When the Exception Becomes the Norm: Article 15 ECHR and States of Emergency in France and Turkey

Master's Thesis

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Abstract

Emergency situations in France and Turkey have drawn attention to the issue of states of emergency and derogations from the European Convention on Human Rights under its Article 15. The purpose of this thesis is to provide the reader with an overview of the conceptual foundations that underlie modern emergency regimes. It will then be argued that these theoretical foundations have been neglected by the judiciary of the Council of Europe. This opens the door for a potential abuse of emergency powers. Modern threats, such as terrorism, difficulty fit within traditional conceptions of states of emergency. This thesis will underline these difficulties and propose a new direction that the judiciary could take in order to better account for the realities on the ground

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List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FETÖ	Fethullah Terror Organisation
HDP	Peoples' Democratic Party
ICCPR	International Covenant on Civil and Political Rights
IRA	Irish Republican Army
UK	United Kingdom
UN	United Nations
US	United States

Introduction

"*Security without freedom leads to totalitarianism, while freedom without security leads to a world of chaos*."[1]

A. *Overview and Research Question*

During states of emergency governments have to act swiftly and efficiently to overcome a particularly grave crisis. The way governments respond to states of emergency situations has proved to present a major contemporary challenge to the effective implementation of human rights.[2] Research on states of emergency emphasises that they have frequently been abused to justify violations of human rights and that temporary emergency powers have a tendency of being institutionalised.[3]

Taking account of the necessity for an effective reaction many domestic and international legal instruments foresee the possibility to temporarily derogate from the ordinary legal framework. In the European Convention on Human Rights (ECHR)[4] Article 15 explicitly provides state parties with a possibility to derogate from their obligations in cases "of war or other public emergency threatening the life of the nation." Such emergency situations justify the use of exceptional measures that can interfere with or limit individual rights in favour of a larger societal interest in the survival of the nation.

Construed as a temporary measure, state practice has shown that states of emergency often become an entrenched reality rather than the exception. Whereas reflections on the

[1] Mireille Delmas-Marty, *Aux Quatre Vents Du Monde* (Seuil, 2016). Translated from French: "La sécurité sans liberté conduit au totalitarisme tandis que la liberté sans sécurité mène le monde au chaos."

[2] Dominic McGoldrick, "The Interface between Public Emergency Powers and International Law," *International Journal of Constitutional Law* 2, no. 2 (2004): 388.

[3] Oren Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* 23 (1998): 437-45.

[4] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, [hereinafter also: the Convention], 4 November 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

issue were for a long time neglected in a European context, recent states of emergency in France and Turkey have drawn attention on challenges and difficulties related to this state practice.[5]

This thesis argues that the current derogation regime under the ECHR does not sufficiently reflect theory and state practice regarding states of emergency. The jurisprudence on Article 15 is unclear on the question what constitutes a state of emergency and has adopted a deferential attitude leaving such an assessment effectively with the derogating state. Therefore, if the human rights system of the Council of Europe (CoE) wants to maintain its legitimacy as guardian of democracy, the rule of law, and individual rights, it is necessary that it increases state accountability and reconsiders the concept under modern day realities.[6]

The critique provided in this thesis moves along two main lines. The first criticism concerns the core of the European derogation regime, its underlying dichotomy between states of "normalcy" and states of "emergency". In order to uphold such a separation, "normalcy" needs to be the norm and "emergencies" are ought to be the exception. Yet, the realities on the ground do not reflect this paradigm. The analysis of the case law regarding Article 15 will demonstrate that the majority findings of the European Court of Human Rights (ECtHR)[7] and the European Commission of Human Rights[8] (ECoHR) have

[5] Literature on the issue has remained largely descriptive and focused on specific principles of the derogation regime under Article 15. Literature on Article 15 with regard to potential abuse and in relation to recent states of emergency is scarce.

[6] This objective of the CoE is echoed in the preamble of the Convention: "[…]Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; […]."

[7] Hereinafter also: the Court.

[8] Hereinafter also: the Commission.

Prior to the entry into force of Protocol 11 to the Convention individuals had to lodge their application with the European Commission on Human Rights who transferred well-founded cases to the Court. Protocol 11 abolished the Commission and granted individuals direct access to the Court. *See*, Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155, http://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.

systematically turned a blind eye on the non-temporary character of certain states of emergency. This reluctance to recognise their entrenched nature has been ignored by a majority of the scholarship over the past decades, but recent cases of prolonged French and Turkish states of emergency demonstrate a necessity to address the issue. In the case of Turkey, the state of emergency proclaimed after the military coup of July 15, 2016 is still ongoing. With regard to France it will be argued that although France recently exited such an explicit state, legislation enacted during, as well as after, the state resembles emergency powers and raises concerns of systematic violations of human rights. Therefore, both cases have in common that they refute the normalcy-emergency paradigm and derogations appear to become the norm. In particular, a structured pattern of violations by France, a country commonly referred to as being at the forefront of the human rights agenda, would seriously harm the credibility and legitimacy of the Convention. Such a pattern is feared with regard to new legislation that has succeeded the state of emergency, as will be argued later in this thesis.

The second criticism concerns the lack of supranational scrutiny on the veritable existence of states of emergency. Indeed, the *margin of appreciation* doctrine developed by the Court and the Commission defers the competence to determine the existence of a state of emergency to the derogating state party. Both judicial organs prefer to focus on the proportionality of emergency measures and rarely overturn the determination of a state party. This lack of supervision seems to open a loophole for governments to declare and maintain states of emergency in an arbitrary fashion that undermines the normativity of the Convention.

Therefore, in a normative way, this research will seek an answer to the question *how to reconsider the Court's approach to states of emergency under Article 15 of the ECHR in order to adapt to contemporary state practice?*

B. *Methodology*

Any form of reconsideration requires a study of what is today before turning to an exploration of what could be tomorrow. Hence, the research question of this thesis can be divided into two sub-questions.

Firstly, *what is the law on emergency-justified derogations from the Convention?* The legal methodology employed to answer this question will follow a *lex lata* approach. This method is used to consider states of emergency in the letter of the ECHR, its case law and other relevant primary sources. To provide the reader with a comprehensive view on the topic, secondary sources will help exploring the theoretical foundations, legal doctrine and practice of states of emergencies and derogation regimes. An exclusively dogmatic analysis of the law would not be suitable for the overall purpose of this thesis as it intends to confront the law with realities on the ground. Therefore, this research follows a *law in context* approach by using case studies of France and Turkey.[9]

The second part of the question is *how the current framework could be adapted to accommodate present day realities?* Taking account of the normative nature of this question this part of the thesis will use a *lex ferenda* approach. This approach will consider the theoretical foundations of derogations and will argue on this basis how the current regime could be developed in order to guarantee a more thorough protection of human rights and to ensure the legitimacy of the Convention.[10]

C. *Structure*

This thesis is divided into four main parts. First, it analyses the theoretical backbone of states of emergency and derogation regimes. Second, it provides an in-depth analysis of the jurisprudence of the Court as well as the Commission and argues that it does not adequately address the temporary dimension of states of emergency. Third, it gives an overview of current state practice by briefly analysing the situations in France and Turkey. Finally, in response to the inability to address these situations under the current approach of the ECtHR, this thesis proposes a new way of approaching the issue that is better suited to respond to contemporary emergency situations.

[9] Michael McConville and Wing Hong Chui, *Research Methods for Law*, Research Methods for the Arts and Humanities (Edinburgh: Edinburgh University Press, 2007), 165-66.

[10] Ibid., 203.

I. States of Emergency and Derogation Clauses: Theory and Law

In an attempt to reconsider the ECHR approach to states of emergency, it is necessary to firstly define the historical and theoretical origins of states of emergency (A) and the principles of derogation clauses in international human rights law (B). Taking account of the drafting history of Article 15, the last chapter of this part will take a closer look at the derogation clause of the ECHR itself (C).

A. *Historical and Theoretical Origins*

States of emergency and derogation clauses in international human rights treaties have been intensively studied across different disciplines, in particular philosophy and political as well as legal theory. It would go beyond the scope of this thesis to discuss this scholarship in great detail.[11] Therefore, this section aims to provide the reader with an overview on the main questions surrounding the issue. It will firstly provide a brief overview on the history of states of emergency before turning towards its conceptual foundations in philosophy and legal theory. It will then elaborate the different approaches legal instruments have taken with regard to states of emergency. Lastly, this section closes with a short critique of the underlying normalcy-emergency paradigm.

[11] For a detailed discussion of the concept, *see*, Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago and London: The University of Chicago Press, 2005); Fionnuala Ní Aoláin and Oren Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (New York: Cambridge University Press, 2006); Marc de Wilde, "Locke and the State of Exception: Towards a Modern Understanding of Emergency Government," *European Constitutional Law Review* 6, no. 2 (2010); John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (2004); Emilie M Hafner-Burton, Laurence R Helfer, and Christopher J Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization* 65, no. 4 (2011); Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Oxford University Press, 1992).

1. History

Before discussing the conceptual and theoretical basis of states of emergency, it is crucial to look at its historical origins. Even though states of emergency only entered most modern constitutions midway through the 20th century, the concept can be traced back to the transition from the Roman monarchy to the Roman Republic in 509 BC.[12] In the constitution of the Roman Republic two consuls were given a broad array of executive powers that were counterbalanced by a reciprocal veto power.[13] Aware of the potential inability of this two-headed government to react efficiently and swiftly to crises that threaten the existence of the Republic, the constitutional framework incorporated the institution of dictatorship.[14] Whenever facing a dangerous deadlock, a dictator, "the only non-elected magistrate of the republic", was appointed and tasked to fight the existential threat.[15] During a dictatorship, individual rights were suspended and the "polyarchy in the structure of government" gave way to a "monocratic power superior to the individual rights."[16] Nonetheless, the Roman law had foreseen a number of temporal and material limits for the appointment of the dictator and the exercise of its task that.[17] Yet, these constitutional safeguards were unsuccessful in avoiding the abuse of the institution by first Sulla, and then Julius Caesar who both remained dictator for several years.[18]

Niccolò Machiavelli undertook an attempt to fit the concept from the Roman Republic into a modern definition of statehood.[19] Nevertheless, it was only in the late 18th and early 19th centuries that European states started to consider constitutional

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[12] Ní Aoláin and Gross, 19.

[13] Ibid.

[14] Ibid.

[15] The dictator was appointed by the two consuls. In cases the two consuls could not decide univocally on a dictator, the appointment power was given to one of them by virtue of drawing lots. *See*, ibid., 19-20.

[16] Ferejohn and Pasquino, 224.

[17] The appointment had to follow certain constitutional rules, the dictator could not end the state of emergency *proprio motu*; dictatorial powers were limited in time; and the ultimate goal of the dictatorship was to restore constitutional normality. *See*, Ní Aoláin and Gross, 19-22.

[18] Ibid., 82-83.

[19] Ibid., 17-24.

accommodations for states of emergency.[20] A 1791 decree from the French Constituent Assembly made a crucial distinction between *état de paix* (state of peace), *état de guerre* (state of war), and *état de siège* (state of siege).[21] Whilst during states of peace military and civil authority operated within their "own spheres", states of war required a concertation of them.[22] During a state of siege authority was transferred completely to the military branch of government.[23] The state of siege eventually entered the constitutional framework with the Second French Republic emanating from the 1848 revolution.[24]

A crucial moment in the history of states of emergency occurred in Germany. Article 48 of the Weimar Constitution provided the President of the Republic with emergency powers allowing him to take "measures necessary to re-establish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights."[25] Despite the fact that "the Weimar Constitution […] tried harder than most constitutions to ensure" its survival in times of emergency, the Nazi regime relied on this article to pass emergency legislation and to suspend the regular legal order.[26] In this light Giorgio Agamben noted that the Third Reich can be regarded as a particularly long state of emergency.[27] Not only in Germany but also in other parts of the world democratic structures were profoundly altered by states of emergency during World War II.[28]

This brief historical overview demonstrates that states of emergency were originally reserved to cases of extreme and exceptional threats. Nevertheless, this brief look at the past has already demonstrated the potential for abuse of states of emergency. As will be demonstrated later, modern day terrorism and an ever-more complex security landscape are

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[20] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitutional Law* 6, no. 5 (2004): 1006-07.

[21] Agamben, 5.

[22] Ibid.

[23] Ibid.

[24] Ibid., 12.

[25] Scheppele, 1007.

[26] Agamben, 3; Scheppele, 1007.

[27] Agamben, 6.

[28] Agamben mentions as one of the most striking examples the interment of 110.000 people with Japanese origins of which a substantial part had U.S. citizenship on U.S. American soil. *See*, ibid., 6-22.

provoking once more the prolonged use of emergency powers. This raises the question if the current wave of states of emergency could lead to another crucial moment in the development of the concept.

2. Conceptual foundations in philosophy and legal theory

The conceptual foundations of states of emergency can be found in philosophy, as well as legal and political theory. States of emergency draw their rationale from an opposition of normalcy and emergency. In such a paradigm, the first is considered to be the norm whilst the second has an exceptional character. The term norm in this context is to be understood in two different ways. Firstly, it is used to describe an "empirical regularity in the natural world or in the society."[29] Secondly, norm also refers to "a command, a prescription, an order."[30] Exceptional circumstances that amount to a state of emergency allow governments to invoke emergency powers that may interfere with or limit the norm, the ordinary legal framework. Many constitutions and most human rights agreements have incorporated provisions allowing state parties to temporarily derogate from certain provisions. The temporary character of a state of emergency is inherent in its ultimate goal to restore a state of normalcy.[31] This section provides the reader with an overview on philosophical justifications for emergency powers and introduces the two major schools of thought in legal theory addressing states of emergency.

Philosophically, the question of justification of emergency powers has been addressed by thinkers reaching back to ancient Greece.[32] Despite representing different streams of political ideas classical philosophers approached the question from a similar angle. In Hobbes' view the justification of states of emergency, or the government of exception, is inherent to the basic task of every sovereign, to assure the public well-being and the survival of the state.[33] Thus, it is not necessary to separately justify such an exceptional state. Similarly, Rousseau argues that an emergency situation justifies the extension of

[29] Ferejohn and Pasquino, 221.

[30] Hans Kelsen and Michael Hartney, *General Theory of Norms* (Oxford: Clarendon, 1991), 1.

[31] Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law* 34, no. 3 (2013): 500.

[32] Scheppele, 1004.

