breach the Home Secretary's obligation to act in accordance with Convention rights.' See *Chahal v. The United Kingdom*, Appl. no. 22414/93, 15 November 1996.

¹⁹⁹ D. Bonner, and R. Cholewinski, (2005) *Immigration and Asylum Law: the impact of terrorism in the United Kingdom*, 'A Contrast of the Responses of its Legal and constitutional Orders to the First Gulf War (1990-91) and the Post 9/11 'War' on Terrorism', in E. Guild, A. Baldaccini, (eds.) *Terrorism and the Foreigners: A Decade of Tension Around the Rule of Law in Europe (Immigration and Asylum Law and Policy in Europe, 11)*, Martinus Nijhoff Publishers, 2007, p. 144.

²⁰⁰ Since its establishment in 2001, SIAC has dealt with appeals against immigration and asylum decisions where, because of national security or other public interest considerations, some of the evidence on which the decision is based cannot be disclosed to the appellant. It is presided by a High Court judge and its decisions are not amendable to judicial review and can only be challenged by way of appeal on a point of law to the Court of Appeal as provided in ATCSA, Section 30(5)(a).

²⁰¹ Sections 21 and 23 of the 2001 Act a person certified and detained to leave the United Kingdom and go to any other country willing to receive him. *A & Others v. The Secretary of State for the Home Department* [2004] 1 All ER 816, para 33.

From the outset, Government was clear that its scheme of indefinite detention without trial of foreign national terrorist suspects, unable to be prosecuted or deported, was incompatible with the guarantee of liberty and security of person afforded by Article 5 of the Convention, as normally applicable. It accordingly entered a protective derogation under Article 15 of the Convention, arguing that, in accordance with that provision, the scheme was a justified, necessary and proportionate response to a public emergency threatening the life of the nation.²⁰²

Clearly, as noted above, the steps taken by the Government in passing this piece of legislation was in the interest of the national security after 11 September 2001. It has to be emphasised that at the time several domestic powers of detention existed under United Kingdom law, namely powers under the Immigration Act 1971 to remove and deport persons on the ground that their presence in the UK is not conducive to the public good or national security ground.²⁰³

3.3. Indefinite Detention of Foreign Nationals

In a momentous decision taken in December 2004 case of *A and others v Secretary of State for the Home Department*,²⁰⁴ which concerned the detention without trial of mainly North African non-national residents in the UK, the House of Lords found the derogation notice invalid, because it was deemed to be disproportionate and discriminatory.²⁰⁵ It is significant to point out that the House of Lords' ruling on the derogation submitted

²⁰² D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?*, Ashgate, 2007, p. 291.

²⁰³ The Government of the United Kingdom has powers under the Immigration Act 1971 to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. L.J. Murdoch, *Article 5 of the European Convention on Human Rights, the Protection of Liberty and Security of Person: Human Rights Files*, 12 (rev), Council of Europe, 2004, p. 124.

²⁰⁴ This case is also referred to as the 'First Belmarsh case.' Nine judges sat in this case. Lord Walker was the only dissenting voice on this point. *A & Others v. The Secretary of State for the Home Department* [2004] 1 All ER 816.

²⁰⁵ *A & Others v. The Secretary of State for the Home Department*, paras 1&2.

by the British government in 2001 in the aftermath of 11 September 2001 attacks in the United States is an important precedent for the application of Article 15 of the Convention.²⁰⁶ The accused were detained in 2001 under the power conferred by Section 23 of the ATCSA act. The detainees appealed to SIAC on the basis that the 2001 Act had violated the prohibition on discrimination under art 14 of the Convention as they allowed suspected terrorist who were non-national to be detained when there were equally dangerous British nationals who could not be detained. That argument was accepted by SIAC, which in July 2002, quashed the 2001 order and granted a declaration that Section 23 was incompatible with Articles 5 and 14 of the Convention.²⁰⁷

