Derogation from human rights in emergency situations

The suspension of certain human rights under the ECHR on grounds of counter-terrorism measures

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<tr>
<td>ATCSA</td>
<td>Anti-Terrorism, Crime and Security Act</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment</td>
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<td>COE</td>
<td>Council of Europe</td>
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<td>CESCR</td>
<td>Committee on Economic, Social, and Cultural Rights</td>
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<td>CTC</td>
<td>Counter Terrorism Committee</td>
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<td>CTITF</td>
<td>Counter-Terrorism Implementation Task Force</td>
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<td>ECHR</td>
<td>European Convention on the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>HRCm</td>
<td>United Nations Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ODIHR</td>
<td>Office for Democratic Institutions and Human Rights</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>PACE</td>
<td>Parliamentary Assembly of the Council of Europe</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>US</td>
<td>United States of America</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WTC</td>
<td>World Trade Centre</td>
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1 Introduction

International law requires States to protect their nationals and others in their territory from acts of terrorism.\(^1\) At the same time, obligation to protect holds an extra-territorial character, in that a State’s jurisdiction may extend to circumstances beyond its territorial boundaries. In the wake of the terrorist attacks on the World Trade Center (hereinafter WTC) of September 11, 2001, the United Nations Security Council (hereinafter UNSC) affirmed the States’ responsibility in addressing terrorism threats. Among others, resolution 1373 requires States to “take the necessary steps to prevent the commission of terrorist acts [and] ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.”\(^2\) The design of measures adopted by States to counter terrorism often include the stop and search of persons as well as the gathering of intelligence through various infrastructural measures, among others. In recent years, the measures themselves, including mass surveillance of digital communications, have often posed a challenge to human rights and the rule of law.

1.1 Overview

The method employed and inherent limitations of the thesis is elaborated on in the following. In order to assess the regime of derogation accurately, it is first necessary to establish the legal framework of international cooperation through treaties, and its binding effects. The second section therefore provides an overview of international human rights law, as a necessary backdrop to the issue of derogation from human rights treaties. The third section introduces the context of domestic and international terrorism and the issues therein. The fourth section lays out the legal framework employed when a State makes use of the right to derogate. The examination entails a review of treaty provisions, case law of the ECtHR prior to the attacks on the WTC, resolutions and reports by international bodies, and legal scholarly literature. The fifth section examines the current relationship between acts or threats of terrorism and the established derogatory regime. In addition, the fifth section investigates whether there are any implications rising out of the balancing act of upholding human rights, while simultaneously recognizing the need to suspend certain rights when facing crises. As will be shown, acts of terrorism as a “public emergency” has a direct and unique impact on the regime of derogation.

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\(^1\) See e.g. UNGA Resolution 60/288 (2006), most recently reaffirmed in UNGA Resolution 68/276 (2014), the protection of the rights in the ECHR, and OHCHR Fact Sheet No. 32 (2008) pp. 1 and 6.

1.2 Methodology and limitations

The thesis’ main objective is to examine the relevant legal framework for the suspension of certain human rights obligations, on grounds of acts or threats of terrorism as a “public emergency threatening the life of the nation.” Particular attention is paid to the issue of to what extent acts or threats of terrorism constitute an exceptional circumstance, according to jurisprudence by the ECtHR. In addition, the thesis makes effort to elaborate on any implications rising out of the inherent differences between traditional and contemporary forms of terrorism. The challenging dichotomy where derogation is supposed to be temporary, limited and supervised, yet often involves continuing terrorist violence and campaigns, is more relevant than ever. The legal framework derives largely from scrutiny of relevant case law, primarily by the European Court of Human Rights (hereinafter ECtHR), in addition to the examination of relevant treaties; the International Covenant on Civil and Political Rights (hereinafter ICCPR) of 16 December 1966, and the European Convention on Human Rights (hereinafter ECHR) of 4 November 1950.

The ECtHR is considered to be the “[m]ost progressive system of commitment.” and has been deemed one of the major developments in international law by several observers. The sheer geographical proportions, in addition to the cultural and sociological diversity of the Contracting States arguably support this view. As of current, the number of Contracting States count a total of 47. The States are bound to respect the rights in the Convention, as provided under Article 1. The ECtHR monitors the respect for human rights of 800 million Europeans. The Court exclusively reviews claims of violations of the Treaty provisions, and is paramount in the development and harmonization of domestic and constitutional human rights law – in conjunction with the ECHR itself and the COE. Case law by the Court examines inter alia the substantive and procedural requirements under Article 15 in the Treaty. Considering the influence the ECtHR has on the interpretation of the provisions in the ECHR, and in laying down minimum human rights standards applicable in the ECHR member States more

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3 Cf. ECHR Art. 15 (1).
4 Often referred to as the Court.
5 Entry into force 23 March 1976. Full citation of treaties is contained in the bibliography.
6 Entry into force in 1953.
7 Aall (2011) p. 25.
9 COE webpage, 47 Member States (quoted 1. October 2016).
10 COE webpage, 800 million Europeans (January 2012).
11 ECHR Arts. 19 and 32.
generally, an examination of the activity of this judicial institution is essential for examining terrorism as a “public emergency threatening the life of the nation”.

On grounds of the aforementioned, the relevancy and importance of both the Treaty and case law is evident, and arguably crucial in attempting to shed light on the issue of derogations from human rights treaties.

Section 3 examines terrorism as a domestic and international phenomenon, and its definitions according to international law, primarily. The examinations reviews some of the current concerns in regards to terrorism acts and threats, e.g. there are no clearly defined adversary, terrorist organizations are diverse and unconstrained of territorial boundaries, and as such, it seems impossible to determine when the threat ceases to exist. European countries have had to confront terrorism, in one way or the other, since the ECHR’s entry into force. The global dimension of terrorism has become a prevalent characteristic during the twenty-first century, compared to the threats of the 1960s, 1970s or 1980s. The relevant findings in this section serves as a backdrop to the examination of derogation on grounds of terrorism prior to the attacks on the WTC and contemporary terrorism, in sections 4 and 5, respectively. Lastly, it is important to note that international humanitarian law is arguably equally as important as human rights law when assessing the issue of international terrorism. However, since the ECtHR has been generally reluctant to review the “complementarity of human rights and international humanitarian law,” it falls outside of the thesis main objective to elaborate extensively on the subject.

In order to understand terrorism as a catalyst for invoking derogation(s), it must be established how the legal mechanisms of derogation operate, based on Article 15 of the ECHR. Therefore, section 4 contains an analysis of perspectives on, and the legal mechanisms of derogation on grounds of traditional terrorism. From a legal positivistic view, with an emphasis on binding law as reflected in the relevant treaty provisions of the ECHR, case law of the ECtHR prior to the attacks on the WTC, and State practice and opinio juris. Note that there seems to be an extended use of inter referencing in literature and articles regarding international law. The thesis makes effort to include sources that are referred to regularly in scholarly writing, in conjunction with the actual relevance the source holds in relation to the analysis, with a preference for case law of the Court – especially that coming from the Grand Chamber.

13 Cf. ECHR Art. 15 (1).
Finally, section 5 focuses on examining how the ECtHR reviews derogation on grounds of acts or threats of terrorism after the attacks on the WTC, in conjunction with the relevant findings in previous sections. Considering, however, that derogation is rarely invoked by European States as a basis for anti-terrorism policies, the available case law is limited. Scheinin et al. point out that “fewer than ten states have introduced a state of emergency with explicit reference to acts of or the threat of terrorism” since the entry into force of the ICCPR and up until 2011. However, there are several recent examples where the applicability of the aforementioned conditions may constitute due examination by the ECtHR, as is mentioned in section 5.

2 The nature of human rights

First, the thesis examines the origins and current state of the legal framework of international human rights law, to illustrate in which way international human rights law both enable and restrict the States’ legislative and executive powers. This is relevant both when considering derogation as a measure by itself, but also in conjunction with terrorism as a phenomenon.

2.1 Defining human rights

It is a difficult task to establish a correct definition of human rights, or more precisely, the legal content and scope. There exist countless propositions, and most, if not all societies are governed by constitutions or basic laws that seek to balance the power between individuals and the government. What can be ascertained, however, is that human rights revolve around fundamental rights for every individual, which the State and its law enforcement mechanisms must respect. In addition, there are two significant elements, which should be paid notice when considering the general content of human rights. First, human rights accrue to all individuals, without any discrimination, as the ECtHR has affirmed on numerous occasions. Second, there are some limits to the steps that the State is required to take in ensuring that individuals enjoy their rights. The right to private and family life, for instance, does not mean that the State is obliged to provide each individual with a family. Neither does the right

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18 See ECHR Art. 1, and ICCPR Art. 2 (1).
19 Cf. the recipients of the provisions in the ECHR are referred to as «everyone» and «no one», throughout. See also the ICCPR preamble.
21 Ibid. Art. 8.
to marry entail a governmental obligation to provide suitable spouses for “[m]en and women of marriageable age”.

In the present-day, some would argue that a universal definition of human rights exist within the Universal Declaration of Human Rights (hereinafter UDHR) of 1948. Apart from being the world’s most translated document, it represents the developing internationalization of human rights, while also being domestically impactful considering the relationship between the individual and the State. In the context of the aforementioned, it is necessary to give a brief overview of international law, the development and current state of human rights, and the States’ international legal obligations.