[33] Thomas Hobbes, *Leviathan*, ed. John C A Gaskin (Oxford University Press, 1998).

governmental prerogatives or to nominate a dictator who temporarily suspends the rule of law.[34] In his view, such a state is justified in cases of existential threat where "the people's principal aim is that the state should not perish. The suspension of legislative authority in this fashion does not abolish it; the officer who keeps it silent is unable to make it speak; in overriding it, he is not able to take its place. He can do everything except make laws."[35] Rousseau emphasizes the importance of limiting the timeframe of such a state in advance, as there is no control over its execution.[36] In *Two Treatises of Government* John Locke expands the concept and creates a theory of prerogative power which gives the executive branch the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it".[37] Locke introduced a "functional litmus test" to evaluate if the prerogative power had been used appropriately, for the public good.[38] Locke regards governmental action going against the public good as tyranny.[39] Accordingly, an abuse of prerogative power has the ability to "an uprising to restore the people's rights and to limit the government's resort to such arbitrary power."[40] This distinguishes Locke fundamentally from Rousseau for whom there is no possibility for resistance once exceptional powers have been invoked. This brief summary of philosophical foundations of states of emergency has demonstrated that emergency powers are justified by a need to assure the survival of the nation.

Regarding legal theory on the legality of states of emergency there seems to be a divide "between writers who favor a constitutional or legislative provision for the state of exception and others […] who unreservedly criticize the pretense of regulating by law what by definition cannot be put in norms […].[41] This opposition is particularly well represented in

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[34] Jean-Jacques Rousseau, *Discourse on Political Economy and the Social Contract* trans. Christopher Betts, Oxford World's Classics (Oxford and New York: Oxford University Press, 1994), 153.

[35] Ibid.

[36] Ní Aoláin and Gross, 21.

[37] John Locke, *Two Treatises of Government*, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1960), para. 160.

[38] Ní Aoláin and Gross, 120.

[39] Ibid., 121.

[40] Ibid.

[41] Agamben, 10.

works of German legal philosophers Carl Schmitt and Hans Kelsen who both wrote extensively on the issue with regard to Article 48 of the Weimar Constitution.[42]

Schmitt, the most prominent proponent of the latter view[43] argued that "the precise details" of emergencies are not predictable, therefore the law cannot regulate states of emergency.[44] Schmitt criticises the pretention of liberal constitution to regulate everything because constraining decision-makers during a state of emergency might threaten the existence of said constitution itself.[45] Thus, the ordinary legal framework should seize to have effect and "the most guidance the constitution can provide is to indicate who can act in such a case."[46] Furthermore, Schmitt sees the competence to decide on the existence of a state of emergency with the sovereign as he starts his book *Politica*l *Theology* with the following sentence: "Sovereign is he who decides on the exception."[47]

This view is opposed to the theory of his contemporary Hans Kelsen. Kelsen, who conceived states as a *Rechtsstaat*, a "state of law", that is synonymous to a juridical order and a hierarchy of norms that has the constitution at its top.[48] For Kelsen, the state is the law and thus the continuity of the law is a condition for the continuity of the state.[49] Therefore, this school of thought situates states of emergency within an overarching legal framework. In particular in light of the potential for abuse and the possibility for grave infringements of individual rights that may occur during states of emergency, proponents of such an approach emphasize the importance of legal supervision.[50]

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[42] For an account of the discussion between Schmitt and Kelsen, *see* Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans. Lars Vinx (Cambridge: Cambridge University Press, 2015).

[43] Agamben, 10.

[44] Carl Schmitt, *Political Theology – Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago and London: University of Chicago Press, 2005), 6-7.

[45] Scheppele, 1009-10.

[46] Schmitt.

[47] Ibid.

[48] Pietro Costa, "The Rule of Law: A Historical Introduction," in *The Rule of Law – History, Theory and Criticism*, ed. Pietro Costa and Danilo Zolo (Springer, 2007), 112.

[49] François Tanguay-Renaud, "The Intelligibility of Extralegal State Action: A General Lesson for Debates on Public Emergencies and Legality," *Legal Theory* 16, no. 3 (2010): 168-69.

[50] Sheeran, 502.

Italian philosopher Giorgio Agamben argues that neither of the two approaches can claim the upper hand and that "in truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other."[51]

3. States of emergency in domestic and international legal framework

Having established the conceptual foundations of states of emergency it is necessary to have a look at different ways legal documents integrate such states. Gross and Nì Aoláin distinguish two major ways legal instruments accommodate for states of emergency.

On the one hand, "business-as-usual" models do not include particular rules for states of emergency. The provisions that govern normalcy are deemed fit to also address exceptional emergency situations. With regard to major international human rights instruments only the African Charter on Human and Peoples' Rights (ACHPR)[52] has chosen a business-as usual model and does not include a derogation clause.[53]

On the other hand, legal instruments that foresee an accommodation for states of emergency are based on the aforementioned crucial dichotomy between states of normalcy and states of emergency.[54] Rules that govern normal states are deemed unfit to address states of emergency. The success of such approaches to states of emergency is "measured not only in the ability to overcome grave threats and dangers, but also in the ability to confine the application of extraordinary measures to extraordinary times, insulating periods of normalcy from the encroachment of vast emergency powers."[55] Three different legal approaches can be distinguished: constitutional models, legislative models and interpretative models.[56]

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[51] Agamben, 23.

[52] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

[53] *See*, Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the Echr and the Absence of a Derogation Clause in the Achpr," *Birkbeck Law Review* 1, no. 1 (2013).

[54] Ferejohn and Pasquino, 224-25.

[55] Ní Aoláin and Gross, 171.

[56] Ibid.

Constitutional models are based on the Roman institution of dictatorship which is commonly regarded as the "prototype" of modern state of emergency regimes.[57] The brief discussion of the Roman model hints at the characteristics of such a model. Indeed, constitutional models refer to the "inclusion of emergency provisions in the constitutional document."[58] These provisions differ in their wordings and, whilst most constitutions enclose explicit state of emergency provisions, this is not a universal feat.[59] Constitutional provisions on states of emergency have a double-edged nature. On the one side, they allow for the limitation of individual rights and the broadening of executive prerogatives. But on the other side they keep emergency measures within the constitutional framework and guarantee a certain degree of judicial review, a logic that is mirrored in derogation clauses in international human rights treaties.

Legislative models are based on legislative amendments and modifications of the ordinary legal framework in times of emergency that are not inscribed within a constitutional framework.[60] Like constitutional models, the ordinary rules are deemed unfit to accommodate the particular needs of an emergency situation.[61] But unlike constitutional models the answer is not found in "a complete overhaul of the existing system. The existing system is kept intact while some special adjustments are introduced through legislative measures."[62] This can be achieved by amending ordinary laws or passing new emergency-specific legislation.[63]

Derogation clauses in international human rights instruments fit within these legislative or constitutional approaches.[64] In the context of treaties concluded under the rules of public international law the term constitutional might appear misleading, and indeed, only the ECHR appears to have somewhat constitutional characteristics.[65]

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[57] Ibid., 17; Ferejohn and Pasquino.

[58] Ní Aoláin and Gross, 35-65, 255.

[59] Ibid.

[60] Ibid., 66-71, 255.

[61] Ibid., 66.

[62] Ibid.

[63] Ibid., 66-67.

[64] "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," *Human Rights Quarterly* 23, no. 3 (2001): 644; *Law in Times of Crisis: Emergency Powers in Theory and Practice*.

[65] *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 256.

The last approach, *interpretive* models, relies on a different interpretation of the ordinary laws through the prism of an emergency situation.[66] Judicial interpretation accommodates the need for an expansion or a restriction of certain legal norms as required by the emergency.[67]

4. The normalcy-emergency paradigm and entrenched states of emergency

Oren Gross and Fionnuala Nì Aolàin recognise a major problem with the normalcy-emergency paradigm that is highly relevant for the remainder of this research. It concerns the dynamics of the relationship between emergency and normalcy. Whatever was considered as normalcy before a crisis situation might not be the normalcy once this particular crisis is overcome. The new normalcy has its roots in the extraordinary measures that were deployed to fight the threat.[68] Hence, what might have been "sufficient "emergency" measures in the past […] may not be deemed enough to deal with […] crises [in the present or future]."[69] This might lead to an escalade of ever "more radical powers [that] are needed to fight impeding crises."[70] Furthermore, these new, more drastic measures lead to an *ex post facto* legitimation of prior, less intrusive emergency measure.[71]

Emergency measures after the September 11, 2001 attacks and their global implication for the fight against terrorism are used to corroborate such a view of the paradigm. Gross and Nì Aolàin enumerate a number of measures that were unthinkable before the attacks but that have found their way into the ordinary legislative framework via temporarily designed emergency measures.[72] This normalisation of the exception can notably be furthered by the jurisprudence on states of emergency. Emergency-induced decisions and judgments might later be applied to cases under the ordinary legal framework.[73]

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[66] Ibid., 72-78, 255.

[67] Ibid.

[68] Ibid., 228.

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid., 237.

The emergency-normalcy paradigm presupposes prolonged states of normalcy that are interrupted by brief emergency intermezzos. This poses a problem with regard to states of emergency that become entrenched realities and thus reverse this relationship.[74] When there is no return to normalcy, the paradigm loses its validity. As Gross and Nì Aolàin remark, "[e]mergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable."[75]

5. Conclusion

In conclusion of this brief theoretical outline, it should be kept in mind that legislative and constitutional approaches on states of emergency draw their conceptual rationale from a crucial opposition between normalcy and emergency. Whilst there are different views on the role the law plays during a state of emergency it is commonly accepted that the interest in the survival of the nation justifies a temporary, exceptional, derogation from the norm. Whenever a state of emergency is declared, the balance between individual and societal interests shifts towards the society and justifies the temporary derogation from individual rights. Nevertheless, contemporary threats appear to challenge the temporary nature of the emergency. Furthermore, it should be kept in mind that every discussion on what constitutes normalcy and what is an emergency is somewhat artificial.[76]

B. *Derogation Clauses: Different Layers of Protection and Principles of Derogation*

Built on the theoretical foundations of states of emergency, derogation clauses aim at facilitating state action in response to exceptional crises while attempting to maintain at least a certain degree of supervision. Hence, derogation regimes in international human rights treaties operate as a double-edged sword. On the one hand, they allow state parties to derogate from their obligations, but, on the other hand, they limit derogation by way of a

[74] Ibid., 175.

[75] Ibid.

[76] "Unfortunately, bright-line distinctions between normalcy and emergency are frequently untenable, as they are constantly blurred and made increasingly meaningless." Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional," *The Yale Journal of International Law* 112 (2002): 1070.

certain set of principles comprised in their texts as well as jurisprudence. The following part will consider these limits by discussing different layers of protection given to specific rights and the major principles that govern derogation clauses.

1. *Different layers of protection*

Generally speaking, international human rights treaties comprise three categories of rights.[77] A public emergency can never justify the violation of *non-derogable rights* which enjoy an absolute protection.[78] What is considered a non-derogable right varies from one convention to the other.[79] In the three most prominent conventions, the American Convention on Human Rights (ACHR)[80], the ECHR, and the International Covenant on Civil and Political Rights (ICCPR)[81], there are four common non-derogable rights. These rights are the right to life, the prohibition of torture and other inhumane or degrading treatment or punishment, the prohibition of slavery or servitude and the no punishment without law (*nullum crinem sine legem*) principle.[82]

The second category of rights are those which can be derogated from in times of public emergencies relying on a derogation clause. In theory, every right that is not part of the non-derogable rights can be interfered with during a state of emergency. Again, logically such rights vary but they include among others the right to freedom of assembly, freedom of speech, detention and fair trial rights, etc.

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[77] "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 445.

[78] Ní Aoláin and Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 258.

[79] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 446.

[80] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf.

[81] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

[82] For the ACHR *see*, Article 27(2); for the ECHR *see*, Article 15(2); for the ICCPR *see*, Article 4(2).

Thirdly, there are certain rights that cannot only be derogated from during states of emergency but that can also be limited in situations falling short of said states.[83] By way of limitation clauses state enjoy a higher degree of discretion in the choice of their policy measures. Limitation clauses, also known as accommodation clauses, "provide that the right in question shall be subject to limits dictated by such considerations as public order, national security, and general welfare."[84] An example for such a right is the right to family life under Article 8 ECHR which is limited by considerations of "national security, public safety or the economic well-being of the country, […]."[85]

Therefore, when the material and procedural conditions set out in derogation clauses are fulfilled, a state may derogate from the second and third category of rights. Emergency measures that would be considered a violation of the provisions in normal times become excused by the extraordinary circumstance of a given crisis.[86]

2. *Principles of derogation regimes*

Scholarship has long recognised the exceptional threat that an abuse of emergency powers could pose to the international human rights framework. In the words of Dominic McGoldrick, a state's "response […] to a public emergency is an acid test of its commitment to the effective implementation of human rights."[87] Several principles recur in the context of derogation clauses across different treaty systems. They are designed to minimise the abuse

[83] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 447.

[84] Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights," *Yale Journal of World Public Order* 9 (1982): 113-14.

[85] The second paragraph of Article 8 reads as follows: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[86] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 448.

[87] McGoldrick, 388.

of emergency powers by way of attaching certain criteria and principles to their proclamation and exercise.[88] These main principles can be divided into procedural and material principles.

On the procedural side, the *principle of proclamation* aims at reducing the emergence of de-facto states of emergency by way of requiring states to officially declare a state of emergency by following the relevant domestic procedures.[89] It should further be noted that the principle prevents states from using an *ex post facto* justification for the violation of a treaty provision.[90] The *principle of notification* requires member states to notify other parties within a given timeframe by deposing an instrument of notification with a competent treaty body.[91] By way of informing them on the existence of an emergency situation the principle enables other state parties and treaty bodies to "exercise their rights under the convention to ensure that all parties comply with the provisions of this instrument."[92] The two principles complement each other. Whilst the principle of proclamation is domestically orientated, the principle of notification "operates on the international level."[93]

Materially, the *principle of proportionality* is present in all major derogation regimes and limits state action in times of emergency. Even in cases where a derogation is justified by an ongoing state of emergency states do not enjoy unlimited discretion in the choice of their measures.[94] Under the ECHR measures can only be taken "to the extent strictly required by the exigencies".[95] Measures taken under a derogation regime must be proportional regarding

[88] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 448.

[89] McGoldrick, 395-96.

[90] Joan F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision," *Human Rights Quarterly* 7, no. 1 (1985).

[91] McGoldrick, 422-25; Aly Mokhtar, "Human Rights Obligations V. Derogations: Article 15 of the European Convention on Human Rights," *The International Journal of Human Rights* 8, no. 1 (2004): 75-78.

[92] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 449.

[93] Ibid., 449-50.

[94] Ibid., 450.