The Secretary of State appealed and subsequently the decision was overturned by the Court of Appeal on the basis that, the proper pigeonhole for the legislative scheme was ‘immigration’, which of necessity distinguishes, as recognised in international law, between citizens and aliens, and that the greater threat to the national security came from foreign nationals, so that the detention of such nationals was not discriminatory contrary to Article 14 of the Convention.²⁰⁸ The accused appealed against the Court of Appeals decision and took their case to the House of Lords. The House of Lords with a majority of eight to one ruled that the indefinite detention without trial at Belmarsh and Woodhill High Security prisons breached the Convention. As a reaction to this decision,

²⁰⁶ Harris, O’Boyle & Warbrick Law of the European Convention on Human Rights, *op. cit.*, p. 619.

²⁰⁷ Bonner, Executive Measures, Terrorism and National Security, *op. cit.*, p. 291; Conte, Human Rights in the Prevention and Punishment of Terrorism, *op. cit.*, p. 540.

²⁰⁸ Both SIAC and more so the Court of Appeal paid special attention to executive opinions of the possibility of danger that existed in the UK on the same level by the Al Qaeda operatives as the devastating attacks upon the United States. In the court of appeal, Lord Woolf referred to the Derogation in time of emergency (para 33-35) and he concluded that again paying due deference to executive opinion, the detention measure taken did not go beyond the exigencies of that emergency situation required; nor were they disproportionate. The Court of appeal also held that because of the availability of SIAC appeal and review options, the deprivation of liberty imposed was subject to adequate safeguards.

the UK Government withdrew part of its derogation and also secured the enactment of the Prevention of Terrorism Act 2005, which introduced the mechanism commonly known as control orders.²⁰⁹ Furthermore, as a result of many legal disputes allied to a change of government in the UK in 2010, the aforementioned act was replaced by ‘the terrorism prevention and investigation measures’ (T-PIMs), issued under the Terrorism Prevention and Investigation Measures Act 2011.²¹⁰

3.4. The European Court of Human Rights and the Notion of Permanent Emergency

Both the House of Lords and the Court when called upon to decide whether there was a public emergency threatening the life of the nation utilized the margin of appreciation doctrine. The Court held that ‘by 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.’²¹¹ Furthermore, a wide margin of appreciation should be granted to the state concerned ‘on the nature and scope of the derogations necessary to avert it.’²¹² In spite of the fact that the UK was the only member state of the Council of Europe to declare a state of emergency under Article 15 of the Convention the Court accepted that there was indeed a state emergency threatening the life of the nation in the UK. It is worth noting that in the aftermath of a major terrorist attacks on Madrid train station on 11 March 2004, costing the lives of many innocent people, Spain did not declare a state of emergency.²¹³ By relying on *Lawless*, the

²⁰⁹ Dickson, Human Rights and the United Kingdom Supreme Court, *op. cit.*, p. 167.

²¹⁰ Available at : <<http://www.legislation.gov.uk/ukpga/2011/23/enacted>>.

²¹¹ *A and Others v. The United Kingdom*, *op. cit.*, para 173.

²¹² *Ibid.*

²¹³ Spain was one of the few countries that had joined the US and UK in their ‘war on terrorism’ after 9/11 and it could be argued that, its cooperation with the US administration made them a target. Madrid Train Attacks, 11 March 2004, available at: <<http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457031/html/default.stm>>.

Court held that any terrorist attack could constitute an emergency, therefore, it could be inferred that a state of emergency existed.²¹⁴

On this point, the House of Lords was in unison with the Court in considering that acts of terrorism can constitute an emergency.²¹⁵ In contrast, Lord Hoffman, the only dissenting Law Lord stated that the attacks of the 11 September 2001, and the subsequent threat posed by the Al-Qaeda organization did not amount to a state of emergency. He likened the threat posed by that organization to the Spanish Armada or Nazi Germany which had imperilled the life of the nation through overthrowing the UK rule and to subject its citizens to their rule.²¹⁶ Nonetheless, his Lordship conceded that organizations such as the Irish Republican Army because of its organization and dedication to endangering the territorial integrity of the UK posed more of a serious threat to the life of the nation.²¹⁷ Lord Hoffman was unequivocal in his criticism of the approach adopted by the UK government:

‘The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to terrorists such victory.’²¹⁸

Hence, Lord Hoffman provided a warning to the danger of the executive’s abuse of power especially in relation to proportionality of actions taken. However, by considering the jurisprudence of the Court, it is fairly obvious that it has a very strict view of the issue of abuse of power. As in the present case, the Court stated:

It is ultimately for the Court to rule whether the measures were “strictly required.” In particular, where a derogating measure

²¹⁴ *A and Others v. The United Kingdom*, *op. cit.*, para 176, see also *Lawless v Ireland*, *op. cit.*, para 28.

²¹⁵ *A & Others v. The Secretary of State for the Home Department*, *op. cit.*, para 115.

²¹⁶ *Ibid*, para 91.

²¹⁷ *Ibid*, para 93.

²¹⁸ *Ibid*, para 97.

encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.²¹⁹

It is significant to point out that the Court adopted an identical approach to the House of Lords by not questioning whether a national emergency actually existed.²²⁰ Therefore, both decisions of the House of Lords and the Court concentrated on the second condition of Article 15, whether the measures were proportionate to the exigencies of the situation. By following the reasoning applied by the House of Lords in the domestic case the Court paid special deference to the highest court in the UK and held that the measures taken by the UK Government:

While imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.²²¹

Hence, this pronouncement mirrors the majority decision in the House of Lords that the derogation measures of the indefinite detention without trial of foreign terrorist suspects, was not 'strictly required by the exigencies of the situation' and therefore violated the right to liberty of those foreign terrorist suspects.²²² Moreover, the House of Lords held that by detaining foreign but not British terrorist suspects, Part 4 of the ATCSA breached the prohibition of discrimination contained in Articles 5 and 14 of the

²¹⁹ *A and Others v. The United Kingdom*, *op. cit.*, para 184, see also *Brannigan & McBride*, paras 48-66; *Aksoy*, paras 71-84.

²²⁰ *A & Others v. The Secretary of State for the Home Department*, *op. cit.*, Lord Bingham, paras 30-44.

²²¹ *A and Others v. The United Kingdom*, *op. cit.*, para 186.

²²² *A & Others v. The Secretary of State for the Home Department*, *op. cit.*, Lord Bingham, paras 30-44.

Convention.²²³ As noted briefly above, it is the general approach of the Court to pay deference to the national authorities of the member states but this deference cannot be blind.²²⁴ As Lord Rodger succinctly put it, ‘due deference does not mean abasement ... even in matters relating to national security.’²²⁵ Ever since the case of *Lawless*, which was a standard bearer for cases in relation to Article 15 of the Convention both the Commission and the Court adopted a noticeably deferential attitude to the national government as to whether a public emergency existed as well as granting states a wide margin of appreciation.²²⁶ In fact, the *Greek* case was the only occasion that the Commission did not accept a declaration of the Government of Greece, therefore stopping the case ever appearing before the Court.²²⁷ Nonetheless, some scholars have noted that his decision had more to do with the anti-democratic nature of the government that declared the state of emergency in Greece rather than an objective analysis of whether an immediate and serious threat was posed by the communist insurgents in Greece.²²⁸ It is submitted that by declaring a state of emergency under Article 15 of the Convention will to some extent protect human rights as illustrated by the jurisprudence of the Court which clearly distinguishes normalcy from a state of emergency.

As mentioned above, in practice most of the cases concerning emergency situations that have come before the Court have involved continuing terrorist violence and campaigns of irregular armed groups. Inevitably the question arises whether a state can justify ‘continuing of measures which may well be proper response to the most intense periods of violence and disorder, during periods of relative calm, albeit possibly to the

²²³ Ibid, Lord Bingham, paras 45-73.

²²⁴ Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, *op. cit.*, P. 179.