2.2 International human rights law
Domestic law generally consists of two categories: primary and secondary rules. The primary rules set out the rights and obligations of its subjects, alongside general principles. Whereas the secondary rules determine how the primary rules come into existence, and the procedures for altering them. The secondary rules in international law, however, are less accurate in that “there is neither a legislative body comparable to a national Parliament nor a system of binding precedents.” In general, the practice of States affirm three main sources of international law: treaties, custom, general principles of law, as subsidiary means to judicial decisions, and “the teachings of the most highly qualified publicists of the various nations…” There is a broad consensus that Article 38 (1) of the Statute of the International Court of Justice (hereinafter ICJ Statute) form the basis from which the aforementioned sources become relevant. It is an integral part of the United Nations Charter, and binding for all Member States.

The current state of human rights, as it reflects in a number of human rights treaties and in customary international law, developed primarily on the idea that the power of the State is limited. Western, antique culture provide some of the earliest recorded examples that contemplate the idea, notably in Sophocles’ drama “Antigone”. The play portrays a critique of the rulers of the Kingdom of Theben, under King Creon, based on their transgressions against customary laws. During the Enlightenment period, philosopher and physician John Locke,

22 Ibid. Art. 12.  
24 OHCHR webpage, About the Universal Declaration of Human Rights Translation Project (2009), with reference to the Guinness Book of World Records. Full citation of webpages is contained in the bibliography.  
26 Ibid. p. 185, see ICJ Statutes (1945) Art. 38 (1) d.  
28 Notably, the ICESCR, the ECHR, and the ICCPR and its two Optional Protocols.
among others, furthered the thought of individual freedom. Through his influential works, notably the theory of mind, he postulated that individuals do not give up more than what is necessary of their inherent freedom, by joining society.²⁹

Apart from being enshrined in various treaties, several human rights have become part of customary international law, also termed peremptory norms of general international law, or, rules of *jus cogens*. Human rights attain the status of customary international law essentially through consistent state practice, combined with *opinio juris*.³⁰ The latter involving a general recognition by States that a particular right constitutes a legal obligation. The Vienna Convention on the Law of Treaties (hereinafter VCLT) of 23 May 1969 state that rules of *jus cogens* are legal norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted…” Furthermore, these norms can only be modified by a norm of the same character.³¹

States should comply with customary international law, even though they might have chosen not to become a party to a treaty enshrining the relevant rights. Many consider the UDHR to hold several rights that have attained customary law status, as is the case with the ICCPR.³² Certain human rights of customary law character are additionally regarded as non-derogable. According to the International Law Commission’s³³ (hereinafter ILC or Commission) Articles on State Responsibility, these norms of *jus cogens* include the prohibitions of slavery, torture, genocide, racial discrimination and crimes against humanity, and the right to self-determination.³⁴ Furthermore, the Commission recognizes certain rules applicable in armed conflict as having the status of *jus cogens*.³⁵

### 2.3 States' obligations under international human rights law

Not considering peremptory norms, States choose whether to sign and ratify treaties and thereby obligate themselves to its content.³⁶ Treaties are a central element in how States conduct international relations, and are documented in written form. States may implement the provisions in a treaty, making it part of municipal legislation – subsequently enforceable in national courts. The basic rules of the interpretation of treaties are laid down in Articles 31

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³² See HRCm General Comments No. 24 (8) (1994), and No. 29 (11) (2001).  
³³ Established in 1948 by the UNGA.  
³⁴ See ILC (2001).  
³⁶ See VCLT Art. 34.
and 32 of the VCLT. Article 31 states that a treaty must be interpreted in “good faith”, in light of the “ordinary meaning” of its contextual content, and “its object and purpose.”

Legal scholars debate whether States actually change policies in accordance with the human rights treaties they obligate themselves to, and their motivations for doing so.\(^{37}\) Simmons perceives certain weaknesses in the numerous studies prior to 2005, on the relationship between ratification and the implementation in domestic legislation. She points to “the problem of endogeneity and selection effects” as primary faults. She also speculates whether the social meaning of treaties is the prevalent element when considering the cooperation between States, and points out that “[t]reaties heighten reputational costs because the international community and domestic audiences understand them as serious obligations that signal a commitment to behave according to a specified set of rules. They legitimate certain claims and delegitimate others.”\(^ {38}\) Independent of the validity of these conclusions, it is clear that, in principal, States are unable to act in breach of obligations set forth in human rights treaties. All individuals residing within a Contracting State’s territorial boundaries – or subjected to its jurisdiction – are to be treated in accordance with the content of the treaty.\(^ {39}\)

International human rights law thereby has a direct impact on individuals. It is in this context that challenges concerning the upholding of human rights obligations become apparent: Members of the United Nations (hereinafter UN) are obligated to act – both separately and jointly – pursuant of the purposes set out under Article 55 of the UN Charter of 1945. Measures designed to counter terrorism, which is part of the legitimate aim to protect members of society, may prove to challenge human rights obligations such as the right to liberty and security, or the right to a fair trial.\(^ {40}\)

The preamble of the ICCPR reflects on the States’ (and individuals) binding duty to respect, protect and fulfil human rights. This primarily interprets as an obligation not to interfere with the enjoyment of human rights, and applying measures to prevent such interference from others. In so doing, States are required to implement legislative, administrative, and educative measures, to ensure that the legal processes entailing human rights are safeguarded adequately. Furthermore, the aforementioned responsibilities are not limited to the State’s own actions or omissions. If a State fails to exert due diligence in the pursuit of preventing third-party interference, it may be held accountable for actions performed by individuals or other legal enti-


\(^{39}\) ECHR Art. 1, ICCPR Art. 2 (1), see HRCm General Comment 31 (10) (2004).

\(^{40}\) Ibid. Art. 5 and 6, respectively.
ties, such as in the case of torture or other inhuman treatment. Should violations of human rights occur, then the State would be responsible for ensuring an “effective remedy” and for awarding reparations to the victims.

The enforcement of treaty obligations is primarily maintained by various international bodies. Treaty-monitoring bodies – such as the UN Committee Against Torture – ensure that the Contracting States comply with the treaty obligations, and review the “[i]mplementation of the core international human rights treaties.” In the case where a potential violation of rights has occurred, individuals may complain to international bodies after the exhaustion of domestic remedies. The ECtHR is an enforcement mechanism in the European human rights system, mandated to test State compliance and the validity of claims of violation of the ECHR.

An important component of international and regional human rights law is that the States “have both a right and duty to protect individuals under their jurisdiction from acts of terrorism…”, and bring to justice individuals who partake in such acts. The United Nations Global Counter-Terrorism Strategy lays down the so-called Plan of action, therein urging Member States “[t]o take urgent action to prevent and combat terrorism in all its forms and manifestations…” In so doing, the State Members of the UN recognizes that the actions taken “must comply with [their] obligations under international law … in particular human rights law…” This means that, in turn, municipal counter-terrorism legislation must be drafted in conformity with international human rights law.

3 Terrorism as a phenomenon
Terrorism as a phenomenon has in the past few decades evolved from primarily the domestic domain, into attaining global proportions. Contemporary terrorism differs from e.g. conven-

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41 E.g. ICCPR Art. 2 (1) and 7.
42 E.g. ibid. Art. 3 (a).
43 OHCHR webpage, Monitoring the core international human rights treaties (quoted 5 October 2016).
44 ECHR Art. 19.
47 UN Resolution 60/288 (2006) § 3.
tional wars in several ways, and the following sections seek to elaborate on some of the key traits of this new form of terrorism. In extension, the evolving aspects of terrorism may warrant a different approach when considering the validity of derogation, as is examined in section 5.

3.1 The definition of terrorism

In a historical perspective, it is apparent that attempts at establishing a universal definition of “terrorism”, have been an arduous task, perhaps surpassing the pursuance of a definition of human rights. The International Conferences for the Unification of Penal Law harbored some of the earliest attempts at defining terrorism. The attendees of the conference in Copenhagen agreed on a model that defined the phenomenon through various acts. In 1937, the League of Nations defined acts of terrorism as “[c]riminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”

Sixty-four years later, former president of the United States of America (hereinafter US) George W. Bush signed into law the Patriot Act, as part of the response to the terrorist attacks on the World Trade Centre (hereinafter WTC) on 11 September 2001. It expanded upon the definition of “international terrorism”, as well as amending the definition of “domestic terrorism” into the Federal criminal code. Later the same year, the United Kingdom (UK) introduced the Anti-Terrorism, Crime and Security Act (hereinafter ATCSA), which revised the definition of terrorism in essentially the same manner. These two domestic laws expanded on the detention of foreigners without trial and extended jurisdiction beyond national borders. In the case R v. Gul, the Supreme Court in the UK considered the definition of terrorism in accordance with the ATCSA, as “concerningly wide.”

The aforementioned domestic laws serve as examples of counter-terrorism measures invoked by States. It does not serve the purpose of the thesis to perform an extensive evaluation of the legal standards employed by domestic legislation concerning terrorism. More importantly, however, they illustrate the beginning of an increase in the range and scale of such measures, both legal and practical. Consequentially, the invasiveness of the measures challenge the balancing act of upholding and defending human rights on the one hand, while simultaneously providing security against acts of terrorism.

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51 See Patriot Act (2002), Section 802.
52 See ATCSA (2003), Section 23.
First, it is necessary to acknowledge the term “terrorism” as an ambiguous phenomenon in relation to the time and context in which it is employed. One of the current problems, according to Anglí, is that “terrorism as a criminal phenomenon is mistaken for terrorism as a method.” She points out that “most dictatorships are characterized by governing with the use of terror. Yet, can we say that Hitler, Stalin, Pinochet and Bin Laden, for instance, are exponents of the same phenomenon?”