[95] See, ECHR, Art. 15(1).

their degree and duration.[96] Proportional in their degree means that measures have to be evaluated with respect to the threat that a state faces. Furthermore, whenever less intrusive measures can achieve a given objective they have to be preferred.[97] Temporally, measures have to be aiming at the termination of a public emergency, with no regard to their success.[98] Regarding derogations from the ICCPR, the "Siracusa Principles" provide a broader reading of the principle's temporal dimension by stipulating that the "measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger."[99] This seemingly excludes measures that are directed at future or potential threats.

Finally, the *principle of non-discrimination* stipulates that measures may never discriminate on the basis of the membership in a certain category of people.[100] Although the principle is not explicitly mentioned in the ECHR it is included within its proportionality principle. It is hardly conceivable that measures violating in particular the rights of a specific group of people are "strictly required" by a given situation.[101]

Additionally, derogation clauses are limited with respect to other obligations that states have under international law. [102] Such obligations mainly include international humanitarian law and international human rights law prescribed by conventional or customary law.[103]

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[96] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 450.

[97] Ibid.

[98] Ibid.

[99] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf, § 54, 12.

[100] The categories vary from convention to convention. *See*, Article 4(1) ICCPR; and Article 27(1) ACHR.

[101] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 451.

[102] *See*, Article 15(1) ECHR; Article 4(1) ICCCP; and Article 27(1) ACHR.

[103] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 451.

The primary condition for a legitimate claim of derogation is a situation that satisfies the conditions set forth in the clause. Under the *principle of exceptional threat*, derogation clauses generally refer to a "public emergency" of a certain gravity as their condition *sine qua non*.[104] The required degree of gravity varies among treaties, but "[t]here is no real significance to this difference" and Gross notes that "[t]he controlling operative language is […] "public emergency threatening the life of the nation."[105] In other words, only extraordinary threats have the ability to justify derogations. This principle of exceptional threat reaffirms the crucial normalcy-emergency paradigm at the core of derogation clauses. Regarding the existence of such an exceptional threat several factors have to be taken into consideration. Firstly, the threat has to be "actual or imminent" and derogation clauses cannot be invoked in a purely preventive way.[106] Secondly, in accordance with the underlying rationale of derogation systems, measures taken under the ordinary legal framework have to be "manifestly inadequate and insufficient to respond effectively to the crisis."[107] Thirdly, threats cannot be limited to specific region but need to threaten the nation as a whole. Thus, under Article 15 of the ECHR an emergency situation cannot be limited in its impact to specific locations and must threaten the whole population as well as at least a substantial part of the territory of a state party.[108]

C. *History and Content of Article 15 ECHR*

The derogation clause of the ECHR was drafted to address situations where an exceptional emergency threatens the existence of one of its state parties. It strikes a balance between the vital need of a state to protect its survival and the protection of human rights in crisis situations. If the Convention would only function in times of relative stability but collapse under the pressure of crises it would lose a large part of its legitimacy. This chapter pays particular attention to the way in which the rationale behind states of emergency and derogation clauses is reflected in its content and drafting history.

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[104] Ibid., 453.

[105] Ibid., 452.

[106] Ibid., 453.

[107] Ibid.

[108] Ibid.

1. *Travaux préparatoires*

The ECHR is an international treaty that was drafted within the context of the newly formed CoE. In the very first meeting of the Consultative Assembly of the Council that was tasked with drafting a European convention on human rights, the issue of derogations was raised by the United Kingdom (UK). Sir Ronald Ross observed that "[it] is defined in every declaration of human rights that in times of emergency the safety of the community is of first concern."[109]

The emergence of the derogation regime under Article 15 can be traced back to two major factors.[110] Firstly, the memory of World War II atrocities was still vivid and in the minds of the drafters of the Convention. Secondly, the political situation in several countries that were negotiating the contents of the Convention underlined the need for a derogation regime.[111] In other words the drafters aimed on the one hand to avoid violations of human rights that occurred during the conflicts of the first half of the 20th century but also recognised the necessity to give the states a certain leeway in the application of the Convention in times of crises. In this regard, the drafting history of the Convention clearly reflects the two-headed characteristic of aforementioned derogation systems. Indeed, the drafters' desire to limit violations of individual rights is echoed in the *travaux préparatoires* (preparatory work). Notably, a report of the Legal Committee highlights the potential danger for abuse of derogations when they go beyond the intended purpose of protecting the life of the nation.[112]

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[109] European Commission on Human Rights (ECoHR), *Preparatory Work on Article 15 of the European Convention on Human Rights*, http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-CDH(77)5-BIL1338902.pdf, 4.

[110] Ronald St. John MacDonald, "Derogations under Article 15 of the European Convention on Human Rights," *Columbia Journal of Transnational Law* 36, no. 1&2 (1998): 226.

[111] Ibid.

[112] A French representative, presenting the report of the Legal Committee, raised the following observation: "*When the State defines, organizes, regulates and limits freedoms for such reasons, in the interest of, and for the better insurance of, the general well-being, it is only fulfilling its duty. That is permissible; that is legitimate. But when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for coordinating and guaranteeing, then it is against public*

The particular appeal of a derogation clause was that it guaranteed that a certain group of rights received absolute protection.[113] Even in case of an emergency "non-derogable" rights are inviolable because they are "so essential to our self-respect as well as to the respect for other persons, that, really, under no condition could we permit a departure therefrom."[114]

It should be noted that there was little mentioning of the potential of abuse derogation clauses bear. Indeed, only one representative from Italy referred to the potential risk of a derogation clause to give state parties an excuse to violate provisions of the Convention.[115] The temporary character of states of emergency and the danger of entrenched states of emergency is absent from discussions on Article 15. An absence that may have contributed to the reluctance of the judiciary to address the issue that will be discussed in the following part.

2. The text of Article 15

Following the above described discussions Article 15 ECHR (Derogation in time of emergency) was drafted as follows:

> *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*

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interest if it intervenes. Then the laws which it passes are contrary to the principle to the international guarantee." *See*, ibid.

[113] Ibid., 230.

[114] ECoHR, *Preparatory Work on Article 15 of the European Convention on Human Rights*, 18.

[115] Ibid., 6.

ceased to operate and the provisions of the Convention are again being fully executed.

The letter of Article 15(1) incorporates several of the principles outlined earlier in this part. The principle of exceptional threat is echoed in the formulation "*In time of war or other public emergency threatening the life of the nation"*. The paragraph further includes the principle of proportionality by setting out that measures are ought to be "*strictly required by the exigencies of the situation, […]*."

The second paragraph refers to the absolute protection non-derogable rights enjoy. Under the ECHR these rights are the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery (Article 4(1)), and the *nullum crinem sine legem* principle (Article 7).

Article 15(3) comprises both the principle of notification and, by means of judicial interpretation the principle of proclamation. It further stipulates that a derogation can at no point excuse the departure from another obligation a state has under other sources of international law. As mentioned earlier, the principle of non-discrimination is not included in the text of the convention but is generally considered to be comprised in the principle of proportionality.

D. *Conclusion*

The first part of this thesis provided an overview of the theoretical foundations of states of emergency and derogation clauses. Based on a separation between states of emergency and states of normalcy, derogation clauses address the difficult trade-off between the interest of the society at large and the guarantee of individual rights. This part has also shown that the distinction between the norm and what is the exception is difficult to make as it is based on an artificial dichotomy. The potential for abuse of states of emergency and derogations shows the need for an effective limitation of state practice and an efficient external oversight by an independent judiciary, in the context of the Convention, the ECtHR. If the objective of derogation clauses is to keep states of emergency within the judicial sphere an effective scrutiny by the judiciary is of utmost importance. The following Chapter will analyse the case-law with regard to Article 15 in order to observe if such a scrutiny is given within the framework of the Convention.

II. What Constitutes a "Public Emergency"? The Jurisprudence on Article 15

Knowing the rationale, history, and text of Article 15 ECHR, this part has the purpose to give a meaning to the letter. It will begin with a review of the jurisprudence on what is considered a public emergency under the Convention (A). Under jurisprudence are understood both the decisions of the Court and the Commission, including their reports.[116] By way of analysis of this case law, it will be demonstrated that the Court's approach towards this essential question has over time developed a set of criteria that has to be met in order to constitute a public emergency in the meaning of the Convention. However, the Court grants a wide margin of appreciation to member states in determining the existence of an emergency situation (B) that has the potential for abuse (C).

A. *The Principle of Exceptional Threat and the Normalcy-Emergency Paradigm*

This chapter deals with the interpretation of the principle of exceptional threat. It analyses the Convention's case-law and lays down the conditions that have to be met in order to invoke "a public emergency" under Article 15.

1. The beginning: The First Cyprus case and *Lawless*

The very first case on Article 15 that reached the Commission was *Greece v. the United Kingdom*, also known as the *First Cyprus* case.[117] In the case the Geek government filed a complaint regarding the United Kingdom's administration of the island of Cyprus. The UK administration over the island had proclaimed a state of emergency on November 26, 1955 after popular unrest and terroristic activity directed against forces of order affected the island.[118]

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[116] For a brief discussion on the history of Court and the Commission, *see* supra note 8.

[117] ECoHR, *Greece v. the United Kingdom*, no. 176/56, Commission report of 26 September 1958, http://hudoc.echr.coe.int/eng?i=001-73858.

[118] Ibid., § 102, 111; § 106, 115-16.

The Commission answered questions on the existence of a public emergency in the meaning of Article 15, the proportionality of emergency measures and the fulfilment of the notification requirement of Article 15(3).[119] The first question is of particular relevance for this section. The Greek government submitted in its second memorial of May 27, 1957, that ""almost the whole" of the emergency legislation had in fact remained in force, although no more acts of terrorism had been reported in the island during the preceding two months."[120] The UK government claimed that the state of emergency is to be maintained as long as there is a chance of revival of the terrorist activity.[121] The Commission decided to send an investigation party to the island[122] and decided, despite expressing some doubts on the continuous existence of a public emergency,[123] that the "Government of Cyprus has not gone beyond [its discretion in appreciating the threat to the life of the nation]."[124] It should be noted that the Commission examined the existence of an emergency situation during three different stages of the alleged time period.[125]

The next landmark ruling on what constitutes a public emergency occurred in the *Lawless v. Ireland* case before the Commission and the Court. In *Lawless* the Court was asked to rule on the viability of a derogation entered by the government of the Republic of Ireland.[126] As the following analysis will demonstrate, the case offers a vivid account of "the dynamics of a new supra-national court anxious to establish its legitimacy, offer a meaningful review of states' actions, while anxious not to overstep the boundaries of state consent to be subject to external oversight."[127]

Gerard Lawless, who became a member of the Irish Republican Army (IRA) in January 1956 and claimed having left the army five months later, was detained between July

[119] Ibid., § 104, 113-14.

[120] Ibid., § 122, 125.

[121] Ibid., § 123, 126.

[122] Ibid., § 128, 131.

[123] Ibid., § 135, 136.

[124] Ibid., § 136, 138.

[125] Ibid., §§ 131-132, 133-137.

[126] Ní Aoláin and Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 269.

[127] Ibid.

13 and December 11, 1957.[128] His detention without trial in a military camp in the Republic of Ireland occurred in accordance with order given by the Irish Minister of Justice under the 1939 Offences Against the State Act.[129] The Irish government activated special arrest and detention powers that were foreseen in the act on July 8, 1957.[130] Subsequently, on July 20, the Irish Minister for External Affairs notified the Secretary of the Council of Europe of the derogation under the Article 15 of the Convention with extent to the entry into force of said special powers.[131] Earlier, both the Commission and the Court had found in the detention without trial a violation of Mr. Lawless' rights under the Convention.[132] The question therefore arose if the existence of a public emergency could excuse these violations? It should be noted that the Irish government contested the right of the Court to rule on the existence of a state of emergency and argued that it was entirely in the discretion of the state itself to determine what constitutes a state of emergency and which measures are deemed appropriate.[133]

The court rejected the argument and decided 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."[134] The majority of Commission members (nine votes to five) came to the conclusion that, as of July 5, 1957, a state of public emergency had indeed existed on the territory of the Republic.[135]

The Court acknowledged the findings of the Commission which proposed a certain set of factual findings for the determination on the existence of public emergency. Firstly, the existence and operation of an outlawed and secret military organization that was active on the territory of the Irish Republic.[136] Secondly, the impact this activity had on the diplomatic

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[128] European Court of Human Rights (ECtHR), *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961, §§ 1-4, Series A no. 3, (1962), http://hudoc.echr.coe.int/eng?i=001-57518, 4.

[129] Ibid., § 1, 4.

[130] Ibid., § 16, 9.

[131] Ibid., § 17, 9.

[132] Ibid., §§ 8-22, 18-22.

[133] Ní Aoláin and Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 269.

[134] ECtHR, *Lawless v. Ireland (No. 3)*, § 22, 27.

[135] ECoHR, *Lawless v. Ireland*, no. 332/57, Commission Report of 19 December 1959, § 89, http://hudoc.echr.coe.int/eng?i=001-73438, 83.

[136] ECtHR, *Lawless v. Ireland (No. 3)*, § 28, 28.

relations between the Republic and the UK.[137] The Commission emphasised in this regard that these anti-British attacks endangered the Republic of Ireland's relations with the United Kingdom and considered such tensions as a threat to the existence of the Republic itself.[138] Thirdly, the escalation of terrorist activity in late 1956 and early 1957.[139] Both Commission and Court relied on the IRA's July 3-4 attacks to determine that there was an "imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland."[140] It is noteworthy that the majority of the Commission admitted that the activities by the IRA did not affect the "daily life of the general [Irish] public, except perhaps in the areas near the border with Northern Ireland."[141]

The dissenting members of the Commission claimed, among other factors, that the factual findings of the majority did not fulfil the requirements of a "public emergency threatening the life of the nation".[142] They considered the threat to be too local in order to meet the threshold and that the degree of the threat was not existential enough in order to allow for a derogation from the Convention.[143] In addition, the dissent argued that the threat was by no means imminent as required by the derogation clause.[144]

Both decisions, by the Court and by the Commission, refer at several points to the Irish government's assessment of the crisis.[145] This is the first sign of a hesitance the Court has when it comes to interfere with a government's discretion to derogate from international human rights instruments in case of public emergencies that might potentially threaten the existence of the nation. Gross notes that "it comes as no surprise that the [Court and Commission] were doubly reluctant to intervene in this case, which might have affected two

[137] Ibid.

[138] ECoHR, *Lawless v. Ireland*, § 90, 90.

[139] ECtHR, *Lawless v. Ireland (No. 3)*, §28, 28.

[140] Ibid., § 29, 28.

[141] ECoHR, *Lawless v. Ireland*, § 90, 88.

[142] ECoHR, *Lawless v. Ireland*, §§ 92-96, 94-104.

[143] Ibid.

[144] Ibid.

