Crisis Situations, Counter terrorism and Derogation from the European Convention on Human Rights. A Threat Analysis

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CRISIS SITUATIONS, COUNTER TERRORISM AND DEROGATION FROM THE EUROPEAN CONVENTION OF HUMAN RIGHTS

A Threat Analysis

Jan-Peter Loof*

1 INTRODUCTION

1.1 THE SUBJECT OF THIS CONTRIBUTION FROM A HISTORICAL PERSPECTIVE

The one provision in the European Convention on Human Rights (ECHR) most explicitly focusing on crisis situations is Article 15. This Article provides for the derogation of certain Convention rights during times of war or other public emergency. In this contribution the way the European Court of Human Rights is supervising the use of this derogation clause by the Contracting States is analyzed. How did the Court interpret the separate provisions of this Article? Which level of scrutiny did it apply? And, does this interpretation and level of scrutiny affect the European human rights protection in the post-9/11 era?

From time immemorial governments have tried to come to an organized response to crises, political violence or acts of terrorism in the form of emergency rules or the implementation of a state of emergency. The solution has often been found in assigning special powers to the (head of the) Executive, in appointing a special official to cope with the emergency situation (e.g. the Roman dictatorship) or in transferring civil powers to military authorities (e.g. the British martial law

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and the French *état de siège*).[1] History shows that from the earliest development of emergency regimes, these regimes provide for the infringement of the rights and freedoms of citizens: at first mainly the infringement of property rights and the deviation from the normal system of justice, later also the infringement of other rights. Actually, the manner in which the dictatorship in the Roman Republic was organized has long been taken as an example of a good set of rules for states of emergency. This is because of its fairly strictly formalized, controlled and time-limited nature which preserved, as much as possible, both the return to ordinary governmental structures and the liberty of individuals. This appreciation for the Roman dictatorship has also influenced the way in which the derogation clauses in post-World War II constitutions and in human rights treaties like the ECHR and the International Covenant on Civil and Political Rights (ICCPR, which contains a derogation clause in Article 4) have been structured and interpreted.[2]

The legal literature on states of emergency and other crisis situations offers ample evidence that 'public emergencies' and 'unprecedented threats' have frequently been called on in the past to justify human rights violations; that 'temporary' measures to fight crisis situations have often developed into permanent ones; and that it is extremely difficult to re-institute human rights protections once lost.[3] Another effect that has been identified frequently is the leaking out of measures justified by anti-terror sentiments into mainstream law

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1 Cf. C.L. Rossiter, *Constitutional Dictatorship. Crisis Government in the Modern Democracies*, (Princeton: Princeton University Press, 1948), pp. 3–28, J. Fitzpatrick, *Human Rights in Crisis. The International System for Protecting Rights During States of Emergency*, (Philadelphia: University of Pennsylvania Press, 1994), pp. 19–31; C.J. Friedrich, *Constitutional Government and Democracy. Theory and Practice in Europe and America*, (Waltham-Toronto-London: Blaisdell, 1968) (4th ed.), pp. 563–566; A.L. Svensson-McCarthy, *The International Law of Human Rights and States of Emergency*, (The Hague-Boston: Martinus Nijhoff, 1998), pp. 9–45.

2 J.P. Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden? Opschorting en beperking van mensenrechtenbescherming tijdens noodtoestanden en andere situaties die de staatsveiligheid bedreigen* (Human rights and national security: compatible entities? Derogation and restriction of human rights during states of emergency and other situations that threaten national security), (Nijmegen: Wolf Legal Publishers, 2005), pp. 35–40 and 686; Rossiter (1948), p. 28, states – conferring to Machiavelli: *Discourses*, I, 34: 'The lessons that Rome has taught the world have been many and significant, but none is of more present consequence than the pregnant truth imparted by the history of the famed dictatorship: that in a free state blessed by a high constitutional morality and led by men of good sense and good will, the forms of despotism can be successfully used in time of crisis to preserve and advance the cause of liberty.' See also Hamilton in *Federalist Paper No. 70* and J.E. Finn, *Constitutions in Crisis. Political Violence and the Rule of Law*, (Oxford-New York: Oxford University Press,1991), pp. 15–16.

3 Most recently, this was identified in the Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, initiated by the International Commission of Jurists, *Assessing Damage, Urging Action*, Geneva: December 2008, p. 25. *See also* Rossiter (1948), p. 13 and O. Gross, '"One More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', (1998) 23 *Yale Journal of International Law*, pp. 437–440.

enforcement: with the passing of time, extraordinary counter-terrorism measures have come to be used against drug-traffickers, organized crime and ordinary criminals, thus interfering with the human rights of many.[4]

1.2 DEROGATION OF HUMAN RIGHTS IN THE POST-9/11 ERA: WHAT ABOUT THE EUROPEAN SUPERVISION?

In the wake of the 11 September 2001 attacks in the United States, many States, responding to United Nations Security Council resolutions and public anxiety, began to adopt an increased array of counter-terrorism measures. While the Security Council failed to immediately refer to States' duty to respect human rights in their responses to terrorism, it subsequently made it clear in a 2003 resolution that 'States must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law'.[5] Despite this guidance, some government officials and policy makers – most notably in some European liberal democracies – claimed that the exposed threat of trans-national terrorism was of an unprecedented and exceptional nature and required exceptional responses and new standards, including new standards regarding the observance of certain basic human rights. As a consequence, measures were taken and legislation was enacted of a more repressing nature than that of the measures and legislation traditionally used to fight domestic crises or political conflicts.

The relevant and central question of this contribution is whether, given the contemporary worldwide threats of terrorism (mainly by Islamic radicals), these kinds of counter-terrorism measures can be justified through application of the derogation clause of the ECHR. Article 15 serves as a kind of emergency button, making it possible for States and governments to switch from an ordinary level of human rights protection to a lower, emergency level of protection. It will be established that the way in which the European Court of Human Rights is supervising whether these governments are really justified in switching to an emergency level of human rights protection – the test whether there is indeed a situation of severe emergency – is flawed and allows derogation for very lengthy periods (situations of 'entrenched emergencies'). The additional question will be raised whether or not this Strasbourg supervision does create a 'legal grey hole'

4 For example, C. WARBRICK, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism', (2002) *European Human Rights Law Review*, p. 287; C. WALKER, 'Intelligence and anti-terrorism legislation in the United Kingdom', (2006) 44 *Crime, Law & Social Change*, p. 387; R. CHESNEY & J. GOLDSMITH, 'Terrorism and the convergence of criminal and military detention models', (2008) 60 *Stanford Law Review*, p. 1079.

