

# **“Once More unto the Breach”: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies**

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It is familiar to find rules that have explicit or implicit exceptions for cases of necessity or emergency. It is unfamiliar to find rules without any such exceptions . . . . The consequences of making exceptions depend on the details.

Cass R. Sunstein<sup>1</sup>

It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.

Sherlock Holmes<sup>2</sup>

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1. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 962–63 (1995).

2. 1 ARTHUR CONAN DOYLE, *A SCANDAL IN BOHEMIA*, reprinted in *SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES* 209, 212 (1986).

## I. INTRODUCTION

Emergencies are certain to occur during the lifetime of any community. While their nature and character, their intensity and frequency, may vary substantially from one community to another and from one period to the next within the same community, it is certain that they *will* occur.

Exigencies provoke the use of emergency powers by governmental authorities. The vast scope of such powers and their ability to interfere with fundamental individual rights and civil liberties and to allow governmental regulation of virtually all aspects of human activity—as well as the possibility of their abuse—emphasize the pressing need for clearly defining the situations in which they may be invoked.<sup>3</sup> Yet, defining a “state of emergency”<sup>4</sup> is no easy task.<sup>5</sup> It may even be argued that defining “emergency” is not a meaningful project. Whatever the tools used to attend to this definitional problem, some of the terms that will eventually be used are inherently open-ended and manipulable. Overly flexible definitions allow decisionmakers a relatively wide margin of discretion without setting real guidelines for their actions. Furthermore, it is not at all clear that even if a

3. “[T]he absence of consensus as to when a public emergency occurs [makes it] by no means plain when exactly a State is allowed by international law to derogate from its obligations to respect and ensure human rights.” Yoram Dinstein, *The Reform of the Protection of Human Rights During Armed Conflicts and Periods of Emergency and Crisis*, in *THE REFORM OF INTERNATIONAL INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS: FIRST INTERNATIONAL COLLOQUIUM ON HUMAN RIGHTS* 337, 349 (International Colloquium on Human Rights ed., 1993).

4. Domestic legal systems employ a wide variety of terms when dealing with the phenomenon of emergency. Frequently, one may encounter several terms used within the same legal system. Many constitutions establish a dual structure of emergency regimes that recognizes two possible types of emergencies such as a “State of Emergency” and a “State of Siege” or a “State of War.” See, e.g., GRONDWET [Constitution] [GRW. NED.] arts. 93, 103 (Neth.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] arts. 19, 141 (Port.); ÚSTAVA REPUBLIKE SLOVENIE [Constitution] art. 92 (Slovn.). Some systems adopt multilevel legal and constitutional arrangements dealing with emergencies. Thus, for example, article 91 of the German Basic Law tackles the issue of “Internal Emergency” (“*Innerer Notstand*”), article 80a refers to the “State of Tension” (“*Spannungsfall*”), and chapter Xa (articles 115a–i) deals with the “State of Defense” (“*Verteidigungsfall*”). See JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 197–99 (1991) (discussing examples); Note, *Recent Emergency Legislation in West Germany*, 82 HARV. L. REV. 1704 (1969) (discussing German law). Similarly, the Canadian Emergencies Act authorizes the Governor in Council (the federal government) to declare four different types of emergencies: “public welfare emergency” (section 5), “public order emergency” (section 16), “international emergency” (section 27), and “war emergency” (section 37). See Peter Rosenthal, *The New Emergencies Act: Four Times the War Measures Act*, 20 MANITOBA L.J. 563, 565–73 (1991); Eliot Tenofsky, *The War Measures and Emergency Acts: Implications for Canadian Civil Rights and Liberties*, 19 AM. REV. CAN. STUD. 293, 296–97 (1989). Finally, no fewer than nine different states of exception can be found in the constitutions of Latin and South American countries, including, among others, the state of siege (*estado de sitio*), state of emergency (*estado de emergencia*), state of alarm (*estado de alarma*), state of prevention (*estado de prevención*), state of defense (*estado de defensa*), and state of war (*estado de guerra*). See generally NARCISO J. LUGONES, *LEYES DE EMERGENCIA: DECRETOS DE NECESIDAD Y URGENCIA* [EMERGENCY LAWS: DECREES OF NECESSITY AND URGENCY] (1992); DIEGO VALADÉS, *LA DICTADURA CONSTITUCIONAL EN AMÉRICA LATINA* [CONSTITUTIONAL DICTATORSHIP IN LATIN AMERICA] (1974).

5. “[N]o statute defines a national emergency . . . . The test for when a national emergency exists is completely subjective—anything the President says is a national emergency is a national emergency . . . .” Note, *The National Emergency Dilemma: Balancing the Executive’s Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1458–59 (1979).

working definition of "emergency" could be formulated, it would stand the test of actual exigencies. In times of crisis, legal niceties may be cast aside as luxuries enjoyable only in times of peace and tranquility.<sup>6</sup>

The term "emergency" is, by its nature, an "elastic concept."<sup>7</sup> The difficulty of defining it in advance was cogently captured by Alexander Hamilton when he wrote that

it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>8</sup>

Traditionally, emergencies were considered in terms of a dichotomized dialectic. The term "emergency" connotes a sudden, urgent, usually unforeseen event or situation that requires immediate action,<sup>9</sup> often without time for prior reflection and consideration. The notion of "emergency" is inherently linked to the concept of "normalcy" in the sense that the former is considered to be outside the ordinary course of events or anticipated actions. To recognize an emergency, we must, therefore, have the background of normalcy.<sup>10</sup> Furthermore, in order to be able to talk about normalcy and

6. As Margaret Thatcher noted:

To beat off your enemy in a war, you have to suspend some of your civil liberties for a time. Yes, some of those measures do restrict freedom. But those who choose to live by the bomb and the gun, and those who support them, can't in all circumstances be accorded exactly the same rights as everyone else. We do sometimes have to sacrifice a little of the freedom we cherish in order to defend ourselves from those whose aim is to destroy that freedom altogether.

Dan Fisher, *Critics See Nation Switching Roles with Soviets; Own Rights Eroding, Britons Say*, L.A. TIMES, Apr. 6, 1989, at 6 (quoting Prime Minister Margaret Thatcher).

7. H.P. LEE, EMERGENCY POWERS 4 (1984); see also *Ningkan v. Government of Malaysia* [1970] A.C. 379, 390 ("[T]he natural meaning of the word [emergency] itself is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government."); *Bhagat Singh & Others v. The King Emperor*, A.I.R. 1931 P.C. 111, 111 ("A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action . . ."). Moreover, as the International Law Association maintained,

[i]t is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.

ILA Paris Report 59 (1984), quoted in JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 31 (1992).

8. THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This inherent difficulty has led some scholars to conclude that formulating an abstract definition of emergency may be futile or unnecessary. See JOHN HATCHARD, INDIVIDUAL FREEDOMS AND STATE SECURITY IN THE AFRICAN CONTEXT: THE CASE OF ZIMBABWE 2 (1993); LEE, *supra* note 7, at 5. For similar conclusions regarding the related concept of "national security," see Peter Hanks, *National Security—A Political Concept*, 14 MONASH U. L. REV. 114, 117–18 (1988) (discussing versatility of "the national security 'trump'" in American, British, Australian, and Canadian jurisprudence); and J. A. Tapia-Valdés, *A Typology of National Security Policies*, 9 YALE J. WORLD PUB. ORDER 10, 10–11 (1982) (arguing that concept of national security necessarily depends on questions of ideology and is more political category than purely military concept).

9. See NEW SHORTER OXFORD ENGLISH DICTIONARY 806 (5th ed. 1993).

10. The term "normalcy" was coined by Warren Harding during the 1920 presidential

emergency in any meaningful way, the concept of emergency must be informed by notions of temporariness and exception. For normalcy to be "normal," it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to that rule<sup>11</sup>—it must last only a relatively short time and yield no substantial permanent effects. Whatever the definitional difficulties concerning the concept of "emergency," the elements of temporariness and exceptional nature are widely accepted as the common denominators that make a dialogue on the issue of emergency possible.<sup>12</sup> Thus, traditional discourse on emergency powers posits normalcy and exigency as two separate phenomena and assumes that emergency is the exception. Thus, the governing paradigm is that of the "normalcy-rule, emergency-exception."<sup>13</sup>

This Article examines the viability of the traditional discourse on emergency regimes through the prism of the derogation regime established under three major international human rights conventions. The subject matter of public emergency presents a background for a head-on collision between state sovereignty and national security on the one hand, and the growing international involvement in protecting individual human rights against state encroachment on the other hand.<sup>14</sup> Mindful of this conflict and keen to

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campaign. See ROBERT K. MURRAY, *THE POLITICS OF NORMALCY: GOVERNMENTAL THEORY AND PRACTICE IN THE HARDING-COOLIDGE ERA* 9 (1973). By "normalcy," Harding did not refer to "the old order, but a regular steady order of things. I mean normal procedure, the natural way, without excess." *Id.* at 15. Harding's message that "America's present need is not heroics but healing; not nostrums but normalcy," *id.* at 9, was the conservative response to the problems facing postwar America, such as price increases, unemployment, rapid demobilization, the debates over the League of Nations, and the subsequent deflation. See *id.* at 2-5.

11. A reversed image of the relationship between normalcy and emergency arises out of Carl Schmitt's theory of the "state of exception" (*Ausnahmezustand*). According to this theory, every legal norm presupposes the existence of a certain normal and ordinary state of affairs and can therefore be applied only as long as this state of affairs continues to exist. In exceptional circumstances in which this normal state of affairs is interrupted, the legal norm is no longer applicable and cannot fulfill its ordinary regulatory function. Thus, the concept of the "state of exception" inherently implies the existence of a normal state of affairs, and, in fact, a normal constitutional order, controlled and regulated by constitutional norms. For Schmitt, the exception not only confirms the rule but is the source of the rule's very existence. Inasmuch as crises represent the sphere of the political (indeed, the apex of politics) and given the primacy of politics over all other spheres of human endeavor (including law), Schmitt argues that it is the exception that defines the norm and not vice versa—the exception is primary to the norm and defines and informs that norm. In short, "[t]he rule proves nothing; the exception proves everything." WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION* 36 (1994) (quoting CARL SCHMITT, *POLITICAL THEOLOGY* 15 (1988)). See generally JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* (1983); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen, AND HERMANN HELLER IN WEIMAR REPUBLIC* (1997); GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEALS OF CARL SCHMITT BETWEEN 1921 AND 1936* (2d ed. 1989).

12. See *infra* notes 79-80 and accompanying text.

13. The formula of "normalcy-rule, emergency-exception" may be replaced by a formula referring to a presumption of normalcy where emergency constitutes a rebuttal to that presumption. See Sunstein, *supra* note 1, at 963 ("A rule with necessity or emergency exceptions might be described, somewhat imprecisely, as a strong presumption.").

14. See Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 2 (1981). See generally PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 220-21 (7th ed. 1997) (discussing human rights as matter of international concern).

preserve governmental maneuverability in the face of emergency,<sup>15</sup> the drafters of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),<sup>16</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>17</sup> and the American Convention on Human Rights (American Convention)<sup>18</sup> included derogation clauses in each of the three documents.<sup>19</sup> Designed to accommodate the needs of the state with the rights of individuals, the derogation clauses seek primarily to allow governmental action infringing recognized individual rights in a period of extreme emergency beyond what governments lawfully could do in times of normalcy.<sup>20</sup> "[T]he derogation articles embody an uneasy compromise between the protection of individual rights and the protection of national needs in times of crisis."<sup>21</sup> Within the framework of the conventions, the

15. Thus, for example, during the preparatory work on the European Convention, a U.K. delegate stated that "[i]t is defined in every declaration of human rights that in times of emergency the safety of the community is of first concern." Hartman, *supra* note 14, at 4.

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

17. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

18. American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65 rev. 1 corr. 1 (entered into force July 18, 1978), 9 I.L.M. 673 (1970) [hereinafter American Convention].

19. Article 15(1) of the European Convention states:

In times 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 obligations under international law.

European Convention, *supra* note 16, art. 15(1). Similarly, the ICCPR provides:

In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law . . . .

ICCPR, *supra* note 17, art. 4(1). Finally, the American Convention states:

In times of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law . . . .

American Convention, *supra* note 18, art. 27(1).

20. See Hartman, *supra* note 14, at 6-7, 14-15 (explaining that derogation clauses are result of practical desire to retain government flexibility with regard to employment of emergency measures). Higgins, who considers the derogation clauses as designed to better control, rather than expand, the scope of legitimate governmental action, expresses the opposite position. According to that position, the need for a derogation clause emanated from the imprecision of the ordinary limitation clauses and their inability to provide a clear guideline for the conduct of governments' public emergencies threatening the life of the nation. See Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 286 (1976-1977).

21. Hartman, *supra* note 14, at 2. The derogation regime was established against the backdrop of certain general doctrines of international law such as necessity and self-defense. See INTERNATIONAL COMM'N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 413 (1983); N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. ESCOR, 35th Sess. § 60, at 16, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) [hereinafter *Questiaux Report*]. The doctrines of necessity and self-defense may still be relevant today even in the context of human rights protection under regional and international systems, as certain human rights conventions, such as the African Charter on Human and

derogation regime acknowledges the possibility of a signatory state derogating from some of the individual rights protected under the conventions in extraordinary times and under specified conditions. Emergency measures taken in accordance with the conventions operate from within the legal system. In times of national danger, states are required to balance security interests and individual rights concerns according to a set of rules that both define the circumstances in which they may exercise emergency measures that infringe upon enforceable human rights and what measures they can use.

The derogation regime is premised on, and constructed around, the basic assumption that emergency is a distinct and extraordinary exception to the general rule of normalcy. By analyzing the jurisprudence of the European Court of Human Rights (Court) and the European Commission of Human Rights (Commission), this Article's main purpose is to demonstrate the danger of overreliance on the "normalcy-rule, emergency-exception" paradigm. The normative rules prescribed by the derogation regime may prove useful in a world governed by that basic paradigm. When applied to situations diverging from that model, however, these rules fail to safeguard the very interests that the human rights conventions aim to protect. Adopting the traditional view concerning the normalcy-emergency relationship, both the European Court and the Commission have ignored, for the most part, the phenomena of permanent, entrenched, or de facto emergencies reflected in the cases coming before them.<sup>22</sup> This may lead, in turn, to attempts to solve questions at hand by applying the wrong medicine as a result of a faulty diagnosis.

This Article seeks to demonstrate this point by critically examining the jurisprudence of the European Court and Commission in two types of cases. The first group involves an explicit derogation—a government's recognition of the existence of a state of public emergency—when, in fact, the situation is an entrenched emergency. The paradigmatic cases in this context are those resulting from the conflict in Northern Ireland. The second group of cases arises as a consequence of Turkey's fight against the Kurds. These cases

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Peoples' Rights, do not include any special emergency provisions similar to the derogation clauses. See African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986), 21 I.L.M. 59 (1982) [hereinafter African Charter]; see also ORAA, *supra* note 7, at 209 (discussing why African Charter does not include derogation clause). Given this omission, principles of general international law concerning the need to comply with treaty obligations in circumstances of emergency would be applicable. See *id.* at 210. In addition, principles of general international law are also relevant with respect to those states that are not party to any international or regional human rights instruments:

At this stage in the evolution of international law, it is clear that customary law imposes international obligations in the area of human rights which are binding even for States which are non-parties of human rights treaties. However, once the content of the customary international law applicable to normal situations has been ascertained, the problem is to determine the principles regulating the human rights obligations of States in situations of emergency.

*Id.* at 211.

22. See *Questiaux Report*, *supra* note 21, §§ 96–147, at 26–33; SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* 45–56 (1989); INTERNATIONAL COMM'N OF JURISTS, *supra* note 21, at 413–17.

raise the issue of systematic human rights violations. The common denominator between these two sets of cases is, therefore, the underlying factual negation of any claim to normalcy as the general way of life. In both categories of cases, the exception has swallowed the general rule. Entrenched emergency has become the ordinary state of affairs in Northern Ireland, while violations of human rights in Turkey are a matter of ongoing practice rather than a mere aberration. Furthermore, the Article argues that the European Court and Commission have so far failed to address adequately the challenges that these two types of cases raise. The main reason for that systemic failure is the international community's attachment to the notion of "normalcy-rule, emergency-exception."

This Article seeks to accomplish two goals. First, by challenging the "normalcy-rule, emergency-exception" paradigm, it attempts to provoke reassessment of traditional approaches to emergency regimes. Crisis and emergency are no longer sporadic episodes in the lives of many nations; they are increasingly becoming a permanent fixture in the unfolding story of humanity. One need not subscribe to notions of a climacteric of crises<sup>23</sup> to recognize that fact. For example, a study published in 1978 estimated that at least thirty of the 150 countries then existing were under a state of emergency.<sup>24</sup> Similarly, a substantial number of states have entered a formal derogation notice under article 4(3) of the ICCPR.<sup>25</sup> This number does not include states that are not signatories to the ICCPR or that experience de facto emergencies that they do not officially proclaim and notify.<sup>26</sup> Nor does it take account of those states that have routinized and institutionalized emergency measures in their ordinary legal system.<sup>27</sup> Moreover, not only has emergency expanded to an ever greater number of nations, but within the affected nations, it has extended its scope and strengthened its grip. Observations that "[e]mergency government has become the norm"<sup>28</sup> can no longer be dismissed out of hand.

Second, commentators often claim that if domestic legal systems do not successfully slow the rush towards emergency measures in times of exigencies, supervision and monitoring by the international community nevertheless can safeguard individual rights.<sup>29</sup> As states face modifications to

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23. See Arthur S. Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585, 613 (1980).

24. See Daniel O'Donnell, *States of Exception*, 21 INT'L COMM'N JURIST REV. 52, 53 (1978).

25. For a list of derogation notices so entered, see *The United Nations Treaty Collection: International Covenant on Civil and Political Rights* (visited Apr. 28, 1998) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booi/iv\\_booi/iv\\_4.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booi/iv_booi/iv_4.html)>.

26. On de facto emergencies, see *Questiaux Report*, *supra* note 21, §§ 99-111, at 26-28; and CHOWDHURY, *supra* note 22, at 45.

27. See *Questiaux Report*, *supra* note 21, §§ 129-145, at 26-28; CHOWDHURY, *supra* note 22, at 45-56.

28. *A Brief History of Emergency Powers in the United States*, Working Paper Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, U.S. Senate, 93d Cong., 2d sess., at v; see also Arthur S. Miller, *Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736 (1978) (predicting that crisis government will become worldwide norm).

29. See George J. Alexander, *The Illusory Protection of Human Rights by National Courts*

traditional notions of sovereignty to accommodate greater external intervention in their internal affairs,<sup>30</sup> they also come to rely more on the ability of international mechanisms to bring errant states into line. Perhaps the most expansive inroads into the fortress of states' sovereignty have been made in the area of human rights.<sup>31</sup> Because states of emergency constitute the clearest challenges to individual rights and liberties, it should come as no surprise that international institutions, both regional and global, have been expected to assume a leading role in protecting human rights and liberties during national exigencies. Trusting international adjudicatory institutions seems all the more appropriate when one realizes that regional and international courts are much less likely to succumb to aroused national emotions than are national courts, which comprise an integral part of their communities and therefore tend to support their governments in times of acute exigency.<sup>32</sup> Unfortunately, the jurisprudence of the Court and the Commission casts doubt on the validity of these optimistic assessments.

The thesis put forward in this Article is not relevant only on the international level. The sphere of international law cannot be separated entirely from the domestic one. "International" and "national" are closely linked in a symbiotic relationship in which one sphere influences and shapes the evolution of the other. International law does not have an autonomous existence distinct from, among other things, the domestic realities of states.<sup>33</sup> Domestic politics is knit together with international relations;<sup>34</sup> international law is informed by national legal systems, institutions, and actions and in turn informs them. International law's vision of emergency powers not only gives us a better understanding of domestic emergency regimes but is, in fact, an integral part of that understanding. This link is perhaps clearest in the European system of human rights under the European Convention.<sup>35</sup>

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*During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 3 (1984) ("It is entirely possible that superior courts whose relevant executive authority is not threatened may in fact effectively place limits on subordinate executives. Thus, for example, the European Court of Human Rights can place limits on national executives from countries which are signatories to the European Human Rights Convention."); see also D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 490 (1995) ("In the nature of things, the national judicial means of redress will often have been undermined, so the responsibility of international institutions is the more compelling.").

30. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 287-90 (1988).

31. See *id.* at 287-90.

32. See Alexander, *supra* note 29, at 27-63. This text comprises Alexander's analysis of the performance of the court systems of selected common law countries during periods of emergency. The countries examined include Great Britain, South Africa, Ireland, New Zealand, Canada, Australia, India, and the United States. See *id.*

33. See LOUIS HENKIN, *HOW NATIONS BEHAVE* 12-27 (2d ed. 1979).

34. See *id.* at 28. The connection between domestic politics and international relations has been the focus of much writing by international relations scholars dealing with the "second image," the "second image reversed," and the "two-level game" theories. See, e.g., Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 881-911 (1978); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 427-60 (1988); Michael Zurn, *Bringing the Second Image (Back) In: About the Domestic Sources of Regime Formation*, in REGIME THEORY AND INTERNATIONAL RELATIONS 282, 282-311 (Volker Rittberger & Peter Mayer eds., 1993).

35. On the European Convention system, see generally RALPH BEDDARD, *HUMAN RIGHTS AND EUROPE* (3d ed. 1993); and P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE*



Under the municipal constitutional laws of several European nations, the European Convention operates directly on individuals subject to the relevant domestic legal systems and may enjoy a higher hierarchical status than the national legislature's own legislative enactments.<sup>36</sup>

Part II of the Article sets out the basic structure of the derogation regimes of the European Convention, the American Convention, and the ICCPR. It demonstrates how the regime rests on the basic "normalcy-rule, emergency-exception" paradigm and on the twin components of temporariness and exceptionality. In so doing, it situates the derogation regime within the framework of traditional discourse on emergency regimes and powers. Part III examines the theory underlying the derogation regime as interpreted, explained, and applied by the European Court and the Commission<sup>37</sup> in cases coming before these two institutions. A detailed analysis of the case law not only shows the discrepancy between theory and practice and between judicial rhetoric and judicial decisions in the area of emergency law, but also challenges the very foundation of the emergency regime. Part IV discusses the systemic difficulties that the Court and the Commission face when dealing with emergencies. These difficulties, it is argued, result in national governments faring well when their decisions concerning the existence of a particular situation of emergency are reviewed by the European human rights judicial institutions. Thus, the Article challenges both the assumption that international and regional judicial organs may be better suited to monitor, supervise, and check national governments' conduct in times of national emergency and the basic paradigm of the relationship between normalcy and emergency. The Article concludes with several proposals designed to ameliorate the systemic difficulties and improve the ability of the Court and the Commission to safeguard human rights in times of exigency.

## II. INDIVIDUAL RIGHTS AND PUBLIC EMERGENCIES: THE LAW ON THE BOOKS

### A. *The Protection of Rights Under the Conventions: A Three-Tiered System*

The conventions protect three categories of individual rights. Non-derogable rights, which cannot be abrogated or derogated from either in times of peace or of war or other public emergencies, receive the strongest

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EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 1990).

36. See VAN DIJK & VAN HOOF, *supra* note 35, at 12-14; Thomas Buergenthal, *The Domestic Status of the European Convention on Human Rights*, 13 BUFF. L. REV. 354, 391-92 (1964).