From a philosophical standpoint, it is often and somewhat thoughtlessly repeated that one man’s terrorist is another man’s freedom fighter. Rather, one should ascertain that freedom is an end, while terror is a means. By terming a combatant a “freedom fighter”, reveals nothing regarding his tactics or means for achieving freedom. Labeling the combatant a “terrorist”, however, says something about the means to his end. Based on this logic, it is easy to imagine a plethora of opinions in the pursuance of a correct definition. Nevertheless, it is clear that both practically and as a matter of law, waging war on terrorism as a phenomenon is impossible. Pejic argues that “[t]errorist acts must be dealt with using the specific tools designed for addressing criminal activity, which are domestic and international law enforcement.”

Moreover, “the terrorist acts being perpetrated in various parts of the world (outside situations of armed conflict) are as a matter of law properly characterized as criminal acts that should, inter alia, be dealt with by the application of domestic and international human rights law, as well as international criminal law. That is indeed the framework that is being primarily relied on in practice.”

While applying the ECHR, the Court lays down jurisprudence, which under certain circumstances becomes generally applicable when dealing with an influx of derogatory measures under this convention on grounds of acts of terrorism.

Currently, there are twelve so-called sectoral UN Conventions defining specific acts of terrorism. The United Nations Draft Convention on International Terrorism is an internationally collaborated attempt to establish a universal definition, but is still just a draft, and have been so for several years. Pejic is of the impression that “regional bodies have been more successful in defining terrorism.” She points to the Framework Decision of the Council of the European Union on Combating Terrorism of 2002, together with “a review of other regional and international definitions”. Based on these sources, the conclusion is that “a ’minimum consen-

54 Anglí, Mariona Llobet, p. 18, in Masferrer et al. (2013).
56 Ibid. p. 15.
58 See UNGA Resolution 57/27 (2002), the text of the draft is contained in UN Doc. A/AC.252/2002/CRP.1.
sus exists’ as to the ‘three main features of terrorism’.”⁵⁹ These features include acts of terrorism targeted at specific properties encapsulating human integrity, or material integrity of the society, the acts of terrorism hold a political intent, and, seek to intimidate the populace, or influence governmental actions.⁶⁰

Arguably, it is required of the member States of the United Nations to agree on a comprehensive definition on terrorism for it to become an internationally acknowledged legal standard. Nevertheless, the lack of a universal definition does not render the impact terrorism has on domestic, regional, and international legislation, insubstantial.⁶¹ For the purpose of the thesis’ objective, the aforementioned Framework Decision sufficiently lays out the defining aspects of acts of terrorism. Furthermore, it is the expressed basis for EU counter-terrorism policy.⁶² In any case, the ECtHR have accepted acts of terrorism as “public emergencies”, and thereby as grounds for measures of derogation. Note that, unlike directives, framework decisions are not binding for the parties concerned, in that the European Commission are unable to take enforcement proceedings should member States refrain from codifying and enacting the framework decision as municipal legislation.

According to the aforementioned Framework Decision, terrorism are “intentional acts … as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of … seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation …” The intentional offences referred to are listed in letters (a) to (i), and includes inter alia murder, attacks on the physical integrity of a person, deprivation of personal liberty, or threats of committing any of the acts listed in (a) to (h).⁶³ In addition, the Framework Decision defines what may be deemed offences related or linked to terrorist activities.⁶⁴ In conjunction, the elements above constitute acts of terrorism, which the member States should give status as terrorist offences under domestic legislation, in addition to taking “necessary measures.”

⁶⁰ Ibid.
⁶¹ See i.e. UNSC resolution 1373 (2001) and 1566 (2004), which compares to the (unbinding) COE Framework Decision on Combating Terrorism (2002), by laying out detailed binding rules on measures to be adopted by Contracting States.
⁶² As amended by COE Framework Decision 2008/919/JHA, (2).
⁶⁴ Ibid. Arts. 2 and 3, respectively.
The Framework Decision lays down an essential aspect about terrorism as a matter of law. Acts of terrorism are considered criminal offences, and should be addressed through the application of municipal law, international human rights law and international criminal law.\textsuperscript{65}

3.2 Domestic and international phenomenon

The UN Charter of 1945 represents an important turning point in the development of international human rights.\textsuperscript{66} The enactment of the UDHR in 1948 marked the first attempt at laying down a comprehensive list of human rights, albeit not binding for the member States. More importantly, it paved the way for additional human rights treaties, and in November 1950 the ECHR was effectuated. The drafting of the Convention drew on the inspiration of the UDHR, as well as the events of the Second World War.\textsuperscript{67} Consequentially, this arguably holds true in regards to the individual provisions, thereby also the right to derogate under Article 15. The provision was drafted in light of the challenges posed by conventional war, in respect to human rights. A “public emergency” was thought to encompass “war, internal unrest, natural disasters or economic crises.”\textsuperscript{68}

In \textit{Lawless v. Ireland}, however, the ECtHR concluded that the regime of derogation not only applies to conventional wars, but also threats of a smaller scale. The Court found that the acts of terrorism originating within Ireland’s borders, i.e. domestic terrorism, were equally applicable.\textsuperscript{69} \textit{Lawless v. Ireland}\textsuperscript{70} share common traits with the cases examined in section 4; \textit{Ireland v. the United Kingdom}\textsuperscript{71} and \textit{Brannigan and McBride v. the United Kingdom}.\textsuperscript{72} The acts of terrorism adhered to a confined area within the territorial borders of the State concerned, and the latter cases concerned further derogation by UK authorities in respect of Northern Ireland.\textsuperscript{73} The events of the late 20\textsuperscript{th} century in Ireland, popularly termed “The Troubles”, is but one of many examples of domestic terrorism. Zedner points to the activities of the Irish Republican Army (IRA), Basque Separatists (ETA), and the Red Army Faction (RAF) in Germany, as causes for the “introduction of special powers and even emergency security measures.”\textsuperscript{74}

\begin{figure}[h]
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\begin{itemize}
\item Pejic (2004) p. 15.
\item Aall (2011) p. 24, and UN Charter (1945) Art. 55 c.
\item Ovey (2006) pp. 1-3, see also the ECHR, annex.
\item Michaelsen (2005) p. 141.
\item Lawless v. Ireland (No. 3) (1961) §§ 28-30.
\item Ibid. § 28.
\item Ireland v. the United Kingdom (1978) §§ 12 and 29-75, cf. § 205.
\item Brannigan and McBride v. the United Kingdom (1993) §§ 46 and 47.
\item Namely, the Republic of Ireland and Northern Ireland.
\item Zedner (2006) p. 118.
\end{itemize}
\end{figure}
The regime of derogation has supposedly suffered under conditions such as these. Milanovic has recently argued that Ukrainian authorities may have acted in breach of the principle of good faith, when invoking derogatory measures as “anti-terrorist operations.” He points out that the labelling of internal conflicts as such, and not as armed conflict, the government seek to “delegitimize the adversary”. In so doing, States avoid “explicitly recognizing that the situation qualifies as an armed conflict in the sense of IHL [international humanitarian law].” In reversal, this would result in legitimization of non-State armed groups, whenever a State recognizes the existence of an armed conflict in their territory. Moreover, by declaring a state of emergency, the non-State groups may view it as “evidence of the effectiveness of their campaign against the authorities.”

After the events on 11 September 2001, the scale of the attacks and the harm done increased substantially. Terrorist activities became an international phenomenon, which in turn spawned the notion that conventional counter-terrorism measures were inadequate. In conjunction with these events, the “war on terror” rhetoric became part of the labelling of international terrorism. It emphasized the exceptional nature of what is also termed contemporary terrorism. The International Committee of the Red Cross (hereinafter ICRC) recently argued that the “war on terror” rhetoric is void of legal applicability. The Committee instead encourages a classification of the “the various situations of violence” on a case-by-case analysis, with regards to “the various armed conflicts and the numerous counterterrorism measures at the domestic and international levels…” Smith labels the “war on terror” rhetoric as “insidious”, and views it as a threat to the protection of human rights because of its potential to “destabilize and weaken”. The ECtHR may in this regard play a central role in determining what effect, if any, contemporary terrorism will have on matters concerning human rights in the future. In particular, when considering circumstances that warrant the suspension of certain rights.

The UK, Canada, Italy, Australia, Hong Kong, Indonesia, India, and New Zealand, to name a few, were among the first to intensify the enactment of domestic anti-terrorism legislation as a response to the attacks on the WTC. Executive Director of the UN Counter-Terrorism

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75 See also Scheinin et al. (2010) p. 25
76 EJIL: Talk! (European Journal of International Law blog) webpage, Ukraine Derogates from the ICCPR and the ECHR, Files Fourth Interstate Application against Russia (5 October 2015).
82 Zedner (2006) p. 120.
Committee Executive Directorate (CTED), Jean-Paul Laborde, recently affirmed the view that “terrorism is a global threat requiring a comprehensive and unified response”, taking note of the more than 30,000 foreign terrorist fighters from some 100 countries around the world.\(^\text{83}\) The continued development of counter-terrorism legislation over the past few decades shows that terrorism is of higher actuality than ever before. Apparently, the lack of a comprehensive and internationally recognized definition has a negligible effect on the willingness of States to enact anti-terrorism legislation. The majority of domestic, regional, and international legislation currently deem acts of terrorism as criminal offences. In 2012, the Human Rights Watch found that more than 140 countries enacted new, or revised existing counter-terrorism legislation, following the terrorist attacks on the WTC.\(^\text{84}\) In addition, the increase in legislation aimed at governing terrorism and countermeasures appears to suffer under a growing trend. The ICRC points out that States seem to “consider any act of violence carried out by non-State armed group in armed conflict as being “terrorist” by definition, even when such acts are in fact lawful under IHL [international humanitarian law].”\(^\text{85}\)

Apart from recognizing contemporary terrorism as a phenomenon of global proportions, the threat it poses is inherently different from domestic (traditional) terrorism in several other ways. Contemporary terrorism does not necessarily affect the recipient country or region directly.\(^\text{86}\) Neither does it exclusively hail from, or act on orders of a particular country, and subsequently, cannot be classified “as a ‘war’ in the traditional sense according to international law in so far as there was no declaration of war…”\(^\text{87}\) In addition, it is exceedingly difficult to assess the origin of the threat, who the adversary is, and at what time the threat will cease to exist.\(^\text{88}\) International terrorism “comprises amorphous, transnational terrorist networks about which information is scarce and less easily reduced to categorical suspect populations.”\(^\text{89}\) Zedner views the uncertainty about contemporary terrorism partly as a product of the lack of intelligence. She points to two distinct sources, namely “uncertainty as to the nature, likelihood, scope, or target of a particular threat, and second, fabricated uncertainty caused by the unwillingness of inability of States to adduce evidence.” State secrecy may interfere with the submission of evidence before the Court, and the evidence submitted may be inadequate or lacking. The increasing need to protect sources of intelligence poses a serious challenge to the respect for human rights – in particular the ECHR Article 6 on the right to a fair trial.