5 UN Security Council Resolution 1456, 20 January 2003, para. 6.

– a term introduced by the South-African author David Dyzenhaus, indicating a legal space in which there are some legal constraints on executive action, but ones that are so insubstantial that they still permit the government to do as it pleases[6] – and therefore does pose a threat to the human rights protection throughout Europe.

To lift a bit of the veil already, my conclusion will be that, theoretically, the Strasbourg supervision of derogations causes great concern, but in practice no real harm has yet been done.

2 HISTORY AND CONTENT OF THE DEROGATION CLAUSE

The drafting history of Article 15 ECHR and Article 4 ICCPR, as well as the case law of the European Court of Human Rights (ECtHR) and the UN Human Rights Committee on the derogation clauses are closely connected and intertwined. Both drafting history and case law indicate that it is possible for the State Parties to derogate from their treaty obligations in a crisis situation that threatens the life of the nation. However, this possibility is not intended to serve as a loophole for not enforcing human rights in emergency situations. Especially the preparatory works to Article 4 ICCPR provide useful evidence of the fact that many States protested against the insertion of a derogation clause in the Covenant and that after the narrow adoption of a British proposal to do so, the main focus of the delegations was on drafting the provision in such a way as to minimize the risk of abuse and to make sure that States would be bound by their legal obligations in the human rights field, even in armed conflicts and similar crisis situations. The *ratio legis* of the derogation clauses is to offer governments the possibility of some further 'controlled restrictions' on the enjoyment of human rights in difficult crisis situations, without providing them with a *carte blanche*.[7] The drafters intended to prevent arbitrary derogations based on the dangerous 'doctrine of necessity' by the establishment of an appropriate regime for emergencies at the end of the 1940s.[8]

Currently, an analysis of the provisions in the 1969 Vienna Convention on the Law of Treaties (VCLT) and in the more recent Articles on the Responsibility of States for Internationally Wrongful Acts developed by the International Law

6 D. Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?', (2006) 27–5 *Cardozo Law Review*, p. 2018; D. Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency*, (Cambridge: Cambridge University Press, 2006), p. 42.

7 A.L. Svensson-McCarthy, 'Minimum Humanitarian Standards – from Cape Town Towards the Future', (1997) 58–59 *ICJ Review*, p. 7. *See also* Loof (2005) p. 364–375.

8 For example, J. Oráa, *Human Rights in States of Emergency in International Law*, (Oxford: Clarendon, 1992), p. 228; Svensson-McCarthy (1998), p. 213–217.

Commission (hereafter: ILC Articles)[9] concerning grounds that may justify States' deviation from their treaty obligations – especially Articles 62 and 65 VCLT on fundamental change of circumstances and ILC Article 25 on necessity[10] – shows that derogation of human rights is only possible if and to the degree that the human rights treaties themselves leave room for it. There is no way to 'circumvent' the derogation regime offered by the human rights treaties by reference to general international law concepts such as fundamental change of circumstances or necessity, nor would doing so offer the States additional latitude in taking action.[11] Furthermore, it has been argued by several authors, *inter alia* by Seiderman,[12] that the derogation clauses of the ECHR and the ICCPR in this regard are more than mere treaty rules. They can also be considered rules of international customary law. This is important because then non-signatory parties to the treaties are also bound by these standards.

Since this contribution is dedicated to the ECtHR's supervision of the application of the derogation clause, the following will mainly focus on Article 15 ECHR. This Article reads:

> 1. In time of war or any 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 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.

Regarding the conditions and limits that Article 15 ECHR places on the use of derogating measures, seven conditions can be distinguished:[13]

(1) Proclaiming a state of emergency in which fundamental rights are derogated is only allowed in a crisis situation that is so grave that the life of the nation is threatened (the principle of *exceptional threat*).

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9 Noted by the United Nations General Assembly and annexed to the General Assembly Resolution 56/83 (2002).

10 See generally M. Agius, 'The Invocation of Necessity in International Law', (2009) LVI *Netherlands International Law Review*, p. 95–135.

11 Loof (2005) p. 170–173.

12 I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, (Antwerpen-Groningen-Oxford: Intersentia-Hart, 2001).

13 For example, Oráa (1992); Svensson-McCarthy (1998); Loof (2005).

(2) The state of emergency in which fundamental rights are derogated from must be officially proclaimed.
(3) Emergency measures that derogate fundamental rights are only justified if they are strictly necessary and are in reasonable proportion to the purpose they serve, such as overcoming the crisis situation (the principle of *proportionality*).
(4) Emergency measures that derogate fundamental rights may not be taken on arbitrary or discriminatory grounds.
(5) Certain fundamental rights – the non-derogable rights – can never be derogated from and may therefore under no circumstance be limited any further than is permitted on the basis of the ordinary limitation clause (if such a clause is contained in the particular treaty article).
(6) Derogation of certain fundamental rights may not lead to the violation of other obligations under international law by which the State is bound.
(7) Derogation of certain fundamental rights is only allowed after international notification to the Secretary-General of the Council of Europe (who will inform the other Contracting States).

For a closer look at the way in which the ECtHR is supervising the application of Article 15 by Contracting States, some of these conditions will be explained more thoroughly in the following paragraphs. Our main focus will be on the principle of exceptional threat, on the principle of proportionality and on non-derogable rights.

3 THE PRINCIPLE OF EXCEPTIONAL THREAT

Because of the multitude of factors and circumstances that can make a situation a 'public emergency threatening the life of the nation', it is very difficult to give a more specific interpretation or definition of the *principle of exceptional threat.* The formula 'war or other public emergency threatening the life of the nation' was specifically chosen during the drafting process to prevent abuse of the power to derogate. So far, the European Court and the former European Commission on Human Rights (EComHR) have, via their case law, attempted to further specify the degree of seriousness which an emergency situation must meet if that situation is to be considered a 'public emergency'.