37. I focus on the jurisprudence developed by the European Court and Commission because the European Convention system has been traditionally viewed as the most advanced and developed of all international and regional human rights mechanisms. See Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 633 (1987).

protection.<sup>38</sup> The only limitations on the scope of non-derogable rights are intrinsic to each right, which is protected within its own definition and its internal range of application. An action outside those limits is not an impermissible attempt to derogate from the right at issue since that right does not apply at all with respect to such an action. The range of non-derogable rights differs from convention to convention.<sup>39</sup>

A second category comprises those rights that seem limited only by their own built-in definitional limitations but that nevertheless can be derogated from in situations of public emergency under the conventions' general derogation clauses. Rights falling into this category set their own limits in ordinary times by means of a predefined scope of applicability. In

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38. For that reason, those rights have been described as "emergency-proof" by Eric-Irene Daes, Special Rapporteur of the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities. See *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights*, U.N. Doc E/CN.4/Sub 2/432/Rev 2, at 197-202 (1983).

39. Four non-derogable rights are common to the ICCPR, the European Convention, and the American Convention: the right to life; prohibition of torture; prohibition of slavery or servitude; and prohibition of retroactive criminal laws. See American Convention, *supra* note 18, arts. 4-6, 9; ICCPR, *supra* note 17, arts. 6-8, 15; European Convention, *supra* note 16, arts. 2-4, 7. Two additional rights are found in the ICCPR and the American Convention: the rights to recognition of legal personality and freedom of thought, conscience, and religion. See American Convention, *supra* note 18, arts. 3, 12; ICCPR, *supra* note 17, arts. 16, 18. The prohibition of imprisonment for breach of contractual obligation is included only in the ICCPR. See ICCPR, *supra* note 17, art. 11. Finally, the following non-derogable rights appear only in the American Convention: the rights of the family, the right to a name, the rights of the child, the right to a nationality, and the right to participate in government. See American Convention, *supra* note 18, arts. 17-20, 23. The list of non-derogable rights included in each of the conventions has been expanded and developed from one convention to the other. Thus, the European Convention, which is the oldest of the three conventions, includes the shortest list of non-derogable rights, whereas the American Convention, the most recent, has the longest list of such rights. In contrast, the African Charter, which was signed and entered into force after the American Convention, does not include a derogation clause at all, and therefore includes only rights of the second and third categories. See African Charter, *supra* note 21. In theory, at least, rights of the second category are non-derogable according to the meaning given to that concept in the other three conventions.

Examination of the lists of non-derogable rights reveals that a right was included either because it was deemed to be a fundamental and basic right or because it was such that derogation could not be "strictly required" by the exigencies of the situation—the right not to be imprisoned for contractual debt is one example. See JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* 64 (1994); Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 230-31 (1997). Hartman suggests that the enumeration of the four common non-derogable rights reflects existing conventional and customary international law, although the inclusion of the other rights in the different lists does not, in and of itself, necessarily identify them as "fundamental" rights. See Hartman, *supra* note 14, at 15; see also Daphna Shrager, *Human Rights in Emergency Situations Under the European Convention on Human Rights*, 16 ISR. Y.B. HUM. RTS. 217, 232-34 (1986) (noting that right to life, freedom from torture, and freedom from slavery and servitude—that is, three of four common non-derogable rights—constitute *jus cogens* norms). On these issues, the *Questiaux Report* states:

[T]he idea of a basic minimum from which no derogation is possible, is present in a sufficient number of instruments to justify our approaching the matter by reference to a general principle of law recognized in practice by the international community, which could, moreover, regard it as a peremptory norm of international law . . . .

*Questiaux Report*, *supra* note 21, § 68, at 19. There are conflicting views as to whether the lists of non-derogable rights under the human rights conventions ought to be expanded and their ambit broadened to encompass additional rights. See, e.g., Shrager, *supra*, at 235-41.

times of extraordinary peril, however, they may be further derogated from in accordance with the procedural and substantive guidelines set out in the applicable derogation clauses.

The third group includes rights that not only can be derogated from in times of emergency but also can be limited by resort to external limitations transcending definitional restrictions. Reconciling such individual rights with the needs and interests of the community at large<sup>40</sup> in situations falling short of a public emergency crisis is further facilitated by "limitations clauses"<sup>41</sup> that permit, even in ordinary times, a breach of an obligation imposed by the convention for specified reasons such as public order, public safety, morals, or national security.<sup>42</sup>

The second and third categories of rights are subject to possible derogations in accordance with the general derogation clauses of the ICCPR, the European Convention, and the American Convention,<sup>43</sup> which apply only in situations that amount to a "public emergency."<sup>44</sup> Under special

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40. See Higgins, *supra* note 20, at 281.

41. Those clauses are also sometimes known as "accommodation clauses" to emphasize that their main goal is, indeed, accommodating individual rights and liberties, on the one hand, and the interests and the needs of the community, on the other hand. See Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORDER 113, 113 (1982); see also HATCHARD, *supra* note 8, at 3 (speaking of "clawback clauses"); Higgins, *supra* note 20, at 281 (same). Accommodating human rights considerations with the reasonable needs of the state may be achieved by using techniques such as the limitation clauses, derogation provisions, the possibility of denouncing a convention, introduction of reservations to the provisions and dictates of the convention, general articles that state that individual rights may only be exercised in conformity with the rights of others (e.g., article 17 of the European Convention), and, according to some opinions, the use of the notion of inherent limitations on individual rights. See *id.* at 281, 288.

42. See Higgins, *supra* note 20, at 281. For examples of such circumstances, see European Convention, *supra* note 16, art. 6(1) (establishing right to fair and public hearing, but noting that "press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society . . ."); *id.* art. 8(2) (establishing right to respect for one's private and family life, home, and correspondence, but permitting interference by public authority with exercise of that right "in accordance with the law and when it 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"); *id.* art. 9(2) (proclaiming that "[f]reedom to manifest one's religion or beliefs shall be subject only to" the same limitations); *id.* art. 10(2) (upholding right to freedom of expression "subject to such . . . restrictions . . . as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"); and *id.* art. 11(2) (establishing right to freedom of peaceful assembly and to freedom of association subject to limitations "prescribed by law and [which] are necessary in a democratic society in the interests of national security or public safety, 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 . . .").

43. A fourth major human rights convention—the African Charter—does not include a derogation clause, and merely uses the technique of limitation clauses with respect to certain rights enumerated therein. See African Charter, *supra* note 21.

44. Whereas the limitation clauses apply in times of peace and normality, the derogation clauses "kick in" only when exceptional circumstances of public emergency exist. Other distinctions between the two types of clauses exist. First, the scope of rights affected is different. Whereas limitations clauses are rights-specific, the derogation clauses apply across the board to all rights (with the exception, of course, of the non-derogable ones). Second, state derogation from rights is more

circumstances, countries may derogate from any of the individual rights included in the second and third categories "to the extent strictly required by the exigencies of the situation."<sup>45</sup> Measures which, if employed in ordinary times, would constitute violations of the state's international obligations may be legitimate if taken in exceptional circumstances and if certain procedural and substantive conditions are met.<sup>46</sup>

### B. *The Principles of the Derogation Regime*

Several principles form the core of the "legal regime of the derogation clause[s]."<sup>47</sup> They function to minimize the danger of usurpation or abuse of the derogation power by establishing a set of criteria through which any particular exercise of that power may be evaluated.<sup>48</sup> Compliance with these principles is necessary to legitimate derogation in a particular case.

Two procedural principles are essential.<sup>49</sup> The principle of proclamation requires an official declaration of the existence of a state of

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likely to be scrutinized, as the derogation is subject to international accountability (due to requirement of notification of derogation under relevant clause). See ORAÁ, *supra* note 7, at 9.

45. A debate arose as to the necessity of including derogation clauses in conventions dealing with human rights. Proponents of inclusion argued that the incorporation of a derogation clause in each convention would allow more countries to join the conventions without feeling that by doing so they would compromise their ability to address future crises. Hartman rightly points out that the derogation clauses result from a realistic approach recognizing that suspension of human rights treaties is practically inevitable during periods of acute crisis. See Hartman, *supra* note 14, at 11. In addition, the presence of a general derogation clause prevented the inclusion of an even larger number of specific limitations on individual rights. It also enabled the courts to construe broadly the particular rights included in the conventions without fear that such an expansive construction would impair the signatory states' ability to defend themselves and their citizens against extreme public emergencies. The absence of such a "safety net" might have led to a narrower interpretation of particular human rights. Finally, it was argued that the existence of derogation clauses offered a legal mechanism for states to deal with crises, thus reducing the states' incentive to disregard and violate the conventions in times of acute emergency. See *id.* at 3; Schreuer, *supra* note 41, at 115.

Opponents of the inclusion of derogation clauses in the conventions, on the other hand, expressed fear that such articles might divert the focus from the protection of rights to the restrictions, limitations, and derogations from those rights. The presence of a derogation clause might actually encourage governments to resort to that mechanism by its very existence and by permitting considerations of expediency to prevail over true necessity. Moreover, the existence of a derogation clause could encourage a government to foment violence or at least an atmosphere of fear so as to invoke the derogation power under the conventions. See Schreuer, *supra* note 41, at 123. It was also argued that a general limitation clause or several specific clauses would be sufficient and that there was no need for the more radical derogation clauses. See Hartman, *supra* note 14, at 4-5.

46. The question of whether the right to derogate excuses a breach of the conventions or, alternatively, prevents a breach from taking place due to the fact that the derogation suspends the derogating state's obligations under the conventions is an open one. See Hartman, *supra* note 14, at 13 n.70. On the excuse-justification distinction, see generally GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759-875 (1978); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); and Miriam Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse*, 102 L.Q. REV. 71 (1986). See also Robert Ago, *Addendum to the Eighth Report on State Responsibility to the International Law Commission*, in [1979] 2 Y.B. Int'l L. Comm'n 13, §§ 48-55, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (discussing concept of "military necessity" and its history).

47. See ORAÁ, *supra* note 7, at 3.

48. On the distinction between usurpation and abuse of power, see Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 329 (1952).

49. See Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4*

emergency. Its purpose is to make public the governmental decision that a state of emergency exists and to reduce the incidence of de facto states of emergency by requiring states to follow formal procedures set forth in their own municipal laws.<sup>50</sup> This requirement is, therefore, domestically directed. The second procedural principle is that of notification, which obliges a derogating state to notify the other parties to the relevant convention, within a brief period of time and through the depositary of the instrument, of the derogation.<sup>51</sup> In theory, this principle enables effective international supervision over derogation measures and allows other states to exercise their rights under the convention to ensure that all parties comply fully with the provisions of that instrument.<sup>52</sup> Unlike the principle of proclamation, the

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*Derogation Provision*, 7 HUM. RTS. Q. 89, 99 (1985).

50. See *Questiaux Report*, *supra* note 21, § 43, at 12; CHOWDHURY, *supra* note 22, at 28–29; FITZPATRICK, *supra* note 39, at 59; ORAA, *supra* note 7, at 34–35. Hartman adds that another purpose behind the principle of proclamation is to prevent ex post facto explanations for violations of individual rights. See Hartman, *supra* note 49, at 99; Hartman, *supra* note 14, at 18. A requirement of an official proclamation appears only in article 4 of the ICCPR. It was, however, mentioned by the European Commission in *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482 (1976) (Commission report), and by the European Court in *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) § 47, at 61–62 (1960–1961) [hereinafter *Lawless* (Court)]. In the latter case, the Court ruled that the principle of proclamation does not constitute a necessary prerequisite for a justifiable derogation. See *id.* Even under article 4 of the ICCPR, the principle of proclamation has not been construed to require the U.N. Human Rights Committee to analyze the compliance of the derogating state with its own municipal laws or to invalidate a derogation not in compliance with such laws. See ORAA, *supra* note 7, at 35–37; Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 80 (Louis Henkin ed., 1981).

The most recent authoritative discussion of this point was made by the European Court in *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993). In the circumstances of that case, the Court found that the requirement of “official proclamation” was fulfilled by virtue of a statement made on December 22, 1988, by the Secretary of State for the Home Department to the House of Commons that explained in detail the reasons underlying the Government’s derogation. See *id.* § 73.

51. See *Questiaux Report*, *supra* note 21, §§ 44–54, at 13–15.

52. See ORAA, *supra* note 7, at 58–86. The jurisprudence concerning this principle has identified certain elements that ought to be contained in a notice of derogation (for example, specification of convention’s provisions from which there has been derogation and reasons for derogation). See Buergenthal, *supra* note 50, at 84–86; Hartman, *supra* note 14, at 18–21; Schreuer, *supra* note 41, at 117–20. Three main issues are usually discussed in this context: the required timing of notification, the substance to be included in the notification, and the role of the Secretary-General upon receiving such a notification.

Partsch notes that of fifteen derogations reported between 1955 and 1967, only two (the subjects of litigation in the *Lawless* and *Greek* cases) were reported immediately while the rest were reported several months, or even years, after they took force. In certain cases, the notice of derogation was submitted to the Secretary-General only after the derogation had, in fact, elapsed; in at least seven cases, derogations that had been submitted by a state for a dependent territory were terminated only when that territory gained its independence and the European Convention no longer applied to it. See Karl Josef Partsch, *Experiences Regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights*, 1 ISR. Y.B. HUM. RTS. 327, 329–30 (1971). But see Schreuer, *supra* note 41, at 119 (stating that “recently, compliance has improved greatly and notifications are provided within days of the imposition of measures derogating from the Convention”). Be that as it may, a state’s compliance with the notification requirement has traditionally been reviewed independently of the question of the state’s justification for the derogation. See Hartman, *supra* note 14, at 22; Higgins, *supra* note 20, at 290–93. Under the current jurisprudence of the European organs, it seems that a notice of derogation otherwise valid under article 15(1) may be relied upon notwithstanding a failure to comply with the requirements of article 15(3) of

principle of notification operates on the international level. Proclamation and notification are therefore complementary rather than alternative requirements.

The principle of proportionality is one of the basic substantive principles underlying the derogation regime.<sup>53</sup> Proportionality is essential to the legitimacy and justification of a claim to derogation from otherwise protected human rights. Even when an act of derogation may be justified under the conventions, the state does not enjoy unfettered discretion with respect to the derogation measures that it wishes to pursue.<sup>54</sup> Such measures can only be taken "to the extent strictly required by the exigencies of the situation."<sup>55</sup> Derogation measures employed by a government, as well as the fact of derogation itself, must be proportional to the particular threat, both with respect to degree and duration.<sup>56</sup> Proportionality of degree implies, *inter alia*, that the more severe and intense the threat to the life of the nation, the more extreme and prejudicial to individual rights emergency measures may be.<sup>57</sup> In addition, where less restrictive alternative measures can tackle the problem effectively, the government may not employ more draconian means to fight off the crisis.<sup>58</sup> Hence, derogating measures may not be used unless the measures provided for by the various limitation clauses are insufficient to deal with the emergency.<sup>59</sup> The measures taken by the government should also be at least *prima facie* conducive to terminating the emergency, although whether they are successful in achieving that goal in fact is not conclusive as to the question of their legitimacy.<sup>60</sup> Finally, when examining whether certain emergency measures implemented by the government comply with the provision that they be "strictly required," the accepted view is that each measure ought to be evaluated separately, individually, and independently with regard to its necessity.<sup>61</sup>

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the Convention. However, Higgins argues that a failure to comply with the latter requirements may be an indication of bad faith on the part of the derogating government, a fact that is relevant for assessing its compliance with the conditions specified by section 1 of article 15. *See id.* at 291; *see also* Macdonald, *supra* note 39, at 252 (stating that failure to meet notification requirements could be taken as indication of bad faith).

53. For a discussion of the principle of proportionality in the context of derogation from the human rights conventions see CHOWDHURY, *supra* note 22, at 101-19; ORAÁ, *supra* note 7, at 140-70; and Macdonald, *supra* note 39, at 242-45.

54. *See* ORAÁ, *supra* note 7, at 146.

55. The American Convention uses somewhat different language by stating that the derogation measures may only be taken "to the extent and for the period of time strictly required by the exigencies of the situation." *See* American Convention, *supra* note 18, art. 27. The textual difference does not reflect any substantive difference between the three articles.

56. *See, e.g.*, Hartman, *supra* note 14, at 17. For example, derogation measures may not be employed once the situation no longer constitutes a "public emergency threatening the life of the nation." *See* European Convention, *supra* note 16, art. 15(1).

57. *See, e.g.*, ORAÁ, *supra* note 7, at 146, 149.

58. *See, e.g.*, *Questiaux Report*, *supra* note 21, § 63, at 17; ORAÁ, *supra* note 7, at 148-49.

59. *See* ORAÁ, *supra* note 7, at 146.

60. *See Questiaux Report*, *supra* note 21, § 63, at 17; *see also* ORAÁ, *supra* note 7, at 146-47. Oraá explains that there is a requirement of "qualitative proportionality," i.e., each emergency measure must bear some relation to the particular threat—for example, a natural disaster cannot lead to the suspension of political rights. *See id.* at 147.

61. *See* Hartman, *supra* note 14, at 31-35 (examining how European Commission and

Another substantive part of the derogation regime is the principle of nondiscrimination.<sup>62</sup> Under the ICCPR and the American Convention, emergency measures in derogation from human rights included in these instruments may not “involve discrimination (solely) on the ground of race, color, sex, language, religion, or social origin.”<sup>63</sup> Although no equivalent provision appears in article 15 of the European Convention,<sup>64</sup> the general principle of proportionality also covers the issue of discrimination. Indeed, it is difficult to imagine emergency measures designed solely to discriminate against persons on one of the above-mentioned grounds that still could be considered “strictly required.”<sup>65</sup>

Under the derogation regime, emergency measures taken in the face of a public emergency must not be “inconsistent with [the derogating state’s] other obligations under international law.”<sup>66</sup> Such measures, for example, may not contradict the derogating state’s obligations under international humanitarian law (first and foremost the four Geneva Conventions of 1949<sup>67</sup>), other international human rights conventions,<sup>68</sup> and norms of customary international law.

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European Court apply “strictly required by the exigencies” criteria for valid derogation); Hartman, *supra* note 49, at 105–12.

62. See *Questiaux Report*, *supra* note 21, §§ 64–66, at 18.

63. The word “solely” appears in article 4(1) of the ICCPR, but not in article 27(1) of the American Convention. Compare ICCPR, *supra* note 17, art. 4(1), with American Convention, *supra* note 18, art. 27(1).

64. Article 14 of the European Convention, which prohibits discrimination on similar grounds, is not included in the list of the non-derogable rights. On the relationship between articles 14 and 15 of the European Convention, see ORAA, *supra* note 7, at 179–82.

65. See, e.g., *id.* at 174–77, 179–82. It is possible, and the ICCPR explicitly recognizes that possibility by including the qualification “solely,” that emergency measures could be employed mainly against a certain minority group without constituting impermissible discrimination. When a particular group of the population poses a distinct security threat endangering the life of the nation, measures may be taken that are specifically directed at that group. See, e.g., *Questiaux Report*, *supra* note 21, §§ 65–66, at 18; FITZPATRICK, *supra* note 39, at 63.

66. ORAA, *supra* note 7, at 190; see also *id.* at 190–206; Macdonald, *supra* note 39, at 245–48.

67. See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

68. It may be argued that a state that is a signatory to both the European Convention and the ICCPR would not be allowed to take emergency measures that derogate from a right that, although derogable under the Convention, is non-derogable under the ICCPR. Under this construction, derogation from such a right would constitute not only a violation of the ICCPR but also of the European Convention itself. See, e.g., Higgins, *supra* note 20, at 305–06; Schreuer, *supra* note 41, at 129–31; Shraga, *supra* note 39, at 221–24.

In the case of *Brannigan and McBride*, the applicants argued before the European Court that a derogation undertaken by the United Kingdom was “inconsistent with its other obligations under international law” as it was not “officially proclaimed” and thus failed to comport with the United Kingdom’s obligations under article 4 of the ICCPR. The Court rejected the argument when it found that, in the relevant circumstances, the derogation could be regarded to have been officially proclaimed. See *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A), § 73, at 57 (1993). It is thus still possible that in a case where no such official proclamation is made, a derogating state may be held liable both under article 4 of the Covenant and article 15 of the European

The most important prerequisite for a legitimate derogation from otherwise protected rights is that the circumstances in which the derogation has been effected must constitute a "public emergency" of a certain specified degree—the principle of the exceptional threat.<sup>69</sup> There are slight textual differences among the three derogation clauses in the framing of the criteria of "public emergency." Article 15(1) of the European Convention speaks of a "time of war or other public emergency threatening the life of the nation . . . ." By contrast, article 4, paragraph 1 of the ICCPR speaks of a "time of public emergency which threatens the life of the nation . . . ." Finally, article 27 of the American Convention defines a "public emergency" as a "time of war, public danger, or other emergency that threatens the independence or security of a State Party . . . ." Unlike the ICCPR, the two regional conventions mention war as a circumstance that may permit derogation from individual rights.<sup>70</sup> There is, however, no real significance to this difference. The controlling operative language is, therefore, "public emergency threatening the life of the nation." War is a particular, albeit extreme, case of such an emergency.<sup>71</sup> A crisis must be a truly extraordinary exigency to qualify as a derogation-justifying emergency.<sup>72</sup> The derogation

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Convention.

69. "It is because of the 'exceptional' nature of the threat that specific derogation clauses have been introduced rather than relying, as might have been expected, upon ordinary limitation provisions." L.C. Green, Book Review, 32 ALBERTA L. REV. 195, 195 (1994) (reviewing ORAA, *supra* note 7).

70. The ICCPR did not refer to war because it was deemed improper and inconsistent with both the prohibition on the use of force of article 2(4) of the U.N. Charter and the Charter's purposes and principles. See CHOWDHURY, *supra* note 22, at 22 (describing decision of drafters to suppress mention of war); ORAA, *supra* note 7, at 12 (same); Buergenthal, *supra* note 50, at 79 (same); Partsch, *supra* note 52, at 328 (noting that general U.N. policy is not to mention possibility of war). It is clear, however, that war was recognized as the most severe example of a public emergency and that article 4 therefore fully applies to such an extreme exigency.

71. One could argue that "war" is separate from the category of "other public emergency threatening the life of the nation" and that war consequently has an independent scope of application. According to this line of argument, derogation may be allowed under the two regional conventions in any circumstance of war, even if the life of the nation is not threatened—the Vietnam War may serve as an example of such a situation. The counter-argument recognizes war as a particular kind of public emergency. By this interpretation, the term "war" in the European and American Conventions is superfluous. At the time of the drafting of these conventions, war had been increasingly identified with the "total war" of World War II or with nuclear conflict. In such circumstances, it was unrealistic to think of war as anything short of threatening the life of the nation. This argument can also be derived from a textual reading of the relevant articles that refer to "or other public emergency" rather than saying "or a public emergency," thus tying the term "war" to the following term of "public emergency." In fact, one may even go further and argue that the links between war and public emergency require that a valid public emergency be on the scale of an actual war before it can validate derogation from individual and human rights.

Partsch implies, however, that under certain circumstances, even war should not allow a state to resort to the derogation mechanism. Thus, "[a] big power should not be enabled to take derogating measures after a formal declaration of war has been sent to a small 'aggressor.'" Partsch, *supra* note 52, at 330. Similarly, no interpretative significance is attached to the American Convention's qualification of an emergency as one that "threatens the independence or security of a State Party," rather than "threatening the life of the nation." See ORAA, *supra* note 7, at 16. Although conceivably broader in scope, the provision in the American Convention should not be construed as materially different from its equivalents in the European Convention and the ICCPR. See FITZPATRICK, *supra* note 39, at 56; ORAA, *supra* note 7, at 14–16, 27.

72. See, e.g., Buergenthal, *supra* note 50, at 79 (referring to "a public emergency whose



system adopts a vision of spasms of crises—episodic and sporadic events, albeit very serious in nature—that last for a relatively brief period of time before the restoration of normalcy. Emphasizing the exceptional nature of emergencies comports with the traditional paradigm regarding the relationship between normalcy and emergency—that of “normalcy-rule, emergency-exception.”