[145] ECtHR, *Lawless v. Ireland (No. 3)*, § 28, 28; ECoHR, *Lawless v. Ireland*, § 90, 84-85.

nations, rather than only one."[146] When *Lawless* reached the Court, the latter had not yet been established a sufficient standing in order to interfere drastically with the actions of state parties. Although not explicitly mentioned by the Court in the *Lawless* case, this deferential approach by Court and Commission resembles the "margin of appreciation" doctrine that was applied prior to *Lawless* in the *First Cyprus* case as will be discussed later in this part.

2. *The Greek case: Four conditions for a public emergency*

In 1967 a non-democratic military junta overthrew the elected government in Greece.[147] The new government suspended parts of the Greek Constitution that corresponded to several provisions of the ECHR.[148] Denmark, Norway, Sweden and the Netherlands decided to bring a case before the Commission claiming that the Greek government's derogation had violated the Convention.[149] Indeed, by a ten to five majority, the Commission decided that there was no public emergency and found a violation of the Convention.[150]

Prior to discussing the *Denmark, Norway, Sweden and the Netherlands v. Greece* case (also known as *Greek* or *Greek Colonels Case*)[151] in greater detail, it should be mentioned that the case is exceptional as it is until today the only case in which a judicial organ of the ECHR rejected a government's claim regarding the existence of a public emergency. The approach by the Commission followed in this case resembles the dissent in *Lawless* in so far as it evaluates the existence of a state of emergency based on an objective observation of independent facts that will be elaborated below.[152] Furthermore, it places the burden to prove that a public emergency indeed exists on the derogating state party.[153]

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[146] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 263.

[147] Helen Conispoliatis, "Facing the Colonels: How the British Government Dealt with the Military Coup in Greece in April 1967," *History* 92, no. 308 (2007): 520-21.

[148] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 467.

[149] ECoHR, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), nos. 3321/67, 3322/67, 3323/67, and 3344/67, Commission report of 5 November 1969, Yearbook 12, http://hudoc.echr.coe.int/eng?i=001-73020.

[150] Ibid., §125, 75.

[151] Ibid.

[152] *See*, ibid., §113, 70.

However, the decision has to be analysed with regard to its extraordinary circumstances. Several authors draw attention to the fact that the military junta as such was contrary to the democratic principles set forth in the preamble of the ECHR and thus the pressure on the Commission by other democratic state parties was relatively low.[154] Whereas in *Lawless* the constitutionally elected government was challenged by an illegal armed group, in the *Greek* case an unconstitutional government tried to repress those who wanted to restore constitutionality. Furthermore, it should be noted that, compared to *Lawless,* the *Greek* case involved the violation of a broader range of rights.[155]

The substance of the *Greek* case concerns the conditions that have to be met by a specific situation in order to constitute a "public emergency". Four major conditions resort from it: "(1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures and restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate."[156]

In *A. and others v. the United Kingdom* the Court further defined what it considers to be an imminent threat.[157] The case concerns a derogation introduced by the United Kingdom in reaction to the September 11, 2001 attacks. With regard to the existence of an emergency situation the Grand Chamber ruled that "the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was "imminent", in that an atrocity might be committed without warning at any time."[158] The Court notes that the 2005 London bombings had tragically

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[153] Ibid., §154

[154] *See*, Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 468-69; Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, vol. 28, International Studies in Human Rights (Dordrecht: Martinus Nijhoff Publishers, 1996), 20; Fionnuala Ní Aoláin, "The Emergence of Diversity: Differences in Human Rights Jurisprudence," *Fordham International Law Journal* 19, no. 1 (1995): 114.

[155] Schreuer, 126-27.

[156] ECoHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*, §113, 70.

[157] ECtHR, *A. and Others v. the United Kingdom [GC], no. 3455/05, ECHR 2009*, http://hudoc.echr.coe.int/eng?i=001-91403.

[158] ECtHR, *A. and Others v. the United Kingdom [GC]*, § 177, 71-72.

demonstrated that there indeed was a threat that materialised later on.[159] Whilst the declaration of a state of emergency in the present case might appear justifiable the ruling of the Court could open the door for future abuses by way of preventive proclamations.

3. Entrenched states of emergency

At this point it convenes to remind the reader of the objective of constitutional provisions on states of emergency and derogation clauses in international human rights treaties, which is to ensure the exceptional and temporary nature of derogations. Article 15 has the same underlying rationale and its effective functioning will be ultimately judged by how it can maintain this exceptional and temporal character.[160]

As it was discussed earlier in this chapter, in the *First Cyprus* case the Greek government submitted that the conditions for a state of emergency had ceased to exist at a certain moment of the state. The Commission examined different stages of the proclaimed state of emergency and ultimately came to the overall conclusion that there indeed was a state of emergency on the island of Cyprus.[161] This section will demonstrate, that although present in their early jurisprudence, the Commission and the Court have since then not addressed the prolonged dimension and continuity of states of emergency.

Returning not only geographically but also substantially to *Lawless*, the case of *Ireland v. United Kingdom* examined the question on the existence of public emergency without the issue being disputed by any of the parties.[162] The Irish government argued that some of its citizens were detained and interned without trial in violation of Articles 5 and 6 of the Convention.[163] On the basis of the principle of proportionality, the Irish government contended the measures were not "strictly required by the exigencies of the situation."[164]

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[159] Ibid.

[160] Ní Aoláin and Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 171.

[161] ECoHR, *Greece v. the United Kingdom*, § 136, 138.

[162] ECtHR, *Ireland v. the United Kingdom*, *18 January 1978*, no. 5310/71, Series A no. 25, http://hudoc.echr.coe.int/eng?i=001-57506; Michael O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights: Ireland V. The United Kingdom," *The American Journal of International Law* 71, no. 4 (1977): 679-80.

[163] ECtHR, *Ireland v. the United Kingdom, 18 January 1978*, § 144, 50-51.

[164] Ibid.

Furthermore, it claimed that the use of a certain number of interrogation techniques violated the non-derogable Article 3 of the Convention (Prohibition of torture).[165]

In its analysis, the Commission found that the detention and interment without trial did indeed violate Article 5 of the Convention.[166] Therefore, the Commission went on by examining if these violations can be justified by a derogation under Article 15 and concluded that detentions were justified by "the exigencies of the situation."[167] Nevertheless, it also concluded that the interrogation techniques violated non-derogable Article 3 of the Convention.[168]

More importantly for the purpose of this thesis, the Commission went on to examine the uncontested question on the existence of a "public emergency" on the territory of Northern Ireland.[169] Whilst affirming the existence of such an emergency situation, the Commission asserted that the non-contestation does not preclude the Commission or the Court from independently examining the question.[170]

Turning to the substance of the Commission's arguments, it quickly becomes clear that its argumentation challenges the fundamental roots of the derogation system. *Ireland v. the United Kingdom* concerns in its essence the same public emergency than *Lawless*, yet the two cases are ten years apart from each other. This temporal dimension forms the core of the problematic that underlies the case. How to apply Article 15 to enduring states of emergency? Such continuous states of emergency challenge the underlying normalcy-emergency paradigm. In the context of the Northern Irish conflict, derogations had become the norm and were not the exception anymore.[171] In other words, "[t]he concept of an emergency gives rise

[165] The so-called « five techniques » – included hooding, standing against a wall, the subjection to noise, deprivation of food, water, and sleep during the duration of an interrogation. Ibid., § 96, 34-35.

[166] ECoHR, *Ireland v. the United Kingdom*, no. 5310/71, Commission Report of 25 January 1976, http://hudoc.echr.coe.int/eng?i=001-73559, 92.

[167] Ibid., 99 and 103.

[168] Ibid., 473.

[169] Ibid., 95-98.

[170] Ibid., 95.

[171] Kevin Boyle, "Human Rights and Political Resolution in Northern Ireland," *Yale Journal of World Public Order* 9, no. 1 (1982): 175.

to the expectation that such a state of affairs is temporary and that normal conditions will be restored. In Northern Ireland, however, there can be no such expectation."[172]

The weakening of the normalcy-emergency paradigm can also be observed in cases of systematic violations of human rights.[173] The still ongoing campaign of the Turkish government against the Kurdish Workers Party (PKK) that started in 1984 in South-East Turkey represents such a situation.[174] A whole series of cases of alleged violations of human rights by Turkish forces have since entered the Convention's case law.[175]

The Turkish government first invoked Article 15 in 1970 and has spent seventy-seven per cent of the time between 1970 and 1987 in states of emergency.[176] It was only in 2002 that the state of emergency in most South-Eastern provinces of Turkey was lifted.[177] Once again this entrenched nature of the state of emergency did not influence the Commission to resort to an independent assessment on the existence of an "emergency situation threatening the life of the nation".[178] Similar to *Ireland v. the United Kingdom*, the Commission in *Aksoy v. Turkey* (1996) relied on the assessments of the parties to the case.[179] The Court did not

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[172] Ibid.

[173] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 484.

[174] For a broad overview of the conflict *see*, Seevan Saeed, *Kurdish Politics in Turkey: From the Pkk to the Kck*, vol. 84, Routledge Studies in Middle Eastern Politics (Routledge, 2016); Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 484.

[175] For a more detailed discussions of systematic human rights violations in the Turkish context, *see* Aisling Reidy, Françoise Hampson, and Kevin Boyle, "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey," *Netherlands Quarterly of Human Rights.* 15, no. 2 (1997): 165.

[176] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 486.

[177] Mesut Yegen, "The Kurdish Question in Turkey: Denial to Recognition," in *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*, ed. Marlies Casier and Joost Jongerden (New York: Routledge, 2010).75

[178] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 486.

[179] ECoHR, *Aksoy v. Turkey*, no.21987/93, Report of the Commission of 23 October 1995, http://hudoc.echr.coe.int/eng?i=001-45764, §§ 172-79.

engage in any more thorough analysis of the question and explicitly referred to *Lawless* when ruling that "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.""[180]

Situations such as in Northern-Ireland and South-Eastern Turkey profoundly challenge the foundations of the derogation regime. In both cases entrenched states of emergency have deeply affected the societies and led to a normalisation of the exception. Nevertheless, neither Court nor Commission "acknowledged the strain that such a "prolonged crisis" put on the derogation regime."[181] The judicial organs of the ECHR have instead relied on a case by case analysis without making reference to the entrenched nature of the conflicts.[182]

4. Conclusion

Despite the above described difficulties of the ECHR to address entrenched states of emergency, the four factors of the *Greek* case appear to attach certain conditions to the existence of a "public emergency" under Article 15. However, the following chapter will demonstrate that, by way of the margin of appreciation doctrine, the Commission and the Court have deferred an assessment on the fulfilment of these conditions to the derogating party.

B. *The Margin of Appreciation Doctrine*

The term "margin of appreciation" originates from the French m*arge d'appréciation*, a legal doctrine developed by courts in a continental setting to give administrative bodies a certain degree of discretion in the choice of their measures.[183] In the context of the

[180] ECtHR, *Aksoy v. Turkey*, no.21987/93, 18 December 1996, Reports of Judgments and Decisions 1996-VI, http://hudoc.echr.coe.int/eng?i=001-58003, § 70, 19.

[181] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 473.

[182] Ibid., 488.

[183] Jeffrey A Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law," *Columbia Journal of European Law* 11 (2005): 116.

Convention, it refers in general to the amount of discretion the Court grants national authorities in their duty to fulfil their obligations under the Convention.[184]

With respect to states of emergency this "main tool of judicial deference"[185] was first introduced by the Commission in the *First Cyprus* case.[186] The Commission declared that a state that exercises its derogation power under Article 15 enjoyed "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."[187] Thus, in the *Cyprus* case the doctrine was applied to the proportionality of measures taken under a derogation regime. The first time that the concept was mentioned in the context of determining what constitutes a public emergency occurred in the Commission's report in *Lawless*. In an individual opinion, whilst not dissenting from the majority opinion, several members of the Commission declared that they considered that with respect "to the high responsibility which a Government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be 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 exceptional measures derogating from its normal obligations under the Convention."[188]

Other, dissenting, members of the Commission were opposed to this extension of the margin of appreciation doctrine by raising the issue that the existence of states of emergency should be solely based on existing facts and not be determined by "subjective predictions as to the future development or unilateral fears that the situation may degenerate and the threat increase […]."[189] This dissent therefore argued that the existence of a public emergency should be evaluated independently from the prior evaluation of the state party that relies on it to derogate from the Convention.

As mentioned earlier in this part, the Court in *Lawless* did not explicitly refer to the doctrine but did so implicitly by stating that "the existence at the time of a "public emergency threatening the life of the nation," was reasonably deduced by the Irish Government from a

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[184] Ibid., 115.

[185] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 465.

[186] ECoHR, *Greece v. the United Kingdom*.

[187] Ibid., § 143, 152.

[188] ECoHR, *Lawless v. Ireland*, § 90, 85.

[189] Ibid., § 92, 97.

combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957."[190]

In *Ireland v. UK*, by stating that "[i]t falls in the first place to each Contracting State, […] 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" the Court reaffirmed the margin of appreciation doctrine.[191] Not only that, the Court's assertion that "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" is an expansion of the doctrine compared to the prior "reasonable deduction" approach.[192]

The doctrine was further reinforced in *A and others v. the United Kingdom* when the Court found that: "As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation."[193] In its decision on the existence of an emergency situation the Grand Chamber therefore relied on the assessment of domestic judicial organs. Furthermore, the fact

[190] ECtHR, *Lawless v. Ireland*, § 28, 28.

[191] ECtHR, *Ireland v. the United Kingdom*, § 207, 70-71.

[192] *See*, ECtHR, *Lawless v. Ireland [no. 3]*, § 28, 28.

[193] ECtHR, *A. and Others v. the United Kingdom [GC]*, no. 3455/05, ECHR 2009, http://hudoc.echr.coe.int/eng?i=001-91403, §§ 180-81, 72-73.

that other state parties are affected to the same degree by a given crises but do not declare a derogation from the Convention does not affect the ability of each individual state party to determine the existence of a state of emergency on its territory.

Commenting on the case Jan-Peter Loof raises some interesting thoughts with regard to the Court's approach.[194] He admits that it is unquestionable that domestic authorities, i.e. intelligence services, are better placed in assessing the imminence of a terrorist threat.[195] Notwithstanding, Loof emphasises that domestic organs do not operate in the same way during a state of emergency.[196] In times of crises, pressure on both the legislator and the judiciary can impede the normal functioning of the institutional checks and balances.[197]

In light of this analysis, it can be argued that, although the Court retains some discretion on the assessment of an emergency situation, the wide margin of appreciation may leave room for abuses by state parties. Such risks for abuses that threaten the exceptional character of derogations and ultimately the normative value of Article 15 will be addressed in the following chapter.

C. *A Risk for Abuses?*

A limited external judicial oversight by the Commission and the Court can pose a serious threat to the effective implementation of human rights when states abuse Article 15 by derogating in circumstances where the conditions of a public emergency under the ECHR are not met.

The case of *Brannigan and McBride v. the United Kingdom* serves as illustrative example of the risks of the judiciary of the ECHR.[198] The facts of *Brannigan* took place

[194] Jan-Peter Loof, "Crisis Situations, Counter Terrorism and Derogation from the European Convention on Human Rights. A Threat Analysis," in *Margins of Conflict. The Echr and Transitions to and from Armed Conflict*, ed. Antoine Buyse (Intersentia, 2010), 50-51.

[195] Ibid., 50.

[196] Ibid.

[197] Ibid., 50-51.

[198] ECtHR, *Brannigan and McBride v. the United Kingdom*, nos. 14553/89 and 14554/89, 26 May 1993, Series A no. 258-B, http://hudoc.echr.coe.int/eng?i=001-57819.

shortly after the 1988 *Brogan and others v. the United Kingdom* judgment.[199] In *Brogan*, the Court had found a violation of Article 5 ECHR in specific detention measures of the British police forces.[200] At the time of *Brogan* there was no allegation on the existence of an emergency situation that would have given the right to derogate from the Convention.[201] In an apparent reaction to the judgment, the United Kingdom's government reinstated a state of emergency rather than changing its detention measures.[202] Without any apparent aggravation of the situation in Northern Ireland, in *Brannigan* the Court came to the conclusion that the same measures were excused by a state of emergency on the territory of Northern Ireland that had been notified to the Secretary General on December 23, 1988.[203] The dissenting opinion of judge de Meyer illustrates the problem with this approach of the Court: "The Government of the United Kingdom has tried to escape the consequences of that judgment by lodging once again a notice of derogation under Article 15 (art. 15) in order to continue the practice concerned […]. In my view, this is not permissible: they failed to convince me that such a far-reaching departure from the rule of respect for individual liberty could, either after or before the end of 1988, be "strictly required by the exigencies of the situation.""[204]

Once again concerning a situation in the United Kingdom, a more recent example demonstrates a similar pattern, the *A. and others v. the United Kingdom* case. After the September 11 attacks, the British government sought to pass legislation that permitted the detention of foreign terror suspects with very little supervision by the judiciary. On December 18, 2001, the British Government informed the Secretary General of a derogation under Article 15.[205] The Anti-terrorism, Crime and Security Bill, that would have otherwise violated the Convention had already entered the law on December 4 of the same year.[206] The

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[199] ECtHR, *Brogan and Others v. the United Kingdom*, nos. 11234/84; 11266/84; 11386/85, 29 November 1988, Series A no. 145-B, http://hudoc.echr.coe.int/eng?i=001-57450.

[200] Ibid., §66, 21.

29 November 1988, Series A no. 145-B, http://hudoc.echr.coe.int/eng?i=001-57450.

[201] Ibid., § 48, 13

[202] ECtHR, *Brannigan and McBride v. the United Kingdom*, 42.

[203] Ibid., § 31, 13.

[204] Ibid., 42.

[205] ECtHR, *A. and Others v. the United Kingdom [GC]*, § 11, 3.

[206] Ibid., §§ 12-13, 6.

derogation declaration of the UK does more resemble an ex-post facto legalisation of the said bill rather than a genuine response to an imminent threat.

It can be argued that the London bombings of July 15, 2005 have confirmed that a threat had indeed existed on the territory of the UK in the aftermath of September 11, 2001. Regardless of the question if the Court would have acted differently if it had rendered its judgment before the attacks, the subject matter of the case raises an important characteristic of the modern threat landscape that will be addressed in the following two parts of this thesis. If there was a terrorist threat from 2001 until 2005 without materialising one has to question if today's societies are not characterised by a permanent threat. Such an atmosphere could be abused by governments to take measures that interfere with rights under the Convention under the cover of counter-terrorism justified derogations. Therefore, the Court's decision does represent a threat for the legitimacy of Article 15 in so far as it fails to recognise the changing nature of threats.

D. *Conclusion*

The analysis of the jurisprudence of Article 15 has demonstrated that despite having attached a certain set of conditions to the assessment of the existence of public emergencies that threaten the life of the nation the Court has retained only a limited say in such questions. By relying on the margin of appreciation doctrine the ECtHR relies largely on the assessment of the state parties in reaching its conclusion on the existence of an emergency. Furthermore, the Court has not addressed the prolonged, entrenched nature of certain states of emergency. In general, despite first efforts by the Commission, the Court has largely ignored the temporary nature that is ought to be inherently attached to states of emergency. By ignoring the issue, the Court has lost a substantial part of its relevance with regard to emergency situations. The following part will show that states of emergency in a post 9/11 context in general, and in France and Turkey in particular, risk to further undermine the credibility of the Court in this area.

III. Recent States of Emergency and Challenges for the ECHR

A. *States of Emergency in a Post 9/11 Context*

In the aftermath of the September 11, 2001 attacks, international terrorism became one of the most prominent global security challenges of the 21st century. The President of the United States responded to the attacks by declaring a state of emergency and the Congress issued a joint declaration authorising the President to use all "necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[207]

States of emergency have flourished since 9/11 and the war on terror, countries over the world changing their law to fight terrorism in "an era of perceived permanent emergency" against an enemy that is not clearly defined.[208] Author Kim Lane Scheppele developed the idea of an international state of emergency as a way to understand the wave of legal changes that have swept the world after the attacks on the US.[209] Whilst the development and expansion of international human rights law after World War II was the first wave of public law globalisation, a second wave followed the 9/11 events with the development of international security law.[210] Although there is a diversity of national counter-terrorism responses, they are all ultimately responses to the same stimuli, the international framework for fighting radical Islamist terrorism.[211] Before 9/11, states invoking emergency powers would have been urged by the international community to return to normal governance. In the new era, however, extensive and prolonged uses of emergency powers seem fully normalised in the international community's campaign against terrorism.[212]

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[207] Scheppele, 1001.

[208] Aniceto Masferrer, "Introduction: Security, Criminal Justice and Human Rights in Countering Terrorism in the Post 9/11 Era," in *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, ed. Aniceto Masferrer (Dordrecht: Springer Netherlands, 2012), 2.

[209] Kim Lane Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11," in *The Maryland Constitutional Law Schmooze, 2006, Baltimore* (2006), 6.

[210] Ibid., 2.

[211] Ibid., 9.

[212] Ibid., 13.

The state of emergency in France provides a good illustration of a country that followed "the lead set by the British government over decades of habitual practice", as witnessed in the previous part.[213] Two years later, it lifted the state but incorporated in its legislation many measures that should have remained exceptional and temporary, providing a striking example of a state's "addiction to its state of emergency."[214]

B. *France: Towards a Normalised State of Emergency?*

On November 13, 2015, 130 people died and hundreds were wounded in a series of coordinated terrorist attacks in Paris. The next day, President Hollande invoked the state of emergency according to Article 16 of the French Constitution through a series of Presidential decrees.[215] After six extensions,[216] the state of emergency expired in November 2017.

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[213] John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017), 7.

[214] Ibid., 8.

[215] Decrees nos. 2015-1475 (Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/eli/decret/2015/11/14/INTD1527633D/jo); 2015-1476 (Décret n° 2015-1476 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/eli/decret/2015/11/14/INTD1527634D/jo/texte), and 2015-1478 (Décret n° 2015-1478 du 14 novembre 2015 modifiant le décret n° 2015-1476 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031474548&categorieLien=id) of 14 November 2015.

[216] Law no. 2015-1501 of 20 November 2015 (LOI n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions (1), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831&categorieLien=id); Law no. 2016-162 of 19 February 2016 (LOI n° 2016-162 du 19 février 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/2/19/INTX1602418L/jo/texte) ; Law no. 2016-629 of 20 May 2016 (LOI n° 2016-629 du 20 mai 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/5/20/INTX1610761L/jo/texte) ; Law no. 2016-987 of 21 July 2016 (LOI n° 2016-987 du 21 juillet 2016 prorogeant l'application de la loi n° 55-385 du 3 avril

1. *The legal basis of the state of emergency in France*

Three derogations to fundamental rights are admitted under French law: *théorie des pouvoirs exceptionnels* (exceptional powers theory), *état d'urgence* (state of emergency) and *état de siège* (state of siege). The state of siege, described in Article 36 of the 1958 French Constitution, can be declared by the President in the event of an imminent peril resulting from a foreign war or an armed insurrection. It has not been applied since the World War II.

Article 16 of the Constitution provides for exceptional powers to the president in case of severe crisis. Its paragraph 1 reads as follows:

When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfilment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures demanded by these circumstances after official consultation with the Prime Minister, the presidents of the Assemblies, and the Constitutional Council.

Finally, the President of the French Republic is allowed to declare a state of emergency according to the Law of April 3, 1955.[217]

2. *The Law of April 3, 1955 and November 20, 2015*

The 1955 Law provides that a state of emergency can be declared on a part or the totality of the Republic's territory in the event of "an imminent peril resulting from grave disturbances to public order, or events presenting, by their nature or gravity, the character of a public calamity." It is pronounced by Presidential decree and deliberated in the Council of Ministers. However, the initial period of 12 days can only be extended with the approval of

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1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste (1), https://www.legifrance.gouv.fr/eli/loi/2016/7/21/INTX1620056L/jo/texte) ; and Law no. 2016-1767 of 19 December 2016 (LOI n° 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/12/19/INTX1633947L/jo/texte).

[217] Law no. 55-385 of 3 April 1955 (Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350).

the Parliament.[218] The 1955 Act was drafted during the Algerian war that took place between 1954 and 1962 and was applied three times in this context. It has been decreed in three more instances, namely between 1985 and 1987 in New Caledonia, due to unrests related to an independence movement, during the 2005 uprisings in Paris and, eventually, between 2015 and 2017 following the first Paris terrorist attacks.[219]

Emergency measures authorised by the law of 1955 include : bans on the circulation of persons or vehicles;[220] the establishment of protection or security areas where the presence of individuals is regulated;[221] residence bans in relation to all or part of the county against any person seeking to hinder in any way the action of the public authorities;[222] restricted residence orders;[223] temporary closure of concert halls/theatres, pubs and places of meeting of any kind;[224] prohibition of meetings likely to cause or maintain disorder;[225] obligation to surrender, for reasons of public order, certain firearms and ammunition legally held or acquired[226] and searches during both daytime and night-time.[227]

A law of November 20, 2015 modified several provisions of the 1955 Act. On the one hand, it reinforces existing administrative measures and creates additional ones. The Minister of Interior gains the authority to put anyone under house arrest when "there are serious reasons to believe that a person's behaviour constitutes a threat to public security and order;"[228] the government may disband groups and associations of persons taking part in committing or facilitating acts that present serious harm to the public order;[229] the Minister of

[218] Ibid., Article 2.

[219] For an overview on the history of states of emergency in France, *see*, Sylvie Thénault, "L'état D'urgence (1955-2005). De L'algérie Coloniale À La France Contemporaine: Destin D'une Loi," *Le mouvement social*, no. 1 (2007).

[220] Law no. 55-385, Article 5.

[221] Ibid.

[222] Ibid.

[223] Ibid., Article 6.

[224] Ibid., Article 8.

[225] Ibid.

[226] Ibid., Article 9.

[227] Ibid., Article 11.

[228] Law no. 2015-1501, Article 6.

[229] Ibid., Article 6-1.

Interior may take any measure to block websites and social networks inciting acts of terrorism or glorifying such acts, immediately and without judicial control;[230] and the violation of administrative measures now results in increased penalties.[231]

On the other hand, the 2015 law contains provisions that soften the former legislation. Indeed, the requirements for administrative searches are strengthened[232] and the new law abolishes a provision allowing the government to take measures to control the press and publications.[233]

3. The end of the derogatory measures and the normalisation of emergency

The French government showed a tendency to normalize the state of emergency through a constitutional reform at an early stage. On 23 December 2015, the Council of Ministers adopted a Draft Constitutional Law on the Protection of the Nation.[234] Critical voices feared that the constitutionalisation of the state of emergency would place emergency powers and fundamental rights and freedoms on the same level.[235] The Venice Commission nevertheless decided that the text was not *per se* incompatible with international standards.[236] However, the attempt by the French Government to constitutionalise a state of emergency raised strong debates among the French population and was eventually abandoned in March 2016.[237]

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[230] Ibid., Article 11-II.

[231] Ibid., Article 13.

[232] Ibid., Article 11-I.

[233] Law no. 55-385, Article 11.

[234] Government of the French Republic, "Protection of the Nation," http://www.gouvernement.fr/en/protection-of-the-nation.

[235] Council of Europe, *Opinion on the Draft Constitutional Law on "Protection of the Nation of France Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, 14 March 2016, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)006-e, 15.

[236] Ibid, 26-27.

[237] "Projet De Loi Constitutionelle De Protection De La Nation," vie-publique.fr (Prime Minister of the French Republic), http://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-constitutionnelle-protection-nation.html.

The emergency measures that have been implemented during the prolongation of the state of emergency were vividly criticised, not only by civil society organisations but also by the United Nations (UN). According to Amnesty International, France's search powers and application of administrative control measures were not only disproportionate, but also discriminatory.[238] The UN Committee against Torture raised concerns about reports of excessive use of force by the police during search operations.[239] In an unprecedented move in January 2016, five UN Special Rapporteurs highlighted that the state of emergency in France and the law on surveillance of electronic communications imposed excessive and disproportionate restrictions on human rights and fundamental freedoms.[240] In particular, the application of derogatory measures against environmental activists or to ban activists from labour law protests has weakened the rationale behind the declared state of emergency.[241]

Taking these criticisms into account, President Macron officially lifted the state of emergency on November 1, 2017. The preceding day, in a speech at the European Court of Human Rights, he emphasised that "a state of emergency – originally designed to address a situation of limited duration, and relying on blanket provisions – could not be extended indefinitely, although the threat itself [terrorism] is long-lasting and recognised."[242] Highlighting that the state of emergency in France was no longer effective, proportionate and suited to the situation,[243] he introduced a new Law on Homeland Security and the Fight

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[238] "Dangerously Disproportionate - the Ever-Expanding National Security State in Europe," Amnesty International, https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF.

[239] United Nations Committee against Torture, *Concluding observations on the seventh periodic report of France*", CAT/C/FRA/CO/7, 10 June 2016, §§ 12-13, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/FRA/CO/7&Lang=En.

[240] Office of the High Commissioner for Human Rights, "Un Rights Experts Urge France to Protect Fundamental Freedoms While Countering Terrorism," http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16966.

[241] "Dangerously Disproportionate - the Ever-Expanding National Security State in Europe", 16.

[242] Emmanuel Macron, "Speech at the European Court of Human Rights on October 31, 2017," European Court of Human Rights, http://www.echr.coe.int/Documents/Speech_20171031_Macron_ENG.pdf.

[243] Ibid.

against Terrorism.[244] The latter allegedly "guarantees a very high level of security to our fellow citizens, while simultaneously bolstering the protection of freedoms, in particular through judicial supervision and the requirement to obtain authorisation from a judge with responsibility for civil liberties and detention for house searches."[245]

However, an analysis of Law no. 2017-1510 shows that it has incorporated some of the measures foreseen by the 1955 law on the state of emergency. Like Article 8-1 of the latter legislation, Article 1 of the new law authorises the prefect (a member of the executive) to establish protection or security areas ("*périmètres de protection*") in which police forces are given particular verification prerogatives, "frisking" ("*palpations*") and luggage control ("*fouilles de baggage*") without giving a reason. If such a verification should be refused, the authorised agents can remove the individual from the area and prohibit re-entry. A measure that has the potential to conflict with Articles 5 (right to liberty and security) and 8 (right to respect for private and family life) of the ECHR.[246] Article 2 of the new law allows the temporary administrative closure of religious places in order to prevent terrorist attacks ("*lieux de* culte")[247] and resembles largely Article 8 of the 1955 law that gave the administration similar prerogatives.[248] Such closures could violate Articles 9 (Freedom of religion) and 10 (Freedom of expression) of the ECHR. Article 3 of the new law and Article 6 of the old law foresee administrative control or surveillance measures for individuals, among which there is a prohibition to leave a certain perimeter or an obligation to periodically appear at a local police station. Similar Article 4 of Law no. 2017-1510 that foresees home visits and seizures by the police aimed at preventing terrorist attacks (also known as "*visites domicilaires*") mirrors the content of Article 11 of the 1955 law on emergency powers. It should be noted that Article 4 requires a confirmation of the initial recommendation of the police for a visit by a judge of liberties and detention ("*juge des libertés et de la detention*"). Nevertheless, it is doubtful if this judge has the resources to

[244] Law no. 2017-1510 of 30 November 2017 (LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (1), https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=584C00CFDA5BB1F08F1FB7AAE5020A3F.tplgfr27s_3?cidTexte=JORFTEXT000035932811&categorieLien=id).

[245] Macron, 8.

[246] Law no. 2017-1510, Article 1.

[247] Ibid., Article 2.

[248] Law no. 55-385, Article 8.

come to an independent judgment on each individual case, a view that is shared by the French union of magistrates.[249] All of the remaining measures expand the powers of the law enforcement whilst involving the judiciary only in a very limited way. Thus, Law no. 2017-1510 broadens the prerogatives of the executive branch of government in a way that was originally reserved to states of emergency.[250] Looking at the letter of the new law it is striking to observe that the wording has been softened whilst the measures remained similar. Searches and seizures ("*perquisitions*") became visits ("*visites*"), and assigned residence orders ("*assignations à domicile*") became individual control and surveillance measures ("*mesures individuelles de contrôle administratif et de surveillance*").[251] A semantic element that could further contribute to a normalisation of the exceptional.

Although the law is temporally limited in its application until the end of 2020 (extension possible after a review in 2020) it has received widespread criticism, both domestically and internationally. The French Defender of Rights characterised such a replacement of the derogatory state by a de facto state of emergency as a "poisoned pill."[252] CoE Commissioner for Human Rights Nils Muižneks expressed concerns with regard to certain provisions and stressed the need to ensure that the new law does not result in the indefinite extension of the state of emergency.[253] Despite the wave of criticisms towards the draft law, the bill wasn't modified. Deliberately choosing to introduce the new law in the premises of the ECtHR, President Macron insisted that it is at the heart of his motivation to end this period of using Article 15.[254] Yet with the normalisation of emergency, human rights are now permanently at risk and the law is expected to lead to severe cases of discrimination

[249] "Juge Des Libertés Et De La Détention : L'alibi Facile De L'état D'urgence Permanent," Syndicat de la magistrature http://www.syndicat-magistrature.org/IMG/pdf/cp_jld_l_alibi.pdf.

[250] *See*, Law no. 2017-1510.

[251] *See*, Law no. 55-385.; ibid.

[252] Jean-Baptiste Jacquin, "Jacques Toubon : Le Projet De Loi Antiterroriste Est « Une Pilule Empoisonnée »," *Le Monde* 23 June 2017.

[253] Council of Europe, Commissioner for Human Rights, *Letter addressed to the French Senate*, 10 July 2017, https://rm.coe.int/lettre-au-senat-francais-sur-le-respect-des-droits-de-l-homme-dans-le-/1680731105.

[254] Macron, 9.

against Muslims.[255] One shall therefore expect an increase of French case-law in front of the ECtHR.

C. *Turkey: An Entrenched State of Emergency?*

On the night of July 15, 2016, a *coup d'état* allegedly led by a sector of the army resulted in the death of 246 citizens and more than 2,000 wounded in Turkey.[256] Turkish President Recep Tayyip Erdoğan declared a three-month state of emergency on July 20, 2016. Following approval by the Parliament the next day, the Council of Ministers passed a series of emergency decree laws periodically extending the state of emergency until today.[257] The decree laws provide for "a comprehensive purging from the State apparatus of the persons allegedly linked to the conspiracy," and simplify the rules of criminal investigation for terrorist-related activities.[258] Turkish authorities allege that the conspiracy was organised by the supporters of Mr Fethullah Gülen, a cleric who turned against President Erdogan in 2013 accusing the members of the government of corruption. The network of its supporters is denoted as FETÖ/PDY (Fethullah Terror Organisation/Parallel State Structures). Mr Gülen, however, denies playing any role in the coup.[259]

1. The legal basis of the state of emergency in Turkey

[255] "France: Don't 'Normalize' Emergency Powers Proposed Measures Undermine Rights, Rule of Law," Human Rights Watch, https://www.hrw.org/news/2017/06/27/france-dont-normalize-emergency-powers.

[256] Council of Europe, *State of emergency declared in Turkey following the coup attempt on 15 July 2016*, Notification of Communication 25 July 2016, JJ8190C Tr./005-192, https://rm.coe.int/168069538b, 5.

[257] Alan Greene, "The Uk, the Council of Europe and Turkey's International Human Rights Obligations in a State of Emergency: Submission to Foreign Affairs Committee: United Kingdom's Relations with Turkey," (2016).

[258] Council of Europe, *Turkey – Opinion on Emergency Decree Laws Nos. 667 – 676 Adopted Following the Failed Coup of 15 July 2016 Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9 - 10 December 2016)*, 12 December 2016, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e.

[259] Ibid.

The Government can declare a state of emergency pursuant to Article 120 of the Constitution for a limited period of time in the event "of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms." The decision shall be immediately submitted to the Turkish Grand National Assembly for approval. According to Article 121 paragraph 3, during a state of emergency, the Government may legislate by means of emergency decree laws on matters necessitated by the state of emergency without prior authorisation of the Parliament. These decrees shall however be submitted to the Parliament on the same day for approval.[260]

During the state of emergency, Article 15 of the Turkish Constitution allows for the suspension, of the "exercise of fundamental rights and freedoms, but only to the extent required by the exigencies of the situation and provided that "obligations under international law are not violated". Article 15 also contains a list of non-derogable rights, such as, for example, the right to life or physical integrity."[261]

2. *Overview of the emergency measures*

The first decree law (no. 667) ordered the permanent dissolution of over two thousand private institutions, including health institutions, schools, associations and universities. Furthermore, it dismissed a number of judges and public servants.[262] The second decree additionally contained a list of media outlets to be closed, and the following decree laws ordered similar measures.[263] Furthermore, these decrees introduce new criminal procedures simplifying the task of the investigative bodies, prosecution and courts, as well as measures related to arrest and custody.[264] The purges extend to the business sector, the government seizing assets of major companies in the country, and media outlets. Furthermore, the concept of terrorism and who is considered a terrorist was loosely defined in the decree laws.[265]

3. *The extension of the state of emergency*

[260] Ibid., 6.

[261] Ibid., 7.

[262] Ibid., 19.

[263] Ibid., 20.

[264] Ibid., 33.

[265] Ibid., 48.

In an information note attached to the Turkish notification of the state of emergency to the Secretary General of the CoE, the Permanent Representative of Turkey emphasised that the state is a temporary measure as opposed to normalcy: "The purpose of the state of emergency is to take required measures in the most speedy and effective manner in the fight against [the Fethullah Terror Organisation (FETÖ)] terrorist organisation in order to save the nation from this ferocious terror network and return to normalcy as soon as possible."[266]

The Venice Commission emphasises the inherent issue with regard to the prolongation of the state of emergency: The Turkish government argues that the risk of a repeated coup attempt still remains, yet the Commission considers that "this claim seems highly speculative, especially after over a hundred thousand public servants had been dismissed and tens of thousands arrested."[267] While it understands the need to conduct a swift dismissal of persons clearly implicated in the conspiracy, "the same result may be achieved by employing temporary measures, and not permanent ones."[268] Indeed it appears that the government intends to keep certain measures in the legislation permanently, since there is no indication in the decree laws that they will cease to apply after the end of the emergency period.[269] Civil servants were dismissed permanently instead of being suspended during the emergency period, organisations were dissolved and their property confiscated instead of being put under temporary governmental control. Confronted with this clear attempt to further entrench the state of emergency in Turkey, the Venice Commission warns: "if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy."[270]

Although the state of emergency allows Turkey to temporarily derogate from many provisions of the ECHR, non-derogable rights enjoy absolute protection, among which the absolute prohibition on torture and ill-treatment of detainees are particularly relevant in this case. Poor safeguards against abuse in detention under the state of emergency inevitably led

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[266] Council of Europe, *State of emergency declared in Turkey following the coup attempt on 15 July 2016*, 5.

[267] Council of Europe, *Turkey – Opinion on Emergency Decree Laws Nos. 667 – 676 Adopted Following the Failed Coup of 15 July 2016 Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9 - 10 December 2016)*, 10.

[268] Ibid., 20.

[269] Ibid.

[270] Ibid., 49.

to an increased number of reports of ill-treatment in detention.[271] It is equally suspected that the prosecution of those suspected of involvement in the coup is often being conducted without due process.[272] The emergency powers used by the Turkish government have a highly detrimental effect on the parliamentary opposition. In particular members of the Kurdish opposition party Peoples' Democratic Party (HDP) have been targeted by emergency measures under the pretext of the fight against terrorsim. The government in Ankara took direct administrative control over 82 of 103 municipalities held by HDP representatives.[273] Furthermore, several HDP members of parliament have been arrested on ground of terrorist charges and are imprisoned without trial.[274] This use of the state of emergency against the opposition demonstrates a clear potential of abuse of the state of emergency. In the jurisprudence of the Commission a similar use of emergency powers had been criticised in the *Greek Colonels* case.[275]

In January 2017, the President of the ECtHR announced that 5,363 cases have been filed by Turkish nationals in the aftermath of the coup attempt, constituting over 10% of the claims filed before the court in 2016.[276] These numbers allow to expect that the ECtHR will soon be overloaded with Turkish claims, putting at risk the functioning of the Court but also underlining the necessity for the Court to find a way to deal with entrenched states of emergency. More recently the Court has rejected a first series of application on grounds of admissibility. In *Köksal v. Turkey* the Court found that the applicant had not exhausted domestic remedies that were provided by the law on emergency powers.[277] The emergency law provides for a commission for complaints about emergency measures that although non-

[271] "Turkey – Events of 2016," Human Rights Watch, https://www.hrw.org/world-report/2017/country-chapters/turkey.

[272] Ibid.

[273] "Turkey: Crackdown on Kurdish Opposition," Human Rights Watch, https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition.

[274] Ibid.

[275] *See*, ECoHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*, § 119, 71-72.

[276] Zia Weise, "Turkish Detainees Could Lose Right to European Appeal – with Courts in Chaos, Turkey's President Could Cut Off Access to European Court of Human Rights.," *Politico*, 13 June 2017.

[277] ECtHR, *Köksal v. Turkey*, no. 70478/16, 6 June 2017, http://hudoc.echr.coe.int/eng?i=001-174629, § 30, 12.

judicial has been identified as a competent remedy by the Court.[278] This most recent judgment confirms a trend that has seen applications regarding the Turkish state of emergency being declared inadmissible on similar grounds.[279] By doing so the Court has not yet examined the substance of the Turkish emergency situations.

D. *Conclusion*

The situation in France and Turkey offer two distinct illustrations of the challenges faced by the ECtHR with regard to contemporary states of emergency. In France, the derogation to Article 15 has been replaced by permanent measures that are likely to not sustain the level of protection generally admitted by the Court. In Turkey, derogatory measures have been permanently admitted in the legislation and the State appears to abuse the powers allowed during an emergency period. These two examples emphasize the need for the Court to rethink its approach towards state of emergency related cases. An issue that is going to be addressed in the final part of this thesis.

[278] Ibid., § 29, 12.

[279] *See*, ECtHR *Mercan v. Turkey*, no. 38924/11, 8 November 2016, http://hudoc.echr.coe.int/eng?i=001-164866; and *Zihni v. Turkey*, no. 59061/16, 7 March 2017, http://hudoc.echr.coe.int/eng?i=001-169704.

IV. Article 15 in an Evolving Security Landscape

The discussion of *Lawless* has demonstrated that the judiciary of the CoE has taken the stance that they will not leave the evaluation of the existence of an emergency situation under Article 15 ECHR to the derogating state alone.[280] Nevertheless, by granting state parties an overly wide margin of appreciation this supervision appears to be nearly void. In particular, the judiciary of the CoE has systematically failed to recognise the gap between the theoretical foundation of the derogation system, the normalcy-emergency paradigm, and state practice. The case studies of France and Turkey have demonstrated that a discussion on the Court's approach towards such entrenched states of emergency is more pressing than ever.

This part argues that a changing nature of threats that is present in both cases has altered the temporary character of states of emergency therefore the traditional dichotomy between states of normalcy and emergency is seemingly losing its relevance. Hence, the following question arises: How can the Court re-approach the issue under present day realities and limit abuses of derogation under Article 15?

In order to address these issues, the first chapter of this part discusses the nature of terrorist threats under the prism of the normalcy-emergency paradigm (A). The second chapter will then turn towards a normative proposal for the future direction of the jurisprudence on such situations under Article 15 ECHR based on an evaluation of the existence of a state of emergency at the time of the alleged violations (B).