²²⁵ *A & Others v. The Secretary of State for the Home Department*, *op. cit.*, Lord Roger, para 176.

²²⁶ *Lawless v. Ireland* (No. 3), *op. cit.*, para 28.

²²⁷ For a general discussion of this case see Gross and Ni Aoláin, ‘Law in Times of Crisis’, *op. cit.*, p. 273-276.

²²⁸ Ibid, pp. 274-275.

contrary.²²⁹ These days, more often than not, the main threat to a state's *raison d'être* comes from non-state actors in the shape of intangible form of terrorism.²³⁰ Furthermore, the perpetrators of such acts wear no identifiable uniform or insignia in order not to be recognised by the authorities.²³¹ The *modus operandi* of such non-state actors distorts the line between combatants and civilians on the one hand and war and the criminal justice system on the other.²³² For states concerned this poses a novel challenge of while combating terrorism they will have to effectively protect their citizens as well as maintain human rights and democratic freedoms.²³³ It is worth noting that this phenomenon is not limited to the developing states and as the recent events in Ukraine illustrate the continent of Europe has not been immune from this trend.²³⁴

3.5. The New Challenges Facing the Court

The biggest challenge facing the Court will be how to deal with on-going conflicts as in the recent case of Ukraine.²³⁵ Many scholars opine that as empirical evidence in modernity has shown, the state of emergency has now become as frequent that it is essentially permanent. The Italian

²²⁹ Harris, O'Boyle & Warbrick, *Law of European Convention on Human Rights*, *op. cit.*, p. 634.

²³⁰ M. Sassoli, 'Terrorism and War', *JICJ*, vol. 4, No. 5, 959-981, (2006), p. 959.

²³¹ Rogers, 'Unequal Combat and the Laws of War', *Yearbook of International Humanitarian Law*, vol. 7, December 2004, pp 3-34, p. 5.

²³² M. Cherif Bassiouni, *International Criminal Law*, vol. 2, *Multilateral and Bilateral Enforcements Mechanism*, Brill, 2008, p. 58-59.

²³³ It has been argued that rather than being opposed to each other, the aim of countering terrorism and maintaining human rights are complementary and mutually reinforcing. A. Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand*, Springer, 2010, p. 689; see also *Brogan and Others v. United Kingdom*, Appl. Nos. 11209/84, 11266/84, 11386/85, Merit, Judgment (29 Nov. 1988), para 48.

²³⁴ P. Leach, 'The Chechen Conflict: Analyzing the Oversight of the European Court of Human Rights', *EHRLR* 6 (2008) 732, p. 733; see also *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005, para 191.

²³⁵ See 'The Functioning of Democratic Institutions in Ukraine', Assembly Debate on 30 January 2014 (7th Sitting) (see Doc. 13405 and Addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Ms Mailis Reps and Ms Marietta de Pourbaix-Lundin). Text adopted by the Assembly on 30 January 2014 (7th Sitting).

philosopher Giorgio Agamben has argued that ‘the state of exception (Ausnahmestand) tends increasingly to appear as the dominant paradigm of government in contemporary politics.’²³⁶

Since the collapse of communism in Easter Europe and accession of former Soviet Bloc countries the makeup of the Council of Europe has changed enormously.²³⁷ According to some authors these former communist states are now divided into two groups of Central and Eastern European states, namely the group of states such as Poland, Hungary, Romania, Czech and Slovak Republics which ‘consolidation’ after transition to liberal democracy was the *mot d’ordre*, and joining the Council of Europe was to avert any backslide into virulent nationalism or populist authoritarianism.²³⁸ For these states, the resort to derogation from certain rights in the Convention may prove to be problematic, raising the danger of political conflation with previously rule-deficient exceptional regimes.²³⁹ On the other hand, another group of the late joiners the most prominent of which is Russia are at times accused of the most flagrant and systematic violations of human rights on their territories.²⁴⁰ For instance, in the past, Russia has been very reluctant to enter any derogation from the Convention in respect of its actions in Chechnya, maintaining all along

²³⁶ Agamben is of the opinion that there are similarities between the use of emergency measures in post-revolutionary France, Britain through the First World War and during the reign of Nazi Germany in the 1930s with far reaching consequences for liberal democratic societies which claim to protect the rights and freedoms of their citizens as well as raising challenging questions regarding the dichotomy between liberal democracies, totalitarian governments and colonial regimes. G. Agamben, *State of Exception*, Trans. Kevin Attell, Chicago U.P., 2005, p. 27.

²³⁷ See the Resolution 1096 (1996) by the Parliamentary Assembly of the Council of Europe (PACE) on ‘measures to dismantle the heritage of the former communist totalitarian systems’, issued on 27 June 1996. Available at: <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta96/ERES1096.htm>>.

²³⁸ W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Ideal of Pilot Judgments’, *Human Rights Law Review* 9:3(2009), 397-453, p. 435.

²³⁹ Ibid.

²⁴⁰ Ibid.

that its operation there was a ‘counter-terrorist’ one.²⁴¹ In spite of this, other late comers into the Council of Europe such as Armenia in November 2007 and Georgia in March 2008 have entered derogations to the Convention.²⁴² As the cases have started to trickle through to the Court, ‘the justices have to consider that they should judge military operations (including aerial bombardment and artillery shelling) against a normal legal background.’²⁴³

This provides the Court with a unique challenge since the Convention and the Court are founded in human rights law norms and practice.²⁴⁴ It is worth mentioning that in recent decades the distinction between the International Humanitarian Law (Laws of War) and International Human Rights Law is no longer delineated on the classical division of the two bodies of international law.²⁴⁵ In fact, there is now a growing body of

²⁴¹ P. Leach, ‘the Chechen Conflict: Analysing the Oversight of the European Court of Human Rights’, *EHRLR* 6 (2008) 732, p. 733; for the background information for the conflict in Chechnya see O. Solvang, ‘Russia and the European Court of Human Rights: The Price of Non-Cooperation’ (Winter 2008) Vol. 15 *Human Rights Brief*, Issue 2, pp. 14-17.

²⁴² Council of Europe Parliamentary Assembly, the Protection of Human Rights in Emergency situations: Report for the Committee on Legal Affairs and Human Rights (Doc. 11858; 9 April 2009), Rapporteur: Mr Holger Haibach; and Council of Europe Parliamentary Assembly, Recommendation 1865 (2009) The Protection of Rights in Emergency Situations: Reply for the Committee of Ministers, adopted at the 1081st meeting of the Ministers’ Deputies on 31 March 2010 (Doc. 12204, 16 April 2010). Available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12260&Language=EN> and <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12849&Language=EN>.

²⁴³ Ni Aolain, ‘Transitional Emergency Jurisprudence’, *op. cit.*, p. 42.

²⁴⁴ *Isayeva v. Russia*, 24 February 2005, Appl. no. 57950/00, para 191; Ni Aolain, ‘Transitional Emergency Jurisprudence: Derogation and Transition’, *op. cit.*, p. 40.

²⁴⁵ There is a wealth of literature on the subject, see for example, D. Schindler, ‘Human Rights and Humanitarian Law’, (1981-2) 31 *American University Law Review*, pp. 935-977; L. Doswold-Beck and S. Vite, ‘International Humanitarian Law and Human Rights Law’, (1993) No. 293 *IRRC* 94-119; F. Hampson, ‘Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts’, (1992) 31 *Revue de droit militaire et de droit de la guerre* 119-142; C. Droegge, ‘The Interplay between International Humanitarian Law and international Human Rights Law in Situations of Armed Conflict’, 40 *Israel Law Review* 310 2007.

scholarly work which maintains that in essence human rights protection continues even during an armed conflict regardless of the intensity of the conflict.²⁴⁶ A prominent feature of ‘the Convention’s jurisprudence has been its past unwillingness to concede or simultaneously undertake a review of the contemporaneous application of humanitarian law norms with human rights standard.’²⁴⁷ Moreover, where human rights norms have evolved they have done so consistent with developments in the domestic jurisprudence and practice of states.²⁴⁸

In occasions, where states experience internal strife or internal armed conflict it is inevitable that the two legal regimes concurrently come into play in the same jurisdiction.²⁴⁹ Despite the Court’s reluctance to examine the interaction between International Humanitarian Law and Human Rights Law in cases related to Northern Ireland and Turkey in the past it is inevitable that it would have to address these issues regarding Russia in the case of Chechnya and the troubles in Ukraine in 2014. As mentioned above, Russia has always maintained that its operations in Chechnya as purely anti-terrorism, neither a state of emergency nor a situation of martial law has been declared since the commencement of the conflict.²⁵⁰ Hence, it would be very difficult for the Court ‘to view the violations of rights solely in the context of international human rights law norms may be to impoverish judicial and state understandings of the nature of their legal obligations.’²⁵¹ Furthermore, it seems that there is currently reluctance on the part of some members of Council of Europe to declare a state of emergency even when faced with palpable internal armed conflict

²⁴⁶ See generally L. Doswald-Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?’ *IRRC*, Vol. 88 Number 864 December 2006, 881-904.

²⁴⁷ Ni Aolain, ‘Transitional Emergency Jurisprudence’, *op. cit.*, p. 42.

²⁴⁸ S. Greer, *The European Convention on human Rights: Achievements, Problems and Prospects*, Cambridge U.P., 2007, p. 55.

²⁴⁹ H-J. Heintze, ‘On the Relationship between Human Rights, Protection and International Humanitarian Law’, *IRRC*, December 2004 Vol. 86 No. 856, p. 789.

²⁵⁰ Harding, L., ‘Russia end anti-terrorism operation in Chechnya’, *the Guardian*, 16 April 2009; see also *Isayeva v. Russia*, *op. cit.*, para 66.

²⁵¹ Ni Aolain, ‘Transitional Emergency Jurisprudence’, *op. cit.*, p. 43.

as in the case of Ukraine on their territory in 2014.²⁵² It is fair to sum up that in general, states more often than not try to avoid relying on Article 15, particularly in cases of internal disorder, where there is always a risk that the government's opponents will use the emergency declaration as evidence of the effectiveness of their campaign against the authorities.²⁵³ It will be a very difficult task for the Court to continue its formalist approach and maintain that a normal legal assessment applies.²⁵⁴ Consequently, the Court may have to adopt a different approach in order to 'delve into the question of complementarity of human rights and international humanitarian law.'²⁵⁵

It is submitted that in occasions the Court will have no alternative but to directly deal with the issue of interaction between international human rights law and international humanitarian law. In the case of *Korbely v. Hungary* the Court had to consider whether the acts of a Hungarian military officer during the Hungarian revolution in Budapest in October 1956, resulting in the death and injury of a number of insurgents amounted to crimes against humanity.²⁵⁶ After a series of domestic cases and appeals the applicant was convicted of multiple homicides, which according to the Hungarian judiciary, constituted a crime against humanity punishable under Article 3 of the Geneva Convention and as a result the prosecution was not subject to statutory limitation.²⁵⁷ The Court

²⁵² 'Ukraine will not declare state of emergency' Reuters, 21 January 2014, available at : <<http://www.reuters.com/search?blob=ukraine+state+of+emergency>>.

²⁵³ Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights, *op. cit.*, p. 620.

²⁵⁴ *Isayeva v. Russia*, *op. cit.*, para 66; Ni Aolain, 'Transitional Emergency Jurisprudence', *op. cit.*, p. 44.

²⁵⁵ Leach, 'the Chechen Conflict', *op. cit.*, p. 734.

²⁵⁶ On 16 February 1993, the Hungarian Parliament passed an Act ("the Act") which provided, *inter alia*, that – having regard to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (proclaimed in Hungary by Law-Decree no. 1 of 1971) – certain acts committed during the 1956 uprising were not subject to statutory limitation. Subsequently, the President of the Republic initiated the review of the constitutionality of the Act prior to its promulgation. *Korbely v. Hungary*, Appl. no. 9174/02, 19 September 2008, para 16.

²⁵⁷ *Ibid*, para 16.

had to consider the relationship between Common Article 3 of the four Geneva Conventions (1949) and applicable human rights standards under the Convention's protection.²⁵⁸ The applicant's conviction was based on the fact that one of the victims that he had allegedly killed was a non-combatant for the purpose of common Article 3. The applicant relying on Article 7 of the Convention submitted that he had been convicted in respect of an act which had not constituted a criminal offence at the time it was committed. While the Court did not shy away from considering common Article 3 alongside human rights norms, it held that the applicant's did not satisfy all elements of a crime against humanity, therefore, there was a violation of Article 7 of the Convention (no punishment without law) on the part of the state.²⁵⁹ Moreover, the Court concluded that no conviction for crimes against humanity could reasonably be based on common Article 3 in light of the international standards prevailing at the time.²⁶⁰ Cast in this light, the case-law mentioned above and their analysis will shed some light on the task the Court will be facing in the future especially in relation to Article 15 of the Convention and situations where there are no clear-cut dichotomy between a civil strife and an internal armed conflict.

4. Conclusion

The approach adopted by the Strasbourg Court to Article 15 is based upon democracy, the rule of law and protection of human rights. There is no question that power of derogation in times of emergency not only was a necessity but also enabled the Convention organs to supervise the conduct of the states. It can also be deduced, from the Court's jurisprudence that the margin of appreciation has increasingly been granted to states in regards to the state of emergency and proportionality of their action. However, it is submitted that in certain instances the government concerned has to provide a plausible basis for an emergency situation. The Court in recent years has hardly questions the existence of an emergency

²⁵⁸ Ibid, para 90.

²⁵⁹ Ibid, para 76.

²⁶⁰ Ibid, para 32.

threatening the life of the nation. As noted above, the *Greek* case was the only occasion in which the Court did not accept the government of Greece's submission of a derogation mainly due to the undemocratic nature of the revolutionary government. Thus, in recent times, the Court rather than question the existence of an emergency in a particular situation has rather concentrated on the second part of the Article 15 namely the proportionality test – that the measures enacted by the state concerned have been proportionate to the exigencies of the situation. It is fair to say that even its proportionality test has been subjected to a wide margin of appreciation too. As a consequence, granting a tangible level of deference to the national authorities concerned.

The perfect illustration of the modern application of Art 15 is in dealing with the nature of international terrorism particularly after the tragic events of 11 September 2001 in the United States. As discussed above, in the light of the UK government's defeat in the House of Lords and subsequently in the European Court of Human Rights in *A and Others v. the UK*, in relation to illegal detention of a number of Foreign national accused of involvement in international terrorism. The European Court of Human Rights held that the UK Government's action in this regard, namely, the differential treatment of nationals and non-national as discriminatory and inconsistent with Article 14 of the Convention, from which there had been no derogation. Although the Court did not deal directly with the issue of "permanent emergency", neither did it question the viability of the derogation submitted by the UK Government after 11 September 2001 attacks on the US. In other words, the UK Government was granted a significant margin of appreciation. In spite of the fact, that at the time of the enactment of Anti-Terrorism, Crime and Security Act 2001, the UK had not been directly attacked on its soil.

In the last decade, the Court has had to preside over many cases from the former communist states in general and Russia and its on-going conflict in Chechnya in particular. In spite of the fact that the Convention is firmly embedded in human rights norms, the Court has had to consider the

interaction between international human rights and international humanitarian norms. This article recognises instances in which the Court will inevitably have to deal with circumstances in which the dichotomy between a civil strife and an internal armed conflict in relation to Article 15 are not as clear cut.

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