

The ECHR and States of Emergency: Article 15—A Domestic Power of Derogation from Human Rights Obligations

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I. INTRODUCTION

States may face wars, crises, obstacles, major disturbances, or natural disasters that are considered as “exceptional dangers”, which threaten the security, safety, and general welfare of their peoples.¹ These situations may result in a “state of emergency” or a “state of siege”.² When a state of emergency is declared, the efficacy of international legal mechanisms for the protection of human rights is tested. As this Article will detail, a starting point for evaluating the effectiveness of these measures is to identify the standards governing these rights in such situations. Public emergencies present grave problem for states: namely that of overcoming the emergency and restoring order in the country, while at the same time respecting the fundamental human rights of individuals.

Provisions, which regulate emergencies, can be found in most national constitutions, and domestic laws. Nevertheless, at the international level, there was an acknowledgement (codification of margin of appreciation) of the view of these exceptional circumstances that led to the inclusion of derogating clauses, which address the question of emergency dealing with these kinds of situations.³ The International Covenant on Civil and Political Rights (ICCPR),⁴ provided a derogation clause in Article 4 of its

1. JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 221 (1992); MICHAEL PATRICK O’BOYLE, EMERGENCY GOVERNMENT AND EUROPEAN HUMAN RIGHTS LAW: A CASE STUDY OF NORTHERN IRELAND 25, 28 (1975).

2. DJ HARRIS ET AL., THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 489–90 (1995).

3. *Id.*

4. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 4 [hereinafter ICCPR]. It was debated as to whether the limitation clauses set out in the ICCPR were sufficient to substitute the inclusion of a derogation clause. The view prevailed, nevertheless, that the reference to “national security” and “public order” would not suffice as adequate legal guidance in times of major emergency. In this respect, see Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT’L L. 281, 286 (1976–77);

provisions, which gives to the state the right to derogate from its obligations to a certain extent during emergency circumstances: the state may take measures which interfere with the enjoyment of some of the rights protected by the ICCPR.⁵ Similarly, Article 15 (which was borrowed from the draft of the ICCPR) emerges from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁶ with a derogation clause similar to that of the ICCPR.

The *travaux préparatoires* of the ICCPR reveal that by "June 1949 the U.N. Commission on Human Rights had adopted Article 4, practically in its final version."⁷ The ECHR then borrowed the derogation clause from the draft covenant;⁸ thus, the similar wording of both clauses. In a single text of the ECHR submitted by the Conference of Senior Officials in June 1950, the derogation clause is found in its final version. Later this was the model taken by the drafters of the American Convention on Human Rights (ACHR) during the drafting at the San Jose Conference in 1968, which led to the emergence of its Article 27.⁹

The inclusion of derogation provisions in each of the international legal instruments suggests that a closer look at the impact of these

Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation By the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1, 4-5 (1981).

5. ICCPR, *supra* note 4, art. 4.

- (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states' parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
- (2) No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
- (3) Any state party to the present Covenant availing itself of the right of derogation shall immediately inform other states parties to the present covenants through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made through the same intermediary, on the date on which it terminates such derogation.

Id.

6. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 15 [hereinafter ECHR].

7. ORAÁ, *supra* note 1, at 8.

8. *Id.*

9. AMERICAN CONVENTION ON HUMAN RIGHTS art. 27 [hereinafter ACHR].

provisions on human rights protection is necessary. What are the limitations of derogations? What is the judicial protection during a state of emergency? These points merit examination as, during the last decade, the gravest violations of fundamental human rights have occurred in the context of states of emergency. As case studies suggest, states invoke a declaration to circumvent basic and fundamental legal protections. Therefore, this study is important to critically examine the protections and limitations of the ECHR Article 15 situations.

On the bases of the previous aforementioned, this study is divided into two sections. The first section is further divided into two subsections. The first subsection examines the problems in defining emergencies; in the second subsection, we will examine the preconditions required for a valid derogation. The second section determines the Strasbourg machinery for the protection of human rights. This section is also divided into four subsections. Each subsection examines separate case laws from the European Court of Human Rights. