

Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR

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1. Introduction

The doctrine of martial law¹ was already known in Roman law with adages like *necessitas non habet legem* and *rei publicae salus suprema lex est*, but might even stem from the laws of the Greek city states.²

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¹ The distinction between “martial law”, the “state of emergency” and the “state of necessity” is not a matter of discussion in this article. The terms are used interchangeably.

² T. Reinach, *De L’Etat de Siège: Etude Historique et Juridique* (Whitefish, Kessinger Publishing, 1885, reprinted 2010).

In the event of war, the doctrine of martial law allows the executive branch to temporarily derogate from a number of rights and freedoms in order to protect the State against dissolution or hostile occupation. Would it strictly adhere to the rule of law, it would be arduous or even impossible to save the very State on which the rule of law depends. Seizing strategically located property, setting a curfew or monitoring private communications, among others, enables the executive branch to take the decisive action needed in times of peril.

Although the importance of this doctrine in times of war is largely undisputed, historically it has by no means been an innocent concept. It has been regularly abused by regimes to seize power, suppress its people and curtail the rule of law permanently. The most well-known example of such abuse is by the Nazi regime, but likewise misuse is made of it today by some regimes in Arab countries and other totalitarian States. In order to limit the deployment of emergency measures by States and to subject them to international supervision, Article 15 of the European Convention on Human Rights (ECHR) lays down rules for the use of martial law. The article was based on the draft of Article 4 of the International Covenant on Civil and Political Rights (ICCPR).³

This paper describes on the one hand how the European Commission of Human Rights (ECmHR or the Commission) and the European Court of Human Rights (ECtHR or the Court) have gradually accepted the application of the doctrine of martial law not only to traditional warfare, but also to measures countering insurgency, separatists and terrorism, when invoked by the national authorities. On the other hand, partly as consequence of the former, it describes the gradual marginalization of the limitations on the use of this doctrine and of the supervisory role of the European organs. This argument will be developed by analysing the jurisprudential developments on a number of points. First, the margin of appreciation left to Member States in the deployment of martial law is dealt with in section 2 of this paper. The notification principle, requiring States invoking martial law to inform the Secretary General of the Council of Europe thereof, contained in Article 15, paragraph 3 is discussed in section 3 of this paper. The manner in which the European bodies approach the derogation of rights other than those

³ The drafting process of this article may thus in large part be found in the Travaux Préparatoires of the ICCPR. M. J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987).

mentioned in Article 15, paragraph 2 will be the topic of section 4 of this paper. Finally, the requirements laid down in paragraph 1 of Article 15 are assessed in section 5 of this paper: the conformity requirement which holds that the emergency measures may not be inconsistent with obligations under international law in sub-section 5.1 of this paper, the necessity requirement which holds that the emergency measures must be strictly required by the exigencies of the situation in sub-section 5.2 of this paper and the requirement of an existing emergency, namely in case of war or a similar emergency in sub-section 5.3 of this paper. Choosing this structure, this paper moves from analysing the more general to the more specific and from the more procedural to the more substantive requirements of Article 15 ECHR.

Before starting the analysis, it is useful to cite Article 15 ECHR and Article 4 ICCPR in full:

Article 15 - Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

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

2. Margin of Appreciation

That it is by no means a matter of course to incorporate a clause on the state of emergency in a constitution or a human rights treaties is illustrated by the fact that neither the draft of the ICCPR nor that of the ECHR originally contained such provision and that their African counterpart, the African Charter on Human and Peoples' Rights, does not mention it at all. To incorporate this doctrine in a law or treaty is to subject it to legal requirements, a goal consistent with the emphasis on legalism in international conventions. The general objective of international treaties of providing a minimum level of protection is also at the core of the martial law provisions in the ECHR and the ICCPR.⁴ Although in the international and especially the European approach, national States are left a margin of appreciation to interpret and apply the rights and doctrines incorporated in the treaties, and a certain "latitude in judgment" was attributed to them even with regard to invoking the state of necessity,⁵ the special position of Article 15 ECHR is illustrated by the fact that it does not speak of measures which are "*necessary*", a phrase used in other articles of the convention among other regarding the limitation of the rights to privacy and the freedom of speech, but holds that they must be "*strictly required*".

⁴ For example, see the declaration of the UN Secretary-General regarding the drafting process of Article 4 ICCPR, as incorporated in the *Travaux Préparatoires* of Article 15 ECHR: "It was also important that States parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the covenant. Reference was made to the history of the past epoch during which emergency powers had been invoked to suppress human rights and to set up dictatorial régimes." Available at [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART15-DH\(56\)4-EN1675477.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf), p. 13. See further J. F. Hartman, 'Derogation from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations', Vol. 22 *Harvard I.L.J.* 1981, pp. 1-53.

⁵ Bossuyt, *supra* note 3, p. 87.

In addition, the article lists a number of articles which in no case may be derogated from. Moreover, the conformity principle contained in paragraph 1 requires the respect for other international obligations in force at the time of emergency, further restricting the margin of appreciation by States. Finally, the article holds that the State availing itself of the right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures, a requirement which has the explicit objective of allowing other contracting States to assess those measures and possibly to file an inter-State complaint.⁶ Thus, the explicit goal of Article 15 ECHR is to restrict and limit the use of martial law by member States, and the margin of appreciation left to them is in any case more narrow than with regard to other provisions contained in the European Convention.⁷

In the first case regarding Article 15 ECHR, *Greece v. UK* (1958), the British Government invoked the state of emergency on the territory of Cyprus, then part of its empire. The state of emergency was disputed by the Greek State. The Commission argued that “the government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation”,⁸ a discretion which it held, however, to be subjected to critical European supervision. Already in the following case, *Lawless v. Ireland* (1959),⁹ in which the Irish government relied on emergency measures to counter IRA activities, the Commission does not mention the “certain limits” within which the discretion should remain, but rather holds that it is “evident that a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by

⁶ Bossuyt, *supra* note 3, p. 97.

⁷ See further R. St. J. Macdonald, ‘Derogations under Article 15 of the European Convention on Human Rights’, Vol. 36 *Columbia Journal of Transnational Law* 1998, pp. 225-267 and M. P. O’Boyle, *Inter Arma Leges Silent? Emergency Government and European Human Rights Law: A Case Study of Northern Ireland* (Boston, Harvard Law School thesis, 1975). See also UNHCHR & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York & Geneva, UN Publications, 2003), pp. 811-885, available at <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>.

⁸ ECmHR, *Greece v. United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 136.

⁹ See further A. H. Robertson, ‘The First Case Before the European Court of Human Rights: *Lawless v. the Government of Ireland*’, Vol. 36 *B.Y.I.L.* 1940, pp. 343-353 and A. H. Robertson, ‘*Lawless v. the Government of Ireland (Second Phase)*’, Vol. 37 *B.Y.I.L.* 1961, pp. 536-547.

exceptional measures derogating from its normal obligations under the Convention”.¹⁰

Nevertheless, the Court (1961), in that same case, states that “it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled”¹¹ and in the case *Denmark and others v. Greece* (1969), in which the young, revolutionary government of Greece invoked the state of emergency, the Commission states that “the burden of proof lies upon the respondent Government to show that the conditions justifying measures of derogation under Article 15 have been and continue to be met, due regard being had to the ‘margin of appreciation’”.¹²

A turning point was the case of *Ireland v. UK* (1978),¹³ again on the situation in Northern Ireland and the deployed IRA activities, where the Court refrained from a review of the British use of martial law and considered:

It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation.¹⁴

Still, it held that this margin of appreciation is associated with European supervision. In the following case, *Brannigan and McBride v. UK* (1993),¹⁵ again with respect to the situation in Northern Ireland,

¹⁰ ECmHR, *Lawless v. Ireland*, Appl. No. 332/57, 19 December 1959, Report of the Commission, § 90.

¹¹ ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 22.

¹² ECmHR, *Denmark and others v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 5 November 1969, Report of the Commission, § 114. See also T. Buergenthal, ‘Proceedings Against Greece Under the European Convention of Human Rights’, Vol. 62 *A.J.I.L.* 1968, pp. 441-450.

¹³ See further M. O’Boyle, ‘Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. the United Kingdom’, Vol. 71 *A.J.I.L.* 1977, pp. 674-706.

¹⁴ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 207.

¹⁵ See further E. Cryslar, ‘Brannigan and McBride v. U.K. A New Direction on Article 15 Derogations Under the European Convention on Human Rights?’,

the Court cites these words and adds: “At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.”¹⁶

From this case onward, the text from *Ireland v. UK*, supplemented by that of *Brannigan and McBride v. UK*, appears in the Court’s case law as a sort of general disclaimer before assessing the applicability of Article 15 ECHR.¹⁷ This development is not only remarkable because the incorporation of a martial law provision in the convention precisely aims at curbing the discretion of the contracting States, while this discretion is interpreted as very wide by the Court, but also because this wide discretion is not only accepted with regard to the question of whether there exists a state of emergency in a certain area, but also with regard to the question of whether the measures are “strictly required”, a formulation that seems to explicitly oppose such wide discretion.¹⁸

Despite criticism raised against this interpretation, in its most recent case concerning Article 15, that of *A. and others v. UK* (2009),¹⁹ regarding the counter-terrorism measures adopted in the aftermath of

Vol. 65 *Nordic J.L.L.* 1996, pp. 91-121; S. Marks, ‘Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights’, Vol. 15 *Oxford Journal of Legal Studies* 1995, pp. 69-95 and J.P. Loof, ‘Brannigan en McBride tegen het Verenigd Koninkrijk: Brogan en de staatsnood van artikel 15 EVRM; of hoe het Europese Hof Noord-Ierland een noodtoestand bezorgde’, Vol. 18 *Nederlands Tijdschrift voor de Mensenrechten/Nederlands Juristen Comité voor de Mensenrechten-Bulletin* 1993, p. 793-810.

¹⁶ ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 43.

¹⁷ O. Gross & F. Ni Aoláin, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’, Vol. 23 *Human Rights Quarterly* 2001, pp. 625-649.

¹⁸ See among others ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Concurring Opinion of Judge Martens and ECtHR (Grand Chamber), *Demir and others v. Turkey*, Appl. Nos. 21380/93, 21381/93 & 21383/93, 23 September 1998, Concurring Opinion of Judge De Meyer.

¹⁹ See further S. Shah, ‘From Westminster to Strasbourg: A and others v United Kingdom’, Vol. 9 *Human Rights Law Review* 2009, pp. 530-561; J.P. Loof, ‘Hoe Osama Bin Laden het Verenigd Koninkrijk een noodtoestand bezorgde’, *Nederlands Tijdschrift voor de Mensenrechten/Nederlands Juristen Comité voor de Mensenrechten-Bulletin* 2005, pp. 8-24 and J.P. Loof, ‘Noot bij: EHRM 19 februari 2009, 50, (A. en anderen/VK.)’, *European Human Rights Cases* 2009, 5.

9/11, the Court takes even one step further by holding that since the British court had already assessed the application of the emergency law, the ECtHR could only deviate from the conclusion of the British court “if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.”²⁰ Although in this specific case the national court judged in favour of the applicants, it appears that the Court would also adopt this marginal role if the national court judged in favour of the member State invoking the state of emergency and derogating from the rights and liberties of its citizens. In conclusion, although the margin of appreciation is not absolute and some criteria of Article 15 retain some relevance, as will be explained below, it is clear that the general margin of appreciation of States has been extensively broadened.

3. The Notification Requirement

The issue of European supervision is closely affiliated with the “notification requirement” of paragraph 3 Article 15 ECHR, which holds that the High Contracting Party which invokes the state of emergency must fully inform the Secretary General about the emergency measures taken and the reasons therefore, and must also inform him when the emergency measures are repealed. The reason for incorporating such a condition was that recourse to martial law by States was seen as “a matter of the gravest concern and the States Parties had the right to be notified of such action. It was further agreed that since the use of emergency powers had often been abused in the past, a mere notification would not be enough. The derogating State should also furnish the reason by which it was actuated, although this might not include every detail of each particular measure taken.”²¹

Although the final text of Article 15 ECHR is based on the draft version of Article 4 ICCPR, the latter was adopted after the ECHR was finalized, so that both articles differ on a number of points. For example, the ICCPR holds that notification must be sent “immediately” after the proclamation of the state of emergency and that the notice of revocation of the emergency measures is to take place “on the date on which it terminates”. The ECHR lacks such time indications. The ICCPR further requires an indication of the rights that are derogated

²⁰ ECtHR (Grand Chamber), *A. and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, Judgment, § 174.

²¹ Bossuyt, *supra* note 3, p. 97.

from by the emergency measures, while the ECHR uses the more general phrase that the Secretary General should be “fully informed”. Finally, Article 4 paragraph 1 ICCPR holds that the state of emergency must be officially proclaimed, while Article 15 ECHR lacks such requirement.

In their early case law, the Commission and the Court provided further clarity on the notification requirement, choosing a rather strict line. In *Greece v. UK* (1958), the Commission considered that the notification must be issued within a reasonable period of time and that it must contain sufficient information to allow other Contracting States and the Commission to evaluate the nature and scope of the limitation of fundamental rights. In this case, the notification was issued three months after the state of emergency was invoked. The Commission held that even though the state of emergency itself may cause for certain delay and the extent and nature of the emergency may only gradually become apparent, in this case the reasonable period of time was exceeded. Although the Commission did not proceed to declare the recourse to Article 15 ECHR inadmissible for failing to submit the notification within a due period, it emphasized that it did not exclude the possibility that “a failure to comply with paragraph 3 of Article 15 [may] attract the sanction of nullity or some other sanction.”²²

Later, in *Lawless v. Ireland* (1959), the Commission stated that the notification to the Secretary General should be issued “without unavoidable delay”.²³ Subsequently, in the case of *Denmark and others v. Greece* (1969), the Commission held that a failure to meet the requirements listed in paragraph 3, for example by issuing a notification lacking a description of the emergency measures and the Constitution on which these measures were based, could not be repaired by submitting such information during the judicial proceedings.²⁴ Finally, the Commission considered in the case of *Cyprus v. Turkey* (1975)²⁵ that Turkey, which had neither officially proclaimed the state of emergency nor issued an official notification to

²² ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 158.

²³ ECmHR, *Lawless v. Ireland*, Appl. No. 332/57, 19 December 1959, Report of the Commission, § 80.

²⁴ ECmHR, *Denmark and others v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 5 November 1969, Report of the Commission, § 45.

²⁵ See further V. Coufoudakis, ‘Cyprus and the European Convention on Human Rights: The Law and Politics of Cyprus v. Turkey, Applications 6780/74 and 6950/75’, Vol. 4 *Human Rights Quarterly* 1982, pp. 450-473.

the Secretary General, could not rely on Article 15 ECHR with respect to the invaded territory of Cyprus.²⁶

In conclusion, the early case law provides further details on the notification requirement by specifying that the notification must be issued without unavoidable delay, that the emergency measures and the constitution on which they are based should be incorporated in the notification and that recourse to Article 15 ECHR will be denied when a State has not officially proclaimed a state of emergency nor informed the Secretary General thereof. However, in subsequent case law, the Commission and the Court deviated from this strict line.

Already in *Lawless v. Ireland* (1961), the Court altered the order in which it discussed the different requirements listed in Article 15 ECHR and assessed the notification requirement not before the substantive requirements of paragraph 1, but afterwards. This implies that a substantive review of the emergency measures can take place, even without having ascertained that the notification requirement was met. Furthermore, the Court stated that the notification to the Secretary General is not subjected to any formal or textual criteria. Finally, the notification issued by the Irish Government merely stated that the emergency measures were necessary “to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution”. The Court accepted this marginal explanation and held that it sufficiently enabled the Court to assess the reason, the nature and the impact of the emergency measures in place.

In the case of *Ireland v. UK* (1978), the Court no longer substantively assessed whether the government had fulfilled the notification requirement, but merely stated that “the British notices of derogation...fulfilled the requirements of Article 15 para. 3”²⁷ and in the case *Brannigan and McBride v. UK* (1993), the Court accepted the notification by the British Government in which it only temporarily invoked Article 15 and in which it stated that it had not yet formed a “firm and final view” regarding the reasons for and necessity of the emergency measures.²⁸

²⁶ ECmHR, *Cyprus v. Turkey*, Appl. Nos. 6780/74 & 6950/75, 26 May 1975, Decision as to the admissibility, § 527-528.

²⁷ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 223.

²⁸ ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 54.

Interestingly, the latter case regarded the same emergency measures as in the case of *Brogan and others v. UK* (1988) five years earlier, in which the government had not invoked the state of emergency and subsequently, the derogation from certain liberties protected by the ECHR was qualified by the ECtHR as a violation. Instead of revoking these measures, the British Government decided to leave them intact and legitimize them by relying on the state of emergency. Consequently, there was a huge delay in the notification of the emergency measures to the Secretary General. Nevertheless, the Court ruled that the notification in 1988 regarding measures which entered into force in 1974 did not exceed the reasonable period of time, since they were qualified as emergency measures only later on.²⁹

From these cases onward, the notification requirement is seldom, if ever, discussed. In the cases of *Aksoy v. Turkey* (1996), *Demir and others v. Turkey* (1998), *Nuray Sen v. Turkey* (2003), *Elci v. Turkey* (2004), *Ozkan v. Turkey* (2004), *Belin v. Turkey* (2006) — all cases in which the state of emergency was invoked by Turkey to combat the Kurdish separatist group PKK in the south-east of the country³⁰ — and of *A. and others v. UK* (2009), the notification requirement is not discussed by the Court since it already denied the claim of the state of emergency on basis of the substantial requirements embodied in paragraph 1 of Article 15. For example, in *Aksoy v. Turkey* (1996) the Court ruled:

The Court is competent to examine...in particular whether the Turkish notice of derogation contained sufficient information about the measure in question, which allowed the applicant to be detained for at least fourteen days without judicial control, to satisfy the requirements of Article 15 para. 3. However, in view of its finding that the impugned measure was not strictly required by the exigencies of the situation... the Court finds it unnecessary to rule on this matter.³¹

It again appears that the notification requirement is not a pre-condition for invoking the substantive parts of Article 15. Rather, it seems to function as a mere formality.

Perhaps even more illustrative are the Court's rulings in *Sakik and others v. Turkey* (1997), *Sadak v. Turkey* (2004), *Yurttas v. Turkey* (2004) and *Yaman v. Turkey* (2005) and that of the Commission in

²⁹ *Id.*, § 56.

³⁰ C. Buckley, 'The European Convention on Human Rights and the Right to Life in Turkey', Vol. 1 *Human Rights Law Review* 2001, pp. 35-65.

³¹ ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, 18 December 1996, Judgment, § 86.

Simsek v. Turkey (1999): all cases in which the Turkish Government had proclaimed the state of emergency in the “Kurdish provinces” in the south-east of the country, but went on to rely on the emergency measures in other parts of the country as well. The Court held that Turkey could not rely on Article 15 ECHR, but not because it did not satisfy the notification requirement since it had not indicated the correct territory on which the state of emergency was applicable. Instead, the Court did so because it found that the use of emergency measures in areas where there was, according to the notification, no state of emergency was not “strictly required”, a condition embodied in paragraph 1 of Article 15 ECHR.

For example, in *Sakik and others v. Turkey* (1997) the Court held:

It should be noted, however, that Article 15 authorises derogations from the obligations arising from the Convention only “to the extent strictly required by the exigencies of the situation”. In the present case the Court would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation. It follows that the derogation in question is inapplicable *ratione loci* to the facts of the case.³²

It is clear in these cases that the Court no longer treats the notification requirement as a pre-condition before assessing the substantive requirements of paragraph 1, nor does it emphasize the criteria formulated in its early case law. It seems like the notification requirement has lost most if not all of its importance in the most recent decisions.³³

4. Derogation

In the second paragraph of both articles in the ICCPR and the ECHR there is a list of rights which in no event may be curbed. These rights are considered as absolute minimum freedoms to which even in times of emergency no exception can be made.³⁴ In the ECHR, these are the right to life (except in respect of deaths resulting from lawful acts of war), the prohibition on torture and slavery and the *nulla poena sine*

³² ECtHR, *Sakik and others v. Turkey*, Appl. Nos. 23878/94-23883/94, 26 November 1997, Judgment, § 39.