In addition to the overarching requirement of temporary duration and effect, several factors are considered when giving specific content to the principle of exceptional danger.<sup>73</sup> First, the particular crisis must be actual or imminent.<sup>74</sup> Derogation may not be used as a purely preventive mechanism unless an imminent danger exists. Second, normal measures available to the state should be manifestly inadequate and insufficient to respond effectively to the crisis. The panoply of “normal measures” also includes those measures available to the state in accordance with the limitation clauses that apply in times of normalcy.<sup>75</sup> Third, the threat must have nationwide effects. An emergency situation whose impact is confined to certain localities cannot satisfy the principle of exceptional danger as articulated in article 15.<sup>76</sup> The threat must endanger the whole population and either the entire territory of the state or significant parts thereof.<sup>77</sup> Finally, the emergency must threaten

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seriousness is beyond doubt”). The qualification “threatening the life of the nation” was preferred to such alternatives as “directed against the interests of the people,” “gravely threatening the vital interests of the people,” “in case of exceptional danger,” and “threatening the security and general welfare of the people.” See ORAA, *supra* note 7, at 13.

73. See, e.g., *Questiaux Report*, *supra* note 21, § 55, at 15–16.

74. See, e.g., ORAA, *supra* note 7, at 27–28; Hartman, *supra* note 14, at 16.

75. See, e.g., ORAA, *supra* note 7, at 29–30 (viewing emergency measures as last resort).

76. See J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 308 (2d ed. 1987).

77. See *Questiaux Report*, *supra* note 21, § 55, at 15–16. A danger, whatever its gravity, that is confined to a certain part of the state’s territory and that affects neither the rest of the territory nor the life of the nation as a whole cannot be considered a national emergency justifying the exercise of the derogation power. Nor does a threat to a discrete segment of the population establish a threat to “the life of the nation.” See Hartman, *supra* note 14, at 16; see also CHOWDHURY, *supra* note 22, at 24–26 (arguing that emergency ought to be nationwide in its effects); ORAA, *supra* note 7, at 28–29 (distinguishing between emergency in one part of territory that affects whole nation and one that is confined in its effects only to that part of territory); Hartman, *supra* note 49, at 92–93 (claiming that emergencies of limited geographic scope may occasionally justify derogation if they impair functioning of national institutions); Richard B. Lillich, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT’L L. 1072, 1072–74 (1985) (listing Paris Standards, which define “public emergency” as exceptional situation of crisis that affects whole population). In contrast, Buergenthal argues that

[a] public emergency . . . need not engulf or threaten to engulf an entire nation before it can be said to ‘threaten the life of the nation.’ Here one must distinguish between the magnitude and seriousness of a threat and the geographic boundaries in which the threat appears or from which it emanates. A ‘public emergency which threatens the life of the nation’ could presumably exist even if the emergency appeared to be confined to one part of the country . . . and did not threaten to spill over to other parts of the country.

A contrary interpretation is unreasonable . . . .

Buergenthal, *supra* note 50, at 80.

Alternatively, the geographical boundaries of the emergency would not necessarily determine the existence or absence of a “public emergency threatening the life of the nation,” but they might remain relevant to the question of whether the particular emergency measures taken to fight that emergency were “strictly required.” It will be harder to show that an emergency confined to certain territorial boundaries of one or more regions of a nation, rather than present throughout the nation,

the very existence of the nation, that is, the "organized life of the community constituting the basis of the State."<sup>78</sup>

### C. *The Derogation Regime and the Normalcy-Emergency Dialogue*

The derogation regime is premised—as the name "derogation" itself indicates—on the aberrational nature of emergencies. The regime is a product of the dialectic of dichotomy between normalcy and emergency. This view separates normalcy, which is considered to be the general state of affairs, from emergency, which is deemed the exception. The conventions thus promote a discourse that posits normalcy and emergency as two discrete, separable phenomena. The derogation clause lies dormant as long as conditions are calm and tranquil. It awakens only when certain exceptional circumstances arise, only to return to hibernation with the subsequent return to normalcy. The basic rationale underlying this regime is that human rights are susceptible to incursions and infringements, more so than at any other time, during the acute pressures of emergency and crisis. To protect these rights and prevent their dilution or nullification, it is imperative to ensure that "emergency" and "crisis" do not become expedient governmental tools used to facilitate the violation of individual rights. To that end, derogation from such rights is made possible only in the most extreme circumstances. Derogation measures last only temporarily, and their ultimate purpose ought to be that of bringing about a rapid return to normalcy.<sup>79</sup> "[A]bove and beyond the rules [that constitute the general

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justifies emergency measures throughout the nation's territory.

It may be argued that the situation in Northern Ireland exemplifies this latter type of emergency. See Schreuer, *supra* note 41, at 124–25 ("The recognition of a crisis situation affecting a certain region cannot depend on the question of whether it extends to the entire nation-state, including all other regions or provinces and, possibly, overseas territories."). Higgins finds it difficult to see the situation in Northern Ireland as threatening the life of the whole nation, i.e., the United Kingdom—for purposes of article 15, "the whole nation" is, in this context, Northern Ireland. See Higgins, *supra* note 20, at 302. Green, on the other hand, looks to another context, the "ethnic cleansing" in Bosnia-Herzegovina. Green argues that although this atrocious criminal activity was directed against a particular part of the population, i.e., the Bosnian Muslims, it might be considered a threat directed at the very existence of the Bosnian state. See Green, *supra* note 69, at 195–96.

78. This includes, for example, threat to the physical integrity of the population, the territorial integrity of the state, or the continued function and operation of the fundamental organs of the state. See, e.g., ORAA, *supra* note 7, at 29; Hartman, *supra* note 14, at 16 (positing requirement of serious danger to some fundamental element of statehood); Draft Guidelines for the Development of Legislation on States of Emergency, reprinted in FITZPATRICK, *supra* note 39, at 56 n.21 ("Even serious disruption of the organized life of the community . . . would not constitute sufficient grounds for a state of emergency if the disruption would not present a serious danger to the life, physical security, or other vital interests of the population."); Daes, *supra* note 38, Part III, para. 42 (claiming that although life of nation need not necessarily be threatened with actual extinction in order for there to be legitimate recognition of "public emergency," emergency requires "a breakdown of order or communications [such] that organized life cannot, for the time being, be maintained"); see also CHOWDHURY, *supra* note 22, at 26–27 (arguing magnitude of threat must imperil institutions essential to functioning of democratic government); Schreuer, *supra* note 41, at 122–23 (rejecting interpretation of "threat to the life of the nation" as meaning threat to existing power structure).

79. See CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 7, 306 (1948) (arguing that return to status quo ante is only legitimate purpose of emergency measures). But see FINN, *supra* note 4, at 40–43 (arguing for possibility of

principles of the derogation system] . . . one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normalcy.”<sup>80</sup> Thus, only a truly extraordinary crisis that lasts for a relatively brief period of time can be a derogation-justifying emergency. Moreover, to be legitimate, emergency measures employed by the state must to be proportional in both degree and duration to the particular threat.

This Article argues that the jurisprudence of the judicial institutions operating under the European Convention reveals a substantial schism between the theoretical discourse of the derogation regime and the reality in which derogations actually take place. This is in large part a result of the application of conventional theories concerning emergency regimes to situations in which basic assumptions underlying these theories falter. Viewing emergencies through the prism of the derogation clauses may result in a distorted picture.

There are two major problems with the derogation model. First, a substantial number of states of emergency in the modern world do not follow the “normalcy-rule, emergency-exception” paradigm. Rather than provisional and temporary emergencies, the world increasingly faces *de facto*, permanent, institutionalized, or entrenched emergencies.<sup>81</sup> While acknowledging the increasing occurrence of such situations, some commentators have argued that “[i]n an increasing number of cases, the

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constitutional reconstruction, as opposed to mere restoration).

80. See *Questiaux Report*, *supra* note 21, § 69, at 20; CHOWDHURY, *supra* note 22, at 45; Macdonald, *supra* note 39, at 241–42 (“It is inherent in theory and practice that the declaration of an emergency represents a temporary measure.”). For example, derogation measures must be limited to the duration of the particular emergency. This is explicitly recognized by the American Convention, but it is also implied by the derogation clauses included in the European Convention and the ICCPR. See, e.g., *De Becker v. Belgium*, [1962] App. No. 214/56, Eur. Ct. H.R. (ser. B) at 11 (Commission report). In this case, the Belgian Government suspended the right to freedom of expression of De Becker, who was convicted as a Nazi collaborator. Under the relevant Belgian legislation, De Becker, a former newspaper editor, was prevented from editing, printing, and distributing newspapers or other publications. The suspension was still in effect in 1960, fifteen years after the end of World War II. The Belgian government claimed that article 15 could not be construed to require that all wartime measures automatically cease to have effect when the war ends. The Commission found that the extension of the suspension of De Becker’s rights under article 10 of the European Convention over such a long period was not in conformity with the requirements of article 15 as it was not a proportionate measure and that the derogating government did not claim that a situation of “public emergency” had continued in Belgium. See *id.* at 133; see also Higgins, *supra* note 20, at 293–95 (discussing case).

81. A *de facto* state of emergency arises in circumstances where “there is no proclamation or termination of the state of emergency or . . . the state of emergency subsists after it has been officially proclaimed and then terminated.” *Questiaux Report*, *supra* note 21, § 103, at 26. Permanent emergencies include those states of emergency that are “perpetuated either as a result of *de facto* systematic extension or because the Constitution has not provided any time-limit *a priori*.” *Id.* § 112, at 28. While not defining a “complex state of emergency,” Questiaux finds a common feature shared by all emergency regimes falling into this category, namely “the great number of parallel or simultaneous emergency rules whose complexity is increased by the ‘piling up’ of provisions designed to ‘regularize’ the immediately preceding situation and therefore embodying retroactive rules and transitional regimes.” *Id.* § 118, at 29. Institutionalization of emergency regimes refers to situations in which emergencies facilitate an institutional transformation of a democratic regime into an authoritarian or “restricted” democratic regime. See *id.* §§ 129–45, at 31–32.

practices analysed seem actually to be 'deviations' from the theory of exceptional circumstances in that they tend more and more to depart from the 'reference model' described . . . ."<sup>82</sup> It is to this point that the second challenge to the "reference model" of the derogation regime is addressed. Speaking of a normative "reference model"—what I have called the "normalcy-rule, emergency-exception" paradigm—while admitting the existence of "deviations" from that model fails to acknowledge the role reversal between the rule and its exceptions. In fact, the "deviations" may be more accurately characterized as the rule, while the "reference model" might constitute a mere exception to that rule. The assumption of the exception directs attention, in any given judicial case, to the specific attributes of the particular emergency at hand, which loses its identity as one link in a larger chain of emergencies or as a discrete part of a wider phenomenon of an emergency regime.

#### D. Defining "Public Emergency"

##### 1. The European Convention

The most comprehensive case law on the derogation regime is found under the European Convention in the work of the Commission and the Court.<sup>83</sup>

In the *Lawless* case,<sup>84</sup> the Commission's nine-member majority defined a "public emergency" for the purposes of article 15 of the European Convention as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question."<sup>85</sup> Some of the five dissenters proposed a more rigorous reading of the term "public emergency." One alternative reading suggested that the linkage between war and public emergency in article 15—"[i]n time of war or other public emergency"—indicated that "public emergency" must be construed as "tantamount to war" or as analogous to circumstances of war.<sup>86</sup> Another dissenting opinion suggested that a public emergency exists only when the constitutional order of the state has completely broken down—when the different branches of government can no longer function.<sup>87</sup> The Court, however, merely affirmed the Commission's decision without attempting to provide a definition of its own.<sup>88</sup>

82. *Id.* § 97, at 26.

83. For a brief review of the operation of the Court and the Commission, see *infra* note 283.

84. See *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) at 56 (1960–1961) (Commission report) [hereinafter *Lawless* (Commission)]; *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) (1960–1961).

85. *Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 90, at 82.

86. *Id.* § 93, at 95 (Commission member Süsterhenn, dissenting).

87. *Id.* § 96, at 101 (Commission member Ermacora, dissenting).

88. The Court's theoretical treatment of this issue explained:

[I]n the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; . . . they refer to an exceptional situation of crisis or emergency

In the *Greek* case,<sup>89</sup> the majority of the Commission's members identified four characteristics of a "public emergency" under article 15:

- (1) It must be actual or imminent;
- (2) Its effects must involve the whole nation;
- (3) The continuance of the organized life of the community must be threatened;
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.<sup>90</sup>

Thus, the Commission's efforts at definition remain in place because of the Court's decision not to attempt to refine or modify these formulations.

## 2. *The ICCPR and the American Convention*

In its General Comment 5/13 on article 4 of the ICCPR, the U.N. Human Rights Committee (Committee) indicated that an alleged emergency will justify a derogation under that article only if the relevant circumstances are of an exceptional and temporary nature.<sup>91</sup> Furthermore, the Committee

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which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed . . . .

*Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 28, at 56.

It is interesting to note that there are two points of difference between the English text of the Court's judgment and the French text of the decision (which was designated as the official text) with regard to the excerpt above. While the English text refers to "an exceptional situation of crisis or emergency," the French text reads "*une situation de crise ou de danger exceptionnel et imminent.*" Thus, the French text adds the notion of an "imminent emergency." The qualification "exceptional," which is attached in the English text to both crisis and emergency, applies, in the French version, only to the latter.

In his concurring individual opinion, Judge Maridakis, after identifying the principle of *salus rei publicae suprema lex est* as the rationale underlying article 15 of the European Convention, stated that:

By "public emergency threatening the life of the nation" it is to be understood a quite exceptional situation which imperils or might imperil the normal operation of public policy established in accordance with the lawfully expressed will of the citizens, in respect alike of the situation inside the country and of relations with foreign Powers.

*Id.* at 64 (Maridakis, J., concurring).

89. 1 EUROPEAN COURT OF HUMAN RIGHTS, *THE GREEK CASE: REPORT OF THE COMMISSION* (1969) [hereinafter *The Greek Case*].

90. See *id.* § 153, at 81. With regard to the actual or imminent character of the emergency, the Commission noted that this imposes a limitation in time, i.e., the legitimacy of a derogation undertaken at a certain date depends "upon there being a public emergency, actual or imminent, at that date." *Id.* § 157, at 82. In a dissenting opinion, Mr. Delahaye sought to clarify that qualifying an emergency as "actual" is superfluous, and the operative qualification ought to be only "imminent." *Id.* § 169, at 88.

Mr. Eustathiades, relying on the French text of the European Court judgment in the *Lawless* case, stated in his dissenting opinion that article 15 recognizes two situations that justify derogation from a state's obligations under the European Convention: first, a situation of *exceptional and imminent danger* that affects the whole population and constitutes a threat to the organized life of the community of which the state is composed; and second, a situation of *crisis* that has the same effect as the former. See *id.* § 182, at 95.

91. See *Report of the Human Rights Committee*, U.N. GAOR Human Rights Comm., 36th Sess., Annex VII, General Comment 5/13, at 110, U.N. Doc. A/36/40 (1981). Section 3 of the General Comment provides as follows:

determined that in cases coming before it in accordance with the mechanism set forth in the Optional Protocol,<sup>92</sup> the state bears the burden of showing that these requirements have been fulfilled.<sup>93</sup> The principles identified in the General Comment serve as guidelines for members of the Committee when they examine states' reports under the procedure prescribed by article 40 of the ICCPR.<sup>94</sup>

Both the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights also have accepted the requirement that the emergency be exceptional and temporary. In one of its reports, the IACHR stated that under article 27 of the American Convention, "the emergency should be of a serious nature, created by an exceptional situation that truly represents a threat to the organised life of the State."<sup>95</sup> The IACHR has often expressed its opinion that governmental emergency measures may only be carried out in "extremely serious circumstances" and may never suspend certain fundamental rights.<sup>96</sup> In its advisory opinion on *Habeas Corpus in Emergency Situations*,<sup>97</sup> the Inter-American Court stated, inter alia, that article 27 is "a provision for exceptional situations only."<sup>98</sup>

### 3. *Additional Definitions*

Similar definitions, underscoring the provisional and exceptional nature of "public emergencies," appear in studies prepared by international and nongovernmental organizations. Thus, for example, a report submitted in 1982 to the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities refers to "states of emergency" as a generic

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The Committee holds the view that measures taken under article 4 are of *an exceptional and temporary nature* and may only last as long as the life of the nation concerned is threatened and that in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefor and, further, to fulfill their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.

*Id.* § 3 (emphasis added).

92. For a discussion of the Optional Protocol mechanism, see FITZPATRICK, *supra* note 39, at 83-114.

93. See ORAA, *supra* note 7, at 21.

94. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 522-36 (1996). Hartman claims, however, that the Committee's interpretation of article 4(1) of the ICCPR remains obscure due to the absence of a mechanism of "general comments" under article 40(4). See Hartman, *supra* note 14, at 30.

95. ORAA, *supra* note 7, at 24.

96. *Report on the Situation of Human Rights in Argentina*, Inter-Am. C.H.R., OEA/ser. L./V./II.49, doc. 19 corr. 1, at 25-27 (1980).

97. *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. C.H.R. 17, OEA/ser. L./V./II.17, doc 13 (1987).

98. *Id.* at 23. The Court also observed that "rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency." *Id.* at 24.

juridical term reflecting the use of emergency powers in exceptional circumstances. "Exceptional circumstances" exist when there are

temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation, that is to say, the political and social system that it comprises as a State, and which may be defined as follows: "a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community which forms the basis of the State." . . . When such circumstances arise, then both municipal law, whatever its theoretical basis, and international law on human rights allow the suspension of the exercise of certain rights with the aim of rectifying the situation, and indeed protecting the most fundamental rights.<sup>99</sup>

The International Law Association (ILA) adopted another definition of "public emergency." For a period of eight years between 1976 and 1984, the ILA worked to develop minimum standards for a rule of law in states of emergency. The major result of this work is the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Standards), which the ILA Conference adopted in 1984. Article 1 of Section A of the Paris Standards prescribes the following:

- (a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.
- (b) The expression "public emergency" means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.<sup>100</sup>

In his commentary on the Paris Standards, Subrata Chowdhury identifies the four basic elements of the definition of "public emergency" as "(a) territorial scope; (b) magnitude of the threat; (c) provisional or temporary status of the crisis; (d) official proclamation."<sup>101</sup>

Another definition of "public emergency" similar to that adopted by the European Commission and Court was suggested by a group of international law experts who convened in 1984 in Siracusa, Italy, to formulate a list of seventy-six principles concerning the limitation and derogation provisions in the ICCPR.<sup>102</sup> Principles 39-41 deal with the concept of "public emergency threatening the life of the nation":

- 39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: affects the whole of the population and either the whole or part of the territory of the State, and threatens the

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99. *Questiaux Report*, *supra* note 21, § 23, at 8.

100. *See* CHOWDHURY, *supra* note 22, at 11.

101. *Id.* at 24-29.

102. THE SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1984), *reprinted in* 7 HUM. RTS. Q. 3, 7-8 (1985).

physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.
41. Economic difficulties per se cannot justify derogation measures.<sup>103</sup>

### III. FROM THEORY TO PRACTICE: THE JURISPRUDENCE OF DEROGATIONS

As a matter of practice, the concept of "public emergency" came to stand for something far less than truly exceptional circumstances threatening the life of the nation. It has also become clear that derogation clauses only theoretically provided objective criteria against which any particular derogation might be compared. Experience has revealed time and again that the European Court and Commission give great deference to the decisions of national governments and to the manner in which those governments exercise their discretion. The rhetoric of the Court and Commission helps to cloud that fact but cannot hide it.

#### A. *Early Beginnings*

Gerard R. Lawless, a Dubliner, became a member of the Irish Republican Army (IRA) in January 1956 and, according to him, left that organization five months later. Between July 13 and December 11, 1957, Mr. Lawless was detained without trial in a military detention camp in County Kildare in the Republic of Ireland in accordance with the orders of the Irish Minister of Justice under the 1939 Offences Against the State Act (as amended in 1940). On July 8, 1957, the Irish government activated the special powers of arrest and detention provided for in this Act following a proclamation to that effect issued three days earlier. On July 20, the Irish Minister for External Affairs sent a letter to the Secretary-General of the Council of Europe, informing him of the entry into force of the special powers of arrest and detention and notifying him of a derogation to that extent under the provisions of article 15 of the European Convention.<sup>104</sup> Both the Commission and the Court found that detaining Lawless without trial for the five-month period in 1957 violated the obligations of the Irish government under certain articles of the European Convention.<sup>105</sup> Thus, it became necessary to examine whether the detention could be justified under the provisions of the derogation regime.

103. *Id.*; see also Daniel O'Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23, 23-25 (1985) (restating principles).

104. *Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 72, at 68 (1960-1961). For a description of the factual basis of the case, see *id.* § 54, at 58-59; and *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) §§ 15-25, at 36-40 (1960-1961).

105. The Court held that the detention violated the provisions included in articles 5 and 6 of the European Convention but did not conflict with article 7. See *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) §§ 8-22, at 46-55.



The majority of the members of the Commission determined that a state of public emergency had in fact existed in the Republic of Ireland as of July 5, 1957. They emphasized several factors supporting this conclusion. First, the IRA had carried out a violent anti-British campaign in Northern Ireland, especially since December 12, 1956,<sup>106</sup> which resulted in the killings of policemen as well as IRA volunteers and caused substantial damage to property.<sup>107</sup> The Commission specifically noted that the IRA operated against targets outside the Irish Republic—in Northern Ireland—and that such actions jeopardized the Republic's relations with the United Kingdom. This was considered no less a threat to the life of the Irish nation than the internal threat posed by the IRA's terrorist actions within the territory of the Republic itself.<sup>108</sup> Finally, the Commission considered certain aspects of the IRA activity in the Irish Republic.<sup>109</sup> It is important to note, however, that even the majority conceded that the IRA's activities within the territory of the Irish Republic had not affected the daily lives of the general public.<sup>110</sup> Therefore, the Commission directed most of its attention to the IRA's activities *outside* the borders of the Republic, in the six counties comprising Northern Ireland. The aggregate of these factors led it to conclude that a threat to the life of the Irish nation had, in fact, existed. The Commission went on to find that threat to have been imminent.<sup>111</sup>

The Court, in a unanimous ruling, affirmed the Commission's opinion, basing its judgment, as had the Commission, on a three-pronged factual

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106. The Court stated:

[I]n 1957 the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland; whereas the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; whereas, in particular, the amassing of the necessary evidence to convict persons involved in the activities of the IRA and its splinter groups was meeting with great difficulties . . . .

*Id.* § 36, at 58.

107. Two incidents were specifically mentioned. On December 12, 1956, the IRA blew up two bridges, an army building, and a broadcasting station, and set a courthouse and police property on fire. On July 4, 1957, a policeman was killed and another was wounded. *See Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 90, at 84–90; *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 14, at 35–36; *id.* § 29, at 56.

108. *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 14, at 35–36.

109. Among those factors were the existence, within the territory of the Republic, of an illegal military organization that resorted to political violence to further its political agenda; the use, by that organization, of the territory of the Republic as a base for its operations across the border in Northern Ireland; the severe strain this organization put on the resources (both with respect to manpower and to economic resources) of the security authorities of the Republic; attempts to interfere with the ordinary criminal proceedings in which IRA members stood as defendants by intimidation of judges and witnesses; and two cases in which the IRA conducted armed raids to acquire explosives within the territory of the Republic itself. *See id.* §§ 14–15, 17, at 35–37.