The first substantive interpretation of Article 15 ECHR was made by the Court in *Lawless v. Ireland.*[14] Confirming the determination by the European Commission that Article 15 should be interpreted in the light of its 'natural and customary' meaning, the Court defined 'public emergency' as 'an exceptional situation of crisis or emergency which afflicts the whole population and

14 ECtHR, *Lawless v. Ireland* 1 July 1961 (Appl. no. 332/57).

constitutes a threat to the organised life of the community of which the community is composed'. This definition was further developed and clarified by the Commission in the *Greek Case*.[15] Reaffirming the basic elements of the Court's approach in *Lawless v. Ireland*, the Commission emphasized that the emergency must be actual or at least 'imminent'. In order to constitute an Article 15 emergency, the Commission held that a 'public emergency' must have the following four characteristics:

- it must be actual or imminent (so it should not be a crisis that could *possibly* occur in the future or is merely perceived by the government);
- its effects must involve the whole nation;
- the continuance of the organized life of the community must be threatened; and
- the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Regarding the second and third criteria, it should be noted that these are generally applied in a rather relaxed way. The second criterion does not alter the fact that a crisis geographically limited to a part of the country can constitute a public emergency under Article 15. Hence, the United Kingdom was permitted to derogate from the ECHR, even though disturbances were largely confined to Northern Ireland.[16] As far as the threat to the organized life of the community is concerned, some members of the Commission argued in the *Greek Case* that when the organs of the State are functioning normally, there is no grave threat to the life of the nation and, therefore, emergency measures are not legitimate. However, the majority in the Commission did not follow this reasoning.

Thinking on the more precise meaning of both criteria was highly influenced by the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Largely based on studies of the early Strasbourg case law on Article 15 ECHR by Hartman,[17] and drafted by a group of 31 distinguished experts in international law convened by the International Commission of Jurists in Siracusa (Italy) in Spring 1984, the *Siracusa Principles* determine a threat to the life of the nation as one that affects (a) the whole of the population and either the whole or part of the territory of the

15 EComHR, *Denmark, Norway, Sweden and The Netherlands v. Greece* 19 November 1969, (Appl. no. 3321–3323.67 and 3344/67) (The Greek Case).

16 For example, ECtHR, *Ireland v. UK*, 18 January 1978 (Appl. no. 5310/71); ECtHR 22 April 1993, *Brannigan and McBride v. UK* (Appl. no. 14553/89; 14554/89).

17 J.F. HARTMAN, 'Derogation from Human Rights Treaties in Public Emergencies', (1981) *Harvard International Law Journal*, pp. 1–52; J.F. HARTMAN, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision', (1985) *Human Rights Quarterly*, pp. 89–131.

State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the well-being of the people and the protection of their individual rights and freedoms.[18] Hartman explains that 'some fundamental element of statehood, such as the functioning of the judiciary or legislature or the flow of crucial supplies, must be seriously endangered'.[19]

In addition to the *Siracusa Principles*, the International Law Association (ILA) has devoted several meetings to the issue. These resulted in the *Paris Minimum Standards of Human Rights Norms in a State of Emergency* ('Paris Minimum Standards'), which were approved by the ILA Paris Conference in 1984.[20] As far as the determination of a public emergency is concerned, the *Paris Minimum Standards* essentially contain the same criteria as the *Siracusa Principles*. It can thus be concluded that – at least in the mid-1980s – there was a broad consensus among international law experts on the interpretation of (this element of) the derogation clauses in the ECHR and the ICCPR.

4 THE 'NORMALCY-RULE, EMERGENCY-EXCEPTION' HYPOTHESIS AND 'ENTRENCHED EMERGENCIES'

It must be noted that some experts have pointed to the possibility that, rather than serving as restraints, derogation provisions may sometimes serve as invitations to increase State repression.[21] Additionally it has been argued that there is good reason to believe that setting a time limit on states of emergency has the unintended consequence of encouraging human rights abuse.[22] The objective of both constitutional derogation provisions with time limits, and clauses on derogation in human rights treaties, is securing the temporariness of the emergency regime. Hence, the successful functioning of Article 15 is based on the premise that Contracting States will derogate from the ECHR only when

18 Siracusa Principle 39. The Siracusa Principles are reproduced in (1985) *Human Rights Quarterly*, pp. 3–14 and in UN Doc. E/CN.4/1985/4 (1985).

19 HARTMAN (1981) p. 16.

20 They were published in the (1985) 79 *American Journal of International Law*, pp. 1072–1082. An extensive commentary on the Paris Minimum Standards is given by S.R. CHOWDURY, *Rule of Law in a State of Emergency*, (London: Pinter, 1989).

21 C. GROSSMAN, 'States of Emergency: Latin America and the United States', in: D. GREENBERG et al (ed.), *Constitutionalism and Democracy: Transition in the Contemporary World*, (Oxford-New York: Oxford University Press, 1993); L CAMP KEITH, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behaviour?', (1999) 36 *Journal of Peace Research*, p. 95.

22 L. CAMP KEITH & S.C. POE, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration', (2004) 26 *Human Rights Quarterly*, pp. 1071–1097.

there is a public emergency that meets the required threshold, and the derogation, in accordance with the very nature of emergencies, will be a *temporary* one. An emergency regime is in place for a limited period of time in order to retain a situation of normalcy. This is what Gross and Ní Aolaín call the 'assumption of separation': the belief in the ability to separate emergency and crisis from normalcy, counter-terrorism measures from ordinary legal rules and norms.[23] Both authors argue that this perspective is mistaken. The central theme of their book is that an all-to-common and important aspect of the empirical nature of emergencies is their permanence. From this perspective Gross and Ní Aolaín criticize the emergency regime models of which the ECHR derogation clause is an example: the models of accommodation. These models allow for rights derogation but put too little pressure on States regarding the retraction of derogating measures.

Looking at the Strasbourg case law, it can be seen that Gross and Ní Aolaín have a point. Both the European Commission and Court have generally based their decisions on the validity of this 'normalcy-rule, emergency-exception' hypothesis. However, they have avoided any form of pronouncement on the validity of states of emergency declared by Contracting States. And they have avoided taking a strong stand on time limits.[24] The jurisprudence of the EComHR and the ECtHR is unclear when it comes to the temporary nature of a state of emergency that derogates fundamental rights. It can be deduced from the Commission report on the *De Becker v. Belgium* case[25] that derogating emergency measures should end as soon as the crisis circumstances have passed. Yet such a pronouncement does not prevent the Strasbourg bodies from being prepared to accept the fact of the existence of such crisis circumstances for a long period of time and, as a consequence, to also accept a long-lasting derogation of fundamental rights. That this readiness exists is especially evident from the Strasbourg judgments on the British emergency measures directed at the situation in Northern Ireland.[26] On the basis of counter terrorism legislation for Northern Ireland, an emergency regime that derogated certain human rights was in effect for many decades in (parts of) the UK. The fact that this legal situation lasted for such a long time did not pose an insurmountable problem for either the Commission or the Court.[27] Thus, the existence of a state of emergency was allowed to exist in the UK for several decades because of the IRA terrorism in Northern Ireland. Such a situation is a so-called 'entrenched emergency'.