³³ By contrast, Loof argues that the Court accepts a strict line as he does not see the Court’s judgment as an interpretation of the criterion of necessity in paragraph 1, but (also) of the notification requirement. J. P. Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden?* (Nijmegen, Wolf Legal Publishers, 2005), p. 625.

³⁴ Bossuyt, *supra* note 3, p. 91.

lege principle.³⁵ In addition, the ICCPR recognizes a number of other rights which may not be waived during an emergency; these are the right to recognition by the law and to freedom of thought, conscience and religion. It also refers to Article 11 ICCPR which states that no one “shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”. The idea of the non-derogable rights or *nodstandfeste Rechte* came up after the Second World War and is also the logic behind the so-called *Ewigkeitsklausel* in the German Constitution.³⁶

As a consequence of Article 15 paragraph 2 ECHR, there is a tripartite division in the ECHR protected rights.³⁷ There are rights which are non-derogable, namely the right to life (except for lawful acts of war), the prohibition of torture and of slavery and the *nulla poena sine lege* principle.³⁸ There are rights which may be waived in emergencies only, such as the prohibition on forced labour, the right to liberty and security, the right to a fair trial and the right to an effective remedy. Finally there are those rights which, under certain conditions listed in the second paragraph of those articles, may be limited in normal circumstance and may be even further curtailed during times of emergency, such as the right to privacy, the freedom of thought, conscience and religion, the freedom of expression and the right to assembly and association.³⁹

In the case law of the Commission and the Court, this tripartite classification has spurred the question of which approach they should take in discussing Article 15 ECHR: either first determine whether a violation of a fundamental right has occurred, which may or may not be justified under the limitation clause embodied in the second paragraph of that article, and then assess whether an infringement might be justified by the state of emergency, or, in a more holistic approach, having found that an emergency situation exists, assess these questions all together.

³⁵ Initially, it was proposed to incorporate the right of petition. A.L. Svensson-McCarthy, ‘*The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*’ (Den Haag, Martinus Nijhoff Publishers 1998), p. 499.

³⁶ Grundgesetz für die Bundesrepublik Deutschland, Article 79(3), 8 May 1949.

³⁷ ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 319 and ECmHR, *Lawless v. Ireland*, Appl. No. 332/57, 19 December 1959, Report of the Commission, § 111.

³⁸ ECtHR, *G v. Germany*, Appl. No. 65210/09, 07 June 2012, Judgment, § 79 and ECtHR, *K v. Germany*, Appl. No. 61827/09, 07 June 2012, Judgment, § 88.

³⁹ See further R. Higgins, ‘Derogations Under Human Rights Treaties’, Vol. 48 *B.Y.I.L.* 1976, pp. 281-319.

In *Greece v. UK* (1958), the Commission opted explicitly for the latter approach “as the subjects are inter-related and the validity of a derogation may have an influence on most of the questions submitted for consideration by the commission, both de facto and de jure, it seemed preferable for the chapter on Article 15 to precede the chapters dealing with the particular measures denounced by the Greek Government.”⁴⁰ Along this line, the Commission in the case of *Denmark and others v. Greece* (1969), referred to the aforementioned consideration, and added: “The reason for this is that the invocation of Article 15 by the respondent Government has the character of a general defence under the Convention of acts done and measures adopted on and after 21st April, 1967, and may therefore properly be given priority.”⁴¹

Now and then, such reasoning reoccurs in the subsequent case law, as in the judgment of the Commission in *Simsek v. Turkey* (1999), in which it, before assessing the possible violation of treaty rights, first discussed the “preliminary objection under Article 15”.⁴² The Court also applied this approach in *Brogan and others v. UK* (1988), when it assessed the applicability of Article 15 in its ‘General Approach’ at the beginning of its decision.⁴³ Finally, this line of reasoning may also be found in *Sakik and others v. Turkey* (1997), where the Court held that since the Turkish Government relied on the state of emergency it “must accordingly first determine whether the derogation concerned applies to the facts of the case”.⁴⁴

In contrast to this original approach there are some cases in which the applicability of Article 15 is discussed only at the very end of the decision, namely the Commission in *Lawless v. Ireland* (1959) and *Brannigan and McBride v. UK* (1991) and the Court in *Lawless v. Ireland* (1961) and *Kármán v. Hungary* (2006).⁴⁵

However, most commonly the possible recourse to Article 15

⁴⁰ ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 93.

⁴¹ ECmHR, *Denmark and others v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 5 November 1969, Report of the Commission, § 15.

⁴² ECmHR, *Şimşek v. Turkey*, Appl. No. 28010/95, 1 March 1999, Report of the Commission, § 48.

⁴³ ECtHR, *Brogan and others v. the United Kingdom*, Appl. Nos. 11209/84, 11234/84, 11266/84 & 11386/85, 29 November 1988, Judgment, § 48.

⁴⁴ ECtHR, *Sakik and others v. Turkey*, Appl. Nos. 23878/94-23883/94, 26 November 1997, Judgment, § 33.

⁴⁵ ECtHR, *Kármán v. Hungary*, Appl. Nos. 6444/02 & 26579/04, 22 November 2005, Judgment.

is discussed in direct relation to the infringement of a specific convention right. Sometimes, the Commission and the Court discuss the applicability of Article 15 prior to assessing the infringement of the specific, underlying fundamental right, as in the cases of the Court in *Sadak v. Turkey* (2004), *Yurttas v. Turkey* (2004), *Yaman v. Turkey* (2005) and *Bilin v. Turkey* (2006). More commonly, it is discussed only after an assessment has been made of the possible infringement of a specific fundamental right and the possible legitimation under limitation clauses of the article concerned, as in cases before the Commission in *Ireland v. UK* (1978) and *Aksoy v. Turkey* (1995) and the Court in *Brannigan and McBride v. UK* (1993), *Aksoy v. Turkey* (1996), *Demir and others v. Turkey* (1998), *Nuray Sen v. Turkey* (2003), *Ozkan v. Turkey* (2004), *Elci v. Turkey* (2004) and *A. and others v. UK* (2009).

Besides the fact that some consistency in the approach might be desirable, the latter and most frequent approach is diametrically opposed to the original one of the Commission. Initially, a general description of facts and circumstances of the case was presented and the legitimacy of a possible derogation from fundamental rights was addressed in a general assessment. In contrast, under this new approach, only after an infringement has already been established, does the Court assess whether derogation might be legitimized under Article 15 ECHR.⁴⁶ Moreover, this approach marginalizes the importance of the doctrine of martial law,⁴⁷ since if no breach was found, or if it was concluded that the limitation could be legitimized under the limitation clause of a specific article, no discussion of the emergency situation takes place. Furthermore, on several occasions, both the Commission and the Court have declared that the breach of one of the convention rights was so serious that it could under no circumstances be repaired by relying on Article 15, so that a detailed assessment of this doctrine was dismissed.

5. The Requirements of Paragraph 1: Conformity, Necessity and Emergency

It has been discussed how the margin of appreciation, the notification requirement and the possibility of derogation from fundamental rights

⁴⁶ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Separate Opinion of Judge Fitzmaurice.

⁴⁷ It should be noted that this approach becomes very complex if, as has happened several times, not only Article 15 is invoked, but Articles 17 and 18 are also relied upon.

have been interpreted in the case law. This final section will discuss the three requirements listed in paragraph 1 of Article 15 ECHR. First, the requirement of conformity which holds that emergency measures should not be inconsistent with obligations under international law, secondly, the requirement of necessity, which holds that these measures must be strictly required by the exigencies of the situation and finally the requirement of an existing emergency, which embodies the condition that there must exist a war or other public emergency threatening the life of the nation.⁴⁸

5.1. The Conformity Requirement

The requirement that the emergency measures be in conformity with the obligations under international law is found both in the ECHR and in the ICCPR. This refers to generally recognized rules of international law⁴⁹ as contained in the Hague and Geneva Conventions on the law of armed conflict and (other) UN conventions on human rights, rights of minors, torture and genocide and possibly to the text of the Paris Minimum Standards of Human Rights Norms in a State of Emergency.⁵⁰ The reason for including such a requirement is securing a minimum standard of fundamental freedoms, even in times when Article 15 can be invoked successfully.

The most interesting fact about the case law on this point is its absence. Only one case — that of *Lawless v. Ireland* (1961) — seems to assess this condition in depth, though only on first sight as the Court mistakenly discussed the notification requirement of paragraph 3 under the heading: “As to whether the Measures derogating from obligations under the Convention were ‘inconsistent with ... other obligations under international law’”.⁵¹ In the remainder of the case law, the conformity requirement is seldom discussed. If it is briefly mentioned, it is only to conclude that there is nothing to suggest that the State

⁴⁸ Remarkably, the case law sometimes takes into account the requirements of necessity and proportionality when assessing the question whether there exists a public emergency threatening the life of the nation.

⁴⁹ See also Article 35 ECHR.

⁵⁰ The Paris Minimum Standards were adopted at 61st Conference of the International Law Association, held in Paris from August 26 to September 1, 1984, by the International Law Association (ILA). For the text and comments see S.R. Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London, Pinter Publishers, 1989) and R.B. Lillich, ‘The Paris Minimum Standards of Human Rights Norms in a State of Emergency’, Vol. 79 *A.J.I.L.* 1985, pp. 1072-1081.

⁵¹ ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 39.

invoking Article 15 disregarded its obligations in this respect, as held by the Commission in *Greece v. UK* (1958) and *Ireland v. UK* (1978) and the Court in *Ireland v. UK* (1978). Sometimes, an analysis of the conformity requirement is disregarded in total since invoking Article 15 was already rejected on the ground of one of the other requirements, such as by the Commission in *Denmark and others v. Greece* (1969). Finally, in *Lawless v. Ireland* (1959), the Commission referred to the international obligations not to reject or restrict the recourse to Article 15, as was the purpose of the conformity principle, but to allow it. This because the Commission felt that Ireland was under the international obligation to safeguard the territorial integrity of other countries, in this case that of Britain, against the extraterritorial activities of the IRA, and could only do so by relying on emergency measures.

It is thus apparent that the conformity requirement plays a very marginal role. The only development which can be (cautiously) drawn from the case law is that the reference to international obligations was initially rather broad, including among others the Hague and Geneva Conventions,⁵² while later on, references were more and more limited to the ICCPR, more specifically, Article 4 of the covenant.⁵³ Illustrative in this respect is the matter of *Marshall v. UK* (2001), where the Court declared the case inadmissible. The applicant alleged that the British Government had violated the conformity requirement, and referred not only to those obligations embodied in Article 4 ICCPR and the jurisprudence of the UN Human Rights Committee, but also to “the evolving view of the Inter-American Court in this area and to the adoption of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, which have received the approval of the International Law Association.” The Court, however, rejected the complaint since it found

nothing in the applicant’s reference to the observations of the United Nations Human Rights Committee to suggest that the Government must be considered to be in breach of their obligations under the International

⁵² ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 147. See also ECmHR, *Cyprus v. Turkey*, Appl. Nos. 6780/74 & 6950/75, 26 May 1975, Decision as to the admissibility, § 527/528.

⁵³ See also L.E. Pettiti, E. Decaux & P.H. Imbert (eds.), *La Convention européenne des droits de l’homme: commentaire article par article* (Paris, Economica, 1995), p. 497; G. Cohen-Jonathan, ‘*La Convention Européenne des Droits de l’Homme*’, (Aix-en-Provence, Economica, 1989), p. 561 and P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention of Human Rights* (Den Haag, Kluwer Law International, 1998), p. 57.

Covenant on Civil and Political Rights by maintaining their derogation after 1995. On that account the applicant cannot maintain that the continuance in force of the derogation was incompatible with the authorities' obligations under international law.⁵⁴

The Court focused solely on Article 4 ICCPR and ignored the other documents and jurisprudence referred to by the complainant.

Likewise, in the only case in which the conformity requirement was discussed in substance⁵⁵ — that of *Brannigan and McBride v. UK* (1993) — only Article 4 ICCPR was taken into account, more specifically the requirement that the state of emergency must be proclaimed officially, which, as mentioned earlier, is not included in the ECHR. The Court took a very reserved position in this matter and argued that “it is not its role to seek to define authoritatively the meaning of the terms ‘officially proclaimed’ in Article 4 of the Covenant”⁵⁶ and went as far as to accept the argument by the Government that it had officially proclaimed the state of emergency through a statement by the Minister of Home Affairs to the House of Commons.

The question remains whether the conformity requirement represents any value at all since it is barely referred to in case law and its relevance seems to be limited to those conditions mentioned in Article 4 ICCPR, and even with regard to that article, it remains to be seen what role the conformity requirement could play. It is far from logical to include the non-derogable rights mentioned in paragraph 2 of Article 4 ICCPR, but not in the ECHR, by invoking the conformity requirement, since the drafters of the ECHR explicitly opted for an exhaustive enumeration of these rights.⁵⁷ With respect to the notification requirement, those conditions contained in the ICCPR but not the ECHR have never been referred to by relying on the conformity principle. Moreover, as discussed, the requirement of official proclamation of the state of emergency is taken into account only marginally by the Court. Finally, the case law of the UN Human Rights Committee, from which it is clear that emergency measures may only be invoked in exceptional

⁵⁴ ECtHR, *Marshall v. the United Kingdom*, Appl. No. 41571/98, 10 July 2001, Decision as to the admissibility.

⁵⁵ See also A. Mokhtar, ‘Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights’, Vol. 8 *The International Journal of Human Rights* 2004, pp. 65-87.

⁵⁶ ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 72.

⁵⁷ See the travaux préparatoires of Article 15 ECHR available at [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART15-CDH\(77\)5-BIL1338902.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART15-CDH(77)5-BIL1338902.pdf)

circumstances, was discussed by the ECtHR in the case *A. and others v. UK* (2009), only to find that this requirement did not apply to Article 15 ECHR.⁵⁸

Another suggestion might be that the conformity principle refers to the standards under international humanitarian law.⁵⁹ In the pending case of *Georgia v. Russia* (2011),⁶⁰ the Court found admissible a complaint regarding presumed indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, which resulted in, among other consequences, hundreds of civilians being injured, killed, detained or missing. Georgia had argued, *inter alia*, that Russia violated principles under the standards of international humanitarian law, while Russia argued that the ECHR did not, *ratione materiae*, provide protection for these standards and therefore the complaint before the Court should be found inadmissible. The Court, however, referred, among others, to the conformity principle under Article 15 ECHR and did not reject the claim of Georgia, but decided to join this complaint with the merits of the case; consequently, it is possible that in the future, the conformity principle might provide protection for some standards of international humanitarian law. Still, it should be stressed that the Court did not decide that the conformity principle should be interpreted in such a manner, only that this question should be part of the substantive decision, and that so far, international humanitarian law hasn't played any significant role in relation to Article 15 ECHR.

Finally, possible relevance of the conformity requirement could lie in the prohibition on discrimination explicitly included in Article 4 ICCPR. The ECHR recognizes this as a separate obligation in Article 14, but this article may possibly be waived by invoking Article 15. Article 4 ICCPR states that emergency measures may only be taken "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." This condition was included against the background of the discriminatory laws and measures adopted in various countries during

⁵⁸ ECtHR (Grand Chamber), *A. and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, Judgment, § 178

⁵⁹ See also ECtHR (Grand Chamber), *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08, 07 July 2011, Judgment.

⁶⁰ ECtHR, *Georgia v. Russia*, Appl. No. 38263/08, 13 December 2011, Decision as to the admissibility.

World War II, most prominently those taken by the US Government in the aftermath of the attack on Pearl Harbor including rules on the deportation and internment of Japanese residents and descendants.⁶¹

However, in the case law this condition has been of no relevance. In *Denmark and others v. Greece* (1969), the Commission considered that the measures by the revolutionary government, that had just come to power, against communist parties and organizations, who allegedly planned a coup, were in conflict with Article 14 ECHR,⁶² and in *Cyprus v. Turkey* (1976), in which the Turkish Government imposed specific measures on the invaded territory of Cyprus against the Greek Cypriot, the Commission established a violation of Article 14.⁶³ However, in neither of those cases, was the question addressed whether such a breach could be justified by invoking Article 15, since an appeal on the latter article was rejected. In *Ireland v. UK* (1978), the Court referred to its marginal role in considering whether the policy of the British Government to act almost exclusively against the IRA and not against other active terrorist organizations, which were sympathetic to British domination, was in violation of Article 14.⁶⁴ In *Yaman v. Turkey* (2005), the Court did not investigate in substance whether the Turkish Government discriminated against the Turkish-Kurdish⁶⁵ and in *A. and others v. UK* (2009), the Court held that anti-terrorism measures discriminated against foreigners and as such were in violation of Article 5, making an assessment of a possible conflict with Article 14 unnecessary.⁶⁶ In conclusion, like the other obligations under international law, the anti-discrimination provision under Article 4 ICCPR is of no relevance in the case law of the ECtHR. Thus, to date the conformity principle has been of almost no relevance.

5.2. The Necessity Requirement

Emergency measures should be strictly required by the exigencies of the situation. Five distinct conditions have been derived from

⁶¹ See also *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶² ECmHR, *Denmark and others v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 5 November 1969, Report of the Commission, § 274.

⁶³ ECmHR, *Cyprus v. Turkey*, Appl. Nos. 6780/74 & 6950/75, 26 May 1975, Decision as to the admissibility, § 503.

⁶⁴ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, §§ 229, 235. See also Separate Opinion of Judge O'Donoghue and Separate Opinion of Judge Matscher.

⁶⁵ ECtHR, *Yaman v. Turkey*, Appl. No. 32446/96, 2 November 2005, Judgment, § 88.

⁶⁶ ECtHR (Grand Chamber), *A. and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, Judgment, § 192.

this principle in the case law, which primarily refers to the possible violation of Articles 5 and 6 ECHR as most emergency measures regard the internment or detention of persons, limiting their rights to access to and a speedy arraignment for a judge, legal representation and similar rights.⁶⁷ First, the measures must be necessary in the sense that the normal measures and competences are insufficient to master the emergency.⁶⁸ Secondly, the measures must be proportionate. For example, the time a person is held in prison without trial should be proportional to the severity of the emergency. Thirdly, the subsidiarity requirement must be met, for example, by taking into account the alternative of installing special (war) courts. Fourthly, measures should be effective, and finally, there must be a causal relationship between the emergency and emergency measures.⁶⁹

As it was already explained how the condition that the measures should be “strictly required” has been gradually transformed into a “wide margin of appreciation” for the national authorities and a similar trend may be detected with regard to the five sub-conditions, to avoid overlap, only a few of the most poignant examples of this trend will be presented. Although the necessity requirement seems to be the only one which is of some importance in the Court’s case law, even this requirement has been interpreted very broadly.⁷⁰

The condition of causality was addressed in *Brannigan and McBride v. UK* (1993), a case that regarded the measures found to be infringing on fundamental rights in *Brogan and others v. UK* (1988). In the latter case, the United Kingdom had not relied on Article 15 and argued that these measures would be legitimate as the ECHR also allows for limitation of fundamental rights in ordinary circumstances. When the Court did not follow its line of reasoning, the government did not revoke these measures, but instead went on to proclaim the state of emergency

⁶⁷ F. Bruscoli, ‘The Rights of Individuals in Times of Armed Conflict’, Vol. 6 *The International Journal of Human Rights* 2002, pp. 45-60; A. De Zayas, ‘Human Rights and Indefinite Detention’, No. 857 *I.R.R.C./R.I.C.R.* 2005, pp. 15-38; R. Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism’, Vol. 68 *The Modern Law Review* 2005, pp. 655-668 and S. Stavros, ‘The Right to a Fair Trial in Emergency Situations’, Vol. 41 *I.C.L.Q.* 1992, pp. 343-365.