\(^{83}\) UN News Centre webpage, *Top UN counter-terrorism official urges cohesive response to ‘persistent’ threat of terrorism* (22 July 2016).

\(^{84}\) Human Rights Watch (2012) p. 5.


\(^{86}\) Aall (2011) p. 473.

\(^{87}\) Parliament Assembly of the COE, Resolution 1271 (2002), No. 2.

\(^{88}\) Aall (2011) p. 477.

It is also important to acknowledge that contemporary terrorism, as a global phenomenon, is inherently different from armed conflicts of global proportions. Al-Qaeda or the Islamic State group are rightly perceived to have global reach, however, they cannot be perceived as to fall within the meaning of armed conflict according to international humanitarian law. This would require “the existence of a ‘unitary’ non-State party opposing one or more States”, which currently hardly can be said about the al-Qaeda and its associated groups. In legal terms, another fundamental difference is that armed conflict both allows for, and prohibits certain acts of violence. Violence labelled as “terrorism”, however, is always prohibited. These aspects arguably also demonstrate the borders in which a contemporary universal definition of terrorism should develop.

In the case of *A and others v. the Secretary of State for the Home Department*[^93^], Lord Hoffman made a rather ominous remark about the ATCSA: “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.”[^94^] The fact that acts of terrorism, and in particular international terrorism, is wrought with uncertainty and “unknown unknowns”, increases the need for invasive counter-terrorism measures. Which in turn presents the conundrum where States run the risk of failing to balance the employment of security measures, while simultaneously upholding the respect for human rights.

### 4 Derogation from human rights, Article 15 of the ECHR

Certain circumstances may warrant the suspension of the provisions in human rights treaties. The enabling of States to “escape” certain human rights when faced with exceptional circumstances is an integral part of the States’ duty to uphold and respect said rights. In the following, the thesis elaborates on the legal framework of derogation under Article 15 of the ECHR, with emphasis on case law prior to the terrorist attacks on the WTC.

#### 4.1 Perspectives on derogation

It is widely acknowledged by international legal scholars that human rights are the first to be set aside when States are facing crises, such as civil wars, armed conflict, or economic depression. McGoldrick recognizes that “[t]he response of a state to a public emergency is an

[^90^]: E.g. the Geneva Conventions of 1949 and their two Additional Protocols of 1977.
[^93^]: UK Supreme Court forerunning case to the *A. and Others v. the United Kingdom* (2009).
States take steps to limit rights, which international law acknowledges by providing derogation clauses. Both the ICCPR and the ECHR authorizes the suspension of some of the obligations imposed on the Contracting States by these human rights treaties. An important distinction to make is that such escape clauses do not suspend the rule of law. They are drafted primarily to provide leeway for States threatened by exceptional circumstances. In support of this view, case law by the ECtHR establishes that derogation is a temporary and limited remedy.

The leeway a derogation clause offers is an important factor when a State determine the risks affiliated with the agreement. Such clauses offer solutions to crises, and renders the agreement more flexible. Naturally, legal literature argue that States consider both the substantive and the procedural conditions of an agreement when at the precipice of ratification. The level of international commitment the agreement represents is part of a risk analysis. Because the right to derogate authorizes the suspension of certain clauses, it reduces uncertainty, which in turn may increase the possibility of State compliance. Interestingly, a study by Hafner-Burton et al. found that “stable democracies and countries where domestic courts can exercise strong oversight of the executive are more likely to derogate than other regimes …”. Furthermore, they argued that this conclusion was “consistent with the finding that democracies are more likely than other regimes to file reservations when they join human rights treaties.” In regards to these findings, attention must be paid to the conclusions of Simmons in section 2; that the methods employed by legal scholars and researchers up until 2005 suffered from analytical flaws. She states that “no one has shown any significant external enforcement behind the provisions of international human rights treaties of a kind that might plausibly account for the patterns of compliance observed across a number of rights areas.” Incidentally, the former of the aforementioned core findings of Hafner-Burton et al. arguably concludes that such “external enforcement” comes in the form of “stable democracies” and “strong oversight of the executive” by the domestic courts. In countries where these traits are present or

96 ICCPR Art. 4, and ECHR Art. 15.
98 See e.g. Lawless v. Ireland (No. 3) (1961), § 22.
100 Ibid. p. 594.
101 Ibid. p. 596.
104 Ibid. p. 291.
strong, the likelihood of derogation increases. Such behavior may arguably be viewed as State compliance.

Escape clauses may on the other hand induce deviant behavior and weaken the objective of the treaty, which is particularly evident considering the nature of human rights. It is precisely in exigent events – threats to individual rights – that the escape clause triggers. Hafner-Burton et al. argue that the logic of derogation is only relevant to the extent that the State can be held accountable, for instance through the removal of leaders from office by voting. However, even authoritarian governments might want to formally derogate from certain human rights obligations, in order to maintain an air of legitimacy and compliance with international law – as Simmons points out. Since it is unlikely that such governments are held accountable for their transgressions, they nevertheless often act in violation of the provisions in human rights agreements. Alternatively, they may choose to derogate, only to refrain from or limit the information about the measures invoked, as well as “keep[ing] derogations in place for long periods …”

The aforementioned findings warrant a clarification in light of the thesis’ objective. The examination in section 5 does not account for the rate at which the States in question have derogated and, potentially, violated provisions in the ECHR. Derogating measures deriving from deviant motivations is therefore not part of the considerations. Neither does the scope of the thesis’ objective require an examination of the relative level of governmental accountability, or the robustness of its judiciary system. The analysis presupposes the presence of said findings in the factual context of exemplified case law, unless otherwise specified.

Although a state of emergency in principle affords to the State a wide range of remedies, it is important to acknowledge that underlying circumstances, such as “national security”, might also constitute a right to intervene under “normal” circumstances. Articles 8 through 11 of the ECHR allows for interference with rights therein, provided they are necessary with regard to “national security” or “public safety”. When interference is lawfully based on vital interests of the State, it essentially illustrates an aspect of what is known as the margin of appreciation. In the case Klass and Others v. Germany, the German government pleaded that the

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105 Hafner-Burton et al. (2011) p. 675.
108 See core findings by Hafner-Burton et al. (2011) p. 675.
109 See ECHR Arts. 8 (2), 9 (2), 10 (2), and 11 (2).
110 The term was first introduced in Greece v. the United Kingdom (1958-59).
national security was at risk, on grounds of acts of terrorism. The Court was unable to verify the existence of such a threat, but accepted certain systems of secret surveillance.\footnote{Klass and Others v. Germany (1978) § 48, cf. ECHR Art. 8 (2).} When the Court abandons the examination of the existence of a threat, as was the case in \textit{Klass}, the level of scrutiny of the measures taken intensifies. In such circumstances, special regard is given to whether the measures are non-discriminatory, proportional, and in accordance with proper procedure.\footnote{Aall (2011) pp. 470-471.}

Measures invoked on grounds of e.g. “national security”, are not explicitly relevant to the thesis’ objective, and is therefore not dealt with further. It is nevertheless important to be aware of the distinction, when considering the regime of derogation. The test of proportionality, in addition to procedural conditions, constitute two core elements of the Court’s examination of the validity of derogation on grounds of terrorism.

4.2 Substantive requirements

The aforementioned arguably raises some interesting questions about the regime of derogation, albeit says little about its defining legal mechanisms. The following section examines the legal framework of derogation, by drawing on several legal sources, notably case law coming from the Grand Chamber of the ECtHR. The majority of the referenced examples of case law are based on acts or threats of terrorism.

4.2.1 Circumstances threatening the life of the nation

Article 15 (1) of the ECHR begins with a rather stern requirement:


textbf{“In time of war or other public emergency threatening the life of the nation […]”}

Derogation clauses in the ICCPR and the ECHR are quite similar\footnote{Cf. ICCPR Art. 4, and ECHR Art. 15.}, and the rationale of the decisions of the ECtHR are easily applicable to ICCPR cases.\footnote{Michaelsen (2005) p. 138.} However, neither the ICCPR nor the ECHR provide an explicit definition of the aforementioned passage. In \textit{Lawless v. Ireland}, the Court affirmed how the European Commission wanted the article to be interpreted; in light of its natural and customary meaning.\footnote{Gani et al. (2008) p. 112, cf. Lawless v. Ireland (No. 3) (1961) § 28. Cf. VCLT (1969) Art. 31.} The Court interpreted the term “public emergency” in Article 15 (1) as “an exceptional situation of crises or emergency which affects
the whole population and constitutes a threat to the organised life of the community of which the State is composed…”\textsuperscript{116}

The basic elements of the Court’s approach in Lawless derived from the case \textit{Denmark, Norway, Sweden and the Netherlands v. Greece} of 1969, usually referred to as the \textit{Greek Case}. It was the first case in which enforcement of derogation took place.\textsuperscript{117} From July 1954 to October 1999, the European Commission of Human Rights, in cooperation with the ECtHR and the Committee of Ministers of the COE, supervised the member States’ obligations under the ECHR.\textsuperscript{118} It is noteworthy that the authentic version of the \textit{Greek Case} is written in French, and thereby, the relevant assessments on Article 15 (1) are not explicitly obvious in the English version\textsuperscript{119}. The Commission emphasized four characteristics,\textsuperscript{120} which had to apply to a “public emergency” in order for a State to be entitled to its derogatory right according to Article 15\textsuperscript{121}: 

1. The threat must be actual or imminent.
2. The consequences of the threat must involve the whole nation.
3. The nation and the organization of the society has to be under threat.\textsuperscript{122}
4. The crises or threat must be exceptional. Considering that normal measures or restrictions afforded by the ECHR, regarding the maintenance of public safety, health and order, are clearly inadequate.\textsuperscript{123}

Aall argues that criteria no. 3 – the organization of the society – represents a “certain alteration of the text [in Article 15]”, because it deviates from the wording in the Article itself. He also points out that the cumulative criteria presupposes an overall assessment, which constitutes an additional modification of the requirement that the state of emergency must “threaten the life of the nation.”\textsuperscript{124}

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\textsuperscript{116} Lawless v. Ireland (No. 3) (1961) § 28.
\textsuperscript{117} Zand (2014) p. 10.
\textsuperscript{118} The Commission ceased to exist on 1 November 1998, when the ECtHR took its place as a permanent European treaty-monitoring body.
\textsuperscript{119} It reads: “Une situation de crise ou de danger public exceptionnelle et imminente […]”.
\textsuperscript{120} Denmark, Norway, Sweden and the Netherlands v. Greece (1969) (note 56) § 153.
\textsuperscript{121} See also Gani et al. (2008) p. 113.
\textsuperscript{122} Members of the Commission argued that while the functioning of the society continued as normal, there was no exceptional circumstance, and therefore no need for emergency measures.
\textsuperscript{123} See Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (1984), where these requirements are recognized as general legal standards. See also Paris Minimum Standards of Human Rights Norms in a State of Emergency (1985).
\textsuperscript{124} Aall (2011) p. 472.
\end{flushleft}
In the *Greek Case*, the Commission also established to whom the burden of proof befalls, in determining the existence of a “public emergency”, and whether the measures invoked are “strictly required by the exigencies of the situation.”\(^{125}\) It is on the respondent government invoking the power of derogation to satisfy the Court that a public emergency exists.\(^{126}\) The position of the Commission is similar to that adopted by the HRCm, as expressed in the latter’s General Comment 29.\(^{127}\) The State is granted a so-called margin of appreciation\(^ {128}\), as mentioned earlier, in regards to submitting evidence of whether there exists a “public emergency”, and if the measures invoked are “strictly required by the exigencies.” The margin of appreciation effectively gives the State discretionary powers when determining an adequate response to the exceptional circumstances.

Macdonald describes the doctrine as the Court’s “responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties.”\(^ {129}\) Greer questions whether the margin of appreciation should hold the status of “doctrine”, because of the lack of “minimum theoretical specificity and coherence…” Rather, he argues, it is “a pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to exercise in certain circumstances.”\(^ {130}\) In any case, it is for the Court to decide whether the evidence supporting the existence of a crises and the necessity of the derogating measures, is admissible, relevant, or of probative value.\(^ {131}\) The Court also holds for itself to investigate all available material, independent of the origins of the evidence, and may, if necessary, “[obtain] material proprio motu.”\(^ {132}\) For the sake of practicality, the thesis uses the terms margin of appreciation and doctrine interchangeably.

In *Ireland v. the United Kingdom*, the Court held that a “public emergency” might exist even though the threatening circumstances exclusively originates in a confined part of the State’s territory. However, the implementation of the derogating measures must target the specific geographical area where the threat arises.\(^ {133}\) The Court’s position thereby further developed

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125 ECHR Art. 15 (1).
126 Denmark, Norway, Sweden and the Netherlands v. Greece (1969) § 154, see also applicants’ submission in Brannigan and McBride v. the United Kingdom (1993) § 44.
127 HRCm General Comment No. 29 (2001) § 154.
128 Derives from the French term «marge d’appréciation».
131 Ireland v. the United Kingdom (1978) § 210, cf. ECHR Art. 55.
132 Ibid. § 160.
133 The Court reaffirmed its logic of territorial scope, e.g. in Sakik and Others v. Turkey (1997) §§ 37-39.
the territorial scope of criteria in the *Greek Case*. In accordance with the margin of appreciation, the Court stated that it is for the respondent State to determine whether there actually is a “public emergency”, and if it threatens the “life of the nation”. Moreover, in overcoming the threatening circumstances it is for the State to determine the scope of the measures invoked. The Court justified its decisions by stating that “the national authorities are in principle in a better position than the international judge to decide” because of the government’s “direct and continuous contact with the pressing needs of the moment…”

On these grounds, the Court concluded that derogation under Article 15 (1) of the ECHR affords to the respondent State a “wide margin of appreciation.”

The Court reaffirms this logic in e.g. *Aksoy v. Turkey*, reiterating most of the wording in *Ireland v. the United Kingdom*.

Considering the aforementioned, it is sufficiently clear that the fulfillment of the requirement under Article 15 (1) hinges on certain aspects: There has to be an actual or imminent public emergency, of exceptional nature, which threatens the continuance of the organization of the society.

### 4.2.2 The Principle of Proportionality

According to Article 15 (1) of the ECHR, the scope of the derogating measures invoked by the Contracting Parties is limited:

> “to the extent strictly required by the exigencies of the situation […]”

A textual interpretation of the wording indicates that the requirement consists of two criteria. First, the measure must be rational in relation to the objective pursued. Second, the measure must be “strictly” proportional, which in turn indicates a rather intense level of legal scrutiny. The criteria are an integral part of what is termed the principle of proportionality. The principle constitutes a form of balancing act in international law, and is arguably of ancient origin. In its simplest form, the term proportionality “means that a response or action must be commensurate with the anticipated goal to be achieved.” As such, the principle

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134 Ireland v. the United Kingdom (1978) § 207.

135 Ibid. § 207.

136 *Aksoy v. Turkey* (1996) § 68. The case is a rare example where it was found that the respondent State had not satisfied the requirements under Article 15, as stated by Zand (2014) on p. 181.

137 See the equivalent in the ICCPR Art. 4 (1), and HRCm General Comment No. 29 (2001).

138 In accordance with Art. 31 of the VCLT (1969).

139 The Babylonian “Code of Hammurabi” 1722 BC may be viewed as one the earliest attempts at embodying the principle, with the wording “an eye for an eye, and a tooth for a tooth”. A more recent example is the English Bill of Rights of 1689, reflecting the ideas of the aforementioned John Locke.

140 Newton et al. (2014) p. 15.
enables the assessment of seemingly incompatible, operational imperatives. In terms of derogation, upholding and respecting human rights while simultaneously recognizing the need to suspend certain rights when facing crises, are certainly competing operational imperatives.

Examination of both case law and constitutional provisions of modern democracies show that the principle is considered part of international customary law. The principle is also laid down in the Treaty on European Union (TEU, 2009) Article 5 (4); “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” Jurisprudence in case law by the ECtHR establishes the principle as the basis on which the Court scrutinize measures adopted by national authorities. As stated earlier, the doctrine of the margin of appreciation affords to the State certain discretions, in determining “how far it is necessary to go in attempting to overcome the emergency”, i.e. whether the measure is “strictly required by the exigencies of the situation”. The latter entails that the State is simultaneously granted a certain “margin of error”. The doctrine therefore arguably applies equally to the principle of proportionality. In the aforementioned case Ireland v. the United Kingdom, the Court held that the respondent State is granted a wide margin of appreciation when determining the necessity and scope of the derogating measures. However, the discretion left to the State is limited, as the Court held in e.g. Brannigan and McBride v. the United Kingdom: “It is for the Court to rule on whether inter alia the States have gone beyond the ‘extent strictly required by the exigencies’ of the crises. The domestic margin of appreciation is thus accompanied by a European supervision...” In other words, the States’ actions are in all cases the object of scrutiny by treaty monitoring organs. The doctrine of (a wide) margin of appreciation presumes that the respective States’ judiciary systems and legislative organs are committed to the fulfillment of their obligations to uphold and respect human rights.

Legal scholars argues for different systematical approaches to the content of the principle, albeit there seems to be a consensus regarding the core criteria. The following is an attempt to summarize the criteria according to Article 15 (1):

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142 Ireland v. the United Kingdom (1978) § 207.
145 Including e.g. the ECtHR and national courts.
1. Normal means are not sufficient to deal with the crises, i.e. measures permitted by national laws in conformity with international human rights law.
2. In so far as the measure is necessary, it must cease to apply once the crises is nonexistent.
3. There must be a rational connection between the measure employed and the pursued objective. In other words, the measure must be genuinely suited to reduce or eliminate the crises.
4. The importance of the right derogated from must stand in proportion to the severity of the crises. In other words, the level of scrutiny required by the monitoring organ raises laterally with the importance of the right.
5. The measure and its implementation must be adequately safeguarded, such as to avoid deviant or abusive use.

The basis for the criteria derives largely from jurisprudence in case law by the ECtHR. The following are examples of judiciary decisions by the Court that established the content of the requirement.

In light of criteria no. 1, in Lawless v. Ireland, the Court considered to which extent normal means had proven sufficient to reduce or eliminate the crises. In its conclusion, the Court held inter alia that “ordinary law had proven unable to check the growing danger which threatened the Republic of Ireland”, and that the ordinary and special domestic courts “could not suffice to restore peace and order…”

In Ireland v. the United Kingdom, the Court affirmed the temporal character of derogating measures, in accordance with criteria no. 2. The Court held that a measure, which at the time of implementation fulfills the criteria in accordance with the principle of proportionality, might not do so indefinitely. It stated that “[t]he interpretation of Article 15 must leave a place for progressive adaptions.” Lehmann argues that a textual interpretation of Article 15 (1) supports this view, placing emphasis on the term “[i]n time of” In Aksoy v. Turkey, the Court reaffirmed the temporal character of derogating measures.

In A. and Others v. the United Kingdom, the sequel to the so-called Belmarsh case, the Court acknowledged the actual threat of international terrorism, and the necessity of employing counter-terrorism measures. The Court was not convinced, however, of the validity of the

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147 See in particular Lawless v. Ireland (No. 3) (1961) §§ 35 and 36.
148 Ibid. § 36.
149 Ireland v. the United Kingdom (1978) § 220.
151 See The Court’s Approach (3) a, in Aksoy v. Turkey (1996).
Government’s reliance on Article 5 (1) f of the ECHR. The evidence (and lack thereof) suggested that the measure was unsuitable to diminish or eliminate the crises, which may be viewed as a breach of criteria no. 3.

In Aksoy v. Turkey, the Court acknowledged the severity of the crises, stating that it had “taken account of the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it.” In Brannigan and McBride v. the United Kingdom, the Court emphasized that "having regard to the nature of the terrorist threat … the derogation was strictly required by the exigencies of the situation.” The Court’s assessments illustrate the content of criteria no. 4; that the Court imposes on itself to consider the nature and severity of the crises, when determining whether the measure is “strictly required by the exigencies of the situation.” Considering the aforementioned analysis of the principle of proportionality, the necessity of a measure of derogation is determined on two distinct levels. Whether the measure and the effect it has on individuals and human rights are necessary to obtain the objective, and whether the suspension of rights are proportionate, in the sense of having less value than the value of obtaining the objective.

Finally, in Lawless v. Ireland, the Court gave special attention to the severity of the threat of terrorism, in addition to whether the implementation and continued use of the derogating measure was adequately safeguarded. The measure, a system of administrative detention, was “subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals…” The Court emphasizes the relevant aspects of the safeguarding systems, including the annulment of the Proclamation, a “Detention Commission” granted binding authority, and the appeal of ordinary courts before the Commission.

4.2.3 Incompatibility of other obligations under international law
The latter part of Article 15 (1) of the ECHR reads:

“… provided that such measures are not inconsistent with [the High Contracting Party’s] other obligations under international law.”

The wording of the phrase is by a textual interpretation quite clear. Derogating measures are unlawful provided they are incompatible with other obligations the State has assumed under

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156 Lawless v. Ireland (No. 3) (1961) §§ 37 and 38.
157 Ibid. § 37.
international law. In general, the requirement of consistency is considered to reinforce the protection of human rights in a state of emergency, in addition to excluding customary human rights law and norms of *jus cogens* from the regime of derogation.\textsuperscript{158}

Zand points out that the requirement “rarely have been proved to be problematic in the past…”\textsuperscript{159} An exception is the case *Brannigan and McBride v. the United Kingdom*, which historically is the first case law example where the Court examined the question of consistency.\textsuperscript{160} In a statement to the House of Commons, the Secretary of State formally and publicly made clear the government’s intentions to derogate. The applicants argued that the government’s statement was not “officially proclaimed,”\textsuperscript{161} in accordance with the requirement in Article 4 (1) of the ICCPR. It was therefore “inconsistent with the United Kingdom’s other obligations under international law.”\textsuperscript{162} The Court noted that it was not within its mandate to determine the meaning of the term “officially proclaimed.” Nevertheless, it went on to examine the plausibility of the basis of the application, and found that the statement was “well in keeping with the notion of an official proclamation.”\textsuperscript{163} It was thereby consistent with other international obligations. The proclamation of derogation ensures the possibility of verifying whether derogating measures are compatible with other, potential obligations.

### 4.3 Procedural requirements

The procedural requirements of derogation are laid down in Article 15 (3) of the ECHR. The main purpose of the requirements is to keep the Secretary General and the members of the COE informed about the notice of derogation.\textsuperscript{164} The following sections elaborate on the issue of proclamation. The absence of a formal and public declaration of state of emergency by the State concerned may render the invoking of derogation invalid.\textsuperscript{165}

#### 4.3.1 Proclamation and notification

The first part of Article 15 (3) of the ECHR reads:

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\textsuperscript{159} Zand (2014) p. 194.

\textsuperscript{160} Note that the Court, in *Lawless v. Ireland (No. 3)* (1961) § 40, held that it may consider the relevant part of Art. 15 (1) at its own leisure.

\textsuperscript{161} See ICCPR Art. 4 (1) providing: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…”

\textsuperscript{162} *Brannigan and McBride v. the United Kingdom* (1993) §§ 67-73.

\textsuperscript{163} Ibid. § 73.

\textsuperscript{164} Zand (2014) p. 191.

\textsuperscript{165} Ibid. p. 192.
“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.”

The provision expressly requires of the State to inform the Secretary-General of the COE of the derogating measures invoked, and reasons given for those actions. An interpretation of the provision reveals two important aspects, based on jurisprudence in case law by the ECtHR:

First, the provision does not expressly state that derogating measures require an official proclamation. The Court noted in Lawless v. Ireland that Article 15 (3) that it is “required only that the Secretary-General of the Council of Europe be informed of the measures of derogation taken, without obliging the State concerned to promulgate the notice of derogation within the framework of its municipal laws.” When viewed in conjunction with the requirement of compatibility in Article 15 (1), however, a State may arguably be required to officially proclaim derogating measures. The previous observations made in Brannigan and McBride v. the United Kingdom supports this view: Although the Court found that the UK had satisfied the requirement of proclamation, the applicants argued on the fact that the UK is bound by both the ICCPR and the ECHR. The ICCPR requires that the existence of a “public emergency which threatens the life of the nation” is “officially proclaimed,” when invoking derogating measures. In the report Cyprus against Turkey from 1983, the European Commission on Human Rights found that Turkey was not eligible to apply Article 15 to the measures taken, on grounds of the absence of an official and public notice of derogation. An official and public notification is necessary because the public needs to be informed about the changes to the law. Which, in turn, has to do with the requirement of giving due notice to everyone about restrictions on their rights. As a general practice, laws enter into force after having been published in the official gazette.

Second, although not explicitly stated, a proclamation of the existence of a “public emergency” must be in accordance with the principle of good faith. The principle derives primarily from customary law, specifically, principles of law, and Article 31 of the VCLT. In regards to the ICCPR, the Siracusa Principles hold that “[a] proclamation of a public emergency shall be

166 Lawless v. Ireland (No. 3) (1961) § 45.
167 ICCPR Art. 4 (1).
168 See also HRCm General Comment No. 29 (2001) § 2.
169 Adopted on 4 June 1999.
171 See e.g. the Official Public Record of the UK, webpage.
made in good faith based on an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation."172

4.3.2 Information on the measures taken and reasons given
The Contracting State is responsible for keeping the Secretary General of the COE fully informed about measures taken, and the reasons for doing so. In Greece v. the United Kingdom, the Commission held that it is the States’ responsibility to notify the measures in question, without any unavoidable delay, such as to enable the other parties to the Convention to appreciate the content of the derogating measures.173 For example, in Lawless v. Ireland, the Court found that the Irish Government had provided sufficient information on the reasons for taking derogating measures.174 Moreover, in Aksoy v. Turkey, the Court reaffirmed its prerogative to examine whether the provided information on derogating measures is sufficient.175

4.3.3 Information about the date on which the measures cease to apply
The latter part of Article 15 (3) of the ECHR reads:

“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.”

According to a textual interpretation of this passage, the State must notify when the derogating measures have ceased to apply, and subsequently, at which time normalcy is restored in respect to the relevant obligations under the Treaty. The case Brogan and Others v. the United Kingdom raised an interesting question in relation to in which way a notification about the date affects the Court’s ability to consider the permissibility of derogation. The British government informed the Secretary General of the COE of the withdrawal of a notice of derogation. The notification preluded the case’s proceedings, and the Court thereby held that “there is no call in the present proceedings to consider whether any derogation from the United Kingdom’s obligations under the Convention might be permissible under Article 15 …”176

4.4 Non-derogable or intangible rights
Article 15 (2) of the ECHR lists certain non-derogable rights:

173 Greece v. the United Kingdom (1958) §§ 152-159.
175 Aksoy v. Turkey (1996) § 86.
“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.”

According to the wording, the paragraph prohibits derogation from the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, slavery and servitude, and the rule of law, respectively. Aall interprets the exclusion of these rights from the regime of derogation as a precedential appraisal of proportionality.\(^{177}\) The above examination of ECtHR case law supports this view. A misconception of Article 15 (2) is that there are no exceptions to the prohibition of derogation from said rights. In the words of Thorbjørn Jagland, Secretary General of the COE: “...in no circumstances can a state derogate from Article 2: the right to life, Article 3: prohibition of torture and inhumane or degrading treatment or punishment and Article 7: no punishment without law.”\(^{178}\) Although one may presume the Secretary General spoke of derogation as an isolated legal regime, it illustrates an important legal aspect of the ECHR: The preclusion of derogation from said rights is absolute, however, the provisions themselves allow for exceptions.\(^{179}\) The Court has on several occasions examined whether such suspensions have been valid, or even present:

In *McCann and Others v. the United Kingdom*, the Court acknowledged that Article 2 “not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified ...” In addition, it pointed out that the provision “ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15).”\(^{180}\) Clearly, certain circumstances may warrant a suspension of the rights in the provision. Not considering “deaths resulting from lawful acts of war”, Article 2 (2) a permits the use of force “in defence of any person from unlawful violence”, provided it is “absolutely necessary.” The phrase suggests that a potential suspension of rights hinges on a test of proportionality, which in turn, is independent of the requirement of “a public emergency threatening the life of the nation”.

In *Rantsev v. Cyprus and Russia*, the applicant argued that the Cypriot authorities had failed in their fulfillment of the obligations in Article 4 (1). The Court established that “together with Article 2 and 3, Article 4 enshrines one of the basic values of the democratic societies

\(^{177}\) Aall (2011) p. 476.


\(^{179}\) See e.g. ECHR Arts. 8 (2), 9 (2), 10 (2), and 11 (2).

making up the Council of Europe…” Moreover, the Court noted that “[u]nlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.”\(^{181}\) Article 4 (3) lists certain circumstances which are excluded from the meaning of the term “forced or compulsory labour”, for instance, “any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community” is not to be interpreted as a prohibited form of labor. The regime of public emergency is thereby relevant, without having to derogate under Article 15. 

There are certain provisions in the ECHR that under no circumstances, according to a textual interpretation, allow for lawful exceptions: Article 3, prohibition of torture and inhumane or degrading treatment or punishment; Article 7, no punishment without law; and Protocol No. 13 to the Convention, the abolition of the death penalty.\(^{182}\) The ECtHR has recognized the latter as a fundamental right, along with Articles 2 and 3.\(^{183}\) Naturally, non-derogable rights are of negligible importance to the examination of derogation on grounds of acts or threats of terrorism. They are, however, important in the sense that terrorism often include murder, attacks on the physical integrity of a person, deprivation of personal liberty, or threats of committing any of these acts, as defined by the COE Framework Decision on Combating Terrorism.\(^{184}\) Which, in turn, constitute violations of human rights.

## 5 Derogation on grounds of contemporary terrorism

Section 4 focused on examining case law concerning derogation on grounds of acts or threats of terrorism prior to the attacks on the WTC, notably Lawless v. Ireland, Ireland v. the United Kingdom, Brannigan and McBride v. the United Kingdom, and Aksoy v. Turkey. The following sections make effort to answer whether the established experience and guidelines of the ECtHR concerning derogation on grounds of traditional terrorism, is affected by the development of contemporary terrorism.

### 5.1 Contemporary terrorism before the Court

In the aftermath of the attacks on the WTC in 2001, traditional terrorism saw a development in relation to its defining aspects, as was explained in section 3. The “war on terror” rhetoric

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\(^{183}\) See Al-Saadoon and Mufdhi v. the United Kingdom (2010) § 118.

in conjunction with the characteristics of contemporary terrorism led to an increase in legislation that intruded on individuals’ rights, by favoring the protection of society as a whole. However, only a few of the Contracting States of the ICCPR have invoked the right to derogate on the basis of acts or threats of terrorism, since the Convention’s entry into force. In response to the terrorist attacks on the WTC, a similar trend is apparent in relation to derogation under Article 15 of the ECHR. These tendencies may indicate that it is possible for States to operate within the obligations and rights within international Conventions, while simultaneously being able to adequately deal with threats of international terrorism.

Recently, however, several Contracting States have laid forth notifications on derogation on grounds of acts or threats of terrorism, which in turn, may be lodged before the ECtHR in the future: On 5 June 2015 the government in Ukraine notified the COE that they had decided to invoke Article 15 of the ECHR, considering the emergency situation in the country. On 24 November 2015 the COE was notified of a number of state of emergency measures taken, by the French government, on grounds of the terrorist attacks in Paris. On 21 July 2016, the situation in Turkey in the aftermath of the failed military coup warranted a notification of derogation by the Turkish government. Turkey continues to argue that the threat qualifies as serious enough that it warrants the declaration of a state of emergency, in the process of restoring normalcy. It remains to see whether the aforementioned notifications will be lodged before the Court.

The increase in scale and severity of acts of terrorism, as described in section 3, has been one of the focal points supporting arguments in favor of the need to reevaluate civil liberties and national security. In the words of former US Vice President Dick Cheney, contemporary terrorism has created “a new normalcy”. However, several observers have, partly or wholly

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185 Scheinin et al. (2010) p. 23
188 COE webpage, Ukraine – Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) (10 June 2015). Ukrainian authorities had previously refrained from declaring a state of emergency, see Reuters webpage, Ukraine will not declare state of emergency – presidential aide, (21 January 2014).
189 COE webpage, France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights (25 November 2015).
190 COE webpage, Secretary General receives notification from Turkey of its intention to temporarily suspend the European Convention on Human Rights (21 July 2016).
rejected this notion. The European Parliament held in this matter that “the EU is rooted in the principle of freedom; points out that, in support of that freedom, security must be pursued in accordance with the rule of law and subject to fundamental rights obligations; states that balance between security and freedom must be seen from this perspective…” The statement reflects the fundamental elements of which the ECtHR delivers judgment, but also the difficulties, or opportunities, the Court faces when assessing the validity of derogating measures on grounds of contemporary terrorism. Zand points to a general opinion that the defining aspects of terrorism has shifted, which may have rendered the “experience and guidelines” of the ECtHR case law prior to the attacks on the WTC less relevant. The following section elaborates on this notion.

5.2 Modern application of Article 15 of the ECHR on grounds of contemporary terrorism

As stated in the introductory section, the available case law concerning derogation on grounds of acts or threats of terrorism is limited. Until recently, the UK was the only European State to derogate from the provisions of the ECHR on grounds of the aforementioned, when enacting the ATCSA. Smith views this conduct as contradictory to the emphasis placed on the exceptional nature of international terror brought on by the “war on terror” rhetoric. The derogation notice by the UK government argued in particular on the fact that the threat posed by foreign nationals was continuous. The case A. and Others v. the United Kingdom is a prominent example of case law stemming from the aftermath of the terrorist attacks on the WTC. The case is the conclusion to the so-called Belmarsh case, and concerned the extended power of the UK government to indefinitely detain foreign persons suspected of international terrorism, as enacted by the ATCSA of 2001.

In A. and Others v. the United Kingdom, the Court held that any terrorist attack that destabilizes the organization of society might constitute a “public emergency,” by relying on the

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196 The UK government believed the detention envisioned by the ATCSA would violate Article 5 (1) f of the ECHR.
199 Zand (2014) p. 201. The act is now replaced by “the terrorism prevention and investigation measures” (T-PIMs), under Terrorism Prevention and Investigation Measures Act of 14 December 2011.
decisions in *Lawless v. Ireland*\(^{201}\) and *Ireland v. the United Kingdom*. In the latter, the Court and parties involved agreed that the requirements under Article 15 was satisfied, due to the years of terrorism, which represented “a particular far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province’s inhabitants…”\(^{202}\)

The Court took a different approach in *A. and Others v. the United Kingdom*. The Court held that the immigration measure was unsuited to address “what was essentially a security issue [and] had the result of failing adequately to address the problem…” Moreover, the measure constituted “a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.”\(^{203}\) In regards to the existence of a “public emergency” and the necessity of the measures invoked, the Court reaffirmed and arguably solidified its prior position concerning the margin of appreciation. The UK government argued that the House of Lords “should have afforded a much wider margin of appreciation to the executive and Parliament to decide whether the applicant’s detention was necessary.”\(^{204}\) The Court established once again that the margin of appreciation under Article 15 is considered “wide”, but added that “[t]he doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.” On the one hand, the conclusion establishes that the doctrine is inapplicable outside of the legal framework of the ECHR. Moreover, it suggests a further clarification, or strengthening, of the Court’s ability to review cases of derogation under Article 15.\(^{205}\)

The Court also considered the territorial aspect of terrorism in *A. and others v. the United Kingdom*. The applicants argued that the derogation from the general right of liberty under Article 5 (1) f\(^{206}\) of the ECHR was unlawful. The arguments were largely based on the conclusions by judge Lord Hoffman before the Supreme Court. Lord Hoffman found that the evidence adequately suggested that the UK was under serious threat of acts of terrorism. However, he did not support the conclusion that the nation’s life was threatened, stating that since

\(^{201}\) Lawless v. Ireland (No. 3) (1961) § 28.


\(^{203}\) A. and Others v. the United Kingdom (2009) § 186.

\(^{204}\) See A. and Others v. Secretary of State for the Home Department (2004).


\(^{206}\) ECHR Article 5 (1) and (1) f reads: «No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law … the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”
“terrorist violence, as serious as it is, does not threaten our institutions of government or our existence as a civil community.”  

In contrast, some legal scholars are of the impression that “where there is an organised campaign of violence resulting in deaths at a relatively low level among 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.”  

The Court noted that it was within the borders of a States’ margin of appreciation to judge, based on the evidence, whether such an attack was “imminent.”  

The Court partly based its conclusion on the UK’s alliance with the US, and their military cooperation in Afghanistan and Iraq. However, the UK had not been under attack by al-Qaeda or its loosely based associates at the time.  