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23 O. Gross & F. Ní Aolaín, *Law in Times of Crisis. Emergency Powers in Theory and Practice*, (Cambridge: Cambridge University Press, 2006), p. 171.

24 Hartman (1985) pp. 101–102.

25 EComHR, *De Becker v. Belgium*, 8 January 1960 (Appl. no. 214/56), p. 137–138.

26 ECtHR, *Ireland* (18 January 1978); ECtHR, *Brannigan and McBride*; ECtHR, *Marshall v. UK*, 10 July 2001 (Appl. no. 41571/98). See for a detailed analysis of these judgments Loof (2005) pp. 402–424.

27 *Cf.* Gross (1998) p. 473.

The Strasbourg bodies have never referred to this phenomenon but rather have chosen to examine each application on a case-by-case basis, regardless of the prevailing country situation. Both the Commission and the Court seemed to attach importance to the fact that the British emergency legislation had to be prolonged annually by the British government and that, therefore, national legislative bodies judged periodically whether the circumstances still warranted measures that derogated fundamental rights.[28]

However, if Article 15 allows Contracting States to take only such action as is 'strictly required by the exigencies of the situation', the suspicions of the Court should arguably be aroused where exigencies require derogation over a prolonged period of time.[29] Again, the course of the Court on this point is unclear. In the UK situation the Court did not seem to take into account the enduring period of emergency in Northern Ireland. However, in the 1996 *Aksoy v. Turkey* case and in some later cases regarding the Turkish notification of derogation, the non-temporary character of the Turkish emergency legislation and the fact that the state of emergency was, therefore, not reassessed by the legislature, played a role in the Court's judgment. Although the Court did accept the existence of an emergency situation in south-east Turkey and did not reject the invocation of Article 15 by the Turkish government as such, the derogating detention measures were judged to be not 'strictly required by the exigencies of the situation'. Thus, they constituted a violation of both Articles 5 and 15 ECHR.[30]

Several authors, including Gross and Ní Aolaín,[31] are sceptical of the course that the ECtHR has taken on the principle of exceptional threat. They argue that the ECtHR seems to make an implicit distinction between countries with a strong democratic tradition and those without, giving the benefit of the doubt to the United Kingdom, while taking a strict hand with countries like Greece and Turkey.[32] Furthermore, in their view, a thorough review by the ECtHR of whether invoking an emergency is justified at all has remained consistently off limits. And although they do not consider the ECtHR's supervision over derogations meaningless or without effect, they indicate that it generally fails to deal with the wider problems that accompany emergencies, namely the tendency

28 This is especially clear in *Brannigan and McBride*, § 63–65.

29 This was one of the arguments of the NGOs that were allowed to stand as *amicus curiae* before the ECtHR in *Brannigan and McBride*. *Cf.* E. Hughes, 'Entrenched Emergencies and the 'War on Terror': Time to Reform the Derogation Procedure in International Law?', (2007) 20 *New York International Law Review*, pp. 10–11.

30 ECtHR, *Aksoy v. Turkey*, 26 November 1996 (Appl. no. 21987/93), *RJeD* 1996-VI, § 83; ECtHR, *Demir and others v. Turkey*, 23 September 1998 (Appl. no. 21380/93; 21381/93; 21383/93), *RJeD* 1998-VI, § 43–45; ECtHR, *Nuray Sen v. Turkey*, 17 September 2003 (Appl. no. 41478/98); ECtHR, *Elci and others v. Turkey*, 13 November 2003 (Appl. no. 23145/93 and 25091/94), § 174 and 178.

31 Gross & Ní Aolaín (2006) pp. 285–286.

32 *Cf.* Loof (2005) pp. 708–709.

for emergencies to be prolonged and become permanent and for emergency powers to be subsumed into ordinary law.[33]

However, it must be noted that at another point the ECtHR seems to have taken a clear and unambiguous position. In the cases *Sakik and others v. Turkey* (1997), *Sadak v. Turkey* (2004) and *Yaman v. Turkey* (2004) the Court did rule that the derogation under Article 15 was inapplicable to the measures imposed on the applicants as they had been arrested and detained (and maltreated) in an area that was not part of the declared state of emergency region.[34] The government, for its part, contended that this should not be a bar to the derogation's applicability, since the terrorist campaign which had its nucleus in the state of emergency region of south-east Turkey, gave rise to incidents in other parts of the Turkish territory as well. The ECtHR, noting that Article 15 permits derogations only to 'the extent strictly required by the exigencies of the situation', was of the opinion that it would be working against the object and purpose of Article 15 if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation. Therefore, it followed that the derogation in question was inapplicable, *ratione loci*, to the facts of the case and Turkey remained accountable under the 'normal' ECHR standards.

5 THE LEVEL OF SCRUTINY APPLIED BY THE EUROPEAN COURT AND ITS ABILITY TO ASCERTAIN THE EXISTENCE OF A 'PUBLIC EMERGENCY'

5.1 A WIDE MARGIN OF APPRECIATION

A general problem with the four aspects of the *principle of exceptional threat* indicated in paragraph 3 is that although they were formulated fairly strictly by the Strasbourg bodies, those same bodies apply a very wide margin of appreciation when assessing the question of whether a 'public emergency threatening the life of the nation' existed. Due to this wide margin of appreciation allowed to national authorities (since the *Ireland/United Kingdom* judgment), the normative clarity and 'sharpness' of the elements of the principle of *exceptional threat* as they were formulated in early Strasbourg jurisprudence (the *Lawless* judgment, the *Greek* case) have, to a considerable degree, been watered-down.

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33 Gross & Ní Aolaín (2006) pp. 288–289.

34 ECtHR, *Sakik and others v. Turkey*, 26 November 1997 (Appl. no. 23878/94 and others), RJ&D 1997-VII; ECtHR, *Sadak v. Turkey*, 8 April 2004 (Appl. no. 25142/94 and 27099/95); ECtHR, *Abdülsamet Yaman v. Turkey*, 2 November 2004 (Appl. no. 32446/96).

In practice, it comes down to the Strasbourg bodies going along, almost without comment, with the statements and views regarding the existence of a crisis that threatens national security as stated by the government in question, when the Strasbourg bodies were under the impression that the government acted in good faith.[35] It was precisely due to the lack of good faith on the part of the Greek colonel's regime that a wide margin of appreciation was not allowed in the *Greek* case.

In the first decades of the Strasbourg case law, there may have been reasons for the Commission and the Court to show some reserve in sensitive issues like national security and combating terrorism. It can be argued that at that time, for strategic reasons, in order to prevent the undermining of their authority, the Commission and the Court did not issue reports or judgments that could raise the risk of States rejecting the jurisdiction of the Court and the right of individual applications. When Protocol No. 11 came into force in 1998, the right of individual applications and the jurisdiction of the Court became mandatory and, therefore, could no longer be revoked separately. One might argue that the ECtHR has gained such an authoritative position now that it need no longer fear as much the undermining of its authority by one or more governments' critique. In relation to other sensitive issues touching on national security, the Court has also not hesitated to at times give 'harsh' judgments and find violations of the ECHR.[36] There do not seem to be any valid reasons for using a less scrutinizing test just because the derogation clause is at issue. However, the reactions in the British media and politics on the recent judgment in *A. and others v. UK*,[37] in which some former suspected terrorists were awarded limited amounts of financial compensation for having been administratively detained under a regime that violated Article 5 ECHR, indicates that States are very sensitive in this field.[38]

5.2 RISKS

In my opinion, the lack of real clarity regarding the exact content of *the principle of exceptional threat*, due to the wide margin of appreciation offered by the ECtHR, poses serious risks for the protection of human rights. In the first place, this lack of clarity has led to situations in which Article 15 ECHR was invoked and accepted, while it was very doubtful whether, for instance, the requirement

35 This is especially clear in the cases of *Brannigan and McBride* and *Marshall*.

36 For example, ECtHR, *McCann and others v. UK*, 27 September 1995 (Appl. no. 18984/91), *Series A* Vol. 324: violation of Art. 2, unnecessary killing of suspected IRA terrorists on Gibraltar; ECtHR, *Chahal v. UK*, 15 November 1996 (Appl. no. 22414/93), *RJ&D* 1996-V: ban on expulsion of foreign terrorist suspect and lack of judicial control in expulsion procedure.

37 ECtHR, *A. and other v. UK*, 19 February 2009 (Appl. no. 3455/05).

38 See my case note on this judgment in (2009) 50 *European Human Rights Cases*.

that the functioning of the political organs of the State or the judiciary be seriously threatened, or the requirement that there was no way for the State to protect its security through less drastic means that did not derogate any ECHR rights, were met.

The most explicit example of this is the *Brannigan and McBride v. UK* judgment. In this case the British government relied on a notification of derogation – regarding Art. 5(3) and 5(5) ECHR – that seemed not to be the result of an increase in terrorist activities in Northern Ireland, but of the earlier *Brogan* judgment of the ECtHR. Although the ECtHR[39] took into account the problems caused by IRA terrorism on the territory of the UK in the *Brogan* judgment, British detention measures – applied in a period in which no notification of derogation was effective – were judged to be in violation of the right to *habeas corpus* and the right arrested persons to be brought 'promptly' before a judicial authority. The reaction of the British government was not to adapt the detention measures to bring them into conformity with Art. 5 ECHR, but to send a new notice of derogation to the Secretary General of the Council of Europe. And in *Brannigan and McBride v. UK*, the ECtHR accepted the existence of a public emergency in the period shortly after the *Brogan* judgment.[40]

In the second place, we can point to the British notification of derogation in late 2001. This notification was the result of the fact that immediately after the 9/11 attacks in the United States the British government managed to have legislation passed that again entailed a derogation from the obligations under Article 5 ECHR. At that time, the view towards derogations from the ECHR became abundantly clear: the British Home Secretary stated on several occasions that the derogation of the treaty obligations was only a 'formality' that was simply necessary to facilitate the measures in question (unlimited detention of foreign terrorist suspects with very limited judicial checks).[41] My thesis is that the Strasbourg 'stretching' of the *principle of exceptional threat* by applying a wide margin of appreciation paved the way for the ease with which the UK government in 2001 used the possibility to derogate from the ECHR. Accepting such an attitude towards the application of Article 15 by States might lead to the detriment of the level of human rights protection in all of Europe. In situations like that of today, with (at least to a certain degree) a European wide threat of terrorism by Islamic radicals, many State Parties could be inclined to notify a derogation to the ECHR, thus reducing the human rights protection to a crisis level for an indefinite period. For, given the fluency of the terrorist networks of today and the character of terrorist attacks in recent years, how are we ever to know that the threat of terrorism has ended?

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39 ECtHR, *Brogan and others v. UK*, 28 October 1988 (Appl. no. 11209/84), *Series A* Vol. 145-B.

40 See for critical comments on the Brannigan and McBride judgment *inter alia*: Svensson-McCarthy (1998) pp.309–318; Hughes (2007) pp. 18–19.

41 Loof (2005) pp. 657–664; Hughes (2007) pp. 52–58.

After 2001 it remained to be seen how the ECtHR would react to the notice of derogation by the British government. Would it accept the post-9/11 threat of terrorism as a public emergency under Article 15? The answer was given in the *A. and others v. UK* judgment of 19 February 2009.

5.3 THE CASE OF *A. AND OTHERS V. THE UNITED KINGDOM* AND THE INHERENT LIMITS TO REVIEW OF THE ACTUAL EXISTENCE OF A PUBLIC EMERGENCY

The case of *A. and others v. UK* concerns the application of the British *Anti-Terrorism, Crime and Security Act* (ATCS Act 2001) which was rushed through Parliament within a few weeks after 9/11. This Act was a comprehensive effort to increase Britain's ability to identify terrorists and to seize the financial assets of terrorist organizations. Part 4 of the Act permitted the *indefinite detention* of non-British terrorist suspects without the need to charge or try them for any offence.[42] It was clear that these measures were not in conformity with the UK's obligations under Article 5(1) ECHR, so the UK government issued a notice of derogation to the Secretary General of the Council of Europe.