⁶⁸ See also ECtHR, *De Becker v. Belgium*, Appl. No. 214/56, 27 March 1962, Judgment.

⁶⁹ “Required by”, which suggests a causal relation, was explicitly added to the draft of Article 15 ECHR.

⁷⁰ See also ECtHR, *Bilen v. Turkey*, Appl. No. 34482/97, 21 February 2006, Judgment.

one month after the Brogan decision. This led the complainants in Brannigan and McBride to think, and not without reason, that the UK had not determined a state of emergency and subsequently adopted specific emergency measures to combat the situation, but the other way around: that the measures had been adopted and subsequently, in order to maintain them, the state of emergency had been declared. Surprisingly, the Court devoted no attention to this argument and merely suggested that it would follow the British Government in this respect.⁷¹

In the same case, the conditions of subsidiarity and necessity were discussed. Within one month after the Brogan case, the British Government notified the Secretary General that it wanted to derogate from Article 5 ECHR, but that it had not yet reached a “firm and final view” on this matter and wished to further investigate whether reasonable alternatives were available. While nothing suggested that the government had indeed conducted such further research, but rather decided to defend the legitimacy of the emergency measures before the Court, the Court held that this approach fell within the margin of appreciation of the State, even although Article 15 leaves no room for such ‘interim measures’.⁷² Moreover, the Court seemed to suggest that setting up special tribunals would not be a good alternative, as the British Government had little to no incriminating evidence against the detained, or did not wish to release it.

The required necessity of the emergency measures was also discussed. The British Government argued that the normal judicial process and the right of access to a judge by detainees could not be upheld since it had little incriminating evidence and because the British legal system allows the prosecutor not to disclose all evidence to the court. Should the normal judicial proceedings be followed, argued the Government, the judiciary would lose its credibility and its authority, since it would have to pass judgments on the basis of very little evidence. The complainants questioned whether bypassing judicial control on the basis of emergency measures would indeed benefit its credibility and authority, as the government seemed to believe, and ECtHR Judge Pettiti noted in his dissenting opinion that he found it difficult to believe “that the independence of a judge would be undermined

⁷¹ ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 51. See also Dissenting Opinion of Judge De Meyer.

⁷² *Id.*, Judgment, § 54.

because he took part in proceedings making it possible to grant or approve an extension of detention.”⁷³ Although these arguments do not seem entirely illogical, again, the Court paid no attention to them and followed the government, holding that the condition of necessity was met.

The condition of effectiveness was addressed in the case of *Ireland v. UK* (1978), where the complainants referred to the developments in Northern Ireland and claimed that the emergency measures “not only failed to put a brake on terrorism but also had the result of increasing it”. Without being clear what arguments the British Government had to deny this claim, the Court held:

It is certainly not the Court’s function to substitute for the British Government’s assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the measures adopted by that Government from 9 August 1971 onwards. For this purpose the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.⁷⁴

This is remarkable since the question whether measures are effective, proportionate and necessary forms part of the question whether they are “lawful”,⁷⁵ while the Court seemed to suggest that it should only assess the legality of the measures.

Finally, the question of compliance with the condition of proportionality, whether the derogations from Articles 5 and 6 are proportionate in light of the existing conditions, is answered with little consistency by the Commission and the Court⁷⁶ and sometimes, the Court is prepared to accept exceptionally far-reaching measures. For example, in *Ireland v. UK* (1978), measures by which persons who

⁷³ *Id.*, Dissenting Opinion of Judge Pettiti.

⁷⁴ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 214.

⁷⁵ See also Svensson-McCarthy, *supra* note 37, p. 600.

⁷⁶ ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 297; ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 38; ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 66; ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, 18 December 1996, Judgment, § 78 and ECtHR (Grand Chamber), *Demir and others v. Turkey*, Appl. Nos. 21380/93, 21381/93 & 21383/93, 23 September 1998, Judgment, § 57.

were not suspected of any offense could be detained for 48 hours and those suspected for a period of six months, while at the same time limiting extensively their rights to a fair trial, were not found in breach of the condition of proportionality.⁷⁷ The Court has moved in its case law from balancing the proportionality of the period of detention as such to instead increasingly emphasizing the existence of adequate safeguards, such as aid by a lawyer, access to a doctor and contact with relatives. Although it is already debatable that the period of detainment is no longer at the core of the Court's proportionality assessment, the aforementioned safeguards are not the only ones the Court is prepared to take into account. In *Lawless v. Ireland* (1961), the Irish Government had detained Lawless for a number of months. However, after a month, the government offered to release him on the condition that he would declare not to undertake further terrorist activities. While he initially refused, he accepted the same offer after it was proposed to him a few months later. The Court did not question whether after the first month it was still necessary to detain Lawless nor did it refer to the fact that Lawless' promise could hardly be accepted as a real guarantee against terrorist activities. Instead, it held that the offer was to be taken into account as a serious safeguard when assessing the legitimacy and the proportionality of the detainment.⁷⁸

The foregoing shows that not only, as already discussed in section two, has the requirement of 'strict necessity' gradually been interpreted to allow for a wide margin of appreciation by States, but also that the five sub-conditions of the necessity requirement are interpreted in a very broad manner and the Court has accepted rather far-reaching arguments by governments invoking the state of emergency. It should also be noted that both the Commission and the Court seem to refrain from a substantive assessment of the necessity and proportionality of emergency measures which were initially applied, but were later withdrawn or revised.⁷⁹ All in all, the necessity requirement does not serve as a big hurdle when nations invoke the state of emergency, although it should be remembered that the state of emergency invoked

⁷⁷ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 221. See also ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Dissenting Opinion of Judge Walsh.

⁷⁸ ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 38.

⁷⁹ ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, §§ 203-235. ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 220.

on territories not indicated in the notification to the Secretary General are rejected with a reference to the necessity requirement.

5.3. The Emergency Requirement

Finally, paragraph 1 of Article 15 ECHR holds that any High Contracting Party may take emergency measures in time of war or other public emergency threatening the life of the nation. Initially, the draft only contained reference to war, alluding first and foremost to a defensive war. However, it was not excluded by the drafters that under certain circumstances a “pre-emptive war” might also legitimize recourse to martial law.⁸⁰ In addition to war, there was also left some room for other “instances of extraordinary peril or crisis, not in time of war, when derogation from obligations assumed under a convention would become essential for the safety of the people and the existence of the nation”,⁸¹ such as an extreme natural disaster.⁸² Throughout the legislative history of both Article 4 ICCPR and Article 15 ECHR, the use of the emergency law in the interest of the people, not against it, is heavily emphasised. This must be interpreted against the background of the abuse of the doctrine by totalitarian regimes, such as in Nazi Germany. Finally, the drafters of the conventions emphasized, both with regard to war and to similar emergencies, that the emergency should be so severe “as to threaten the life of the nation as a whole.”⁸³

Given the emphasis on the “nation as a whole”, the interpretation of the word “nation” is of special relevance.⁸⁴ The wording of the ECHR: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures” seems to suggest a link between the High Contracting Party and the nation. The opposite was however the outcome of *Greece v. UK* (1958), which regarded the state of emergency proclaimed by Great Britain on the territory of Cyprus, which formed part of its kingdom, so as to suppress the Greek and Turkish Cypriot insurgents. Greece challenged the jurisdiction of the British Government to promulgate the state of emergency, since not the whole British Empire was in peril, but only a specific region. However, the Commission ruled that

⁸⁰ Bossuyt, *supra* note 3, p. 89.

⁸¹ *Id.*, p. 83.

⁸² *Id.*, p. 86.

⁸³ *Id.*

⁸⁴ See on this topic P. Ducheine, *Krijgsmacht, Geweldgebruik & Terreurbestrijding: Een onderzoek naar juridische aspecten van derol van strijdkrachtenbij debestrijding van terrorisme*, (Nijmegen, Wolf Legal Publishers, 2008), pp. 383-442.

The term “nation” means the people and its institutions, even in a non-self-governing territory, or in other words, the organised society, including the authorities responsible both under domestic and international law for the maintenance of law and order’ and suggested that an empire existing of multiple countries may legitimately invoke the state of emergency on one of its countries, since it could otherwise not effectively respond to ‘an attempt to overthrow by force the established Government of the territory.’⁸⁵

This interpretation is remarkable since the Commission seems in fact to license colonial regimes to invoke the state of emergency to suppress the desire for self-determination and autonomy of the indigenous population by overthrowing the suppressers.⁸⁶ That such use of martial law is by no means fictitious is evident from the fact that Britain relied on Article 15 not only with regard to the territory of Cyprus, but also with regard to Singapore, Kenya, British Guinea, Rhodesia, Zanzibar, Mauritius, Aden, Malaya and Nysaland and martial law was deployed by France with regard to New Caledonia.⁸⁷ If ‘nation’ connotes not the whole empire, but only a region, consequently, the gravity of the danger and the necessity of the emergency measures must be assessed on a regional basis as well. If this is true, it is highly questionable whether it is in the interest of the rebelling indigenous population, an interest which must then also be assessed on a regional basis, to limit their rights and freedoms by invoking the state of necessity. This is in contrast with the specific focus on the interest of the people by the drafters of the ECHR and ICCPR.

Moreover, it appears from the case law regarding the situation in Northern Ireland that not only revolt in a colony may be seen as a threat to the “nation as a whole”, but that conflict in a specific sub-region of a country may also be sufficient. Although the interpretation of threat to the “nation as a whole” was discussed in substance by the Court in *Lawless v. Ireland* (1961),⁸⁸ in *Ireland v. UK* (1978) it merely stated that it was “perfectly clear” that the life of the whole of Great Britain was in danger⁸⁹ and in *Brannigan and McBride v. UK* (1993), the Court referred briefly to “the extent and impact of terrorist

⁸⁵ ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Report of the Commission, § 130.

⁸⁶ See ECmHR, *Greece v. the United Kingdom*, Appl. No. 176/56, 26 September 1958, Dissenting Opinion of Judge Eustathiades, § 139.

⁸⁷ Svensson-McCarthy, *supra* note 37, pp. 699-700.

⁸⁸ ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 28.

⁸⁹ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, 18 January 1978, Judgment, § 205. See Separate Opinion of Judge O’Donoghue.

violence in Northern Ireland and elsewhere in the United Kingdom” and concluded that Great Britain was indeed in danger.⁹⁰ It ignored the question by Judge Walsh whether “the island of Great Britain, is threatened by ‘the war or public emergency in Northern Ireland’, which is separated by sea from Great Britain and of which it does not form a part.”⁹¹

In the Turkish cases, this line was continued so that both the Commission (1995) and the Court (1996) in the case *Aksoy*, apparently without seeing a contradiction in terms, held respectively that “There is no serious dispute between the parties as to the existence of a public emergency in South-East Turkey threatening the life of the nation”,⁹² and that “The Court considers, in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation’.”⁹³ Such statements were also made in subsequent case law.

Finally, there are some reasons to believe that it would be possible to invoke Article 15 ECHR with reference to extraterritorial derogations, in case of a State’s forces engaged in operations abroad.⁹⁴ This could be derived from *Al-Jedda v. UK (2011)*, which regarded, among others, the internment of an Iraqi civilian by British forces for more than three years in a detention center in Iraq, run by British forces. In this case, the Court did not reject outright the possibility that the state of emergency could be invoked in these circumstances by the British Government.⁹⁵ This has led commentators to believe that, although

the wording of Article 15 para. 1 ECHR refers to the life of the nation seeking to derogate, it is not so strictly formulated that it could not allow for a more dynamic interpretation, so to include unstable foreign territories where the Member State in question would operate. Correspondingly, the Court [in *Al-Jedda*] seems to have assumed in

⁹⁰ ECtHR, *Brannigan and McBride v. the United Kingdom*, Appl. Nos. 14553/89 & 14554/89, 25 May 1993, Judgment, § 47.

⁹¹ *Id.*, Dissenting Opinion of Judge Walsh.

⁹² ECmHR, *Aksoy v. Turkey*, Appl. No. 21987/93, 23 October 1995, Report of the Commission, § 179.

⁹³ ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, 18 December 1996, Judgment, § 70.

⁹⁴ See also ECtHR (Grand Chamber), *Bankovic and others v. Belgium and others*, Appl. no. 52207/99, 12 December 2001, Decision as to the admissibility.

⁹⁵ ECtHR (Grand Chamber), *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08, 07 July 2011, Judgment, § 100.

its decision that a derogation of the United Kingdom in relation to Iraq was indeed conceivable. In this respect, a State could lawfully derogate from the Convention in case of an exceptional situation of crisis which affects the whole population and constitutes a threat to the organized life of the community in which a Member State conducts a military operation. In principle, only the interpretation of the “nation” concept would have to be broadened.⁹⁶

It remains to be seen whether such extra-territorial derogations and a recourse to Article 15 ECHR will in fact be accepted by the ECtHR, but if it is, this would mean that the invaded territory under control of a Member State would be included in the concept of “nation” and that an emergency situation on that specific territory would be enough to satisfy the criterion of an emergency threatening the life of the nation as a whole.⁹⁷

In addition to the fact that not the life of the entire nation needs to be endangered during the crisis, a shift can be observed in the interpretation of the required gravity of the emergency. While the drafters of both conventions primarily had in mind the case of a defensive war, in the matters before the European Court and the Commission, there was only one instance that regarded a war, though this was a war of aggression in which Turkey invaded Cyprus. In the early jurisprudence, the cases did however concern grave threats. In *Greece v. UK* (1958), the British ruler and his institutions were threatened on their territory of Cyprus, in *Lawless v. Ireland* both the Commission (1959) and the Court (1961) accepted the existence of a state of emergency because the extraterritorial activities of the IRA potentially could give rise to

⁹⁶ H. Krieger, ‘After *Al-Jedda*: Detention, Derogation, and an Enduring Dilemma’, Vol. 50 *Military Law and the Law of War Review* 2011, p. 436. See also F. Naert, ‘Comments on: The Application of Human Rights Law in Peace Operations on the presentation and paper by Kjetil Mujezinović Larsen’, in S. Horvat & M. Benatar (eds.), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multination Deployments* (Brussels, 2013, Congress Proceedings published in Vol. 19 *Recueils of the International Society for Military Law and the Law of War*), p. 341.

⁹⁷ See further on this topic F. Naert, ‘The European Court of Human Rights’ *Al-Jedda* and *Al-Skeini* Judgments: an Introduction and Some Reflections’, Vol. 50 *Military Law and the Law of War Review* 2011, pp. 315-320 and A.-M. Baldovin, ‘Impact de la jurisprudence récente de la Cour européenne des droits de l’Homme sur la planification et l’exécution des opérations militaires à venir: Application extraterritoriale de la Convention, imputabilité des faits des troupes et fragmentation du droit international’, Vol. 50 *Military Law and the Law of War Review* 2011, pp. 369-418.

a war⁹⁸ and *Denmark and others v. Greece* (1969) concerned a newly formed revolutionary government that invoked martial law to limit the activities of the communist organizations who wanted to overthrow it. This gradually shifted to the cases in Northern Ireland (Ireland and Brannigan and McBride) and Turkey (Aksoy, Sakik, Demir, Simsek, Nuray Sen, Sadak, Yurttas, Ozkan, Elci, Yaman and Bilin) in which martial law was applied to combat separatist movements (the IRA and the PKK) that were fighting for (the right to) self-determination, secession and/or autonomy of a specific religious or ethnic group in a specific sub-region of the country. This accumulated in the most recent case before the court (A. and others), which regarded the use of emergency measures in order to avert the possible attacks of a foreign terrorist organization (al-Qaeda), which does not aim to overthrow the government nor achieve secession of a region, but only wants to sow fear by occasional attacks. In conclusion, there has been a rather large shift in the nature of the emergency in the cases regarding Article 15 ECHR.

In all cases but one, the Court and the Commission accepted that there was a public emergency which threatened the existence of the nation, the exception being the case of *Denmark and others v. Greece* (1969). In this case, the Commission found that there was a fragile, newly formed, revolutionary government, and there were a number of organizations and a substantive part of the population that wanted to overthrow the government. Thereto, illegal organizations were founded, illegal activities deployed, critical infrastructure sabotaged, shooting incidents took place and, reportedly, some 100 actual or attempted bomb incidents had been committed in a period of two years, with multiple injuries and deaths as a result. Yet, the Commission held that “[it] does not find, on the evidence before it, that either factor is beyond the control of the public authorities using normal measures, or that they are on a scale threatening the organised life of the country”.⁹⁹

If one compares this case with that of *A. and others v. UK* (2009), where the British Government had enacted emergency measures in the aftermath of 9/11 even before any incident had occurred on its territory, a change may be noted. In this case, the Court accepted that

⁹⁸ ECmHR, *Lawless v. Ireland*, Appl. No. 332/57, 19 December 1959, Report of the Commission, § 90 and ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 28.

⁹⁹ ECmHR, *Denmark and others v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 5 November 1969, Report of the Commission, § 143.

a threat to the survival of the nation as a whole existed and referred to the opinion of Lord Hoffman who noted in the national procedure that “[t]errorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”¹⁰⁰ The Court noted: “However, the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the ‘nation’ and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.”¹⁰¹ Although there is no doubt that a terrorist attack may have a major impact on a city and even a country as a whole, it can be disputed whether such a catastrophe indeed threatens the life and existence of the nation as a whole.¹⁰²

This most recent decision by the Court not only shifts the nature of the emergency necessitating recourse to emergency measures, but also shifts the role the state of emergency could play in modern society. In a war, the extent and nature of the danger is clear and immediate; the Court has held in *Lawless v. Ireland* (1961), a position which it later repeatedly confirmed, that the emergency must regard a “danger exceptionnel et imminent”.¹⁰³ However, with regard to separatist movements who apply terrorist strategies and especially to terrorist organization like al-Qaeda, it will be less evident how imminent the danger really is. The essence of terrorism lies in its elusiveness and unpredictability, not in the actual danger or the frequency of the attacks. Al-Qaeda has engaged in only two major attacks in Europe since 9/11, namely in Madrid and London. Given this fact, it is questionable whether the state of emergency was meant for such kind of threats. It is noteworthy that the Court in *A. and others v. UK* (2009) held that the

¹⁰⁰ ECtHR (Grand Chamber), *A. and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, Judgment, § 96.

¹⁰¹ *Id.*, § 179.

¹⁰² See further *Guidelines on Human Rights and the Fight Against Terrorism*, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002 at the 804th meeting of the Ministers’ Deputies; R. Smith, ‘The Margin of Appreciation and Human Rights Protection in the “War on Terror”: Have the Rules Changed Before the European Court of Human Rights?’, Vol. 8 *Essex Human Rights Review* 2011, pp. 124-153 and K. Dorling, ‘A Comparative Assessment of Anti-Terrorism Arrest and Detention Powers in the UK and Spain and of their Compliance with the European Convention on Human Rights’, Vol. 4 *Essex Human Rights Review* 2007, pp. 1-17.

¹⁰³ ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, 1 July 1961, Judgment, § 28 (the authentic French text is cited as the English translation of it is poor).

British Government was right, in respect to al-Qaeda, “for fearing that such an attack was ‘imminent’, in that an atrocity might be committed without warning at any time.”¹⁰⁴ How the terms “imminent” and “any time” can be reconciled remains unclear.