110. *See Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 90, at 85; *see also Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 36, at 57–58 (noting that IRA's activities mainly took place in Northern Ireland). An exception to that general rule might have been activities in counties of the Irish Republic bordering on Northern Ireland.

111. In coming to this conclusion, the majority members emphasized the seriousness of the violent incidents of July 4, 1957, and that most of the IRA prisoners held by the Republic were due to be released during July 1957. The fact that those events happened in the first half of the month of July undoubtedly played a significant role in the decision of the Irish government to proclaim a state of emergency in the Republic.

finding: the existence of an illegal and secret military organization operating within the territory of the Irish Republic that resorted to violent actions to further its goals; the detrimental impact of this organization's operations on the foreign relations of the Republic due to its activities in Northern Ireland; and finally, the "steady and alarming" escalation in the intensity and scale of its terrorist campaign from the autumn of 1956 through the first six months of 1957.<sup>112</sup> Like the Commission, the Court placed special significance on the IRA's fatal attacks in Northern Ireland on the night of July 3-4 and on the proximity of these attacks to the beginning of the Orange marching season.<sup>113</sup> These factors "had brought to light . . . the 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."<sup>114</sup>

The dissenting members of the Commission formulated their opinions around several common themes. They claimed, for example, that the facts as laid out by the majority did not demonstrate the existence of a threat to the life of the whole nation. At most, the threat posed by these activities had been local, affecting the life of certain segments of the public but not the life of the public as a whole.<sup>115</sup> Moreover, the dissenters asserted, this danger did not rise to the level of a "public emergency" allowing derogation from individual rights enumerated in the European Convention. At most, it threatened the public order or safety of the Republic and thus supported only limiting rights under the terms of the various limitation clauses of the Convention.<sup>116</sup> Finally, the dissenters argued, the threat had been merely potential, rather than actual or imminent as the derogation clause required.<sup>117</sup>

It is indeed questionable whether the IRA posed a real threat to the life of the Irish nation during the relevant time period.<sup>118</sup> The existence of a state

112. See *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 28, at 56. It is remarkable that the portion of the Court's decision concerning the question of the existence of a public emergency threatening the life of the nation is less than two pages long.

113. See *id.* § 29, at 56. July 12 is the traditional marching day for the Protestant "Orange Lodges" in Northern Ireland. The marches are normally accompanied by an upsurge in sectarian violence.

114. *Id.* § 28, at 56.

115. See *id.* § 28, at 56.

116. See *id.*

117. See *Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 93, at 97-98 (1960-1961) (Commission member Süsterhenn, dissenting); see also FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 112 (2d ed. 1996) (differentiating between actual and potential threats).

118. Is the fact that the Commission split so sharply over the question of the existence of a public emergency sufficient per se to demonstrate that no real emergency situation did, in fact, exist? The argument would go as follows: It is accepted by both majority and minority members that a public emergency arises only in the most exceptional circumstances. This seems to indicate that the existence of a public emergency must be a clearly recognized factor accepted by anyone who evaluates the situation. Yet, in this case, the existence of a public emergency in the Irish Republic was not clear to five of the Commission members.

This issue raises questions of formal logic and may be disposed of through the use of deontic logic separating the statement "it is obvious that X" from the statement "it is obvious that it is obvious that X." See Ron Shapira, *The "Givati" Case and Common Sense*, 1 ISR. J. CRIM. JUST. 121, 122-25 (1990). Whereas an emergency (X) may only be recognized to exist in truly exceptional

of emergency was closely linked to the "continuance of unlawful activities in Northern Ireland by the IRA." Northern Ireland, however, was neither part of the Irish Republic's territory nor under its control. The IRA's terrorist activities across the border did not threaten the life of the Republic and affected the day-to-day lives of its citizens only marginally, if at all. In short, the events in the North had no real spillover effect into the territory of the Republic. Of course, it could be imagined that continued terrorist activity might lead to such actions as closure of the border between the North and the Republic or might otherwise detrimentally impact Anglo-Irish relations. Yet, even assuming that such effects could be considered a "public emergency," there was no indication that they had been anything more than a remote possibility, much less an imminent or actual threat to the normal life of the Irish nation.

The European judicial bodies have hesitated to interfere with the discretion of national governments in cases involving derogation from human rights for reasons of public emergency that may detrimentally affect the life of that nation. It comes as no surprise, then, that these institutions were doubly reluctant to intervene in this case, which might have affected two nations, rather than only one. It may be that the Court and the Commission chose to emphasize the potential harmful effects on the foreign relations of the Republic of Ireland and on its good neighborly relationship with the United Kingdom, although this issue was not before either the Commission or the Court in this case.

Moreover, as at least one judge openly acknowledged, by July 1957 the IRA terrorist campaign was winding down.<sup>119</sup> The Court praised the government's success in "using means available under ordinary legislation, in keeping public institutions functioning more or less normally" until the IRA carried out its murderous attack on the night of July 3, 1957.<sup>120</sup> Was that attack, in and of itself, sufficient to justify resort to derogation? Did the potentially explosive combination of this attack and the annual Orange processions support Lawless's continued detention without trial, even when the marching season was over? Finally, if indeed the fear that releasing persons such as Lawless at that time might lead to further violence was well-founded, why did the Irish government offer Lawless release as early as July 16, "provided he gave an undertaking in writing 'to respect the Constitution and laws of Ireland' and not to 'be a member of or assist any organisation which is an unlawful organisation under the Offences against the State Act, 1939,'" an offer that he declined?<sup>121</sup> Surely, if his detention were necessary

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circumstances, a judicial organ may deliberate at length and its members may disagree whether such truly exceptional circumstances occurred. The mere fact of deliberation and disagreement does not detract, in and of itself, from the validity of the finding that an emergency did actually exist.

119. See *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) at 65 (1960-1961) (individual opinion of Judge Maridakis). The last IRA terrorist act carried out in Northern Ireland before the attack on the night of July 3 (which apparently was the direct and immediate cause for the derogation measures undertaken by the Irish government) was on the night of April 25-26.

120. *Id.* § 29, at 56.

121. See *id.* § 21, at 39.

to prevent further terrorist activity in Northern Ireland, his written pledge would not have served as an insurmountable barrier against his participating in, or assisting, such activity in the future.

The *Lawless* decision has been widely praised for the willingness demonstrated by both the Commission and the Court to review on the merits the question of whether a situation of public emergency did exist that would allow a state to use the power of derogation set out in article 15.<sup>122</sup> Both rejected the proposition that the resolution of such an issue ought to be left to the sole discretion of the state—a significant decision indeed, especially in light of the fact that *Lawless* was the first case to come before the Court. Indeed, at the time, neither the Court nor the Commission had yet established their status vis-à-vis the states parties to the European Convention. As a result, neither institution enjoyed sufficient confidence to interfere with the government's discretion on such a sensitive issue.

It is somewhat tempting to compare the *Lawless* decision with the U.S. Supreme Court's opinion in *Marbury v. Madison*.<sup>123</sup> In that case, the Supreme Court asserted its power of constitutional judicial review; in *Lawless*, the European Court established its jurisdiction to review independently derogation claims and measures. Both decisions coated doctrinal boldness with a specific result upholding the claims of the government.<sup>124</sup> Unlike *Marbury v. Madison*, however, *Lawless* has not signaled the dawn of an active judicial review by the European Court and Commission, for reasons to be found in the judgment itself. Most importantly, both the Court's ruling and the Commission's majority opinion emphasized the dual requirements of temporal duration and exceptional nature in identifying a "public emergency." When applying these criteria, however, both institutions gave the national government wider leeway than a strict interpretation of these fundamental principles would have demanded. While their rhetoric reinforced the notion of emergencies as temporary and exceptional situations, their decisions substantially undermined the significance of the principle of exceptional danger. Indeed, the Court and Commission similarly relaxed the "temporariness" requirement in later opinions. In that respect, perhaps more than in any other, the *Lawless* decisions have set the tone for future dealings with governmental invocation of the power to derogate.

For reasons explained above, neither the Court nor the Commission chose to stand up to the Irish government. Yet precisely because both

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122. "[I]t 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 in the present case[.]" *Id.* § 22, at 55. The Commission first established its competence to review and rule on the compliance of a derogating state with its obligations under article 15 in *Greece v. United Kingdom*, 1958-1959 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm'n on H.R.).

123. 5 U.S. (1 Cranch) 1 (1803). For a favorable view of the European Court's judgment, see, for example, Harold F. Porter, Jr., *The Lawless Case: A Beachhead for Civil Rights*, 49 A.B.A. J. 79 (1963).

124. See Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101, 111 (1995).

adopted the rhetoric<sup>125</sup> of judicial activism, their decisions carried significant legitimating value for the actions of that government.<sup>126</sup> Thus, in *Lawless*, both the Court and the Commission undermined their jurisdiction independently to review and determine the legitimacy of a derogation decision and the measures following it—thus sowing the seeds of their own ineffectuality.<sup>127</sup> Although they have not completely abdicated their judicial review responsibility to decide a derogation case on its merits, the European human rights bodies have adopted a markedly deferential attitude toward the national governments as to whether a “public emergency” exists.

The main tool of judicial deference has been the doctrine of the “margin of appreciation,”<sup>128</sup> which the Commission first adopted in the (*First*) *Cyprus* case<sup>129</sup> when it stated that a state exercising the derogation power under the European Convention enjoyed “a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.”<sup>130</sup> This “measure of discretion” applied only to the second constitutive element of article 15, namely, that the emergency measures taken by that government be limited to the extent strictly required by the exigencies. It was not mentioned in the context of the existence of a “public emergency threatening the life of the nation.”<sup>131</sup>

The Commission extended the notion of a measure of discretion in the *Lawless* case, applying it not only to the question of whether the measures taken by the government were “strictly required” by the exigencies but also to the determination of whether a “public emergency threatening the life of the nation” existed. Thus, it stated:

[H]aving regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion—a certain margin of appreciation—must be kept to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its

125. See Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1506 (1986).

126. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 29–31 (1962); see also Ronen Shamir, “Landmark Cases” and the Reproduction of Legitimacy: *The Case of Israel’s High Court of Justice*, 24 L. & SOC’Y REV. 781, 781 (1990) (claiming that decisions that counter some governmental practices allow courts to confer legitimacy on other governmental policies).

127. See Ni Aolain, *supra* note 124, at 112 (stating that “judicial deference to the states’ assessment of risk . . . was the stumbling block created and followed with only one exception in subsequent derogation cases”).

128. The concept of “margin of appreciation” is derived from French administrative law. See FRANCIS G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 201 (1975); HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 30 (1993).

129. *Greece v. United Kingdom*, 1958–1959 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm’n on H.R.). In this case Greece brought an application against the United Kingdom alleging that the latter violated its obligations under the European Convention by resorting to such measures as whipping, detention without trial, and deportation in Cyprus. In its response, the United Kingdom pointed out that it invoked the derogation clause of the Convention and claimed that the circumstances prevailing in Cyprus at the time amounted to a “public emergency threatening the life of the nation.” *Id.* at 174.

130. *Id.* at 176.

131. See, e.g., *The Greek Case*, *supra* note 89, §§ 180–184, at 92–99 (Commission member Eustathiades, dissenting) (analyzing two constitutive questions falling under article 15 cases).

normal obligations under the Convention.<sup>132</sup>

A minority of the Commission members adamantly rejected the margin of appreciation doctrine, arguing that evaluation of the existence of a public emergency ought to be based solely on existing facts without regard to any "account of subjective predictions as to future development."<sup>133</sup> The dissenters insisted that the Commission should review *de novo* the existence of a public emergency in a given situation.<sup>134</sup>

Although the Court made no specific mention of the margin of appreciation doctrine in *Lawless*,<sup>135</sup> its opinion contains similar language. For example, the Court concluded 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 combination of several factors . . . ."<sup>136</sup>

By using this doctrine, the Commission and the Court weakened the limitations that the principle of exceptional danger could otherwise be expected to put on governmental exercise of the power to derogate. While public emergency became a somewhat less exceptional, less aberrational phenomenon, the rhetorical adherence to the "normalcy-rule, emergency-exception" paradigm helped disguise that aspect of the case, which would remain dormant for some two decades before rearing its head again.

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132. *Lawless* (Commission), 1 Eur. Ct. H.R. (ser. B) § 90, at 82 (1960-1961). Sir Humphrey Waldock explained the notion of the margin of appreciation in these words:

The question of whether or not to employ exceptional powers under Article 15 involves problems of appreciation and timing for a Government which may be most difficult, and especially difficult in a democracy. . . . The Commission recognises that the Government has to balance the ills involved in a temporary restriction of fundamental rights against even worse consequences then for the people and perhaps larger dislocation than of fundamental rights and freedoms, if it is to put the situation right again . . . . Article 15 has to be read in the context of the rather special subject-matter with which it deals: the responsibilities of a Government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.

*Id.* at 395-96, 408 (Verbatim Report of the Public Hearing Held by the Chamber of the Court on 7th, 8th, 10th, and 11th April, 1961).

133. *Id.* § 92, at 94, (Commission member Eustathiades, dissenting). Furthermore, the same Commission member suggested that fears entertained by the Irish government that the situation in the Republic might degenerate had no foundation in fact as there had been no apparent intensification in the activities of the IRA during the relevant period. *See id.* at 134-42 (stating that emergency in Ireland was not threat to life of nation but only threat to public order) (Commission member Eustathiades, dissenting).

134. The same position was also entertained by the dissenting members of the Commission with respect to the question of whether the measures taken by the Irish government were "strictly required" or not. *See id.* at 135-36 (Commission member Eustathiades, dissenting); *id.* at 152-53 (Commission member Süsterhenn, dissenting).

135. *See Higgins, supra* note 20, at 298.

136. *Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) § 28, at 56 (emphasis added). With respect to the issue of the proportionality of the measures taken by the government, however, the Court seemed to engage in an independent evaluation of possible alternatives.

## B. *A New Direction?*

By the end of the 1960s it seemed that the strong rhetorical statements in *Lawless* rather than the inherent weaknesses in that judgment had carried the day. In that year, Denmark, Norway, Sweden, and the Netherlands brought a case before the Commission claiming that the Greek government had violated the European Convention.<sup>137</sup> That government, a nondemocratic military junta that came to power after violently overthrowing the constitutional government in April 1967,<sup>138</sup> suspended certain provisions of the Greek Constitution that corresponded to various articles of the European Convention. By a ten to five majority, the Commission rejected the Greek government's arguments and decided that no public emergency existed in Greece at the time derogation occurred.<sup>139</sup>

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137. See James Beckett, *The Greek Case Before the European Human Rights Commission*, 1 HUM. RTS. 91, 93 (1970-1971). The case never came before the European Court. The Commission delivered its report to the Committee of Ministers in November 1968. The Committee adopted a resolution that made public the Commission's report. Upon the adoption of this resolution, the Greek government denounced the European Convention in December 1969 and withdrew its membership in the Convention. Greece was not readmitted as a member until 1974. See *id.* at 93-117 (describing two years Commission spent on *Greek case*).

138. See *id.* at 93-94.

139. The Greek government identified the "public emergency threatening the life of the nation" existing in Greece as the threat of a violent Communist overthrow of the military government, a crisis of constitutional government, and a crisis of public order. The Commission concluded that the evidence supplied by the government to support the claim of an "imminent threat of a Communist displacement of the lawful Government by force of arms" was not persuasive. The main evidence consisted of small caches of low quality arms discovered by the government—fewer than 150 rifles and machine guns were so discovered. With regard to these arms, the Commission noted that the overwhelming majority of the rifles seized by the government were in a state of "semi-destruction." Thus, the arms caches were described by the Commission as "negligible in size and quality." The government's evidence also included the discovery of a "General Plan of Action" which supposedly outlined the plan for seizure of power by the Communists, but which, according to the Commission, did not indicate any imminent overthrow of the government. See *The Greek Case*, *supra* note 89, §§ 98-115, at 55-62; § 159, at 82-84. The Commission suggested that "[t]he fact that the respondent Government, having had full access to all available information, whether published, official or secret, has been able to produce only . . . very slender evidence . . . itself demonstrates that no Communist take-over of government by force of arms was to be anticipated." *Id.* § 159, at 84. The Commission concluded further that, not only did the Greek government not show that the threat of a Communist coup was imminent, the evidence actually indicated that a violent takeover was "neither planned at that time, nor seriously anticipated by either the military or police authorities." *Id.* § 159, at 83.

The Commission also rejected the claim that the circumstances prevailing in Greece on and before April 21 (the Greek government made claims going back to May 1944) constituted a constitutional crisis that put public order in serious jeopardy. The Commission acknowledged the existence in April 1967 of a "widespread anxiety about the future of political institutions in Greece and the ability of governments to maintain public order and social progress." *Id.* § 126, at 67. However, the Commission noted that there was "no conclusive evidence" that any of the parties campaigning for the May elections had proposed to abolish the Parliament or substantially to limit its powers. Furthermore, the Commission noted that the Communist party consistently lost electoral power in successive elections. This led to doubts as to whether, in April 1967, the formation of a Popular Front government after the May elections was certain or even likely. Finally, much of the evidence submitted to the Commission to support the claims of the government under this heading referred to events that allegedly took place in 1964 through 1965. This evidence, the Commission stated, was irrelevant to the question of whether an actual or imminent emergency existed in Greece in April 1967. At least one document relied on by the government was a forgery and was declared as such by a Greek tribunal prior to its submission to the Commission. See *id.* §§ 126-132, at 67-71; §§ 163-164, at 85-86.

The *Greek* case is unique among the derogation cases. It was the first, and so far the only, decision in which a European judicial organ rejected a government's contention that a state of "public emergency threatening the life of the nation" existed. The case reversed the relationship between rhetoric and practice. Although it professed respect for the "constant jurisprudence" concerning the margin of appreciation doctrine, the Commission did not grant any such margin to the Greek revolutionary government in what constituted a virtual *de novo* review of the factual basis of the case and the Greek government's submissions.<sup>140</sup> In fact, the Commission engaged in independent factfinding activity.<sup>141</sup> Furthermore, the Commission stated that a state derogating from human rights under article 15 bears the burden of showing that a public emergency exists.<sup>142</sup> With that statement, the approach of the Commission came close to that of the *Lawless* dissent, insofar as it undertook an objective and critical evaluation of the facts.

While the *Greek* case seemed a bold decision, one cannot disregard the fact that the specific circumstances of this case made the Commission's job relatively easy. First, the respondent state was at the time controlled by a nondemocratic regime—anathema to all that the European Convention represented.<sup>143</sup> Politically, no other member state supported it. Its

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The Greek government further argued that, since 1965, the country had come close to a state of anarchy. It specifically cited frequent violent demonstrations, activities, and strikes in which hundreds of policemen and civilians were killed or injured. The Commission conceded that great tension existed in Athens and Salonica, particularly among students and building workers, and that at least one demonstration resulted in serious violence. *Id.* §§ 141–51, at 75–79. However, the Commission nonetheless found that "there [was] no evidence that the police were not in both cities fully able to cope with the situation; there [was] no indication that firearms were used or their use planned and still less was there any suggestion that the army should be called in to assist the police." *Id.* § 149, at 78–79. Thus, the government "was in effective control of the situation." *Id.* § 160, at 84.

It is interesting to note that the Commission, appointed under article 26 of the Constitution of the International Labor Organization, dealt with a complaint against the Greek government for alleged violations of the Freedom of Association and Protection of the Right to Organize Convention, and the Right to Organize and Collective Bargaining Convention. The Commission concluded that the evidence presented to it did not support a conclusion that exceptional circumstances existed in Greece in 1967 that could justify a temporary violation of the two conventions by the state. See *Questiaux Report*, *supra* note 21, at § 57.

140. The majority opinion was careful, however, to pay at least a lip-service to "the 'margin of appreciation' which, according to the constant jurisprudence of the Commission, the Government has in judging the situation in Greece as from the moment it assumed power on 21st April, 1967." The *Greek Case*, *supra* note 89, § 154, at 81.

On the two dissenting judgments in relation to this matter, see Cora S. Feingold, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME L. REV. 90, 93–94 (1977).

141. See A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 278 (3d ed. 1993). See generally HARRIS ET AL., *supra* note 29, at 596–97 (describing Commission's powers of investigation including on-site visits).

142. See *The Greek Case*, *supra* note 89, § 154, at 81.

143. In this context, article 17 of the European Convention states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

European Convention, *supra* note 16, art. 17.



nondemocratic nature made it easier for the Commission to assume an uncompromising stance: Not only would such a decision enjoy moral and political support, but it would be easily distinguishable from any future case involving a democratic regime, thus alleviating member states' fears that a strong decision might be used against them in the future.<sup>144</sup> It has been noted that "[w]here ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and Court are less exacting in their requirements."<sup>145</sup> In the *Greek* case, the danger perceived by the respondent government was posed by those who challenged the unconstitutional seizure of power. It was clear that the military regime's sense of urgency had resulted, to a large extent, from its desire to retain power and block a return to a constitutional democratic order. In *Lawless*, on the contrary, derogation was deemed necessary to combat an illegal military organization that had resorted to violence against a lawful government. Insofar as the Commission's decision opposed the self-proclaimed interests of the Greek junta, it was all the more palatable to established regimes, as it worked against an unconstitutional overthrow of a lawful government. Second, the relevant state in this case was relatively marginalized in Europe. The possible repercussions of a Commission ruling against such a country could not have been overly detrimental to maintaining the structure of the European Convention. Finally, the case involved a governmental derogation from a wide range of individual rights rather than merely the administrative detention and interrogation of detainees of *Lawless*.<sup>146</sup>

Thus, while there is much to be said in support of the final outcome of the *Greek* case, it did not test, in any meaningful way, the Commission's attitude toward the twin issues of temporal duration and the exceptional nature of situations constituting public emergencies.

### C. *Back to the Future: The Parsing of a Prolonged Emergency*

In the case of *Ireland v. United Kingdom*,<sup>147</sup> the parties did not dispute the existence of an emergency situation in Northern Ireland.<sup>148</sup> On August 9, 1971, the British government reintroduced into Northern Ireland such measures as detention and internment under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922,<sup>149</sup> and regulations issued pursuant to it.<sup>150</sup> At least some of the detainees were subjected to the "five techniques"—

144. See Beckett, *supra* note 137, at 113; Hartman, *supra* note 14, at 29; Ni Aolain, *supra* note 124, at 114.

145. Ni Aolain, *supra* note 124, at 114.

146. See Schreuer, *supra* note 41, at 126-27.

147. *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.).

148. See *id.* See generally Michael O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 AM. J. INT'L L. 674 (1977) (analyzing Commission's treatment of human rights in *Ireland v. United Kingdom*).

149. Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5 (N. Ir.).

150. On August 9, 1971, the government of Northern Ireland brought into operation various special powers permitting the arrest and detention or internment without trial of large numbers of persons. The arrests took place under the Special Powers Act and Regulation 10 thereunder. By virtue

hooding, standing against a wall, subjection to noise, deprivation of food and water, and deprivation of sleep—during their interrogation.<sup>151</sup>

The Irish government contended that the detention and internment without trial violated articles 5 and 6 of the European Convention.<sup>152</sup> It also argued that these measures were not “strictly required by the exigencies of the situation”<sup>153</sup> and that the British government’s detention and internment policy discriminated against Northern Ireland’s minority Catholic community.<sup>154</sup> Finally, the Irish claimed that the use of the five techniques violated the British government’s obligations under article 3 of the European Convention, which is included in the list of the non-derogable rights.<sup>155</sup>

The Commission concluded that, as implemented under the domestic emergency legislation, the powers of detention and internment without trial did, in fact, violate the provisions of article 5 of the European Convention.<sup>156</sup> Thus, it then had to examine whether these measures could be justified under article 15. On this question, the Commission was unanimous in determining that at any point during the period relevant to the case, detention without trial was indeed “strictly required by the exigencies of the situation.”<sup>157</sup>

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of this regulation, a person could be arrested and held in custody for 48 hours for interrogation. Under regulation 11(1), a person could be arrested for the same purpose with no apparent time limit. The detention operation was based on intelligence information gathered by the Royal Ulster Constabulary (RUC), much of which was dated or inaccurate, resulting in the arrest of many persons wholly unconnected with paramilitary activities. In the first few hours of the operation, 342 people were arrested for suspected connections with the IRA. By December 14, 1971, some 1576 people were arrested while 934 were released. *See Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 670–84; FINN, *supra* note 4, at 68–69, 70; David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RTS. 261, 274 (1976).