The Court’s standpoint suggests that even though an act of terrorism does not occur within the territory of a country where derogating measures are in effect, the Court may still consider the threat to be “imminent” and constitute a threat “to the life of the nation.”  

The Court also considered the temporal aspect of “imminence.” It stated that “[t]he 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.” Despite the fact that there had not been any terrorist attack within UK territory, the Court concluded that the authorities “[cannot] be criticized, in light of the evidence available to them at the time, for fearing that such an attack was ‘imminent’…”. Moreover, the Court held that “the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risk…”  

Taking account of the terrorist attacks in London in July 2005, it deemed the threat to be “very real.”  

Smith argues that the Court’s position relates to the aspects of contemporary terrorism, and the “war on terror” rhetoric, in that pre-emptive actions are deemed necessary to prevent attacks. In any case, it represents a concerning prospect considering the longevity of contemporary terrorism.

In assessing the necessity and proportionality of derogation measures, the Court held that it must be based on “those facts which were known at the time of the derogation”, notwithstanding the Court’s prerogative in “having regard to information which comes to light subsequent-

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208 Harris et al. (2009) p. 631.


211 A. and Others v. the United Kingdom (2009) § 177.

212 Ibid. § 177.

213 Smith (2011) p. 149.
The examination of case law, notably the Greek Case, in section 4 established that a threat must be actual or imminent. Smith argues that the Court’s aforementioned statements in A. and Others v. the United Kingdom, “seem to override or at least stretch the condition set out in the Greek case…” Scheinin et al. points out that this could pave the way for a utilization of derogation measures contrary to the purpose of the provision. Certain States might read into the Court’s decision that to keep derogation in force for a long period of time is within their rights. Which in turn may ascribe a sense of normalcy to state of emergency measures. Moreover, Scheinin et al. argues that this “cannot be the purpose of an emergency measure, which must be temporary by definition, the aim being exactly the restoration of normalcy, including the full protection of human rights.” Taking into account that most of the cases lodged before the Court concerned “continuing terrorist violence and campaigns of irregular armed groups,” which are key aspects of contemporary terrorism, it can be argued that it will alter the temporary aspect of derogation.

Nevertheless, the “war on terror” rhetoric, espousing a change in the phenomenon of terrorism, does not seem to have influenced the States’ explicit arguing before the Court. The Court itself has taken a similar approach, by showing reluctance to give up its “experience and guidelines” developed prior to the attacks on the WTC. The case Saadi v. Italy represents a notable exception. The Italian government claimed that “[o]rganised crime of a terrorist nature had reached, in Italy and in Europe, very alarming proportions, to the extent that the rule of law was under threat.” In the same case, the Court made reference to its decisions in previous case law, when stating that “States face immense difficulties in modern times in protecting their communities from terrorist violence … [i]t cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community.” Smith argues that the referencing suggests an implicit link to the Court’s “views of fundamentalist international terrorism with terrorist activity embodied in those cases.” Moreover, this link may represent a reluctance on the Court’s part to deviate from its established view on terror-

216 Smith (2011) p. 149, see also Ireland v. the United Kingdom (1978) § 207.
219 Zand (2014) p. 204.
220 See e.g. references to case law in section 4.
221 Saadi v. Italy (2008) § 169.
223 Saadi v. Italy (2008) § 137.
Finally, in *A. and Others v. the United Kingdom*, the British government argued that the application of Article 5 (1) f relies “on the principle of fair balance, which underlies the whole Convention…” The government held that the Article thereby had to be interpreted “so as to strike a balance between the interests of the individual and the interests of the State in protecting its population from malevolent aliens.” 228 Smith suggests that this was an attempt by the national authorities to alter the margin of appreciation in such circumstances. The Court has persistently taken the view that the national authorities are in a better position to judge whether a measure is in the community’s interest, because of its “direct and continuous contact with the pressing needs of the moment…” 229 Michaelsen argues, on the other hand, that this logic is flawed, in particular when considering international terrorism. He argues that the Court should be in a position to judge whether a terrorist threat exists, and which measures are appropriate to deal with it “without necessarily having to have access to specific intelligence.” 230

In *Saadi v. Italy*, the Italian government adopted the aforementioned reasoning of the British government, when assessing individual’s rights under Article 3 of the ECHR “against those secured to all other members of the community by Article 2.” 231 The Court, however, rejected the arguments, on the basis that “the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct … the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.” 232 The resoluteness of the Court’s position in regards to non-derogable rights – reaffirming its previous guidelines in case law – relates to the current issue of international terrorism in several ways. First, non-derogable rights are not subject to the balancing act of national security and individual’s rights. Second, in combating terrorism, taking a strict “minority versus majority” point of view may create “a situation in which ‘our’ rights come absolutely first.

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225 In this regard, see also Gillan and Quinton v. the United Kingdom (2010) §§ 76-87 in conjunction with § 79.
227 Leroy v. France (2008) § 31. The judgment is written in French. The relevant paragraph mentions the satire in the contested publication on the attacks on the WTC, as a shared dream come true, which was particularly shocking and offensive to victims and their families: “[L]a publication litigieuse présentant l’attentat contre les Twin towers américaines comme un rêve partagé et enfin réalisé était particulièrement choquante et offensante pour les victimes et leur famille.”
229 See e.g. Ireland v. the United Kingdom (1978) § 207.
231 Saadi v. Italy (2008) § 122. See ECHR Art. 2 on the right to life, and Art. 3 on the prohibition of torture.
232 Chahal v. the United Kingdom (1996) § 79.
over those of the ‘other’.\footnote{Smith (2011) pp. 151-152, and Zedner (2004) p. 136.} Indeed, certain rights under the ECHR are subject to the mechanisms of derogation, and subsequently the State’s margin of appreciation. On the other hand, it seems futile to claim that someone are capable of absolute objectiveness in assessing which circumstances warrant a violation of the prohibition of torture or inhuman or degrading treatment of others.

6 Concluding remarks

Throughout, there have been varying opinions on the correct definition and scope of both traditional and contemporary forms of terrorism. What can be ascertained, however, is that terrorism is an ambiguous term, and is defined by elements that change in accordance with time and the context in which the term is applied to. The most successful attempts at establishing a universal definition can be ascribed to regional bodies, such as the Framework Decision on Combating Terrorism by the COE.

The original intent of the right to derogate under Article 15 of the ECHR was to afford leeway for States threatened by exceptional circumstances, such as war, internal unrest, or economical crises. Although the spectrum of "public emergencies" broadened as the traditional form of terrorism emerged, the purpose of Article 15 have not changed substantially. When faced with acts or threats of terrorism, States have traditionally relied on measures governed by domestic legislation, and in a few instances, "normal" exceptions provided by the provisions themselves, or derogation from the rights under the Conventions of which they are bound. In this regard, the ECtHR has been, and still are, an indispensable treaty-monitoring body, and has provided essential insight to the interpretation of the provisions under the ECHR.

The Court established the correct interpretation of the requirements under Article 15. The Greek Case was the first case in which enforcement of derogation took place. The Commission established inter alia certain general criteria for assessing whether a "public emergency" exist, in addition to the burden of proof concerning the evidence for such an assessment. It also introduced the margin of appreciation, which in general grants the respondent State discretionary powers when assessing the existence of a threat, and the measures necessary to avert it. The Court modified its jurisprudence on the requirements under Article 15 in subsequent case law, in particular in regards to the principle of proportionality. In the years following the Greek Case, it became apparent that the Court was willing to take into account the increase in scope and severity of acts or threats of terrorism. The attack on the WTC on 11 September 2001 changed the general opinion of the defining elements of terrorism.
Terrorism attained global proportions, and in general, terrorist attacks increased in severity and scale. The US enacted the Patriot Act, closely followed by the "war on terror" rhetoric, which espouses the exceptionality of terrorism. Contemporary terrorism represents an increasingly severe threat to society and individual's rights, which has led to the belief that the current state of available counter-terrorism measures are inadequate to deal with the phenomenon. Despite such circumstances, the Court has in the majority of cases held a staunch position in regards to its prior experience and guidelines on derogation.

The thesis has shown that the regime of derogation under Article 15 of the ECHR is under immense pressure, considering the evolving, ambiguous traits of contemporary terrorism. Although the ECtHR generally acts in conformity with its established guidelines for assessing the validity of derogating measures, it is also clear that the Court is willing to adapt to the changing circumstances. In this regard, the Contracting States will continue to probe for new ways of interpreting the scope and area of application of the margin of appreciation. The treaty-monitoring bodies must ensure the continued checking of the demands exclaiming the need for a rebalancing of the rights of individuals, in the name of national security. Considering the permanence of contemporary terrorist threats, an essential question is whether the continued use of counter-terrorism measures in "periods of relative calm” is a proper response to the problem. Nevertheless, the Court will presumptively continue to apply the margin of appreciation to its decisions regarding sensitive matters, such as acts or threats of terrorism.

It is noteworthy that case law by the ECtHR, that in some way relates to terrorism activities, have mostly been lodged by applicants who themselves are terrorists or suspected terrorists. The applicants’ deprival of certain human rights by way of derogating measures will presumptively provide the Court with opportunities to further clarify the scope of the State’s obligation to protect their nationals and others from acts or threats of terrorism. Inevitably, the Court will also have to consider the interaction between international humanitarian law and human rights law, despite its reluctance to abandon its formalist approach.

234 See Harris et al. (2009) p. 634.
236 In particular, in regards to surveillance measures, see among others Big Brother Watch and Others v. the United Kingdom (communicated under Article 8 of the Convention in 2014), and Roman Zakharov v. Russia (2015).
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