Not only does this stretch the condition of a threat being imminent, it also raises questions regarding the exceptional nature of the emergency. The essence of a terrorist attack, as the Court rightly observes, is that it can be committed “without warning at any time”. The threat may be present for years, decades and perhaps even longer; the emergency measures could be in force for such a long period, that they would rather become the rule than the exception to it. The requirement of a “danger exceptionnel” formulated in the earlier case law on Article 15 ECHR, which had already been stretched by the fact that the British state of emergency in Northern Ireland had lasted some 30 years, seems to be abolished permanently by the Court in *A. and others v. UK* (2009), by stating that this requirement had never been a condition on European case law.¹⁰⁵

6. Analysis

In 1940, Walter Benjamin, a Jew who committed suicide while fleeing the Nazi regime, wrote in his unfinished manuscript *Über den Begriff der Geschichte* “daß der ‘Ausnahmestand’, in dem wir leben, der regel ist.”¹⁰⁶ Historically, States have abused the doctrine of martial law to seize power, to suppress their people and to curtail the rule of law permanently. The most prominent example of this abuse as of today remains its use by the Nazi regime. It was against this background that the ICCPR and the ECHR incorporated a provision on emergency law so as curb its use by Contracting States and subject it to international supervision.¹⁰⁷

¹⁰⁴ ECtHR (Grand Chamber), *A. and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, Judgment, § 177.

¹⁰⁵ *Id.*, § 178.

¹⁰⁶ W. Benjamin, ‘Über den Begriff der Geschichte’, in: W. Benjamin *Gesammelte Schriften*, vol. I.II, herausgegeben von R. Tiedemann & H. Schweppenhäuser, Frankfurt a.M.: Suhrkamp 1999, at 697 (unofficial translation: “that the state of exception, in which we live, has become the rule”).

¹⁰⁷ For alternatives see B. Mangan, ‘Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform’, Vol. 10 *Human Rights Quarterly* 1988, pp. 372-394 and C. Schreuer, ‘Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights’, Vol. 9 *Yale Journal of World Public Order* 1982, pp. 113-132.

Article 15 ECHR contains a number of strict requirements and conditions for States that want to invoke the state of emergency. Although these strict rules were confirmed in the early case law of the Commission and the Court, this article has shown that almost all of these requirements have been watered down and have been interpreted in such a broad manner that they have no or only a very marginal significance. The notification requirement has degenerated into a mere formality, a breach of which has no consequence whatsoever. The minimum standards of international law have been ignored by the Commission and the Court and consequently, this requirement has never played a role of any significance in the case law so far. The “strict necessity” of the emergency measures, which is required by Article 15 ECHR, has been stretched by the Commission and the Court to a wide margin of appreciation for States. And finally, the emergency situation need neither be imminent nor exceptional, but may also regard vague and elusive threats that do not aim at endangering the existence of a country, but only wish to bring chaos and sow fear.

A final blow seems to have been dealt by a more recent case, namely that of *Hassan v. UK* (2014), in which the United Kingdom derogated from Article 5 ECHR, but neither invoked nor relied on Article 15 ECHR. It did, however, point to standards of international law to legitimize its conduct, *inter alia*, by referring to the Third and Fourth Geneva Conventions of 1949. In this case, the ECtHR accepted “the Government’s argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case”.¹⁰⁸ By way of doing so, the Court marginalised the importance of Article 15 ECHR. While relying on the state of emergency used to be the only means by which the states party to the Convention could derogate from certain articles in the ECHR, it is now only one among several possible ways of derogation available to the Member States. The dissenting opinion of judge Spano, joined by judge Nicolaou, Bianku and Kalaydjieva, is critical on this point:

¹⁰⁸ ECtHR (Grand Chamber), *Hassan v. the United Kingdom*, Appl. No. 29750/09, 16 September 2014, Judgment, § 103. See for further recent developments also *Serdar Mohammed v. Ministry of Defence and Mohammed Qasim, Mohammed Nazim and Abdullah v. Secretary of State for Defence*, judgment of 2 May 2014, [2014] EWHC 1369 (QB), <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf>.

There is simply no available scope to “accommodate”, to use the language of the majority (see paragraph 104), the powers of internment under international humanitarian law *within, inherently or alongside* Article 5 § 1. That is the very *raison d’être* of Article 15, which explicitly opens up the possibility for States in times of war or other public emergencies threatening the life of the nation to derogate from Article 5, amongst other provisions. The majority’s support for a contrary understanding of Article 5 renders Article 15 effectively obsolete within the Convention structure as regards the fundamental right to liberty in times of war.¹⁰⁹

The Convention applies equally in both peacetime and wartime. That is the whole point of the mechanism of derogation provided by Article 15 of the Convention. There would have been no reason to include this structural feature if, when war rages, the Convention’s fundamental guarantees automatically became silent or were displaced in substance, by granting the Member States additional and unwritten grounds for limiting fundamental rights based solely on other applicable norms of international law. Nothing in the wording of that provision, when taking its purpose into account, excludes its application when the Member States engage in armed conflict, either within the Convention’s *legal space* or on the territory of a State not Party to the Convention. The extra-jurisdictional reach of the Convention under Article 1 must necessarily go hand in hand with the scope of Article 15 (see *Bankovič and Others v. Belgium and Others* [GC], no. 52207/99, § 62, 12 December 2001). It follows that if the United Kingdom considered it likely that it would be “required by the exigencies of the situation” during the invasion of Iraq to detain prisoners of war or civilians posing a threat to security under the rules of the Third and Fourth Geneva Conventions, a derogation under Article 15 was the only legally available mechanism for that State to apply the rules on internment under international humanitarian law without the Member State violating Article 5 § 1 of the Convention.¹¹⁰

Consequently, although on first sight, Article 15 ECHR seems to represent a significant threshold for invoking the state of emergency, it still holds true that everything is fair in love and war. The reason for this is that Article 15 is still very much focused on traditional warfare tactics, while the Commission and the Court had and have to deal with modern counter-insurgency and terrorism strategies. The emphasis on war and similar threats is classic to the doctrine of the state of exception, as only an offensive war by a rivalling country could truly threaten to risk the life of the nation. In such extreme scenarios, the

¹⁰⁹ *Hassan v. the United Kingdom*, Dissenting Opinion, § 16.

¹¹⁰ *Hassan v. the United Kingdom*, Dissenting Opinion, §§ 8-9.

executive branch of government was given the power to temporarily deviate from the rule of law; were it to strictly adhere to the rule of law, it would be arduous or even impossible to save the very State on which the rule of law depends. The temporary exception to the rule of law was seen as the only way in which the rule of law could be protected.

The emphasis on war can also be distilled from the way in which the conditions and requirements of Article 15 ECHR are framed. In the past a war was officially proclaimed; Germany would declare war on Russia, Britain on Germany, etc. It was relatively clear which parties were involved, when the war started, which war activities took place, what threat they formed, etc. With modern warfare and terrorist activities, this is less so. It is not always easy to determine when and how emergency measures should be taken. The essence of terrorism lies in its elusiveness and unpredictability and consequently, States have enacted emergency measures out of precaution. It is hard to assess the necessity and proportionality of the measures, as the danger they try to tackle often remains hypothetical. This also means that it may be difficult to notify the Secretary General in detail about the measures and the specific reasons for and logic behind them, as both the threat and the measures are of a general character.

The non-derogable rights fit in the well-established doctrine of the *Jus in Bello*, which holds that warfare must always abide to minimum principles of fairness: innocent civilians may not be directly targeted, the war must be necessary and proportional and even prisoners of war should be able to rely on a set of minimum rights, such as the prohibition on torture.¹¹¹ Again, these principles are questioned by the fundamentally different dynamic of terrorist activities. Unlike soldiers, terrorists often disguise themselves as ordinary civilians, making it hard for a State to distinguish between the two and avoid civilian casualties or measures that affect civilians; the conditions of necessity and proportionality are far more difficult to assess; and even the prohibition on torture has been questioned in relation to ticking time bomb scenarios. These different characteristics not only undermine the principle of non-derogable rights but also erode the condition to abide by the obligations under international law, which also was intended to ensure a minimum level of protection. Last but not least, the condition of exceptionality of the situation and the

¹¹¹ See among others M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (London, Allen Lane, 1978, 4th ed.).

requirement that the life of the nation must be under threat seem less fit for terrorism than for war activities.

Moreover, there are important developments on the domestic level. Most European Nation States have incorporated explicit safeguards against the abuse of martial law by the government or military in their constitution or similar legal documents. Doing so, abuses are less frequent and when they do take place, often they can be adequately addressed on the domestic level by the judiciary. In addition, perhaps the real threat of abuse of martial law comes from fascist regimes and military governments who disregard the legal order and the safeguards against the abuse of martial law altogether. These circumstances have however seldom occurred in Europe after the Second World War and so the use or abuse of martial law has seldom led to a case before the ECtHR. Perhaps the most striking fact is the low number of cases regarding Article 15 ECHR; only some 20 cases have made it to the Court, contrasting sharply with the thousands of cases about, for example, the right to a fair trial, the right to privacy and the right to freedom of speech.

Although it is to be expected that some increase will occur in the near future due to the terrorist measures and related policies adopted across Europe, it is surprising to see that States have simply mostly ignored Article 15 ECHR even although the Court has emphasized that if States do not (successfully) invoke the state of emergency, the facts of the case have “to be judged against a normal legal background.”¹¹² Besides the fact that the States seldom invoke Article 15 ECHR, when they do, the Court often rejects their claim on the basis of the necessity requirement. This is not so much because this requirement forms a high barrier for invoking martial law, but because States — even in the few cases in which they do refer to Article 15 ECHR — have taken measures that are so disproportionate that in no circumstances could they be legitimized, have applied emergency measures to territories on which no emergency situation was proclaimed or — most often — have simply invoked Article 15 ECHR out of a ‘better safe than sorry’ principle, without providing any argument or substantial explanation to the Court on why the state of emergency exists and necessitates the measures taken.