In the earlier notifications of derogation concerning IRA terrorism, the British government had always been able to refer to a series of armed attacks, bomb campaigns and other cases of violence that had occurred on British territory, and a considerable number of casualties on the side of the police and other public order authorities as well as among civilians. In this case, the British government could only refer to British casualties as a result of the attacks of 11 September in the US, the resolutions of the UN Security Council which obliged governments to act stringently against terrorists and to the presence of persons who were a threat to national security, suspected of preparing possible attacks on British territory.[43] Thus, the factual substantiation of the existence of a 'public emergency' in the UK was less strong than it had been in earlier cases. In addition, it can be stated that reference to the obligations of the UK in accordance with the resolutions of the UN Security Council cannot be considered an argument for derogating from the obligations arising from human rights treaties, as it is precisely those resolutions that state that measures taken by the Member States must be in accordance with the obligations arising from the human rights treaties and other relevant provisions of international law.[44]

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42 Art. 21–23 ATCS Act. De ATCS Act only provided for a very limited form of review by an independent tribunal (the Special Immigration Appeals Commission – SIAC) of the ministerial decisions certifying individuals as a threat to national security (art. 25–29 ATCS Act).

43 The notice of derogation by the UK government is published in (2001) *Yearbook ECHR*, p. 21.

44 R. Talbot, 'The balancing act: counter-terrorism and civil liberties in British anti-terrorism law', in: J. Strawson (ed.), *Law after Ground Zero*, (Sydney-London-Portland (Oregon): Glasshouse Press, 2002), pp. 123–135.

In 2003, Britain's Home Secretary had detained 16 foreign nationals under Part 4 of the ATCS Act 2001. Nine of them joined in a procedure before the British courts to have the legality of their detention reviewed. In December 2004 the Law Lords, in an eight-to-one decision, found that Part 4's detention policy violated the UK's commitment to the ECHR (on the basis of the Human Rights Act 1998).[45] The main reasons for this finding were the discriminatory and disproportionate nature of the detention measures. Lord Nicholls of Birkenhead's decision said: 'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.'[46] Lord Nicholls expressed particular concern that the extended powers of detention conferred by the British law applied only to non-British citizens. He wrote: 'It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.'[47] Furthermore, the Law Lords – as part of the proportionality test – expressed serious doubt concerning the effectiveness of the detention scheme, since it allowed for the release of suspected terrorists in case they leave UK territory immediately: '[This] does not explain why a terrorist, if a serious threat to the UK, ceases to be so on the French side of the English Channel or elsewhere.'[48]

In March 2005, the British parliament replaced Part 4 of the Act with new legislation that was designed to comply with the House of Lords' decision. The new *Prevention of Terrorism Act 2005* (PTA 2005) no longer allowed individuals to be detained in prison indefinitely, and instead permitted the imposition of conditions resembling house arrest. In contrast to the ATCS Act, the PTA 2005 applied to both British and non-British citizens.

Notwithstanding the judgment of the Law Lords and the subsequent lifting of the detention measures, the applicants in the national procedure petitioned to the ECtHR in 2005. This resulted in the *A. and others v. UK* judgment. The essence of the ECtHR's approach regarding the arguments given by the government for the existence of a public emergency threatening the life of the nation can be read in § 177 and 180 of the judgment:

> '177. Before the domestic courts, the Secretary of State adduced evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence was adduced before SIAC. All the national judges accepted that the danger was credible (with the exception of Lord Hoffmann, who did not consider that it was of a nature to constitute 'a threat to the life of the nation' (...)). Although when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the

45 *A. and others v. Secretary of State for the Home Department* [2004] *UKHL* 56.
46 Ibid. at § 74 (opinion of Lord Nicholls).
47 Ibid. at § 76 (opinion of Lord Nicholls).
48 Ibid. at § 44 (opinion of Lord Bingham).

> national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was 'imminent', in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently (...).
> 180. As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.'

So, what the Court essentially does is to look at whether there are national mechanisms to control the application of a derogating emergency regime (parliamentary control, judicial review). If these mechanisms are in place, the outcome of their deliberations is simply accepted by the Court.

On the one hand this is unavoidable. In the post-9/11 era it is increasingly clear that bright-line distinctions between normalcy and emergency are frequently untenable. How can an international court ever assess the imminence of terrorist attacks? Information on this will in most cases be in the hands of intelligence services and will certainly not be shared with international bodies. So, what else can an international court do rather than marginally test the existence of national mechanisms that might prevent the unjustified declaration of a state of emergency?

On the other hand, one should keep in mind the fact that these national mechanisms cannot function as an effective counterbalance to the government that declares this state of emergency. The way in which the ATCS Act was rushed through Parliament shows that parliamentary involvement in the decision to derogate from the ECHR was highly influenced by political pressure from the government. One Parliamentary Committee as much as admitted that no 'hard' arguments had been given by the Secretary of State on which the existence of a public emergency threatening the life of the nation could be based, but that in

the light of all the circumstances the government should be awarded 'the benefit of the doubt'.[49] In the judicial review procedure, the Law Lords were hesitant to accept the existence of a public emergency, but eventually did so because they argued that the decision of the legislature in these matters had to be leading. In this review procedure British courts were given access to secret intelligence documents that further substantiated the imminent threat of terrorist attacks. However, a judicial test of the accurateness of such information can only be very limited. So, in essence, a public emergency requiring derogation of certain human rights exists if the government says that it does and gives some arguments that are not clearly unfounded.

6 SUPERVISION OF DEROGATIONS: A 'LEGAL GREY HOLE'?

Now, it could be argued that the lack of time limits in the ECtHR's case law on Article 15 and the wide margin of appreciation offered by the Court to national authorities in assessing the existence of a public emergency indicate that the ECtHR's supervision actually amounts to a 'legal grey hole'. This term was introduced by the Canadian author Dyzenhaus in his book *The Constitution of Law. Legality in a time of Emergency.*[50]

In Dyzenhaus's argument, a grey hole is a legally created black hole, and a black hole is a condition of exemption from legal oversight – as when a legislature legally authorizes the executive to remove certain people or actions from the normal realm of the rule of law. Because it is, in a sense, in accordance with the law to create a grey hole through some legislative device, some have seen this as a way to maintain the rule of law in times of crisis. So long as the executive does not take it upon itself to rule by *diktat* as a Schmittian sovereign would, in this view, rule *by* law is maintained under crisis legislation. Hence, the stance one holds on the question of grey holes reflects one's stance on the question of whether rule *by* law is sufficient to constitute the rule *of* law, and this allows Dyzenhaus to raise a key point: If we are governed in accordance with laws, are we thereby in a rule of law regime? For Dyzenhaus, the idea of the rule of law is far more substantive: it 'has content – law is not a mere instrument of the powerful. Rather, it is constituted by values that make government under the rule of law worth having.'[51] These values, for Dyzenhaus, include individual dignity and fair trial.[52] From this perspective, Dyzenhaus is highly critical of

49 See T.R. Hickman, 'Between Human Rights and The Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', (2005) 68 *Modern Law Review*, pp. 655–668.

50 Dyzenhaus (2006).

51 Ibid., p. 139.

52 Ibid., p. 138 and 210.

situations in which the legislature puts in place a legal regime that limits the authority of the courts to review decisions by public officials, as was the case with the indefinite detention of foreign terrorist suspects under the UK ATCS Act 2001. Often, in such a situation, the legislature stipulates some degree of fairness, but is explicit that no more is appropriate, where the type of decisions 'seem to cry out for much more'.[53] Dyzenhaus agrees with other critics that review procedures offering only a limited review of the legality of these kinds of decisions may be presented as institutions that implement the rule of law, but in fact provide a mere cloak for potential abuse of authority.[54] Dyzenhaus considers such legal grey holes an even bigger risk than legal black holes (situations in which there is no legal review of government actions at all). In a legal black hole situation it is at least clear that there is no legal review. A legal grey hole offers the suggestion that there is adequate control, while it actually is non-existent.[55]

Translating Dyzenhaus's argument to the ECHR system of human rights protection, I would argue that the term 'legal grey hole' can also be used to describe situations in which governmental decisions severely limit the enjoyment of human rights, but are covered by a veil of legitimacy (constitutionality/human rights conformity) because of the 'OK' given in national or international review procedures, while actually these review procedures do not offer an adequate test of the legitimacy of the measures. And then the question should be raised whether the ECtHR's supervision of derogations indeed constitutes a legal grey hole. As far as the principle of exceptional threat is concerned, one might argue that this is the case. The difference between this legal grey hole and Dyzenhaus's then is the fact that this legal grey hole is not the result of a legislative act (the text of Article 15 ECHR) but the result of the deference showed by the ECtHR itself (by allowing States a wide margin of appreciation).

However, the principle of exceptional threat is only one of the conditions that Article 15 ECHR places on the use of derogating measures. One of the other conditions is that derogating emergency measures are only justified if they are strictly necessary and are in reasonable proportion to the purpose they serve: the principle of proportionality.

7 FILLING THE GREY HOLE: THE PRINCIPLE OF PROPORTIONALITY AND NON-DEROGABLE RIGHTS

Very briefly summarized, the greatest threat to the protection of human rights that occurs when a government seeks to protect State security and combat

53 Ibid., p. 210.
54 Ibid.
55 Ibid., pp. 103 and 135–139.

terrorism comes from (emergency) measures that are not proportional to the goals pursued and from methods to tighten security that are fraught with danger, such as having citizens tried by special – usually military – courts. In addition, respect for human rights comes under a lot of pressure with the apprehension and detention of persons that are considered a danger to State security (such as suspected terrorists). Such persons run a considerable risk of inhuman treatment, or of treatment that does not otherwise comply with international standards. It is therefore logical that in the case law on Article 15, the requirement that emergency measures that derogate human rights must pass the test that they be 'strictly required by the exigencies of the situation' plays a central role. In fact, in several cases concerning derogating detention measures the ECtHR chooses not to delve into the substance of the pertaining 'emergency' situation, but switches rapidly to the question whether the emergency measures were proportionate and did not violate non-derogable rights.[56]

In applying this proportionality test, the ECtHR has judged *inter alia* that every emergency measure that derogates fundamental rights has to be clearly linked to the facts of the crisis situation and has to be in reasonable proportion to those facts. This means, for instance, that the intrusiveness of the measures has to correspond with the magnitude and gravity of the crisis. It has also judged that apart from the norms in the ECHR itself, norms from other parts of international law – especially international criminal law – may also be relevant in judging the proportionality of measures that derogate fundamental rights. Finally, in the international judicial check of the proportionality of the emergency measures that derogate fundamental rights, the presence of guarantees against abuse at the national level – in the form of checks on the actions of the government by the legislature and/or the judiciary – plays an important role. All of this makes the ECtHR rather easily accept the existence of a public emergency in the sense of Article 15, but is quite firm in its application of the proportionality test. In several cases the Court, although accepting the existence of a public emergency, has ruled the (derogating) emergency measures disproportionate and therefore in violation of the ECHR. This was the case already in the 1978 *Ireland v. UK* judgment, in which methods of interrogation of detainees were judged a violation of Article 3 ECHR (inhuman and degrading treatment). The same is true for the recent *A and others v. UK* judgment. The Court considered that the detention powers that had been applied were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the ACTS Act 2001 was designed to avert a real and imminent threat of terrorist attack which, according to the evidence, was posed by both nationals and non-nationals. According to the Court, 'the choice by the British Government and Parliament

56 For example, ECtHR, *Aksoy*; ECtHR, *Demir and others;* ECtHR, *Nuray Sen*; ECtHR, *Elci and others.*

of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists'.[57] It agreed with the earlier judgment of the House of Lords that 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. In fact, by referring to the failure to adequately address the threat of terrorism, the ECtHR seems to do something it has not done in earlier cases on Article 15: assess the effectiveness of emergency measures as part of the proportionality test.[58]

Especially in regard to the two emergency measures that governments are inclined to consider most often when facing a crisis situation: the application of prolonged periods of administrative detention (suspension of *habeas corpus*) and the passing of jurisdiction to military courts, the ECtHR has left the Contracting States little leeway. In the 1988 *Brogan* Case the ECtHR judged that – outside a public emergency situation in the sense of Article 15 – a detention period of four days and six hours before an arrested person was brought before a judge was not 'prompt' as required by Article 5(3) ECHR. The application of Article 15 ECHR (in situations of a public emergency) could prolong this period, but several ECtHR judgments show that even in such emergency situations this period may not be longer than around seven days. Longer periods of administrative detention are consequently judged to be disproportionate derogations from Article 5(3) ECHR.[59] Also, the trying of civilians before a military court or a special court that partly consists of military judges is consistently considered to be in conflict with the right to an independent and impartial tribunal (Article 6 ECHR).[60] So the way in which the ECtHR applies the principle of proportionality under Article 15 can function to fill the legal grey hole.

The most explicit limit to derogating emergency measures is the so-called non-derogable rights. One could argue that an emergency measure violating a non-derogable right is automatically disproportionate. In this way, the non-derogable rights place strong and important limits on emergency measures. In the first place, the scope of several non-derogable rights mentioned in the second paragraph of Article 15 – especially the right to life and the prohibition of torture

57 ECtHR, *A. and others v. UK*, 19 February 2009 (Appl. no. 3455/05), § 186.

58 In ECtHR *Ireland*, § 207 and ECtHR *Brannigan and McBride*, § 66 the Court explained that it was not its function to substitute for the government's assessment any other assessment of what might be the most prudent or most expedient way to combat terrorism, nor to retrospectively examine the efficacy of the derogating measures.

59 Compare ECtHR, *Brannigan and McBride* and ECtHR, *Igdeli v. Turkey*, 20 June 2002 (Appl. no. 29296/95) in which a period of seven days before being brought before a judicial authority was judged not to violate Art. 5 with ECtHR, *Aksoy* and ECtHR, *Nuray Sen*, in which periods of 14 and 11 days were judged disproportionate derogations from Art. 5.

60 For example, ECtHR, *Inçal v. Turkey*, 9 June 1998 (Appl. no. 22678/93) *RJ&D* 1998-IV; ECtHR, *Öcalan v. Turkey*, 21 May 2005 (Appl. no. 46221/99), *RJ&D* 2005-IV.

– is very broad. In the ECtHR's case law, all kinds of negative and positive obligations are considered inherent in these rights, including the principle of *non-refoulement*, the obligation to provide detainees with enough food and medical aid, the obligation to take adequate precautions to prevent unnecessary victims in case of violent action against terrorist organizations, and the obligation to perform a careful and transparent investigation at the national level if there are complaints about violation of the right to life or the prohibition of torture. The 2008 *Saadi v. Italy* judgment[61] – concerning the prohibition of *non-refoulement* and the expulsion of a Tunisian man suspected of involvement with terrorist organizations – indicates that the Court is not willing to restrict the scope of these non-derogable rights as a result of the post-9/11 threats of transnational terrorism. In my view, judge Myjer in his concurring opinion to this judgment gave the exact right arguments for not doing so.

8 ARTICLE 15 ECHR: A RELATIVELY SMALL PROBLEM

To sum up the analysis of the paragraphs above: potentially, the ECtHR's supervision of derogating emergency measures taken by Contracting States contains the risk of creating a legal grey hole. This is mainly because of the wide margin of appreciation offered to the States in deciding on the existence of a public emergency and the lack of an explicit test on the time-limited nature of derogations. Because of this, some authors observe a critical lack in appreciation of the reality that the ECHR derogation provision neither envisages nor provides for such a situation. Given the fact that the post-9/11 threat of terrorism is continuous and long-lasting, they call for a reform of the ECHR derogation procedure which should include a less deferential approach by the ECtHR to States' claims of the existence of a public emergency and fact-finding missions to derogating States to make an independent assessment of whether the situation constitutes a public emergency threatening the life of the nation.[62] Purely reasoning from the perspective of the principle of exceptional threat I might agree with them.[63] However, at the end of paragraph 5 I already indicated the difficulties that an international court would have in ascertaining the reality of a terrorist threat. Furthermore, the risks posed by the deference on the question of the existence of a public emergency are mitigated by the Court's application of the proportionality principle under Article 15. Thus, the need for a reformed derogation procedure might not be that great.

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61 ECtHR, *Saadi v. Italy*, 28 February 2008 (Appl. no. 37201/06). See also ECtHR, *Daoudi v. France*, 3 December 2009 (Appl. no. 19576/08).

62 Cf. Hughes (2007) pp. 63–64.

63 *See* Loof (2005) pp. 711–717.

Adding another argument to this, I would like to point to the fact that States rarely invoke Article 15; since the 1960s only the UK and Turkey have done so. Also, the Article only has been invoked for measures derogating from Article 5 ECHR (prolonged periods of administrative detention). Article 15 does not seem to play a role in cases concerning counter-terrorism measures that limit the enjoyment of other ECHR rights. The reason for this is that – outside Articles 5 and 6 and the non-derogable rights – most other articles of the ECHR in the second paragraph contain a particular limitation clause.

From the ECtHR's case law no clear material limit can be distinguished between the limitation and the derogation of a fundamental right. The question remains where the infringements permissible under the regular norms and limitation clauses do end, and where the infringements only permissible if a State invokes Article 15 begin. Actually, the only field in which something can be deduced about these matters is the right to liberty and security of person and the safeguards regarding detention of individuals. As explained in paragraph 7, it becomes clear from the case law concerning the right of detainees to be brought promptly before a judge or other judicial authority (Article 5(3) ECHR) that under the normal treaty rules, it is required that this takes place within a maximum of about four days (see the 1988 *Brogan* judgment). In case of the derogation of this right, detention without having been brought before a competent judicial authority can be prolonged for a period of up to seven days or perhaps a few more. Especially for rights that are provided with a particular limitation clause, it is not clear for which type of interference invocation of the derogation clause will be *absolutely* necessary. With some prudence, it may even be argued that invocation of the derogation clause for rights that are provided with a particular limitation clause is superfluous. For, in case of a serious crisis that threatens the life of the nation, room can already be found (or be claimed by the authorities) for further limitations of the fundamental right in question. This could be done on the basis of the *proportionality* test that takes place when answering the question whether a certain interference is necessary in a democratic society. Reference to a derogation clause would add little to this. The meaning of Article 15 is therefore limited to those cases in which those rights are concerned that are not provided with a particular limitation clause. Outside the cases on Article 5 and prolonged administrative detention, the proportionality test applied by the Court under Article 15 seems to result in States being held responsible under more or less the same standards that apply in normal circumstances.