151. *Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 513.

152. *See id.* at 528–30, 536–38, 542.

153. *Id.* at 544.

154. *See id.* at 604, 610–12.

155. *See id.* at 738–42.

156. *See id.* at 578–80.

157. *Id.* at 602. Hartman criticizes the Commission’s approach as failing to scrutinize closely the issue of proportionality by examining the British approach, rather than examining the measures taken by the government phase by phase. *See Hartman, supra* note 14, at 33. “[T]he principle of proportionality must not be the subject of an over-all assessment *in abstracto* . . . . The ‘*in concreto*’ assessment [results in] . . . analysing the principle of proportionality not on an over-all basis, but derogation by derogation and even in time and space.” *Questiaux Report, supra* note 21, §§ 61–62, at 17. *But see* ORAA, *supra* note 7, at 150–51 (stating that separate examination of each phase of emergency situation “should not be conducted too rigorously” because such examination may conflict with “dynamic” evaluation of national crisis and emergency measures taken to counteract that crisis).

Hartman also deplores the Commission’s failure to examine potential alternative measures and its retreat from the “*Lawless* rule on safeguards.” Hartman, *supra* note 14, at 33; *see also* Higgins, *supra* note 20, at 304 (attacking Commission’s reasoning as circular). The Commission held that the safeguard offered by the establishment of Detention Commissions, which had been deemed significant in *Lawless*, was not always necessary when detention without trial was involved. *See Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 558. In addition, the Commission held that gradual improvements in the safeguards offered by the state did not necessarily indicate inadequacy of former safeguards. The Commission felt that a contrary position would discourage states from attempting to strengthen the safeguards accompanying various derogation measures. *See Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 600. As the Commission explained,

[t]he fact that the measures were improved with time whereas the crisis became more grave cannot be taken to show that the measures under the Special Powers Act ever exceeded the requirements of the situation. Experience must allow improvements to be

Again by a unanimous vote, however, the Commission concluded that the combined use of the five techniques during the interrogations of several detainees amounted to torture within the meaning of article 3 of the European Convention.<sup>158</sup> For its part, the Court refused to rule that each of the five techniques amounted to "torture," instead labeling each of them "inhuman or degrading treatment."<sup>159</sup>

While worthy of some praise, the significance of the Commission's unanimous decision on the five techniques is also somewhat qualified. First, the Commission handed down its decision long after the government of the United Kingdom prohibited any further use of the five techniques in interrogations.<sup>160</sup> Furthermore, although the British government had announced that it did not plan to challenge the Commission's findings on this point,<sup>161</sup> the Court decided that the five techniques did not constitute prohibited torture but only inhuman treatment.<sup>162</sup> In coming to this decision, the Court declined Ireland's invitation to examine the five techniques as a

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made by a Government without its afterwards being held guilty of having violated the Convention. Otherwise this possibility might even conceivably impede the improvement of the safeguards as experience was gained.

*Id.* This "dynamic" approach leaves room for "progressive adaptations of the derogating measures and safeguards." ORAA, *supra* note 7, at 150; Higgins, *supra* note 20, at 304; Schreuer, *supra* note 41, at 128-29.

Another strong challenge to the Commission's decision concerns its failure to examine both the link between the claim that the derogation measures exercised by the British government in Northern Ireland were applied in a discriminatory fashion and the question of whether those measures were "strictly necessary." See Hartman, *supra* note 14, at 34. Detention without trial had been employed almost exclusively against members of the Catholic community in Northern Ireland. Protestant terrorists continued to be brought before the ordinary criminal courts, despite a significant increase in acts of violence committed by Protestant paramilitary groups. Though there was no clear showing why the ordinary criminal courts were adequate to deal with Protestant but not with Catholic terrorism, the European Commission and the Court decided that the emergency measures taken by the British government in Northern Ireland had not been applied in an impermissibly discriminatory manner. Several factors justified this holding: the greater number of terrorist attacks perpetrated by the IRA as opposed to the Unionists; the more substantial risk posed by IRA terrorism because of its well-structured hierarchical organization; and the relative ease of carrying out criminal proceedings against loyalist paramilitaries as against IRA members. Moreover, as the conflict progressed and the British gained more experience, the treatment of the warring groups became more equal. See generally KEVIN BOYLE ET AL., *TEN YEARS IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE* (1980) (describing developments in criminal procedure in Northern Ireland in 1970s).

158. See *Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 794. The Commission further decided that certain other forms of ill-treatment alleged to have been used by the security forces against detainees amounted to inhuman treatment of those detainees in violation of article 3 of the Convention. See *id.* at 930.

159. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) §§ 167-168, at 66-67 (1978).

160. On March 2, 1972, the British government prohibited further use of the "interrogation in depth" techniques by its security forces. On July 26, 1976, a new Headquarters Directive on Terrorist Suspects was issued that prohibited the use of the five techniques. See ANTONIO VERCHER, *TERRORISM IN EUROPE* 67 (1992).

161. See Lesley C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT'L L. 92, 99 (1978).

162. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) §§ 167-168, at 66-67 (holding, by thirteen votes to four, that use of techniques did not constitute torture as they did not cause suffering of particular intensity and cruelty implied by word "torture"); see also *id.* § 165, at 66 ("[T]he applicant government ask[s] for confirmation of . . . [the Commission's opinion that the five techniques constituted torture] which is not contested before the Court by the respondent government.").

whole and to assess their aggregate effect, preferring instead to review each technique separately, as if it were unrelated to other measures employed during interrogations.<sup>163</sup>

Second, and more important to the thesis of this Article, although the Republic of Ireland did not contest the existence of a "public emergency threatening the life of the nation" in Northern Ireland at the relevant times, the Commission *affirmatively* found that such an emergency did, in fact, exist.<sup>164</sup> The parties' stipulation to the presence of an emergency situation cannot exempt the Commission and the Court from independently reviewing this question. The European Convention protects individual rights that states cannot waive or forgo; therefore, the Commission properly made an independent assessment of the situation in Northern Ireland.<sup>165</sup> It is the substance of its decision on this point that is troubling.

The circumstances of the Northern Irish conflict, so well depicted by the Commission in its report, strongly challenge the fundamental premises upon which the derogation system is based. The *continuous* crisis in that area stands in stark contrast to the notion that a state of "public emergency" is an exceptional phenomenon—a temporary deviation from the normal state of affairs—and that a government's use of emergency measures should seek to restore normalcy in as speedy a manner as possible. Emergency has not been the exception in Northern Ireland; it has been the norm.<sup>166</sup> "Normalcy" is an empty phrase when it stands for constant fear, bars on windows and doors, army patrols in residential areas, frequent arrests of young people, ongoing terrorist campaigns, and large numbers of casualties. In these circumstances, how can the emergency be considered anything but a permanent situation that, although varying in intensity, is a constant feature of day-to-day life? The Commission in fact began its report by stating that "[t]he *lasting crisis* in Northern Ireland gave rise to the present application . . . . The present

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163. For a critical assessment of this approach, see FAWCETT, *supra* note 76, at 45-46; and Ni Aolain, *supra* note 124, at 116-17 ("[T]he examination of the specific measures was characterized by the manipulation of categories as a tool to avoid specific scrutiny of the net effect of the techniques used . . . . The combined effect of utilizing more than one technique on detainees was lost . . . .").

164. As the Commission explained its position:

The Commission is satisfied that there existed in Northern Ireland at all times material for the present case a public emergency threatening the life of the nation within the meaning of Art. 15. The degree of violence, with bombing, shooting and rioting was on a scale far beyond what could be called minor civil disorder. It is clear that the violence used was in many instances planned in advance, by factions of the community organised and acting on para-military lines. To a great extent the violence was directed against the security forces which were severely hampered in their function to keep or restore the public peace. The existence of an emergency within the meaning of Art. 15 is not in dispute between the parties.

*Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 584-86.

165. *See id.* at 608, 630-702.

166. *See* Kevin Boyle, *Human Rights and Political Resolution in Northern Ireland*, 9 YALE J. WORLD PUB. ORDER 156, 175 (1982) ("The concept of an emergency gives rise to the expectation that such a state of affairs is temporary . . . . In Northern Ireland, however, there can be no such expectation . . . . Normal conditions will not be restored . . . . Instead, normal conditions will have to be built from the ground up."). *See generally* DERMOT P.J. WALSH, *THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND* (1983) (providing discussion of arrest, interrogation, and operation of courts based on court surveys and interview survey).

emergency is not as such in dispute between the parties. *It began in 1966* with the first use of violence for political ends in Northern Ireland in recent years.”<sup>167</sup> It is difficult—indeed, impossible—to reconcile this statement with the Commission and Court definitions of “public emergency threatening the life of the nation.” The situation in Northern Ireland contradicts the very foundation of the derogation regime as expressed in the concept of “normalcy-rule, emergency-exception.” Yet neither the Commission nor the Court acknowledged the strain that such a “prolonged crisis” put on the derogation regime. Similarly, neither institution addressed the fact that Great Britain has practically maintained an ongoing derogation notice with respect to Northern Ireland.<sup>168</sup> That, too, ran against the theoretical underpinnings of the derogation system. In short, in this case, the Court and Commission’s insistence on viewing issues pertaining to derogation under article 15 through the false mirror of theoretical definitions prevented them from realizing that they faced a completely different situation. As a result, they tried to impose the straitjacket of the derogation regime on circumstances that called for different treatment.

Third, the decisions in *Ireland v. United Kingdom* have further contributed to the expansion of the problematic margin of appreciation doctrine. The Court pushed the doctrine forward by declaring that

[i]t falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter article 15 paragraph 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States engagements (article 19), is empowered to rule on whether the States have gone beyond the “extent strictly required by the exigencies” of the crisis . . . . The domestic margin of appreciation is thus accompanied by a European supervision.<sup>169</sup>

#### D. *Trees and Forest*

The dissonance between the theoretical premises underlying the derogation regime and the reality of continuous conflict continued to be

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167. *Ireland*, 1976 Eur. Conv. on H.R. at 512 (emphasis added).

168. See *infra* note 204.

169. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) § 207, at 78–79. The Commission in this case did not make any specific mention of the margin of appreciation doctrine. It recognized, however, that

both the direct requirements of the emergency and the more indirect considerations as to how the emergency procedures should be organised in relation to normal processes of law, must be in the first place determined by the State concerned, unless the Commission finds that the reasons given cannot, even in the circumstances, justify the extent of derogation.

*Ireland*, 1976 Y.B. Eur. Conv. on H.R. at 598. What the Commission’s process of “finding” entails is not further elaborated by the decision.

played out in the jurisprudence of the Commission and Court's post-Ireland jurisprudence. Northern Ireland (and before 1922 the whole island of Ireland)<sup>170</sup> has experienced an entrenched violent conflict.<sup>171</sup> Between 1969 and 1990, more than 2800 people were killed in Northern Ireland as a result of some sort of political violence.<sup>172</sup> It is estimated that over 33,000 people suffered serious injuries during approximately the same period.<sup>173</sup> The Northern Irish conflict has also imposed a substantial financial burden on all the parties involved.<sup>174</sup>

The entrenched nature of the conflict is also reflected in the Northern Irish legal system. The British government has applied special emergency legislation to Ireland since the 1820s.<sup>175</sup> In addition, the British made a significant number of emergency powers part of Ireland's general, permanent legislative landscape.<sup>176</sup> Interestingly enough, at least one analyst traced the impetus behind this second pattern to the British government's belief that "normality would reassert itself."<sup>177</sup>

As normality did not reassert itself and security considerations remained a prominent part of the Northern Irish agenda,<sup>178</sup> Britain continued to apply numerous emergency legislative measures to the six counties of Northern Ireland during the twentieth century. After violent clashes between Protestants and Catholics caused the deaths of some 300 people within two years,<sup>179</sup> the government introduced the Civil Authorities (Special Powers) Act (Northern Ireland) (Special Powers Act).<sup>180</sup> The Act was renewed

170. See generally F.S.L. LYONS, *CULTURE AND ANARCHY IN IRELAND 1890-1939* (1982).

171. See generally CHARLES TOWNSEND, *POLITICAL VIOLENCE IN IRELAND* (1983) (providing extensive historical overview and brief analysis of Irish situation).

172. See BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* 30 (1993); CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 19 (2d ed. 1992). These numbers do not include deaths occurring in Britain itself in the context of the Northern Irish conflict.

173. O'LEARY & MCGARRY, *supra* note 172, at 40.

174. It is estimated that the extra security costs directly ensuing from the conflict between 1969 and 1990 were 1050 million Irish punts for the Republic of Ireland and some £4150 million for the United Kingdom. See *id.* at 45.

175. See COLM CAMPBELL, *EMERGENCY LAW IN IRELAND, 1918-1925*, at 128 (1994) (discussing riots under special emergency legislation titled "An Act for the more effectual Suppression of local Disturbances and Dangerous Associations in Ireland").

176. See, e.g., The Criminal Law and Procedure (Ireland) Act (1887) (allowing declaration of association unlawful, permitting magistrates to interrogate witnesses in private and so forth); The Prevention of Crimes (Ireland) Act (1882) (allowing suspension of jury trial in certain cases); The Protection of Life and Property Act (1871) (permitting arrest and detention without trial of persons reasonably suspected of membership in secret society); The Peace Preservation Act (1870) (empowering magistrates to compel witnesses to testify during investigation of crime before trial).

177. TOWNSEND, *supra* note 171, at 63.

178. See Fionnuala Ni Aolain, *Where Hope and History Rhyme—Prospects for Peace in Northern Ireland?*, 50 J. INT'L AFF. 63, 67-68 (1996).

179. See FINN, *supra* note 4, at 53.

180. The Special Powers Act created two categories of offenses: those specified in the act itself and those included in regulations issued by the Ministry of Home Affairs (who could delegate the power to issue regulations to his subordinates, including RUC officers) under the Act. Under the emergency regime established by the Act, "the Government enjoyed powers similar to those current in time of martial law." Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Irish Constitution*, 1 ANGLO-AM. L. REV. 368, 400 (1972).

annually from 1922 to 1928, when it was extended for a five-year period. In 1933, the Act was made permanent.<sup>181</sup> Indicative of the state of affairs in Northern Ireland is the fact that since the very creation of "Ulster,"<sup>182</sup> emergency legislation, such as the Special Powers Act, has become a normal part of state procedure.

The end of the 1960s saw the rise of the Northern Irish civil rights movement.<sup>183</sup> The Stormont government reacted with hostility, ignoring or rejecting outright its demands.<sup>184</sup> Seeing that its attempts to improve the conditions of the minority community in Northern Ireland through political and legal action had failed, the civil rights movement turned to mass marches and protests.<sup>185</sup> Continuous rioting and violent clashes during many of the marches, culminating in the Derry riots of August 1969, brought the situation in Ulster to the brink of civil war. A dramatic shift in the nature of the struggle occurred with the militarization of the conflict. The British army replaced the Royal Ulster Constabulary (RUC) as the force primarily responsible for maintaining law and order in the territory.<sup>186</sup> The introduction of the army into the conflict in this new capacity, combined with continued rioting, the IRA's reassertion of its role as the spearhead of armed Catholic resistance in the province,<sup>187</sup> and the rise of several organized Protestant paramilitary groups (such as the Ulster Volunteer Force and the Ulster Defence Association), marked the move to this militarized stage of the struggle.<sup>188</sup> Shortly after "Bloody Sunday,"<sup>189</sup> British direct rule of Northern Ireland was established in March 1972.<sup>190</sup>

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181. The radical nature of this piece of legislation was best reflected in section 2(4), which provided that "[i]f any person does any act of such nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations." The South African Minister of Justice was quoted as referring to section 2(4) when he said that he "would be willing to exchange all the [South African] legislation of that sort for one clause in the Northern Ireland Special Powers Act." COMMITTEE ON THE ADMIN. OF JUSTICE, NO EMERGENCY, NO EMERGENCY LAW 6 (1993).

182. "Ulster" is the name frequently used to refer to the six counties commonly known as "Northern Ireland."

183. See FINN, *supra* note 4, at 56–58.

184. See *id.* at 57. The Government of Ireland Act of 1920 created two devolved Irish parliaments—one holding jurisdiction in the six counties of the North of Ireland, the other controlling in the remaining 26 counties in the South. The Northern Irish parliament was colloquially known as "Stormont" after the area in which it sat.

185. See *id.* at 59–66.

186. See *id.* at 64–65.

187. The Provisional IRA was created after a 1970 split in the IRA. See generally J. BOWYER BELL, *THE SECRET ARMY: THE IRA* (2d ed. 1996) (describing splinter); PATRICK BISHOP & EAMONN MALLIE, *THE PROVISIONAL IRA* (1987) (same); TIM PAT COOGAN, *THE I.R.A.: A HISTORY* (1993) (same).

188. See WALKER, *supra* note 172, at 17–20 (describing nature and tactics of various terrorist groups operating in Northern Ireland).

189. On January 30, 1972, 14 marchers participating in an anti-internment demonstration were shot dead in Derry by British paramilitaries. Subsequent government inquiries established that none of those killed were armed, despite army claims to the contrary. The events of "Bloody Sunday" led to full-scale sectarian violence throughout Northern Ireland. See FINN, *supra* note 4, at 73–74.

190. See *id.* at 75–76; see also Palley, *supra* note 180, at 445 (stating that Northern Ireland (Temporary Provision) Act 1972 substituted Secretary of State for Governor of Northern Ireland to act

In 1973, following the bloodiest year of the "Troubles," the British Parliament enacted the Northern Ireland (Emergency Provisions) Act, 1973 (EPA), which repealed the Special Powers Act while retaining many of the repealed statute's provisions in the new legislation.<sup>191</sup> In addition, the EPA established the Diplock courts, in which the trial of persons suspected of certain scheduled offenses was to be conducted by one judge, operating under relaxed rules of evidence<sup>192</sup> and sitting without a jury.<sup>193</sup> The EPA was further amended in 1975, 1978, and 1987. In 1991, this legislation was replaced by the Northern Ireland (Emergency Provisions) Act (EPA 1991) which, among other things, created new offenses and gave the authorities additional emergency powers.<sup>194</sup>

Another layer of emergency legislation applying to Northern Ireland was added in 1974. Just a few days after a November 21 bombing of a Birmingham pub killed twenty-one and injured more than 180 people, Parliament passed the first Prevention of Terrorism (Temporary Provisions) Act (PTA).<sup>195</sup> While EPA 1991's sphere of applicability was limited to Northern Ireland, this has not been the case with respect to the series of PTAs.<sup>196</sup> The PTA was enacted in the face of what was seen as the extension of the IRA's terrorist campaign to the United Kingdom itself. Once again, temporary emergency legislation obtained a permanent status when, after being amended in 1975 and in 1983 and reenacted in 1984, the PTA became permanent legislation with the passage of the PTA of 1989.<sup>197</sup>

Emergency legislation in Northern Ireland has awesome regulatory breadth and substance. Moreover, it has been maintained as a permanent feature of the jurisdiction's legal landscape. Indeed, over time, its hold on the Northern Irish legal system became ever more entrenched and broad-based as the issues it regulated increased in scope. Furthermore, such expansive emergency legislation had substantial impact on "ordinary," non-emergency legislation. Along with the use of expressly defined emergency powers in Northern Ireland came an increased emphasis on using and modifying the ordinary law to cope with the civil strife.<sup>198</sup> Hence, the story

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as chief executive officer).

191. See generally KEVIN BOYLE ET AL., *LAW AND STATE: THE CASE OF NORTHERN IRELAND* (1975).

192. See, e.g., Lord Lowry, *National Security and the Rule of Law*, 26 *ISR. L. REV.* 117 (1992) (describing reaction of courts in Northern Ireland to emergency situations).

193. See generally JOHN D. JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* (1995).

194. See, e.g., Brice Dickson, *Northern Ireland's Emergency Legislation—The Wrong Medicine?*, [1992] *PUB. L.* 592.

195. See generally PADDY HILLYARD, *SUSPECT COMMUNITY—PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN* (1993).

196. See FINN, *supra* note 4, at 118–34; WALKER, *supra* note 172, at 31–261; David Bonner, *Combating Terrorism in the 1990s: The Role of the Prevention of Terrorism (Temporary Provisions) Act 1989*, [1989] *PUB. L.* 440.

197. E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 591 (11th ed. 1993); WALKER, *supra* note 172, at 33–39.

198. The prime example of this is the abrogation of the right to silence, first in Northern Ireland, now extended to the rest of the United Kingdom. See Oren Gross, *Theoretical Models of Emergency Powers* 243–48, 323–25 (1997) (unpublished J.S.D. dissertation, Harvard Law School).



of the Northern Irish legislation combines permanent, complex, and de facto aspects of emergency regimes. Conceptualizing the situation in terms of "deviations" and "aberrations" from an otherwise general rule of "normalcy" patently misses the point. Emergency is the norm in Northern Ireland, not the exception.

In 1988, a case, *Brogan and Others v. United Kingdom*, brought to Strasbourg addressed the applications of four persons arrested in Northern Ireland under the provisions of section 12 of the PTA 1984, which provided for special powers of arrest without warrant.<sup>199</sup> The applicants were detained for periods from four days and six hours to six days and sixteen-and-a-half hours, during which the police interrogated them about various offenses ranging from membership in the IRA to participation in deadly attacks on the police and the army. None of the four was brought before a judge, and none was charged after subsequent release.<sup>200</sup>

While the Commission and the Court rejected most of the allegations that the British government's actions had contravened the European Convention,<sup>201</sup> the Court ruled, by a twelve to seven majority, that they had violated article 5(3) of the Convention, which requires that a person arrested or detained "be brought *promptly* before a judge or other officer authorised by law to exercise judicial power . . . ."<sup>202</sup> A thirteen-judge majority also found a violation of article 5(5) of the Convention, which makes available an enforceable right to compensation to anyone who was subject to an arrest or detention in violation of the provisions of article 5.<sup>203</sup>

*Brogan* was not a derogation case. On August 22, 1984, the British government notified the Secretary-General of the Council of Europe that it was withdrawing a previously submitted notice of derogation.<sup>204</sup> No claim for

199. See *Brogan and Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) at 16 (1988) [hereinafter *Brogan* (Court)]. The Commission's report was handed down on May 14, 1987. See *Brogan and Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) at 57 (1987) [hereinafter *Brogan* (Commission)].

200. See *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) §§ 11-21, at 19-21.

201. See *id.* §§ 53-54, at 29-30 (declaring majority decision regarding article 5(1) of Convention); *id.* at 34-35 (declaring unanimous decision regarding article 5(4)); *Brogan* (Commission), 145-B Eur. Ct. H.R. (ser. A) § 98, at 62 (declaring unanimous decision regarding article 5(1)); *id.* § 114, at 64 (declaring ten to two majority regarding article 5(4)).

202. *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) § 62, at 33-34. The Court did not define with precision when a detainee or a person arrested ought to be brought before a judge in order to comply with the "promptness" requirement. The Commission's decision on this aspect of the case (by a majority of ten to two) was that article 5(3) had been violated with respect to two of the applicants who had been detained for 5 days and 11 hours, and 6 days and 16 1/2 hours respectively, but had not been violated with respect to two detainees held for periods of 4 days and 6 hours and 4 days and 11 hours respectively (a decision supported by an eight to four majority). The Commission gave no clear indication as to how it reached that decision, or as to where the dividing line fell between what was "prompt" and what was not. See *Brogan* (Commission), 145-B Eur. Ct. H.R. (ser. A) §§ 104-108, at 63.

203. See *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) § 67, at 35; *Brogan* (Commission), 145-B Eur. Ct. H.R. (ser. A) § 119, at 65 (nine to three majority).

204. See DAVID BONNER, EMERGENCY POWERS IN PEACETIME 88 (1985). British notices of derogation were given, prior to 1984, in 1971, 1973, and 1978. See Derogation of 20 August 1971, 1971 Y.B. Eur. Conv. on H.R. 32; Derogation of 23 January 1973, 1973 Y.B. Eur. Conv. on H.R. 24; Derogation of 16 August 1973, 1973 Y.B. Eur. Conv. on H.R. 26; Derogation of 18 December

derogation was made with respect to the factual or legal circumstances giving rise to this case. Both the Court and the Commission held, however, that the background circumstances of the case should be taken into account. Thus, "[i]t is against the background of a continuing terrorist threat in Northern Ireland and the particular problems confronting the security forces in bringing those responsible for terrorist acts to justice that the issues in the present case must be examined."<sup>205</sup>

The opinions written by the seven dissenting judges of the Court resonated with explicit, derogation-like language. A five-judge dissenting opinion asserted:

The background to the instant case is a situation which no one would deny is *exceptional*. Terrorism in Northern Ireland has assumed alarming proportions . . . . It is therefore necessary to weigh carefully, on the one hand, the rights of detainees and, on the other, those of the population as a whole, which is *seriously threatened* by terrorist activity . . . .

While considering, therefore, that there was no breach of article 5(3) in the instant case, we are anxious to stress that this view can be maintained only in so far as *such exceptional conditions* prevail in the country, and that the authorities should monitor the situation closely in order to *return to the practices of ordinary law as soon as more normal conditions are restored* . . . .<sup>206</sup>

The majority's opinion reveals that it too shared this sense of emergency and urgency. Referring to its decision in the *Klass* case,<sup>207</sup> the Court remarked that "having taken notice of the growth of terrorism in modern society, [the Court] has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights."<sup>208</sup>

Such language—stressing the exceptional nature of the situation and the need to return to ordinary legal practices as soon as normalcy is restored—could, without any need for modification, be transplanted into any emergency-related judicial decision. But if the situation had been so exceptional, posing a grave threat to the population, was not an official derogation of article 5 adequate? Why would the British government choose to withdraw its former derogation notices at a time when such exceptional

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1978, 1978 Y.B. Eur. Conv. on H.R. 22.

205. *Brogan* (Commission), 145-B Eur. Ct. H.R. (ser. A) § 80, at 59. In its opinion, the Commission quoted from its report in the case of *McVeigh and Others v. United Kingdom*, App. Nos. 8022/77, 8025/77, 8027/77, 25 Eur. Comm'n H.R. Dec. & Rep. 15, § 157 at 34 (1981), to the effect that

"[t]he existence of organised terrorism is a feature of modern life whose emergence since the Convention was drafted cannot be ignored any more than the changes in social conditions and moral opinion which have taken place in the same period . . . . It faces democratic Governments with a problem of serious organised crime which they must cope with in order to preserve the fundamental rights of their citizens . . . ."

*Brogan* (Commission), 145-B Eur. Ct. H.R. (ser. A) § 84, at 59.

206. *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) at 39–40 (Vilhjálmsdóttir, Bindaschledler-Robert, Gölcüklü, Matscher, & Valticos, JJ., dissenting) (emphases added).

207. See *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A.) at 5 (1978).

208. *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) § 48, at 27.

circumstances still existed in Northern Ireland? Essentially, the position adopted in *Brogan* enabled the British government to enjoy the fruits of derogation without having to incur the legal and political costs of such a formal act.

Not surprisingly, this case also invoked the margin of appreciation doctrine. The dissenting judges applied the doctrine's broad, sweeping form as developed in the derogation context to non-derogation circumstances outside the scope of article 15.<sup>209</sup> A prime example of this attitude is found in the dissenting opinion of Judge Martens, who stated that

[s]triking a fair balance between the interests of the community that suffers from terrorism and those of the individual is particularly difficult and national authorities, who from long and painful experience have acquired a far better insight into the requirements of effectively combating terrorism and of protecting their citizens than an international judge can ever hope to acquire from print, are in principle in a better position to do so than that judge!<sup>210</sup>

On its face, the *Brogan* judgment should win the approval of those who believe that the Court and the Commission ought not assume a strongly deferential attitude towards the claims of national governments. After all, both institutions found the British government to be in violation of its obligations under certain sections of article 5 of the European Convention. Yet, as before, the picture is far from rosy. That a substantial number of judges and Commission members were ready to treat this case as though it were an emergency-related case has already been pointed out. Although they did not claim that a public emergency existed, they recognized the possibility of "context justification" for governmental actions that in fact derogated from otherwise protected rights.<sup>211</sup> Indeed, the Court and the Commission permitted derogation treatment in circumstances in which none of the parties coming before the Court or the Commission formally requested it—a far cry

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209. See *id.* at 44–45 (Evans, J., dissenting); *id.* at 52, 54–56 (Martens, J., dissenting). But see *id.* at 42 (Walsh & Salcedo, JJ., dissenting) ("Article 5 of the European Convention on Human Rights does not afford to the State any margin of appreciation. If the concept of a margin of appreciation were to be read into Article 5, it would change the whole nature of this all-important provision which would then become subject to executive policy.").

210. *Id.* at 54 (Martens, J., dissenting) (emphasis added).

211. See Ni Aolain, *supra* note 124, at 121. On the other hand, with respect to the alleged violation of article 5(1)(c) of the Convention, which permits an arrest or detention of a person when that procedure is "effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence," European Convention, *supra* note 16, art. 5(1)(c) (emphasis added), the Court adopted the position of the Commission (and the British government) that "such an intention [to bring the person arrested before the competent legal authority] was present and that if sufficient and usable evidence had been obtained during the police investigation that followed the applicants' arrest, they would undoubtedly have been charged and brought to trial." *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) § 52, at 29. Both the Court and the Commission chose to ignore substantial empirical indications that the reality was in fact different. See WALSH, *supra* note 166, at 33–34. While ready to examine the broad picture of terrorism in Northern Ireland, neither the Court nor the Commission were ready to apply a similar approach to the exercise of governmental powers of arrest and detention by the British government under article 12. Instead, they focused on the specific case and eliminated from review the general experience concerning these extraordinary powers of arrest. See Ni Aolain, *supra* note 124, at 119–21.

indeed from the paradigmatic principles of exceptionality and temporal duration.

Following the Court's decision in *Brogan*, the British government submitted a *Note verbale* to the Secretary-General of the Council of Europe invoking its right of derogation under the Convention.<sup>212</sup> In general language, it asserted the existence of a public emergency in the United Kingdom emanating from the "campaigns of organised terrorism connected with the affairs of Northern Ireland."<sup>213</sup> The government specifically cited three legislative provisions dealing with powers of detention and arrest, including article 12 of the PTA. Yet the derogation notice did not include any mention of events or developments taking place after August 22, 1984 (the date on which the previous derogation notice was withdrawn), that might justify the conclusion that a state of emergency had developed in the United Kingdom since that date<sup>214</sup> except for a brief reference to the Court's adverse judgment in *Brogan*.<sup>215</sup>

Under these circumstances, one could question whether a "public emergency threatening the life of the nation" did in fact exist in Northern Ireland in December 1988, as compared with the situation prevailing in that area in August 1984, which, by the British government's own admission, did not constitute a public emergency. The facts suggest that the 1988 derogation was but a reaction to the adverse *Brogan* judgment rather than the result of true necessity.<sup>216</sup>

This question came before the European Court in *Brannigan and McBride*.<sup>217</sup> Peter Brannigan and Patrick McBride were arrested by the RUC under article 12 of the PTA. Mr. Brannigan was held in detention for six days and fourteen-and-a-half hours and was subsequently released without charge. Mr. McBride was detained for four days, six hours, and twenty-five minutes, after which he too was released without charge. The facts of this

212. See 31 Y.B. Eur. Conv. on H.R. 15 (1988) [hereinafter *Note verbale*].

213. *Id.*

214. See VAN DIJK & VAN HOOF, *supra* note 35, at 558.

215. See *Note verbale*, *supra* note 212, at 16.

216. At least some commentators have suggested that [w]hen faced with the Court's judgment [in *Brogan*], instead of reversing the policy and amending the legislation . . . the government entered a derogation from Article 5(3). On the face of it this appeared as a blatant disregard of international law, not least because the government had earlier explained to the Court during the course of the case that it had not felt that a derogation was necessary . . . the timing [of the derogation] indicated bad faith and an attempt to avoid compliance with the *Brogan* judgment, rather than a necessary response to an emergency.

LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY 346 (1994); see also Ni Aolain, *supra* note 124, at 122 (stating that derogation was issued as direct response to *Brogan* decision rather than to increase violence). A counterargument might be that the withdrawal of the derogation notice in August 1984 was not due to a recognition that no state of emergency existed at the time but rather was a result of a conviction that the domestic legislative scheme then in existence did not violate any of the provisions of the European Convention, and that, therefore, there was no need for a derogation notice. The Court's decision in *Brogan* drew the government's attention to its mistake and required a derogation to maintain the government's obligations under the Convention.

217. *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 34 (1993).

case were, therefore, substantially similar to those of *Brogan*. This time, however, the British government conceded that article 5(3)'s promptness requirement was not met but invoked as a defense the derogation notice it had submitted in December 1988, claiming that the article 5(3) violation was justified under article 15.<sup>218</sup> The issue, then, was whether the British government's derogation was a valid one under article 15, the very question that the Court left open in *Brogan*.<sup>219</sup>

The Court, accepting the position of the government and the Commission on this matter, concluded that the 1988 derogation was a genuine response to a *persistent* emergency situation.<sup>220</sup> It decided that as far as the "strictly required" question was concerned, it could not say that the government had overstepped its margin of appreciation in its decision that judicial control should not be made part of the process of extending detention.<sup>221</sup> The Court found that adequate and effective safeguards existed against potential abuse of the arrest and detention powers given to the government's agents.<sup>222</sup> The Court thus concluded that

[h]aving regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.<sup>223</sup>

Once again, the Court adopted an extremely broad conception of the margin of appreciation, asserting that

it falls to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, *the national authorities are in principle in a better position than the international judge* to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter *a wide margin of appreciation should be left to the*

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218. *See id.* §§ 37–38, at 48.

219. In the *Brogan* case, the Court stated that there was "no call . . . to consider whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 by reason of a terrorist campaign in Northern Ireland." *Brogan* (Court), 145-B Eur. Ct. H.R. (ser. A) § 48, at 28 (1988).

220. *See Brannigan and McBride*, 258 Eur. Ct. H.R. (ser. A) § 51, at 34 (1993). The Court stated that "there [was] no indication that the derogation was other than a genuine response." *Id.* By this, did the Court mean to say that the applicants had to demonstrate that the derogation was not genuine? If so, the Court had completely reversed its position with respect to the burden of proof concerning the existence of a "public emergency threatening the life of the nation." *See Ni Aolain, supra* note 124, at 123 (observing shift in burden of proof favoring state derogation decision).

221. *Brannigan and McBride*, 258 Eur. Ct. H.R. (ser. A) §§ 58–60, at 54. The Court tersely noted that "[i]n the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attaches great importance." *Id.* § 59, at 54.

222. *See id.* §§ 62–65, at 55–56. The Court alluded to the availability of the remedy of habeas corpus, the right to consult a solicitor after 48 hours from the time of arrest, the right to inform a relative or a friend of the fact of detention, the right to have an access to a doctor, and the fact that the operation of the PTA had been kept under regular independent review.

223. *Id.* § 66, at 56.

*national authorities . . .*<sup>224</sup>

In fact, the *Brogan* minority's position with respect to the margin of appreciation doctrine now became the view of the majority. Although the Court also repeated the accepted view that "[t]he domestic margin of appreciation is . . . accompanied by a European supervision,"<sup>225</sup> such supervision seems unlikely to be effective in the context of emergencies, in light of the extremely broad view of the margin of appreciation doctrine that the Court adopted. According to the Court, "in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."<sup>226</sup> Yet the Court failed to apply its own set of criteria, neither discussing the circumstances leading to the particular emergency nor—even more significantly—considering the "duration of the emergency."

An inverse connection should exist between the scope of the margin of appreciation allowed a derogating government in a particular case and the duration of the emergency situation.<sup>227</sup> All other things being equal, the longer the emergency, the narrower, *not wider*, ought the margin of appreciation allowed the state be. A similar doctrine exists in the area of humanitarian law, which is increasingly converging with human rights law.<sup>228</sup> For example, in dealing with cases concerning various aspects of the Israeli administration of the territories that came under its control in 1967, the Israeli Supreme Court developed a doctrine of "prolonged occupation."<sup>229</sup> Generally speaking, this doctrine means that as the duration of Israeli administration of the territories became longer, the balance

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224. *Id.* § 43, at 49 (emphases added); *see also id.* § 59, at 54 ("It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other . . .").

225. *Id.* § 43, at 50 (quoting from judgment in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) § 207, at 78–79 (1978)).

226. *Brannigan and McBride*, 258 Eur. Ct. H.R. (ser. A) § 43, at 50.

227. *See* Ni Aolain, *supra* note 124, at 125.

228. *See generally* Asbjørn Eide, *The Laws of War and Human Rights—Differences and Convergences*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 675 (Christophe Swinarski ed., 1984) (exploring convergence between law of war and human rights law as trend in humanitarian law); Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982) (same).

229. *See, e.g.*, H.C. 87/85, *Arjoub v. Commander of IDF Forces in the Judea & Samaria Area & Others*, 42(1) P.D. 353, 375–78 (Isr. 1988) (suggesting that establishment of Military Court of Appeals in areas administered by Israel reflects abandonment of draconian emergency measures which—although justified in initial stages of military government—have no place in military government existing for more than 20 years); H.C. 69/81, *Abu Itta v. Commander of IDF Forces in the Judea & Samaria Area & Others*, 37(2) P.D. 197, 313–14 (Isr. 1983) (stating that legislative authorities in areas administered by Israel ought to adapt legislative schemes to changing needs of society); H.C. 337/71, *Christian Association for the Holy Places v. Minister of Defense*, 26(1) P.D. 574, 581–82 (Isr. 1972) (same). *See generally* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 95–103 (1990) (noting applicability of international legal rules to situations of prolonged occupation).

between security and civil considerations gradually has shifted towards the latter. At the same time, the Court has shown a growing willingness (at least rhetorically)<sup>230</sup> to review strictly the actions and decisions of the Israeli military and civilian authorities in the territories. Insofar as security and military considerations traditionally have been linked to a higher level of deference that domestic courts accord their government and to the judiciary's willingness to relax its review of executive discretion,<sup>231</sup> the shift away from such considerations towards the "civil" end of the spectrum could mark a narrowing of the government's "margin of appreciation." It is submitted that the approach of the *Brannigan* Court—expanding the leeway that the margin of appreciation doctrine grants governments rather than narrowing it as the particular crisis became more prolonged—was wrong. Although it operated under the aegis of the derogation regime, it failed to comport with its most basic tenets and principles relating to the exceptional nature of emergencies and to their temporal duration.

When the British government issued its notice of derogation in 1988, the situation in Northern Ireland was not materially different from what it had been in August 1984.<sup>232</sup> Furthermore, the United Kingdom regularly derogated from its obligations under the European Convention due to the situation in Northern Ireland from 1971 to 1984. Hence, according to the British government itself, a "public emergency" must have existed in Northern Ireland, if at all, from 1971 until 1989, when *Brannigan* and *McBride* were arrested. Under such circumstances, how are notions of temporariness and exceptionality relevant? What point is there in theorizing about the extraordinary nature of emergencies and the need to return to normalcy when the two have become one? Indeed, the 1988 notice of derogation has yet to be repealed, and so it may be concluded that a situation of emergency has legally existed in Northern Ireland for some twenty-seven years. To what normalcy, then, can the region return?

*Brannigan and McBride* put the Commission and Court in a position to express their opinions on the phenomenon of permanent emergency and its problematic relationship with the purpose and language of article 15. Neither rose to the challenge.

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230. For critical assessments of the judicial practice of the Israeli Supreme Court with respect to cases coming from the territories see, for example, LEON SHELEFF, *THE RULE OF LAW AND THE NATURE OF POLITICS* 91–127 (1996); David Kretzmer, *Judicial Review over Demolition and Sealing of Houses in the Occupied Territories*, in KLINGHOFFER BOOK ON PUBLIC LAW 305 (Itzhak Zamir ed., 1993); Shamir, *supra* note 126; and Leon Sheleff, *The Green Line is the Border of Judicial Activism: Queries A-bout Supreme Court Judgments in the Territories*, 17 TEL AVIV U. L. REV. 757 (1993).

231. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54–60 (1993); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 10–30 (1992); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 134–49 (1990); LUSTGARTEN & LEIGH, *supra* note 216, at 320–59; Alexander, *supra* note 29, at 15–27.

232. See Ni Aolain, *supra* note 124, at 123; see also VAN DIJK & VAN HOOFF, *supra* note 35, at 558 (stating that position taken by British government in *Note verbale* of 1988 demonstrates bad faith).

E. *Patterns of Violations: The Turkish Cases*

The breakdown of boundaries between normalcy and emergency, between the rule and the exception, and the systemic failure of the European Court and Commission to address situations involving elements of these two allegedly separate realities is also evident in the developing jurisprudence concerning systematic violations of human rights. For some time now, cases before the Court and Commission have alleged ongoing human rights violations by Turkish security forces.<sup>233</sup> The complaints submitted to the European human rights adjudicatory organs have been, for the most part, concentrated geographically and ethnically. Most come from the southeastern provinces and involve victims of Kurdish origin or suspected supporters of the Kurdish cause.<sup>234</sup> The scale and systematic nature of the alleged violations make these cases unique in the history of the European Convention.<sup>235</sup>

Since 1984, the Turkish government has been involved in a bloody armed struggle against the Kurdistan Workers Party (PKK).<sup>236</sup> According to governmental data, between 1984 and 1997, some 26,532 PKK members, 5185 security forces personnel, and 5209 civilians have lost their lives in the conflict.<sup>237</sup> Turkish security forces allegedly committed extensive and systematic human rights violations—including forcible displacement of civilian noncombatants,<sup>238</sup> deaths in detention as a result of excessive force, “mystery killings”<sup>239</sup> and killings by “execution squads,”<sup>240</sup> disappearances,<sup>241</sup> and torture during detention or interrogation<sup>242</sup>—during their fighting against Kurdish guerrillas in general and in the southeastern region of the country in particular. Criticism also has focused on Turkey’s

233. See, e.g., *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996) (Court report) (discussing torture of alleged member of Kurdistan Workers Party (PKK) in southeastern Turkey); *Akdivar & Others v. Turkey*, 23 Eur. H.R. Rep. 143 (1996) (Court report) (discussing alleged burning of houses by security forces in southeastern Turkey).

234. See generally AMNESTY INT’L, *TURKEY: NO SECURITY WITHOUT HUMAN RIGHTS* (1996); AMNESTY INT’L, *TURKEY: A POLICY OF DENIAL* (1995).

235. See Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. HUM. RTS. 161, 162 (1997).

236. See generally MICHAEL M. GUNTER, *THE KURDS AND THE FUTURE OF TURKEY* (1997).

237. U.S. DEP’T OF STATE, *TURKEY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997* § 1(g) (visited Apr. 29, 1998) <[http://www.state.gov/www/global/human\\_rights/1997\\_hrp\\_report/](http://www.state.gov/www/global/human_rights/1997_hrp_report/)> [hereinafter COUNTRY REPORT ON HUMAN RIGHTS PRACTICES].

238. It is estimated that between 2600 and 3000 villages in the southeastern provinces of Turkey have been affected by that policy and that some 560,000 persons have been forcibly displaced since 1984. See *id.*

239. *Id.* § 1(a).

240. *Bit by Bit, Ugly Facts Come Out*, *ECONOMIST*, Jan. 31, 1998, at 55 (discussing execution squad rumored to have been responsible for “mysterious killing” of anywhere between 2500 to 5000 Kurds between 1990 and 1996).

241. See COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 237, § 1(b); see also Stephen Kinzer, *Rights Abuses Stain Turkey’s Democratic Image*, *N.Y. TIMES*, July 13, 1997, at 3 (reporting kidnapping by Turks).

242. See COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 237, § 1(c); *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Public Statement on Turkey*, Dec. 15, 1992, reprinted in 14 HUM. RTS. L.J. 49 (1993).



suspension of civil and political rights, especially those of the Kurdish minority.<sup>243</sup> Indeed, the European Union explicitly cited Turkey's human rights record and its treatment of its minorities as reasons for its decision to, in all but name, accord lower priority to Turkey's application for membership than to those of Cyprus and ten former communist countries.<sup>244</sup>

In most instances, cases have found their way before the European Court and Commission through individual complaints submitted under article 25 of the European Convention.<sup>245</sup> This application mechanism—which depends upon the complained-of state's recognition of the European Commission's competence to receive such individual petitions<sup>246</sup>—became available in 1987, when Turkey formally subjected itself to petitions against it pursuant to a friendly settlement in an interstate case brought by France, Norway, Denmark, Sweden, and the Netherlands.<sup>247</sup>

An individual seeking to employ article 25's petition mechanism must demonstrate to the Commission (and the Court, should the case come before it) that one of the contracting states violated her protected rights.<sup>248</sup> The European jurisprudence has accepted, however, that such a complaint may also raise a claim of "administrative practice" in breach of the Convention.<sup>249</sup> To show the existence of such a pattern of repeated violations

243. See COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 237, §§ 2–3.

244. See *Luxembourg European Council, 12 and 13 December 1997: Presidency Conclusions*, §§ 31–36 (visited Apr. 28, 1998) <<http://europa.eu.int/council/offi/conclu/dec97.htm>>; Ian Mather, *Ankara Faces the Reality of Exclusion*, EUROPEAN, Dec. 18, 1997, at 16. Turkey first applied for inclusion in the European Economic Community in 1963. For a critical assessment of the European Union's decision to reject Turkey, see, for example, *The Luxembourg Rebuff*, ECONOMIST, Dec. 20, 1997, at 17; and *Turkish Wrongs and Rights*, N.Y. TIMES, Dec. 18, 1997, at A26. Turkey's anger at the decision led it to boycott the EU London summit at which the European Conference brought together the member states of the European Union and the European states aspiring to join it for a first meeting. See Mesut Yilmaz, *Ambivalent Turk*, ECONOMIST, Mar. 14, 1998, at 60.

245. See VAN DIJK & VAN HOOF, *supra* note 35, at 37–52.

246. See European Convention, *supra* note 16, art. 25(1).

247. France, Norway, Denmark, Sweden & The Netherlands v. Turkey, App. No. 9940-9944/82, 35 Eur. Comm'n H.R. Dec. & Rep. 143 (1984) [hereinafter *Friendly Settlement*]. The friendly settlement reached among the parties in this case, which received the blessing of the Commission, is a further demonstration of the arguments pursued in this Article. One aspect of the settlement has been the acceptance—in the context of article 15 of the European Convention—of the Turkish Prime Minister's statement that he hoped that "we will be able to lift martial law from the remaining provinces within 18 months." *Id.* at 211. Considering that the applicant states have argued in their application that a state of public emergency had not existed in Turkey, however, their readiness to accept that declaration could be seen as yet another sign of the shaky basis of the derogation regime and its fundamental premises. See VAN DIJK & VAN HOOF, *supra* note 35, at 127.