Finally, the ancient doctrine of martial law has little relevance to most modern States. The fight against terrorism is continuing and is being

¹¹² ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005, Judgment, § 191.

fought increasingly not by the use of force, but by data mining, group profiling, tracing and blocking money streams and by creating black lists.¹¹³ All international conventions struggle with this issue, and the use of martial law and similar doctrines is becoming less and less frequent as a consequence. Not many international treaties incorporate a provision on the use of martial law, some explicitly prohibit such derogations and those who do contain an article about the state of necessity, such as the ICCPR, have, like the provision in the ECHR, become less and less relevant on this point. Thus the doctrine of martial law is seldom used anymore and the criteria once guiding this doctrine have become inept. Still, the ECHR has always prided itself on being the most effective human rights system worldwide. The ECtHR has also strived, through the adoption of the living document doctrine among others, to keep the ECHR up to date and relevant for modern times. The Council of Europe should thus live up to its own standards and continue to show leadership in this field. This is especially important as one of the gravest threats to the respect for human rights is currently formed by the adoption of anti-terrorism policies and similar measures.

The world has changed since the Convention was adopted, the threats which States face have changed and the rules regulating the use of emergency measures were written for a different world than the one in which we currently live. Rejecting an originalist and textual approach, the ECtHR has since long adopted a living law doctrine, arguing that the ECHR must be interpreted according to present-day conditions. This approach has led to a fast marginalisation of almost all requirements and conditions contained in Article 15 ECHR and of the European supervision of the deployment of emergency measures by States. Although the living instrument doctrine has wide support and it's certainly not within the limits of this article to dispute it, the goal of this approach is for legal texts to retain their relevance in a new and changing environment, while the adoption of this approach with regard to Article 15 ECHR has led to the exact opposite result, stripping from it most of its substantive requirements and conditions. Besides the fact that the Court has diminished the importance of Article 15 ECHR, the developments on a domestic level have further undermined its relevance. States simply do not view it as a relevant doctrine; it is used seldom and most States have adequate safeguards against the abuse of martial

¹¹³ See among others ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Council of the European Union v. Yassin Abdullah Kadi* (Kadi II), 18 July 2013, Judgment.

law in their constitution or similar documents. Given the fact that the Court will have to deal with cases regarding terrorism more often in the future,¹¹⁴ given the fact that anti-terrorist and similar measures, and not war activities, form the real threat to the rule of law and the protection of fundamental rights in modern times and given the fact that it has always been the objective to keep the ECHR an effective and modern human rights instrument, it might be time to revise Article 15 ECHR and to frame the conditions in a way in which the article both has relevance in the present day environment and at the same time, retains some of its value.

¹¹⁴ See among others ECtHR, ‘Terrorism and the European Convention on Human Rights’, factsheet, October 2014, http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf.

Summary - Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR

With the decline of traditional warfare and the rise of the fight against terrorism, the doctrine of martial law is increasingly applied by States to modern threats such as terrorism. Under this doctrine, also referred to as the state of emergency or state of necessity, fundamental rights, even those contained in a nation's Constitution or Bill of Rights, may be derogated from in times of war. Enacted in the wake of the Second World War, in which the Nazi-regime abused this doctrine to increase and broaden its powers, Article 15 ECHR embodies strict rules and limitations for States who want to invoke the state of emergency and reserves a major role for European supervision. However, over time the European Court of Human Rights has gradually allowed for a rather broad interpretation of this doctrine to include not only warfare, but also modern day counterterrorism activities. Doing so, the limitations and control by the Council of Europe on the use of martial law by States have been marginalized.

Résumé – Tout est-il permis dans l'amour et à la guerre? Une analyse de la jurisprudence concernant l'article 15 CEDH

La guerre traditionnelle étant en déclin et la lutte contre le terrorisme en essor, la théorie de la loi martiale est appliquée de manière croissante par les Etats aux menaces telles que le terrorisme. Cet état, connu également comme état d'urgence ou état de siège, permet de déroger en temps de guerre aux droits fondamentaux, même à ceux contenus dans la Constitution ou une déclaration de libertés fondamentales de l'Etat concerné. Rédigé dans la foulée de la Seconde Guerre mondiale, pendant laquelle le régime nazi a abusé de cette notion dans le but d'accroître ses pouvoirs, l'article 15 CEDH prévoit des règles rigoureuses et des restrictions pour les Etats souhaitant invoquer l'état d'urgence et il soumet ce droit de dérogation à une supervision par le Conseil de l'Europe. Toutefois, au fil du temps, la Cour européenne des Droits de l'homme a progressivement permis une interprétation assez large de cette théorie, afin de la rendre applicable non seulement à la situation de guerre, mais aussi aux mesures antiterroristes. Ce faisant, les restrictions et le contrôle par le Conseil de l'Europe sur l'utilisation de l'état d'urgence par les Etats sont devenus très limités.

Samenvatting - Is alles geoorloofd in liefde en oorlog? Een analyse van de jurisprudentie met betrekking tot artikel 15 EVRM

Met de afname van de traditionele oorlogsvoering en de opkomst

van de strijd tegen terrorisme wordt de doctrine van de noodtoestand in toenemende mate door Staten toegepast als reactie op dreigingen als terrorisme. In deze doctrine kan er in tijden van oorlog worden afgeweken van fundamentele rechten, zelfs als die in de constitutie of een beginselverklaring over de rechten van de burgers zijn vervat. Uitgevaardigd in de naweeën van de Tweede Wereldoorlog, waarin het naziregime deze doctrine had misbruikt om zijn macht te vergroten en uit te bereiden, legt artikel 15 EVRM strikte regels en beperkingen op aan de Staten die de noodtoestand willen invoeren en onderwerpt die aan supervisie door de Raad van Europa. In de loop der tijd heeft het EHRM evenwel geleidelijk een steeds bredere interpretatie van deze doctrine toegestaan, zodat zij niet alleen oorlogssituaties betreft, maar ook hedendaagse antiterrorismemaatregelen. Daardoor zijn de beperkingen en de supervisie van de Raad van Europa op het gebruik van de noodtoestand gemarginaliseerd.

Zusammenfassung – Ist alles erlaubt in der Liebe und im Krieg? Eine Analyse der Rechtsprechung zu Artikel 15 EMRK

Mit dem Niedergang der traditionellen Kriegsführung und dem Aufkommen des Kampfes gegen den Terrorismus wird die Doktrin des Staatsnotrechts vermehrt auf moderne Bedrohungsformen wie etwa Terrorismus angewendet. Nach dieser Doktrin, auch als Ausnahmezustand oder Staatsnotstand bezeichnet, können in Kriegszeiten auch die Grundrechte, sogar solche, die in der Verfassung eines Staates oder in seinem Grundrechtskatalog stehen, eingeschränkt werden. Artikel 15 EMRK, eingeführt als Folge des Zweiten Weltkriegs, in dem das Nazi-Regime diese Doktrin missbraucht hat, um seine Macht zu steigern und auszuweiten, enthält strenge Regeln und Beschränkungen für Staaten, welche den Ausnahmezustand ausrufen wollen, und weist der europäischen Aufsicht eine bedeutende Rolle zu. Allerdings hat der Europäische Gerichtshof für Menschenrecht im Laufe der Zeit eine eher weite Auslegung der Doktrin zugelassen, welche nicht nur Kriegsführung, sondern auch moderne Terrorbekämpfungsmassnahmen einschliesst. Dadurch wurden die Beschränkungen und die Kontrolle des Europarates über die Verhängung des Staatsnotrechts marginalisiert.

Riassunto – E tutto lecito in amore e in Guerra? Un'analisi della giurisprudenza relativa all'art. 15 CEDU

Con il tramonto dei conflitti tradizionali e l'avvento della lotta al terrorismo, la dottrina relativa alla legge marziale viene vieppiù

applicata dagli Stati per affrontare le minacce moderne quali il terrorismo. Secondo questa dottrina, chiamata anche stato d'emergenza o stato di necessità, in tempo di guerra è concesso derogare ai diritti fondamentali, ivi compresi quelli contemplati dalla Costituzione di uno stato. L'art. 15 CEDU, che venne adottato in seguito alla 2a Guerra Mondiale, durante la quale il regime nazista abusò di tale dottrina onde aumentare ed estendere i propri poteri, prevede regole rigide e limitazioni nei confronti degli Stati che intendono invocare lo stato d'emergenza, riservando un ruolo maggiore alla supervisione da parte dell'Europa. Ciononostante, con il passare del tempo, la Corte Europea dei Diritti dell'Uomo ha gradualmente ammesso un'interpretazione piuttosto ampia di tale dottrina permettendone l'applicazione non solo in relazione alle situazioni di guerra, ma anche alle attività di lotta al terrorismo dei tempi moderni. In tal modo, le limitazioni e il controllo da parte del Consiglio d'Europa in merito all'uso della legge marziale da parte degli Stati sono state marginalizzate.

Resumen – ¿Vale todo en el amor y en la guerra? Análisis de la jurisprudencia del Art. 15 de la CEDH.

El declive de las formas tradicionales de conflicto bélico y el auge de la lucha antiterrorista han favorecido, a su vez, la tendencia de los Estados a aplicar la doctrina del Derecho marcial o de excepción a amenazas contemporáneas como el terrorismo. Al amparo de esta doctrina, también conocida como estado de emergencia o de necesidad, se admite que los derechos fundamentales, incluso aquellos consagrados en el correspondiente texto o declaración constitucional, puedan ser derogados o suspendidos en tiempo de guerra. Promulgado tras la Segunda Guerra Mundial, en la cual el régimen Nazi invocó esta doctrina para incrementar sus potestades, el Art. 15 de la Convención Europea de los Derechos Humanos establece reglas estrictas y limitaciones para aquellos Estados que pretendan hacer uso de la doctrina del estado de emergencia y atribuye, llegado el caso, a las instancias europeas correspondientes un papel principal en el control judicial de su aplicación. Pese a esto, con el paso del tiempo el Tribunal Europeo de los Derechos Humanos ha hecho una interpretación amplia de esta doctrina para incluir no solo situaciones de conflicto bélico sino incluso también de lucha antiterrorista. El resultado práctico de todo esto ha sido la marginalización paulatina de las limitaciones y del control por parte del Consejo de Europa sobre el recurso de los Estados a invocar el Derecho de excepción.