A. *Terrorism and the Normalcy-Exception Paradigm*

In both case studies of this thesis derogations from the Convention were justified on the basis of a terrorist threat. In the case of France relating to international terrorist activity and in the case of Turkey to domestic terrorist groups. Absent from the Convention's preparatory work, terrorism has been frequently invoked in order to declare a state of emergency. This section argues that the nature of this contemporary threat challenges the normalcy-emergency paradigm underlying Article 15 of the Convention. It further argues that contemporary terrorist threats differ from those of the past in their temporal dimension.

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[280] Gross, "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," 492.

1. The exceptional character of the threat

The question what is considered an act of terrorism or a terrorist is, both domestically and internationally, subject to controversial discussion and would go beyond the scope of this thesis.[281] Nonetheless, it is important to consider the characteristic of terrorist threats from the perspective of a dichotomy between norm and exception.

The definitional uncertainty of terrorism reflects the vagueness of the concept. Indeed, terrorism is a constantly changing phenomenon that can take various forms. Attempts of authors to define terrorism give the impression that terrorism is used as an umbrella term for threats of various kinds.[282] One can argue that this unstable definition of terrorism has as a potential side-effect that states overly rely on it to abusively justify the declaration of states of emergency and the derogation from human rights.

In *Lawless* the Court emphasised the exceptional nature a threat must have to amount to an emergency under the Convention.[283] In the public perception terrorism is considered without doubt as one of the major challenges our democratic societies face. However, terrorism is not a new phenomenon, it has been constantly present in modern history and affected societies on a global scale.[284] Manifold efforts to eradicate terrorism have been carried out, yet the threat persists. This observation questions the exceptional nature of the threat.

An issue that resurfaced in the Court's jurisprudence is the argument that the threat of international terrorism can constitutes a legitimate basis for a state of emergency. This argument was upheld in the case *A and others v. the United Kingdom* that made an analogy between the situation in Northern Ireland and the UK after the 9/11 attacks.[285] Referring to its prior decision in *Ireland v. the United Kingdom* the Court ruled that the conditions of Article

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[281] For an overview on the question *see*, Noam Chomsky, "The Definition of Terrorism," in *Weapon of the Strong : Conversations on Us State Terrorism*, ed. Cihan Aksan and Jon Bailes (London: Pluto Press, 2013).

[282] *See*, ibid.

[283] ECtHR, *Lawless v. Ireland [no. 3]*, § 28, 28.

[284] For a brief historical overview of terrorism, *see* Randall D Law, *The Routledge History of Terrorism* (New York: Routledge, 2015), 1-10.

[285] ECtHR, *A. and others v. the United Kingdom*, § 11, 4.

15 for the existence of a state of emergency were satisfied as terrorism represents "a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants." [286] The notice of derogation submitted to the Secretary General described the ongoing crisis as a "threat from international terrorism" without going into detail on the nature of the latter. [287] Moreover, the notice had been issued prior to any major act of Islamist terror on the territory of the United Kingdom. As mentioned earlier the Court rendered its judgment after the 2005 London attacks, whilst the question was discussed by the UK judiciary prior to these attacks. When the decision to declare the state of emergency reached the House of Lords, Lord Hoffman's dissent did not question the ability of terrorism to cause great harm and sees it as a threat but not as exceptional enough to threaten the life of a nation and to justify a derogation from fundamental rights. [288] He concludes that "the real threat to the life of the nation [does not come] from terrorism but from laws such as these."[289] As we have seen earlier in this thesis this did not preclude the Court from ruling that the threat was both exceptional and "imminent". [290]

Another element that questions the exceptional nature of terrorist threats in general is that our everyday lives remain largely untouched until the threat materially manifests itself in an attack. A view that was put forward by the Commission with regard to IRA activities on the territory of Ireland in *Lawless*.[291]

The question therefore arises if the attacks themselves are not to be regarded as the exceptional material manifestation of the threat whilst the terrorist threat has become the norm? Even though from a theoretical standpoint terrorism threatens the life of the nation, empirically speaking specific attacks should be regarded as the real threat.

It would go far beyond the scope of this thesis to discuss terrorism in detail and this small excursion serves to make the reader familiar with a distinction between terrorism as a phenomenon and terrorist attacks as a material reality, namely in the case of France the major terrorist attacks that occurred in Nice and Paris and for Turkey the attempted coup.

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[286] Ibid., § 176, 71.

[287] Ibid., § 11, 4.

[288] Ibid., § 18, 9-10.

[289] Ibid.

[290] Ibid., § 179, 72.

[291] ECoHR, *Lawless v. Ireland*, § 90, 88.

It should be noted that not only in these two cases but in general terrorist attacks may without doubt justify the proclamation of a state of emergency. Nevertheless, having in mind the conceptual foundations of derogation regimes that are rooted in an opposition of normalcy and emergency it can be regarded as troublesome that a phenomenon which is omnipresent in today's societies is put forward as an exceptional (and imminent) threat. Whilst the initial declarations of the state of emergency in France and Turkey were inherently linked to the attacks committed, the prolongation of the state has been justified by the fight against terrorism in general and not by new attacks or attempts to overthrow the government.[292] Having approached the exceptional character of modern day terrorism from a material point of view the next section will address its temporal dimensions.

2. The temporal dimension of the threat

This arguably exceptional character of terrorist threats is supplemented by a changing temporary nature of emergencies. As was established earlier in this thesis, states of emergency are indeed based on an inherent assumption that emergencies are a temporary exception. A time limitation for states of emergency is present in many modern legal emergency regimes and aims at preventing abuses of such states via an illegitimate prolongation.

The duration of a state of emergency is limited to the time when the conditions for its proclamation are maintained. In other words, a state of emergency should cease to exist when the threat to the life of the nation is overcome. This guarantees the temporal limitation of emergency powers and a return to normalcy. In a human rights context, it is of utmost importance to respect this element of states of emergency and derogations in order to avoid governmental abuses in the exercise of extraordinary powers. History has shown that both democratic and non-democratic executives are tempted to broaden their prerogatives without respect for their obligations under international human rights law.

When terrorism is used as the justification for the declaration of a state of emergency such a state could be maintained until terrorism is not a threat to the nation anymore. The fact that despite worldwide efforts this threat does not diminish raises another issue. The nature of the terrorist threat challenges the temporary dimension of the normalcy-emergency paradigm. The repeated prolongation of states of emergency justified by a terrorism threat in France and

[292] An exception is the prolongation of the state of emergency in France after the Nice attacks.

Turkey and their difficulties to return to normalcy emphasises this issue and demonstrates the inadequacy of the normalcy-emergency paradigm applied to terrorism.

There appears to be a conflict between the concept of states of emergency that is inherently limited in time and the non-temporary nature of contemporary threats such as terrorism. In a meeting with then French Minister of the Interior Bernard Cazeneuve, the European Commissioner for Human Rights, Niels Muižneks underlined the issue by calling a possible short-term victory over terrorism "illusionary."[293] If it is so and the fight against terrorism represents a long-term process which requires exceptional measures, then this reality on the ground does collide with the underlying paradigm of emergency regimes.

Furthermore, politically the declaration on the end of a state of emergency is a very sensitive issue because every further attack after such a return to normalcy can put decision-makers under substantial public pressure. Indeed, in its speech on July 14, 2016, then French President François Hollande confirmed that the state of emergency would end by the end of the month.[294] This was only hours before an attacker drove a truck into festive crowds in Nice, Southern France, killing 86 and injuring many more.[295] This new attack ultimately led to the prolongation of the emergency regime until November 2017.[296]

This vividly demonstrates that modern day terrorism does not fit within traditional conceptions of states of emergency. Traditional threats ended at a certain point. In the conflict in Northern Ireland the Good Friday Agreement inaugurated the end of hostilities conducted by the IRA. In Cyprus terrorist activity against British forces declined approaching independence. Modern threats, on the other hand seem to miss such a temporal limitation. For instance, the rationale of terrorist action is to create a widespread fear among the population of a given country.[297] An issue that is discussed by Mary Dudziak in her book *War Time*.

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[293] Jean-Baptiste Jacquin, "Prolonger L'état D'urgence, Un « Risque » Pour La Démocratie," *Le Monde* 30 November 2016 2016.

[294] "Hollande: L"État D'urgence Ne Sera Pas Prolongé"," *Le Figaro*, 14 July 2016.

[295] Alissa J Rubin and Aurelien Breeden, "France Remembers the Nice Attack: 'We Will Never Find the Words'," *New York Times* 14 July 2017.

[296] Max Fischer, "Terror's New Form: A Threat That Can Be Managed but Not Erased," *New York Times*, 16 July 2016 2016.

[297] *See*, Judith Butler, "The Discourse of Terror," in *Weapon of the Strong : Conversations on Us State Terrorism*, ed. Cihan Aksan and Jon Bailes (London: Pluto Press, 2013); George P. Fletcher, "The Indefinable Concept of Terrorism," *Journal of International Criminal Justice* 4, no. 5 (2006): 909.

Dudziak observes in the context of the US "War on terror" that "[p]ost-9/11 scholarship has persisted in the assumption that normality is a state of existence outside times of danger. "Wartime" and "peacetime" broke down, but the basic temporal structure (normal times, ruptured by non-normal times) largely remained in place in legal thought, even if it seemed uncertain whether normal times would ever return."[298] In the US such a return has never taken place despite the end of the American engagement in Iraq in 2010.[299]

3. Conclusion

Joan Fitzpatrick resumes the conflict of contemporary terrorism with the normalcy-emergency paradigm in a precise way: "The "war against terrorism" is the quintessential 'normless and exceptionless exception'. No territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks, and success in applying measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of 'hostilities' is measured by the persistence of fear that the enemy retains the capacity to strike. Long periods without incident do not signify safety, because the enemy is known to operate 'sleeper cells'."[300]

In the European context, it will be interesting to observe if the Court will acknowledge the gap between conceptual theory and practice regarding states of emergency in order to counter a normalisation of the exception. The next part will attempt to provide the reader with an approach that the Court could take in this regard.

B. *Addressing Modern Emergency Situations: Returning to the roots?*

In the theoretical part of this thesis derogation regimes were characterised as a double-edged sword. Looking at the analysis of the jurisprudence on Article 15 and the case

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[298] Mary L Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford and New York: Oxford University Press, 2012), 114.

[299] Ibid., 128-32.

[300] Joan Fitzpatrick, "Speaking Law to Power: The War against Terrorism and Human Rights," *European Journal of International Law* 14, no. 2 (2003): 451. *Citing,* Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy," *Cardozo Law Review* 21, no. 5-6 (2000).

studies of France and Turkey indicate that the edge used to protect human rights during states of emergency has become somewhat dull. The Court has consistently neglected approaching the entrenched nature of emergency situations and opened the door for abuse by relying extensively on the margin of appreciation doctrine. Indeed, by deferring the question on the existence of a "threat to the life of a nation" to the executive of the derogating state party leaves the Court with little to say on the question.

The changing nature of the threat landscape discussed in the first chapter of this part further questions the approach of the Court. The Court has failed to react to these developments and has for its most part neglected the temporary dimension of states of emergency. Hence, this chapter proposes a different approach for the Court that partially refurbishes an approach that had already been taken by the judiciary of the CoE. Indeed, the proposed approach is based on the Commission's assessment of the emergency situation in the *First Cyprus* case. To remind the reader, in this case the Commission had followed arguments brought forward by the Greek government and considered the question of the existence of an emergency situation at different stages of the state of emergency.

This thesis proposes to revitalise this approach and substantially assess the existence of an emergency at the time of an alleged violation of rights under the ECHR. This could give the Court a better ability to distinguish instances in which emergency measures were justified and situations where said measures have been abused.

Furthermore, a continuous assessment at different points in time would allow the Court to make a more precise assessment with regard to the temporal character of states of emergency. Emergency situations require quick and immediate reactions by the executive and whilst the invocation of a state of emergency following a terrorist attack might have been justified, the Court could later assess that the circumstances had changed at the moment of the alleged facts and therefore the state should not have been maintained.

With regard to the particularly sensitive issue at stake, the survival of the nation, the Court is hesitant to interfere with the governments' assessment of the situation. The wide margin of appreciation is a witness of such a reluctance. By assessing the existence of an emergency situation at different stages the Court could continue to grant a wide margin of appreciation for the proclamation of states of emergency but could at the same time tighten this margin for the prolongation of said states. For instance, in the case of Turkey the Court could separate the initial derogation in reaction to the attempted coup, but at the same time decide differently on the later stages of the case where emergency powers appear to be used for political manoeuvres.

The previous chapter defended the idea that modern day threats, in particular terrorism, are constant and have no end-date. What on the other hand has an end are the attacks and their consequences that lead to the proclamation of the state. A division of states of emergency in several periods could allow the Court to focus on "the exceptional" during such states, attacks, uprising, etc. and therefore attempt to reanimate the normalcy-emergency paradigm. Such an approach could help to (re-)sharpen the protective edge of Article 15 ECHR.

Conclusion

Part I of this thesis gave an insight into the conceptual foundations of states of emergencies and derogation regimes in international human rights. It underlined that the concept is rooted in a separation between states of emergency and states of normalcy. Furthermore, a review of literature on the issue has demonstrated that it is at times problematic to separate the norm from the exception.

A difficulty that had an influence on the jurisprudence of Article 15 discussed in Part II. The jurisprudence of the Court has so far neglected the issue of a blurred division between norm and exception. In its assessment of the existence of an emergency the Court grants a wide margin of discretion to the derogating state party.

In particular by ignoring the issue of prolonged states of emergency, the Court has lost a substantial part of its relevance with regard to emergency situations. This is critical with regard to recent states of emergency in France and Turkey discussed in Part III. In France, emergency measures have been replaced by permanent measures that potentially interfere with the rights under the Convention. In Turkey, derogatory measures have been permanently admitted in the ordinary legislation and the State appears to abuse the powers allowed during an emergency period. The two case studies emphasize the urgent need for the Court to rethink its approach in such cases.

Therefore, Part IV discussed the inherent contradiction of the threat underlying both case studies, terrorism, with the normalcy-emergency paradigm. Terrorism threat does not fit within an alternating landscape of times of normalcy and time of emergency. It rather is a constant threat whose end is unknown. Therefore, this thesis argues that the Court should return to an approach taken by the Commission in the first case touching upon states of emergency, the *First Cyprus* case. Such an approach helps the Court to focus on the truly exceptional.