248. See Webster v. United Kingdom, App. No. 7806/77, 12 Eur. Comm'n H.R. Dec. & Rep. 168, 168 (1978); X. v. Austria, App. No. 7045/75, 7 Eur. Comm'n H.R. Dec. & Rep. 87, 87 (1977); X. v. Norway, 1961 Y.B. Eur. Conv. on H.R. 270, 276 (Eur. Comm'n on H.R.). The existence of a potential risk of violation of a person's rights may suffice to consider her a "victim" for the purpose of article 25(1). See, e.g., Klass v. Federal Republic of Germany, 28 Eur. Ct. H.R. (ser. A ) at 18 (1979) (describing recognition by both European Court and Commission as victims five individuals who argued that authorities used secret measures to violate privacy of mail and telecommunications but who had no way of ascertaining whether such measures had been applied to them or not); see also VAN DIJK & VAN HOOF, *supra* note 35, at 40–48 (arguing that risk of violation was deemed sufficient to consider individuals as victims).

249. See, e.g., Donnelly v. United Kingdom, 1973 Y.B. Eur. Conv. on H.R. 212, 216 (Eur. Comm'n on H.R.).

and official tolerance, it is necessary to examine not only the particular case at hand but also the more general context. As the Commission said in the *Friendly Settlement* case, "[t]here is *prima facie* evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of the applicant and the respondent Party."<sup>250</sup>

Modern Turkey is no stranger to public emergency. Turkey has invoked article 15 of the European Convention for more than seventy-seven percent of the period between June 1970 and July 1987, including a continuous stretch of almost seven years from September 1980 to May 1987.<sup>251</sup> In August 1990, the Turkish government reinvoked derogations under article 15 and has maintained them to date.<sup>252</sup> In fact, since 1987, most of the provinces of southeastern Turkey continuously have been subjected to an emergency regime.<sup>253</sup> Yet these data did not move the Commission to conduct an independent review of the existence of public emergency in the cases coming before it. As in *Ireland v. United Kingdom*, the Commission accepted the parties' stipulation of the existence of a "public emergency threatening the life of the nation." Thus, in its opinion in *Aksoy*, the Commission ruled:

There is no serious dispute between the parties as to the existence of a public emergency in South-East Turkey threatening the life of the nation. In view of the grave threat posed by terrorism in this region, the Commission can only conclude that there is indeed a state of emergency in South-East Turkey which threatens the life of the nation.<sup>254</sup>

In its turn, the Court examined the issue only perfunctorily, ruling that "in the light of all the material before it . . . the particular extent and impact of PKK terrorist activity in South East Turkey has undoubtedly created, in

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250. *Friendly Settlement*, 35 Eur. Comm'n H.R. Dec. & Rep. at 165.

251. Turkey invoked article 15 from June 16, 1970, to August 5, 1975; from December 26, 1978, to February 26, 1980; and from September 12, 1980 to May 25, 1987. See 30 Y.B. Eur. Conv. on H.R. 19 (1987); 23 Y.B. Eur. Conv. on H.R. 10 (1980); 22 Y.B. Eur. Conv. on H.R. 26 (1979); 21 Y.B. Eur. Conv. on H.R. 18 (1978); 18 Y.B. Eur. Conv. on H.R. 16 (1975); 13 Y.B. Eur. Conv. on H.R. 18 (1970) (reporting lifting of martial law in all Turkish provinces and ending of Turkey's derogation).

252. See 33 Y.B. Eur. Conv. on H.R. 14 (1990) (reporting derogation from articles 5, 6, 8, 10, 11, and 13 of the European Convention). The derogation notice mentions the death of 136 civilians and 153 members of the security forces in 1989 as a result of terrorist attacks, and the deaths of 125 civilians and 96 members of the security forces since the beginning of 1990. See *id.*; 35 Y.B. Eur. Conv. on H.R. 16 (1992) (limiting scope of existing derogation so as to apply only with respect to article 5 of European Convention).

253. To date, a declared state of emergency persists in six provinces. Six other provinces are under an "adjacent province" status which grants the provincial governors and the security forces certain special powers. See COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, *supra* note 237, § 1(f). Emergency rule was lifted in October 1997 from three provinces—Bingol, Batman, and Bitlis—although this has had only minimal effects on the extensive powers granted to the provincial governors. See *Turkey and the Kurds. By the Gun Alone*, ECONOMIST, Oct. 11, 1997, at 57.

254. *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553, 572 (1996) (Commission report).

the region concerned, a 'public emergency threatening the life of the nation.'"<sup>255</sup>

Thus, the Court and the Commission have not independently investigated whether, in the circumstances brought before them, a "public emergency" existed. Their decisions on this matter have been conclusory, accepting the parties' agreement while completely ignoring the realities of continuous crisis and derogation from rights.<sup>256</sup> This approach is all the more striking when contrasted with two other elements of the Court's *Aksoy* decision. First, the Court asserted that in exercising its supervision over states' actions, it "must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, *and the duration of*, the emergency situation."<sup>257</sup> Second, discussing the Turkish government's compliance with the notification requirements of article 15(3), the Court pointed out that "[n]one of those appearing before the Court contested that the Turkish Republic's notice of derogation complied with the formal requirements of article 15(3) . . . ."<sup>258</sup> It went on to state, however, that "[t]he Court is competent to examine this issue of its own motion . . . ."<sup>259</sup>

As was the case with respect to the *Lawless, Ireland v. United Kingdom, Brogan*, and *Brannigan and McBride* decisions discussed above, a cursory review of the emerging jurisprudence concerning the Turkish cases may suggest that the Court and the Commission effectively are protecting human rights: In a number of cases, they have held that a state infringed upon the petitioners' individual rights.<sup>260</sup>

The various Turkish cases, however, like those concerning the conflict in Northern Ireland, repeatedly have demonstrated a systemic inability to deal with a normal reality of emergency. In Northern Ireland, emergency has become a deeply entrenched feature of everyday life; similarly, in Turkey, or at least in its southeastern provinces, human rights violations are now commonplace. But in neither case has the Court or the Commission openly recognized the inadequacy of conceptualizing the derogation problem in terms of exceptionality, temporariness, singularity, and particularity. Although the Northern Irish cases arose against a backdrop of prolonged crisis, and the Turkish cases—if only by virtue of their sheer number—reflected a more general phenomenon of widespread human rights violations,

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255. *Id.* at 587.

256. Furthermore, both the Court and the Commission were ready to follow in the footsteps of *Brannigan and McBride* as far as a broad scope for the margin of appreciation doctrine was involved. *See id.* at 571, 586–87.

257. *Id.* at 587 (emphasis added).

258. *Id.* at 590.

259. *Id.*

260. The Commission has repeatedly based its decisions in these cases on findings that the particular measures complained of have not been strictly required by the exigencies of the situation. In practically all of the cases determined admissible, the Commission has also ruled that no effective local remedies had been available to the complainant. *See Reidy et al., supra* note 235, at 165. The Commission has not attempted, however, to examine whether a public emergency existed in the circumstances coming before it.

neither the Court nor the Commission accorded these circumstances the weight they ought to have had when deciding the cases before them.

For the most part, the Court and the Commission have dealt with the Turkish cases on a case-by-case basis while ignoring the implications of systematic abuses and rights violations.<sup>261</sup> Thus, for example, on the issue of domestic remedies, Reidy, Hampson, and Boyle have concluded:

[I]n over 60 cases from South East Turkey declared admissible, the Commission has found in each case that the applicants did not have an adequate remedy at their disposal to address their particular complaint. However, the Commission has also always held that as the individual applicants on the particular facts of their complaints had no remedy available to them, the question of a *systematic* failure to provide domestic remedies need not be addressed. The Commission's approach . . . nevertheless prompts the question of how many cases are necessary in which applications, raising essentially similar complaints, are admitted by reason of lack of effective remedies, before the conclusion is reached that there is a practice of violation of the right to an effective domestic remedy?<sup>262</sup>

Furthermore, as their study shows, both the Commission and the Court have so far been reluctant in individual cases to take "a more pro-active role in examining claims as to the existence of a governmental policy from which serious and large scale violation stems,"<sup>263</sup> even though the realities of the Turkish situation should have been obvious. First, dozens of cases have come from the same jurisdiction, each raising substantially similar allegations against the Turkish security forces.<sup>264</sup> Second, in some cases, the complainants furnished the Court and the Commission with external evidence accumulated by prestigious NGOs as well as by the U.N. Committee Against Torture and the European Commission on the Prevention of Torture<sup>265</sup> pointing to the systematic abuse and violation of rights. For the most part, neither the Court nor the Commission have sought to use this information as a catalyst to determine whether administrative practice of torture in fact had taken place.<sup>266</sup>

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261. See, for example, *Aslan v. Turkey*, App. No. 22497/93, 80-A Eur. Comm'n H.R. Dec. & Rep. 138, 144 (1995), in which the Commission stated that it did not deem it necessary to determine whether there exists an administrative practice on the part of the Turkish authorities of tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

See also Christian Tomuschat, *Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights and a Few Dark Stains*, 13 HUM. RTS. L.J. 401, 406 (1992) (describing European system as focused on individual applications).

262. Reidy et al., *supra* note 235, at 165.

263. *Id.* at 172.

264. There were 927 total applications registered against Turkey in 1996 and 1997, 562 and 365 respectively. During the same period, 66 applications were declared admissible by the Commission, 37 and 29 in each year respectively, while 422 were referred to the Turkish government, 78 and 344 in each year respectively. See European Commission of Human Rights, *Survey of Activities and Statistics* (1997) tbl. E (visited Apr. 28, 1998) <<http://www.dhcommhr.coe.fr/eng/97tables.bil.html>>.

265. See Reidy et al., *supra* note 235, at 171.

266. See *id.* at 171-72.

It may not be surprising that the judicial institutions operating under the European Convention have avoided dealing with systematic, large-scale violations of individual rights. Such violations might be said to lie outside the vision of the Convention, perhaps because such practices were considered un-European. Like the derogation regime, the Convention as a whole may be said to be based on the assumption that human rights violations are exceptional. The Convention was meant, after all, to apply only to democratic countries, which presumably respect human rights and the rule of law.<sup>267</sup> Moreover, even if the drafters of the Convention had contemplated systematic violations of human rights, the subsequent practice under that human rights instrument relegated this function to a secondary role.<sup>268</sup> Be that as it may, the Convention, as it stands today, is ill-equipped to deal with such systematic infringements of human rights.<sup>269</sup>

There are also certain practical difficulties that the Court and Commission would have faced had they wanted to tackle the issue of administrative practice in these cases. Ascertaining the facts—both with respect to the concrete allegations made by the complainant in the case at hand and to the more general “practice”—is especially difficult in contentious situations in which the complainant has not sought local remedies, as has been true of most such petitions coming out of Turkey.<sup>270</sup> In addition, it may well be that both the Court and the Commission have chosen to avoid the possibility of declaring Turkey to have given governmental consent—either by way of express authorization or by tacit acquiescence—to widespread practices of torture, kidnapping, arbitrary detentions,

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267. Thus, the Preamble to the European Convention speaks of the European states as being “like-minded and [having] a common heritage of political traditions, ideals, freedom and the rule of law.” European Convention, *supra* note 16, pmbl. It also includes a reaffirmation by the signatory states of “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.” *Id.*

268. As one commentator said:

It was believed that the Convention would serve as an alarm that would bring such large-scale violations of human rights to the attention of other Western European states in time for action to be taken to suppress them. In practice, this last function of the Convention has remained largely dormant, coming to life in just a small number of inter-state applications so far. The Convention has instead been used primarily to raise questions of isolated violations of human rights in legal systems that basically conform to its requirements and are representative of the ‘common heritage of political traditions, ideals, freedoms and the rule of law’ to which the Convention Preamble refers.

HARRIS ET AL., *supra* note 29, at 2.

It may be argued that, paradoxically, the lack of experience in dealing with situations of systematic patterns of human rights violations within the European context has made more difficult the adjustment necessary to deal with such situations when they arise. See William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 18 (1988) (“Prolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain both the discipline necessary to examine asserted security risks critically and the expertise necessary to distinguish the bona fide from the bogus.”).

269. See Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 12 NETH. Q. HUM. RTS. 153, 154 (1994).

270. See Reidy et al., *supra* note 235, at 165–69.

disappearances, unlawful killings, destruction of homes, and similar human rights violations. The implications of such a finding on Turkey's relationship with the European Convention would have been hard to predict. It is perhaps possible that neither the Court nor the Commission was willing to risk the possibility that Turkey might withdraw from the Convention, thus blocking any opportunity for further review of human rights violations. Perhaps both considered it preferable to offer remedies on a case-by-case basis rather than lose that possibility altogether by making sweeping proclamations about the practices of the Turkish government.

#### IV. INTERNATIONAL INSTITUTIONS, NATIONAL EMERGENCIES

Emergencies exert great pressures against continued adherence to protection of human rights. In times such as these, governments often consider protecting human rights and civil liberties to their fullest extent as a luxury that must be dispensed with if the nation is to overcome the crisis it faces. Moved by perceptions of physical threat both to the state and to themselves as individuals, motivated by growing fear and by hatred toward the "enemy," the citizenry may support and even goad the government to employ more radical measures against the perceived threats—to do whatever is necessary to overcome the crisis. Aroused emotions frequently overshadow rational discourse. Moreover, the sense that curtailed freedoms and authoritarian measures will be temporary (until the particular danger is over) and aimed against "outsiders"<sup>271</sup> may smooth the transition into governmental authoritarianism. In these circumstances, notions of the rule of law, rights, and freedoms take a back seat, especially when the people believe that legalistic niceties bar effective action by the government.

Exigencies tend to provoke the "rally 'round the flag" phenomenon, in which governmental actions perceived as necessary to fight off the crisis garner almost unqualified popular support (at least in the short run).<sup>272</sup> A crisis mentality can seize a whole nation and transform an otherwise peaceful community into a "nation in arms."<sup>273</sup> In the process, constitutional structures may be ignored in the name of national security. Governmental efficiency (not to say expediency) becomes paramount, and fundamental constitutional principles may come tumbling down when the trumpets of emergency blow.<sup>274</sup>

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271. See W.A. ELLIOTT, *US AND THEM: A STUDY OF GROUP CONSCIOUSNESS* 9 (1986) (suggesting that crises lead to heightened individual and group consciousness such that internal conformities within community are exaggerated while divergence from "outsiders" is emphasized).

272. See BRUCE RUSSETT, *CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY* 34 (1990).

273. On the concept of "nation in arms," see DAN HOROWITZ & MOSHE LISSAK, *TROUBLE IN UTOPIA: THE OVERBURDENED POLITY OF ISRAEL* 28-29 (1990); and SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 37 (1957).

274. See, e.g., EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 178-79 (1947) (noting that federalism, separation of powers, and judicial review are primary structural elements of peacetime constitution, but that powers of courts are limited during war and emergency).

Domestic courts are considered the bulwark of rights and freedoms against encroachment by the state. As exigencies tend to test the protection of such rights and freedoms, courts are expected to be ever more vigilant in a time of emergency. Much has been written, however, about national courts' consistent failure to live up to this challenge.<sup>275</sup> Nor is such failure unique to any one country or to any particular period in a nation's history.<sup>276</sup> Faced with national crises, domestic judicial institutions tend to "go to war,"<sup>277</sup> much like the community in which they operate; they, too, "like[] to win wars."<sup>278</sup> In states of emergency, national courts "rally 'round the flag" by assuming a highly deferential attitude when called upon to review governmental actions and decisions.<sup>279</sup> The courts' abdication of responsibility follows two major alternative judicial attitudes. On the one hand, courts may invoke judicial mechanisms such as the political question doctrine and proclaim issues pertaining to emergency powers to be nonjusticiable.<sup>280</sup> On the other hand, when deciding cases on their merits, they are likely to uphold the national government's position.<sup>281</sup>

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275. See *supra* text accompanying note 231; see also Brennan, *supra* note 268, at 20 ("With prolonged exposure to the claimed threat, it is all too easy for a nation and judiciary . . . to accept gullibly assertions that, in times of repose, would be subjected to the critical examination they deserve.").

276. Evaluating the performance of domestic courts during World War I, George Bernard Shaw was paraphrased as saying, "during the war the courts in France, bleeding under German guns were very severe; the courts in England, hearing but the echoes of those guns, were grossly unjust; but the courts in the United States, knowing naught save censured news of those guns, were stark, staring, raving mad." *Ex parte Starr*, 263 F. 145, 147 (D. Mont. 1920); see also Arnon Gutfeld, "Stark, Staring, Raving Mad": An Analysis of a World War I Impeachment Trial, 30 Y.B. GERMAN-AM. STUD. 57, 69 (1995) (quoting Montana federal judge George M. Bourquin quoting George Bernard Shaw).

277. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MICH. L. REV. 59, 59 (1980).

278. CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 91 (expanded ed. 1976) (referring to U.S. Supreme Court).

279. Thus, for example, in a famous letter to Zechariah Chafee, Judge Learned Hand described his rejection of the "clear and present danger" test that had previously been developed by Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 628-30 (1919) (Holmes, J., dissenting). Judge Hand's criticized the test, stating: "Besides even their Ineffabilities, the Nine Elder Statesmen have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged." Letter from Learned Hand to Zechariah Chafee (Jan. 2, 1921), *quoted in* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 169 (1994). In a similar vein, Chafee himself wrote that "the nine Justices in the Supreme Court can only lock the doors after the Liberty Bell is stolen." ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 80 (1941).

280. See, e.g., FRANCK, *supra* note 231, at 10; KOH, *supra* note 231, at 146-48.

281. See, e.g., FRANCK, *supra* note 231, at 124 (supporting German courts rejection of political question doctrine, but recognizing that "[m]easured by outcomes, the German judiciary, taking jurisdiction in virtually every instance, has upheld the contested foreign-policy and security initiatives of the political branches in roughly the same proportion . . . as the U.S. federal courts have by practicing abdication"); KOH, *supra* note 231, at 134; CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at 261-64 (1989) (speaking of "ritualistic approval" by courts of governmental emergency measures); Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 80, 1991-95 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)).

The criticism leveled against domestic courts raises the question of whether international judicial institutions can deal more effectively with national predicaments. The argument is often made that international or regional courts, which enjoy detachment and independence from the immediate effects of national emergencies, are better situated to monitor and supervise the exercise of emergency powers by national governments.<sup>282</sup> This Article has shown that international and regional adjudicatory bodies are not necessarily more effective in dealing with the concept of "public emergency" than are domestic courts.

From the beginning, both the European Court and Commission<sup>283</sup> have indicated that they will not abdicate jurisdiction over article 15 questions.<sup>284</sup> Both the Court and Commission, however, have assumed a deferential attitude towards governmental assertions of conformity with the requirements of article 15, challenging the practical significance of their own rulings on their competence to decide these cases.

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282. As one commentator pointed out, "[i]t is entirely possible that superior courts whose relevant executive authority is not threatened may in fact effectively place limits on subordinate executives. Thus, for example, the European Court of Human Rights can place limits on national executives from countries which are signatories to the European Human Rights Convention." Alexander, *supra* note 28, at 3. Indeed, as an example of the relative success of the international adjudicatory mechanism compared with the domestic institutions, mention is made of the jurisprudence of the European Court. *See id.*; *see also* Green, *supra* note 161, at 112-13 (describing international public opinion as sole means to promote protection of human rights, and European Court as sole effective judicial mechanism of protection among international and regional human rights adjudicatory organs).

283. Both institutions were established under article 19 of the European Convention. *See* European Convention, *supra* note 16, art. 19. The Commission may start an investigation into a complaint alleging that a State Party had violated the European Convention upon an interstate complaint under article 24 of the Convention or upon an application of an individual, provided that the State Party complained of had recognized the right to individual petition under article 25. *See id.* art. 24-25. At the time of this writing, all the States Parties to the Convention have made the optional declaration required under article 25. Once an application is found by the Commission to be admissible, the Commission attempts to achieve a friendly settlement between the parties, and if such a settlement is reached, the case will be closed. *See id.* art. 30. If no settlement can be secured, the Commission draws up a report that includes its findings of fact and its legal opinion as to whether they reveal a violation of the Convention by the respondent state. *See id.* art. 31. The case may then be referred to the Court or to the decision of the Committee of Ministers. Under the original Convention system, the Court could hear cases referred to it by either the Commission or a state, but not by an individual. Protocol 9 to the Convention, which entered into force on October 1, 1994 for the states that ratified it, establishes the right of access of individuals to the Court. Interestingly enough, neither the United Kingdom nor Turkey had ratified the Protocol as of December 31, 1997. If the case is not referred to the Court, the Committee of Ministers, a political body, decides whether a violation of the Convention had been committed and delineates the measures that the offending state must undertake to remedy such a violation. *See id.* art. 32.

A major reform in the existing institutional structure is due to take place with the entry into force of Protocol 11 on November 1, 1998. Under the Protocol, the Commission and the Court will be replaced by a single, permanent European Court of Human Rights. Moreover, the new Protocol limits the role played by the Committee of Ministers to supervising the execution and implementation of the decisions handed down by the new Court. *See* Kamminga, *supra* note 269, at 162-63; *see also* Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol 11*, 15 HUM. RTS. L.J. 81 (1994) (describing basic features of reform).

284. *See Lawless* (Court), 3 Eur. Ct. H.R. (ser. A) §§ 28-30, at 56-57 (1960-61); *Greece v. United Kingdom*, 1958-1959 Y.B. Eur. Conv. on H.R. 174, 184 (Eur. Comm'n on H.R.).



Governments fare well when their decisions concerning the existence of a particular situation of emergency are reviewed by the European human rights judicial institutions. This is the result, on the one hand, of the systemic difficulties that courts confront when they face national crises, and, on the other, of a consistent failure to come to terms with the inadequacy of traditional paradigms of emergency. While some of these difficulties are also present at the domestic level, others are unique to, or at least more pronounced on, the international plane. In the following few pages, the Article will focus on this latter category of problems.

1. *Delays.* There is always delay in bringing applications before the European Commission and another wait before the Commission and the Court actually adjudicate a case.<sup>285</sup> Although some measure of delay is a feature of every judicial process—some have even argued that it is a positive element when issues of emergency and national crisis are involved<sup>286</sup>—it has certain undesirable effects on the development of an *international* public emergency jurisprudence. Delay may result in the loss of public interest in the issues and the entrenchment of a “business as usual” attitude that downplays the gravity of derogation measures in a particular case.<sup>287</sup> This is of special significance in light of the important role that public opinion plays in the enforcement of international legal norms. Another result of the delay may be a willingness by the Commission and the Court to accord a wider margin of appreciation to national governments because of their recognition of the difficulty in replicating the conditions that the government faced in dealing with the exigencies of the time; frequently, they prefer to exercise caution before asserting the superiority of the legal scholar over the “man of action.”<sup>288</sup> It can only be hoped that the establishment of a one-institution system under Protocol 11 may help minimize such delays in future cases.<sup>289</sup>

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285. See Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform*, 10 HUM. RTS. Q. 372, 379–82 (1988); Michael P. O’Boyle, *Emergency Situations and the Protection of Human Rights: A Model Derogation Provision for a Northern Ireland Bill of Rights*, 28 N.I.L.Q. 160, 182–83 (1977). *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. 512 (Eur. Comm’n on H.R.), is a prime example of the inherent weaknesses of the institutional structure. The European Commission is a part-time body, composed of a small number of members, that meets only five times a year to deal with an ever-increasing number of applications. It does not have the ability to review a situation of emergency on its own initiative—it must await the submission of an application. Thus, for example, the Commission was unable to review the situation in Northern Ireland until the formal application by the Irish Government in 1971. See Mangan, *supra* at 380. One ought also to take into account the substantial number of applications coming before the Commission, a fact that has led Steiner and Alston to conclude that “[t]he existing system is unable to deal with the greatly increased number of cases . . . [i]n 1993 it took, on average, five years and eight months for a case to be finally decided (four years and four months before the Commission and one year and three months before the Court).” STEINER & ALSTON, *supra* note 94, at 590.

286. See O’Boyle, *supra* note 285, at 183 (arguing that delay might better enable the European Commission to reach a friendly settlement); see also MAY, *supra* note 281, at 268–70 (discussing benefits of delaying judicial review in times of war).

287. See Mangan, *supra* note 285, at 381–82.

288. In his dissenting opinion in *The Greek Case*, *supra* note 89, Delahaye emphasized the distinction between the scholar (i.e., the Commission), who enjoys the benefit of detachment in time and place from the actual or imminent crisis, and the man of action (i.e., the national government), who is faced with concrete facts and is required to respond promptly to those facts as they arise.

2. *Interstate and individual applications.* Since neither the Commission nor the Court can initiate an investigation into a specific situation in a state party to the European Convention,<sup>290</sup> they must await a formal application by another state party to the Convention<sup>291</sup> or by an individual.<sup>292</sup> Practice shows that interstate cases are extremely rare, due mainly to such political considerations as good relations, fear of retaliation, and competing political interests.<sup>293</sup> Furthermore, even when an interstate application is brought before the Commission, the Committee of Ministers (the political organ of the Council of Europe) usually makes the final ruling. Unfortunately, the Committee "has shown an inclination to deviate from the Commission's Report, invariably to take the heat off the offending state."<sup>294</sup> Of course,

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Unlike the scholar, the man of action has "the feeling" for the circumstances and for the most effective way of dealing with them. Such a feeling "will almost certainly be absent in persons who are not of the same nationality as those whose acts they are called upon to judge at a later date." *Id.* § 166, at 86. The logical conclusion of this line of argument is, of course, that in all but few extreme cases, the European Commission would not be able adequately to evaluate the actions of a national government in confronting an alleged "public emergency threatening the life of the nation."

289. On Protocol 11, see *supra* note 283.

290. Neither the Commission nor the Court have the authority to investigate on their own initiative a particular situation of emergency in any state, nor are they authorized to monitor and supervise derogation notices submitted by a state under article 15(3) of the European Convention. See *infra* note 282.

291. Article 24 of the European Convention sets forth this procedure and automatically applies it to any state party to the Convention. See European Convention, *supra* note 16, art. 24. Under article 24, any state party may allege violations of rights protected under the Convention by another state party, regardless of the existence of any connection between the individual victims of the violation and the claimant state. See *id.*

292. The procedure is set forth in article 25 of the European Convention. See European Convention, *supra* note 16, art. 25. The acceptance of this procedure was made optional to the states parties. Since 1991, however, the individual recourse to apply to the Commission has been made available against all states members of the Council of Europe.

293. Since the European Convention entered into force, interstate applications have been submitted to the Commission in only a handful of cases:

*Greece v. United Kingdom* (1956)—complaining of certain measures applied by the United Kingdom to the population of Cyprus, which was under British administration at the relevant time.

*Austria v. Italy* (1960)—concerning the conduct of a trial of several men from South Tyrol/Alto Adige who were accused of murder.

*Denmark, Norway, Sweden & The Netherlands v. Greece* (1967–1970)—concerning alleged human rights violations by the Greek military junta.

*Ireland v. United Kingdom* (1971)—regarding, *inter alia*, the use of the "five techniques."

*Cyprus v. Turkey* (1974–1977)—complaining about Turkey's part in certain events that took place in Cyprus after 1974.

*France, Norway, Denmark, Sweden & The Netherlands v. Turkey* (1982)—concerning the situation in Turkey between September 12, 1980 and July 1, 1982.

*Cyprus v. Turkey* (1994)—alleging the continuing violation of certain provisions of the Convention in relation to the application lodged in 1974.

*Denmark v. Turkey* (1997)—alleging ill-treatment of a Danish national.

See STEINER & ALSTON, *supra* note 94, at 594–95; *The European Commission of Human Rights: Organisation, Procedure and Activities*, § 22 (visited Apr. 28, 1998) <<http://www.dhcommhr.coe.fr/eng/96organ.htm>>; see also John Dugard, *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE. L.J. 329, 338 (1997) ("The experience of human rights treaties shows convincingly that states are unprepared to risk the disruption of relations with other states by filing complaints against human rights violators in such states.").

294. Kamminga, *supra* note 269, at 162. *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv.

individual applications have their own inherent difficulties. These are especially apparent when individual applicants allege that human rights violations have become "administrative practice," as in the Turkish cases, or when "any individual case brought to the knowledge of the monitoring bodies is representative of a general phenomenon with much larger dimensions,"<sup>295</sup> as, it is argued, has been true with both the Turkish and Northern Irish cases.<sup>296</sup>

3. *"Explosive situations."* If international human rights adjudication is "essentially a question about the impact of human rights law on national sovereignty,"<sup>297</sup> the issues involved in emergency-related cases go to the very heart of a state's autonomy. These cases raise extremely sensitive and complex political questions and therefore require the courts to examine such explosive extralegal issues as the socioeconomic, cultural, political and historical backgrounds of various conflicts.<sup>298</sup>

4. *Establishing the facts and on-site visits.* Another systemic difficulty facing the international judicial bodies is the lack of a truly effective factfinding mechanism. Under such circumstances, the international and regional courts hesitate to interfere with the discretion of national governments.<sup>299</sup>

5. *The "margin of appreciation" doctrine.* All of the above result in the Court and the Commission according substantial deference to the decisions and actions of national governments. The doctrine of the "margin of appreciation" is the main mechanism by which this deferential attitude is implemented. This doctrine and the jurisprudence developed around it inject a significant element of subjectivity into the identification of public emergencies.<sup>300</sup> In so doing, the regional courts have weakened substantially their authoritative position vis-à-vis national governments by undermining their ability to invoke seemingly objective criteria when reviewing states' decisions.<sup>301</sup> The introduction of the margin of appreciation doctrine has

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on H.R. 512 (Eur. Comm'n on H.R.), is so far the only interstate case to come also before the Court. The 1982 interstate case brought by the governments of France, Norway, Denmark, Sweden, and The Netherlands against Turkey ended in a friendly settlement. See *Friendly Settlement*, App. No. 9940-9944/82, 35 Eur. Comm'n H.R. Dec. & Rep. 143 (1984). On June 28, 1996, the recent *Cyprus v. Turkey* application was ruled admissible by the Commission. The 1997 application of Denmark against Turkey was introduced to the Commission on January 7, 1997 and still awaits a ruling as to admissibility. See *Survey of Activities and Statistics*, *supra* note 264, tbl. F. Most other applications were decided by the Committee of Ministers and not referred to the Court. See *Organisation, Procedure and Activities*, *supra* note 293, § 20.

295. Tomuschat, *supra* note 261, at 406.

296. See, e.g., Reidy et al., *supra* note 235, at 164-65 (arguing that principles appropriate for dealing with isolated breaches of Convention may be inadequate when dealing with systematic violations).

297. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 9 (2d ed. 1993).

298. See Hartman, *supra* note 14, at 2; Clovis C. Morrisson, Jr., *Margin of Appreciation in European Human Rights Law*, 6 HUM. RTS. J. 263, 269 (1973).

299. See Hartman, *supra* note 14, at 2.

300. See, e.g., Nicholas Lavender, *The Problem of the Margin of Appreciation*, [1997] EUR. HUM. RTS. L. REV. 380, 380-81.

301. To a certain extent, the debate raging around the margin of appreciation doctrine is reminiscent of the rules-standards debate. See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL*

softened the criteria required before answering this question in the affirmative.<sup>302</sup> Rather than trying to formulate rules based on strict requirements, the international courts opted for more vague standards that increased the leeway for discretion and flexibility. This, in turn, led to an increased acceptance of governmental arguments and claims in concrete cases.<sup>303</sup>

The margin of appreciation doctrine means that when reviewing whether a public emergency existed in a particular case or whether certain governmental emergency measures were "necessary," the Commission and the Court will not interfere with the state's judgment on the matter when it falls within a certain margin of appreciation. If a derogating state's appreciation is at least on the margin of its powers under article 15, the courts should rule in its favor. The doctrine's rationale is that, in such cases, the public's interest in an effective government and in the maintenance of order ought to prevail. Maintaining law and order in the face of public emergency is a delicate problem of appreciating complex factors and balancing conflicting considerations of the public interest. The national government is superior to the regional judicial bodies in its ability to resolve this balancing problem because it is more familiar with the particular circumstances and has more complete information than do either the Court or the Commission. When the call is close, the decision by that government

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STUDIES 15-63 (1987) (criticizing critical legal studies' substantive claims regarding choice between rules and standards); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (1991); SUNSTEIN, *supra* note 1; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

302. See generally Feingold, *supra* note 140, at 91; Hartman, *supra* note 14, at 3 (discussing margin of appreciation doctrine as facilitating establishment of vague and inconsistent standards under article 15).

303. See Mangan, *supra* note 285, at 375. Higgins argues that whether a "public emergency threatening the life of the nation" exists is a question capable of an objective answer. See Higgins, *supra* note 20, at 299-300. She concedes, however, that the doctrine may still be applied in connection with the second element of article 15, the requirement that emergency measures be only taken to the extent "strictly required by the exigencies of the situation." Since there will probably be alternative methods to deal with an emergency, a margin of appreciation ought to be kept for the derogating government. See *id.* at 300. Hartman goes a step further when she argues that the two basic constitutive elements of article 15 are both "factors of considerable precision, capable of objective verification" and thus do not leave room for any exercise of the doctrine. See Hartman, *supra* note 14, at 16. In her opinion, the application of the margin of appreciation doctrine to article 15 waters down the strict requirements included therein. See *id.* at 31 (arguing that review of question of proportionality through prism of margin of appreciation doctrine has prevented interpreting "strictly required" condition as meaning "essential or indispensable"); see also Karen C. Burke, *Secret Surveillance and the European Convention on Human Rights*, 33 STAN. L. REV. 1113, 1134 (1981) (arguing that even relatively clear standards tend to become somewhat skewed when applied to any given case through margin of appreciation doctrine); PROCEEDINGS OF THE 8TH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 236-37, quoted in Lord Lester of Herne Hill, Q.C., *Universality Versus Subsidiarity: A Reply*, [1998] EUR. HUM. RTS. L. REV. 73, 75-76 ("The concept of the margin of appreciation has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake.").

should be upheld, even if the Court, for example, would have come to a different conclusion on de novo review. Invalidating a state's judgment on this matter is possible only when that judgment is entirely outside the margin. The sense that the national government is in "a better position" than either the Court or the Commission when issues of derogation under article 15 are concerned makes it almost impossible to obtain a decision against a national government in situations alleged to amount to "public emergencies threatening the life of the nation."<sup>304</sup> The practice of the Court and the Commission demonstrates the pernicious use of the doctrine to avoid conducting an independent examination of the evidence and the tendency to succumb to the position of the relevant national government.<sup>305</sup>

No less alarming is the phenomenon of spillover in the use of the margin of appreciation doctrine and its transformation from a doctrine applicable in only exceptional cases to a decision rule used in "normal" ones.<sup>306</sup> The European Court and Commission developed the doctrine in "explosive situation" cases dealing with situations of "public emergency" and with states' derogations under article 15.<sup>307</sup> Once invoked, however, the resort to that doctrine spilled over from the emergency area to other cases

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304. See, e.g., Green, *supra* note 161, at 100 (stating chance of state being found to have unjustifiably declared public emergency or having used measures not "strictly required" by exigencies is slim). On the other hand, a favorable approach towards the margin of appreciation doctrine was expressed by a former president of the European Court. He wrote that the doctrine was "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the [European] Convention with the sovereign powers and responsibilities of governments in a democracy." Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 9 (1980). Clovis Morrisson has argued that "applied very cautiously, the doctrine of margin of appreciation is defensible. Some latitude must be given the governments in difficult situations. But the Commission must be very judicious in granting this latitude." Morrisson, *supra* note 298, at 286. In his opinion, article 15's vague and general language inherently leaves wide discretion in the hands of the national governments. Thus, he claims that the margin of appreciation doctrine has been utilized by the Court and the Commission as a technique to assert a place for *their own* discretion in determining whether the derogation power had been wrongly exercised in any given case. See *id.* at 267. However, Morrisson agrees that, in practice, the doctrine became associated with judicial self-restraint. See *id.* at 274-75. In contrast, Higgins has referred to "an area of dangerous passivity" by the Court and Commission. See Higgins, *supra* note 20, at 314.

Another possible benefit of the margin of appreciation doctrine is the potential reaction by states deciding whether to denounce the European Convention and withdraw their recognition of the competence of the Commission and Court. See *id.* at 313; Morrisson, *supra* note 298, at 283-86. Higgins notes that the European organs might use the doctrine to calm the anxiety of member states, while, in fact, not implementing the concept in the case at hand. See Higgins, *supra* note 20, at 296-301; see also Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 78-79 (1990) (dealing with margin of appreciation doctrine in non-emergency context).

305. See, e.g., Burke, *supra* note 303, at 1134 (suggesting that "deference" too frequently means abdication of independent roles for Court and Commission); Feingold, *supra* note 140, at 98-99 (citing example in which "the Commission examined only the reasonableness and the good faith of the English courts"); Higgins, *supra* note 20, at 314 (recounting case in which "[t]he Commission has used margin of appreciation as self-denying ordinance against its own review of all evidence before [a national] court"); Ni Aolain, *supra* note 124, at 115 ("The margin of appreciation doctrine has been a crucial aspect of the retreat from substantive scrutiny.").

306. See, e.g., VAN DIJK & VAN HOOF, *supra* note 35, at 604 (comparing margin of appreciation doctrine to "spreading disease").

307. See Morrisson, *supra* note 298, at 269.

dealing with non-emergency situations. In other words, the margin of appreciation doctrine, which was born in the context of the derogation regime, came to be fully operative in non-derogation matters.<sup>308</sup> At first, it carried over to other explosive yet non-emergency situation cases outside the purview of article 15.<sup>309</sup> From there, the doctrine permeated nonexplosive cases concerning, for example, child custody and visitation rights, freedom of expression, and property rights.<sup>310</sup> The broad application of the doctrine in the "explosive situation" cases, resulting in no small measure from the Court's and Commission's reluctance to interfere in such sensitive issues, was projected onto ordinary cases arising in times of peace.<sup>311</sup> Thus, it has been argued that

[b]y applying the doctrine of margin of appreciation to Articles 8 through 11, the Commission and Court have extended to Member States *unlimited* discretion to restrict the enumerated rights . . . . [T]he doctrine has been used to circumvent the express requirements of the Convention . . . . [B]y applying the doctrine to the non-emergency articles, the Commission and Court have effectively abdicated their powers of enforcement under the Convention and have thereby jeopardized the individual rights and freedoms contained therein.<sup>312</sup>

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308. See YOUROW, *supra* note 128, at 21-22.

309. See MORRISON, *supra* note 298, at 269-75. *Iversen v. Norway*, 1963 Y.B. Eur. Conv. on H.R. 278 (Eur. Comm'n on H.R.), resulted from an application by a dentist against a Norwegian law forcing him under threat of criminal action to work for one year in the public dental sector and in an area of the country where there were very few dentists. The applicant argued that such an imposed legal obligation amounted to "forced labor," prohibited under article 4(2) of the European Convention. See *id.* at 302-04. The case posed a serious challenge to the continued viability of the Norwegian health care system. Using the margin of appreciation doctrine, the two commissioners accepted the Norwegian government's claim that the lack of dentists in northern Norway created an emergency that threatened the well-being of the relevant community. See *id.* at 328-30; HARRIS ET AL., *supra* note 29, at 96.

In the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (No. 2) (Merits), 6 Eur. Ct. H.R. (ser. A) at 31 (1968), the applicants—French-speaking parents—argued that Belgian legislation regulating the choice of language of instruction in Belgian schools violated various rights protected under the European Convention. The Court extended the application of the margin of appreciation doctrine in this case from the derogation sphere and established its use in ordinary non-derogation cases. See *id.*; YOUROW, *supra* note 128, at 71-79 (describing case); see also *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) at 5 (1977) (evaluating secret surveillance as part of fight against organized crime and terrorism).

310. See Feingold, *supra* note 140, at 94; MORRISON, *supra* note 298, at 275-83.

311. See Feingold, *supra* note 140, at 94-95. Feingold points especially to the pernicious effects resulting from the application of the margin of appreciation doctrine to such vague categories included in the limitation clauses as the "protection of morals." The combination of the vague concept and the flexible doctrine often permits the state to bypass the limitations included in the Convention. See *id.* at 95; see also HIGGINS, *supra* note 20, at 313-15 (stating that effect of margin of appreciation doctrine in limitation clauses is tantamount to allowing governments to have "two bites at the cherry.").

312. Feingold, *supra* note 140, at 95. The problematic use of the doctrine with respect to vague limitations such as "protection of morals" was exemplified by the case concerning the conviction of a London publisher under the Obscene Publications Act of 1959 for the possession for publication for financial profit of *The Little Red Schoolbook*. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 24-25 (1976). Thus, Feingold notes that "[u]nder Article 10 [of the European Convention, concerning the freedom of expression], necessity and not reasonableness should be the yardstick by which the Commission measures a Member State's interferences with an individual's right to freedom of expression." Feingold, *supra* note 140, at 98. Higgins also criticizes the decision in *Handyside* as one that "has gratuitously kept alive a concept which has been increasingly difficult to control and objectionable as a viable legal concept." Higgins, *supra* note 20,

The pattern established is one in which the jurisprudence of emergency affects, and is carried over into, the jurisprudence of "normalcy." This, in turn, diminishes the practical value of a clear separation of normalcy and emergency, bringing the two closer together as far as judicial treatment is concerned.

6. *Lack of Effective Remedies.* One also should not forget the lack of effective remedies under the European Convention, which exacerbates the systemic difficulties that the human rights courts face. The only remedy against a state that fails to rectify a violation of the Convention is expulsion from the Council of Europe. The legal implications of such a move are limited, although the political ramifications may carry more weight.<sup>313</sup> Ironically, the legal result of expulsion is the release of the violator state from all Convention obligations, enabling it to "derogate" from non-derogable rights and to violate other protected rights in situations not amounting to a "public emergency threatening the life of the nation."<sup>314</sup>

## V. CONCLUSION

Analysis of the jurisprudence of the European Court and Commission addressing governmental claims of a "public emergency" warranting derogation from otherwise protected human rights reveals a consistent failure to see the inadequacy of traditional paradigms. The basic rationale underlying derogation calls for taking into account states of emergency in devising international and regional legal regimes—the interests of states faced with emergencies are to be recognized and accommodated. However, this accommodation ought to take place *within* the confines of legality. It is the legal system that sets the parameters for accommodation and that establishes the pattern of balancing state security with the demands of individual freedoms, liberties, and rights. For accommodation to be meaningful while still respecting the fundamental goal of the major human rights conventions, a well-defined relationship between normalcy and emergency must exist. Normalcy must form the general rule, the ordinary state of things; emergency must be an exception, an aberration. The derogation regime is founded upon this premise. It ushers in a unique set of rules and norms different from that governing activity in ordinary times. These unique rules must remain generally unused if they are to be prevented from dominating the ordinary normative structure.

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at 315.

313. The fear of potential expulsion is by no means restricted to the state concerned. On the contrary, the European institutions are far more apprehensive of creating a position that will require such a step (or even voluntary withdrawal by a state). See Mangan, *supra* note 285, at 382. Expulsion or voluntary withdrawal may send shock waves throughout the system. The only instance of such a rupture was Greece's denunciation of the European Convention and its subsequent withdrawal from the Council of Europe in 1969. It is doubtful whether today, after several decades of operation, a strict approach by the European Court and Commission would lead to a similar state reaction. See Hartman, *supra* note 14, at 51.

314. See Green, *supra* note 161, at 98; Hartman, *supra* note 14, at 2, 48–49.

The jurisprudence of the European Court and Commission shows the difficulties of applying the derogation regime without examining the applicability of its underlying assumption to the real world. Having to treat emergencies as exceptional in order to maintain the paradigmatic regime, the Court and Commission consistently have ignored the entrenched nature of the emergencies in Northern Ireland and the southeastern provinces of Turkey. They have preferred to focus on one image rather than the whole scene in front of them. Their review of the relevant circumstances treats the pertinent facts as a series of snapshots rather than as an ongoing, continuous motion picture. Thus, *Lawless, Ireland v. United Kingdom*, *Brogan*, and *Brannigan and McBride* are considered as four distinct scenarios rather than as complementary parts of a greater whole in which the relationship between normalcy and emergency is reversed. Here emergency constitutes the virtual norm with normalcy forming a mere (somewhat theoretical) exception. Neither the Court nor the Commission has considered the implications of this series of cases. Both institutions have so far managed to avoid taking to their logical conclusion the fact that the United Kingdom has maintained an almost permanent derogation notice with respect to Northern Ireland and that the situation in Northern Ireland constitutes a permanent emergency situation.<sup>315</sup> Both institutions also have disregarded the prolonged state of emergency persisting in the southeastern regions of Turkey. A reality in which emergency is routinized is ignored in favor of maintaining legal fictions of normalcy and regularity.

It is beyond the scope of this Article to examine the more general contention that "[e]mergency government has become the norm."<sup>316</sup> Yet one cannot dismiss the fact that, in at least some cases, clear demarcations between normalcy and emergency no longer exist. It is particularly in such situations that we must carefully consider whether existing legal formulations—based on traditional conceptions about the relationship between normalcy and emergency—apply. Reevaluation of the assumed exception as it applies to derogation cases is all the more urgent now in the European context in light of the substantial expansion of the Council of Europe and the European Convention to include many Central and Eastern European states.<sup>317</sup> The potential for imposing an increased burden on an already overburdened regional judicial system by expanding the constituency that might seek protection against human rights violations is certainly a valid concern. Moreover, the inclusion within the European human rights regime of countries that do not enjoy long and established traditions of protecting human rights<sup>318</sup> and that may need to extend the use of the derogation

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315. See Ni Aolain, *supra* note 124, at 124–26.

316. See *A Brief History of Emergency Powers in the United States*, *supra* note 28, at v; see also Arthur S. Miller, *Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 737 (1978) (predicting that crisis government will become worldwide norm).

317. See, e.g., David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 243 (1993).

318. See Rolv Ryssdall, *Opinion: The Coming of Age of the European Convention on Human Rights*, [1996] EUR. HUM. RTS. L. REV. 18, 26 (stating legal systems of new members do not yet



mechanism to a new category of economic emergencies<sup>319</sup> exacerbates the challenges facing the supervisory machinery of the European Convention.<sup>320</sup>

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meet standards required by Convention).

319. See Macdonald, *supra* note 39, at 236.

320. One aspect of this exacerbated challenge is mentioned by Lord Lester of Herne Hill: The danger of continuing to use the standardless doctrine of the margin of appreciation is that, especially in the enlarged Council of Europe, it will become the source of a pernicious "variable geometry" of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions and practices. That danger will be exacerbated with the enlargement of the Convention by the new democracies.

Lord Lester of Herne Hill, Q.C., *supra* note 303, at 76 (quoting himself in previous report). The task is not made easier by the fact that membership was offered to, and accepted by, Russia before that country gave any meaningful guarantees that it would improve its human rights record. See Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?*, [1997] EUR. HUM. RTS. L. REV. 628, 628-29.