Bibliography

A. *Primary Sources*

1. Council of Europe

- Council of Europe, Commissioner for Human Rights, *Letter addressed to the French Senate*, 10 July 2017, https://rm.coe.int/lettre-au-senat-francais-sur-le-respect-des-droits-de-l-homme-dans-le-/1680731105.
- ———. *Draft Convention for the protection of Human Rights and Fundamental Freedoms*, 7 August 1950, "http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=66&lang=en.
- ———. *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf.
- ———. *Opinion on the Draft Constitutional Law on "Protection of the Nation of France Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, 14 March 2016, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)006-e.
- ———. *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155, http://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.
- ———. *State of emergency declared in Turkey following the coup attempt on 15 July 2016*, Notification of Communication 25 July 2016, JJ8190C Tr./005-192, https://rm.coe.int/168069538b.
- ———.*Turkey – Opinion on Emergency Decree Laws Nos. 667 – 676 Adopted Following the Failed Coup of 15 July 2016 Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9 - 10 December 2016)*, 12 December 2016, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e.

- European Commission on Human Rights, *Aksoy v. Turkey*, no.21987/93, Report of the Commission of 23 October 1995, http://hudoc.echr.coe.int/eng?i=001-45764.
- ———. *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), nos. 3321/67, 3322/67, 3323/67, and 3344/67, Commission report of 5 November 1969, Yearbook 12, http://hudoc.echr.coe.int/eng?i=001-73020.
- ———. *Greece v. the United Kingdom*, no. 176/56, Commission report of 26 September 1958, http://hudoc.echr.coe.int/eng?i=001-73858.
- ———. *Ireland v. the United Kingdom*, no. 5310/71, Commission Report of 25 January 1976, http://hudoc.echr.coe.int/eng?i=001-73559, 92.
- ———. *Lawless v. Ireland*, Commission Report of 19 December 1958, https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-73438&filename=LAWLESS%20v.%20IRELAND.pdf.
- ———. *Preparatory Work on Article 15 of the European Convention on Human Rights*, http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf.
- European Court of Human Rights, *A. and Others v. the United Kingdom [GC]*, no. 3455/05, ECHR 2009, http://hudoc.echr.coe.int/eng?i=001-91403, §§ 180-81, 72-73.
- ———. *Aksoy v. Turkey*, no.21987/93, 18 December 1996, Reports of Judgments and Decisions 1996-VI, http://hudoc.echr.coe.int/eng?i=001-58003.
- ———. *Brannigan and McBride v. the United Kingdom*, nos. 14553/89 and 14554/89, 26 May 1993, Series A no. 258-B, http://hudoc.echr.coe.int/eng?i=001-57819.
- ———. *Brogan and Others v. the United Kingdom*, nos. 11234/84, 11266/84, and 11386/85, 29 November 1988, Series A no. 145-B, http://hudoc.echr.coe.int/eng?i=001-57450.
- ———. *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25, http://hudoc.echr.coe.int/eng?i=001-57506
- ———. *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961, Series A no. 3, http://hudoc.echr.coe.int/eng?i=001-57518.
- ———. *Mercan v. Turkey*, no. 38924/11, 8 November 2016, http://hudoc.echr.coe.int/eng?i=001-164866.
- ———. *Zihni v. Turkey*, no. 59061/16, 7 March 2017, http://hudoc.echr.coe.int/eng?i=001-169704.

2. French legislation

- Decree no. 2015-1475 (Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/eli/decret/2015/11/14/INTD1527633D/jo).
- Decree no. 2015-1476 (Décret n° 2015-1476 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/eli/decret/2015/11/14/INTD1527634D/jo/text).
- Decree no. 2015-1478 (Décret n° 2015-1478 du 14 novembre 2015 modifiant le décret n° 2015-1476 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031474548 &categorieLien=id).
- Law no. 55-385 of 3 April 1955 (Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350).
- Law no. 2015-1501 of 20 November 2015 (LOI n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions (1), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831 &categorieLien=id).
- Law no. 2016-162 of 19 February 2016 (LOI n° 2016-162 du 19 février 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/2/19/INTX1602418L/jo/texte).
- Law no. 2016-629 of 20 May 2016 (LOI n° 2016-629 du 20 mai 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/5/20/INTX1610761L/jo/texte).
- Law no. 2016-987 of 21 July 2016 (LOI n° 2016-987 du 21 juillet 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste (1), https://www.legifrance.gouv.fr/eli/loi/2016/7/21/INTX1620056L/jo/texte).

- Law no. 2016-1767 of 19 December 2016 (LOI n° 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1), https://www.legifrance.gouv.fr/eli/loi/2016/12/19/INTX1633947L/jo/texte).
- Law no. 2017-1510 of 30 November 2017 (LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (1), https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=584C00CFDA5BB1F08F1FB7AAE5020A3F.tplgfr27s_3?cidTexte=JORFTEXT000035932811&categorieLien=id).

3. Other sources

- Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.
- Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf.
- UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.
- UN Committee against Torture, *Concluding observations on the seventh periodic report of France*, CAT/C/FRA/CO/7, 10 June 2016, §§ 12-13, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/FRA/CO/7&Lang=En.
- UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

B. *Secondary Sources*

- Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. Chicago and London: The University of Chicago Press, 2005.
- Aoláin, Fionnuala Ní. "The Emergence of Diversity: Differences in Human Rights Jurisprudence." *Fordham International Law Journal* 19, no. 1 (1995): 101.
- Boyle, Kevin. "Human Rights and Political Resolution in Northern Ireland." *Yale Journal of World Public Order* 9, no. 1 (1982): 156.
- Brauch, Jeffrey A. "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law." *Columbia Journal of European Law* 11 (2005): 113.
- Butler, Judith. "The Discourse of Terror." In *Weapon of the Strong : Conversations on Us State Terrorism*, edited by Cihan Aksan and Jon Bailes. London: Pluto Press, 2013.
- Chomsky, Noam. "The Definition of Terrorism." In *Weapon of the Strong : Conversations on Us State Terrorism*, edited by Cihan Aksan and Jon Bailes. London: Pluto Press, 2013.
- Conispoliatis, Helen. "Facing the Colonels: How the British Government Dealt with the Military Coup in Greece in April 1967." *History* 92, no. 308 (2007): 515-35.
- Costa, Pietro. "The Rule of Law: A Historical Introduction." In *The Rule of Law – History, Theory and Criticism*, edited by Pietro Costa and Danilo Zolo: Springer, 2007.
- Cowell, Frederick. "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the Echr and the Absence of a Derogation Clause in the Achpr." *Birkbeck Law Review* 1, no. 1 (2013): 135.
- "Dangerously Disproportionate - the Ever-Expanding National Security State in Europe." Amnesty International, https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF.
- de Wilde, Marc. "Locke and the State of Exception: Towards a Modern Understanding of Emergency Government." *European Constitutional Law Review* 6, no. 2 (2010): 249.
- Delmas-Marty, Mireille *Aux Quatre Vents Du Monde*. Seuil, 2016.

- Dudziak, Mary L. *War Time: An Idea, Its History, Its Consequences*. Oxford and New York: Oxford University Press, 2012.
- Ferejohn, John, and Pasquale Pasquino. "The Law of the Exception: A Typology of Emergency Powers." *International Journal of Constitutional Law* 2, no. 2 (2004): 210.
- Fischer, Max. "Terror's New Form: A Threat That Can Be Managed but Not Erased." *New York Times*, 16 July 2016 2016, A8.
- Fitzpatrick, Joan. "Speaking Law to Power: The War against Terrorism and Human Rights." *European Journal of International Law* 14, no. 2 (2003): 241-64.
- Fletcher, George P. "The Indefinable Concept of Terrorism." *Journal of International Criminal Justice* 4, no. 5 (2006): 894.
- "France: Don't 'Normalize' Emergency Powers Proposed Measures Undermine Rights, Rule of Law." Human Rights Watch, https://www.hrw.org/news/2017/06/27/france-dont-normalize-emergency-powers.
- Government of the French Republic. "Protection of the Nation." http://www.gouvernement.fr/en/protection-of-the-nation.
- Greene, Alan. "The Uk, the Council of Europe and Turkey's International Human Rights Obligations in a State of Emergency: Submission to Foreign Affairs Committee: United Kingdom's Relations with Turkey." (2016).
- Gross, Oren. "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional." *The Yale Journal of International Law* 112 (2002): 1011.
- ———. "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy." *Cardozo Law Review* 21, no. 5-6 (2000): 1825.
- ———. "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies." *Yale Journal of International Law* 23 (1998): 437.
- Hafner-Burton, Emilie M, Laurence R Helfer, and Christopher J Fariss. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization* 65, no. 4 (2011): 673.
- Hartman, Joan F. "Working Paper for the Committee of Experts on the Article 4 Derogation Provision." *Human Rights Quarterly* 7, no. 1 (1985): 89-131.
- Hobbes, Thomas. *Leviathan*. Edited by John C A Gaskin: Oxford University Press, 1998.

- "Hollande: L"État D'urgence Ne Sera Pas Prolongé"." *Le Figaro*, 14 July 2016.
- Jacquin, Jean-Baptiste. "Jacques Toubon : Le Projet De Loi Antiterroriste Est « Une Pilule Empoisonnée »." *Le Monde* 23 June 2017.
- Jacquin, Jean-Baptiste "Prolonger L'état D'urgence, Un « Risque » Pour La Démocratie." *Le Monde* 30 November 2016 2016.
- "Juge Des Libertés Et De La Détention : L'alibi Facile De L'état D'urgence Permanent." Syndicat de la magistrature http://www.syndicat-magistrature.org/IMG/pdf/cp_jld_1_alibi.pdf.
- Kelsen, Hans, and Michael Hartney. *General Theory of Norms*. Oxford: Clarendon, 1991.
- Law, Randall D. *The Routledge History of Terrorism*. New York: Routledge, 2015.
- Locke, John. *Two Treatises of Government*. Cambridge Texts in the History of Political Thought Cambridge: Cambridge University Press, 1960.
- Loof, Jan-Peter. "Crisis Situations, Counter Terrorism and Derogation from the European Convention on Human Rights. A Threat Analysis." In *Margins of Conflict. The Echr and Transitions to and from Armed Conflict*, edited by Antoine Buyse: Intersentia, 2010.
- MacDonald, Ronald St. John. "Derogations under Article 15 of the European Convention on Human Rights." *Columbia Journal of Transnational Law* 36, no. 1&2 (1998): 225.
- Macron, Emmanuel. "Speech at the European Court of Human Rights on October 31, 2017." European Court of Human Rights, http://www.echr.coe.int/Documents/Speech_20171031_Macron_ENG.pdf.
- Masferrer, Aniceto. "Introduction: Security, Criminal Justice and Human Rights in Countering Terrorism in the Post 9/11 Era." In *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, edited by Aniceto Masferrer, 1-11. Dordrecht: Springer Netherlands, 2012.
- McConville, Michael, and Wing Hong Chui. *Research Methods for Law* [in English]. Research Methods for the Arts and Humanities. Edinburgh: Edinburgh University Press, 2007.
- McGoldrick, Dominic. "The Interface between Public Emergency Powers and International Law." *International Journal of Constitutional Law* 2, no. 2 (2004): 380-429.

- Mokhtar, Aly. "Human Rights Obligations V. Derogations: Article 15 of the European Convention on Human Rights." *The International Journal of Human Rights* 8, no. 1 (2004/01/01 2004): 65-87.
- Ní Aoláin, Fionnuala, and Oren Gross. "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." *Human Rights Quarterly* 23, no. 3 (2001): 625.
- ———. *Law in Times of Crisis: Emergency Powers in Theory and Practice*. New York: Cambridge University Press, 2006.
- O'Boyle, Michael. "Torture and Emergency Powers under the European Convention on Human Rights: Ireland V. The United Kingdom." *The American Journal of International Law* 71, no. 4 (1977): 674-706.
- Office of the High Commissioner for Human Rights. "Un Rights Experts Urge France to Protect Fundamental Freedoms While Countering Terrorism." http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16966.
- Oraá, Jaime. *Human Rights in States of Emergency in International Law*. Oxford: Oxford University Press, 1992.
- "Projet De Loi Constitutionelle De Protection De La Nation." vie-publique.fr (Prime Minister of the French Republic), http://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-constitutionnelle-protection-nation.html.
- Reidy, Aisling, Françoise Hampson, and Kevin Boyle. "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey." *Netherlands Quarterly of Human Rights.* 15, no. 2 (1997): 161.
- Reynolds, John. *Empire, Emergency and International Law*. Cambridge: Cambridge University Press, 2017.
- Rousseau, Jean-Jacques. *Discourse on Political Economy and the Social Contract* Translated by Christopher Betts. Oxford World's Classics. Oxford and New York: Oxford University Press, 1994.
- Rubin, Alissa J, and Aurelien Breeden. "France Remembers the Nice Attack: 'We Will Never Find the Words'." *New York Times* 14 July 2017.
- Saeed, Seevan. *Kurdish Politics in Turkey: From the Pkk to the Kck*. Routledge Studies in Middle Eastern Politics. Vol. 84: Routledge, 2016.

- Scheppele, Kim Lane. "The International State of Emergency: Challenges to Constitutionalism after September 11." In *The Maryland Constitutional Law Schmooze, 2006, Baltimore*, 49, 2006.
- ———. "Law in a Time of Emergency: States of Exception and the Temptations of 9/11." *University of Pennsylvania Journal of Constitutional Law* 6, no. 5 (2004): 1001.
- Schmitt, Carl. *Political Theology – Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago and London: University of Chicago Press, 2005.
- Schreuer, Christoph. "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights." *Yale Journal of World Public Order* 9 (1982): 113.
- Sheeran, Scott P. "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics." *Michigan Journal of International Law* 34, no. 3 (2013): 491.
- Tanguay-Renaud, François. "The Intelligibility of Extralegal State Action: A General Lesson for Debates on Public Emergencies and Legality." *Legal Theory* 16, no. 3 (2010): 161.
- Thénault, Sylvie. "L'état D'urgence (1955-2005). De L'algérie Coloniale À La France Contemporaine: Destin D'une Loi." *Le mouvement social*, no. 1 (2007): 63-78.
- "Turkey – Events of 2016." Human Rights Watch, https://www.hrw.org/world-report/2017/country-chapters/turkey.
- "Turkey: Crackdown on Kurdish Opposition." Human Rights Watch, https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition.
- Vinx, Lars. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Translated by Lars Vinx. Cambridge: Cambridge University Press, 2015.
- Weise, Zia. "Turkish Detainees Could Lose Right to European Appeal – with Courts in Chaos, Turkey's President Could Cut Off Access to European Court of Human Rights." *Politico*, 13 June 2017.
- Yegen, Mesut. "The Kurdish Question in Turkey: Denial to Recognition." In *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*, edited by Marlies Casier and Joost Jongerden. New York: Routledge, 2010.

- Yourow, Howard C. *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. International Studies in Human Rights. Vol. 28, Dordrecht: Martinus Nijhoff Publishers, 1996.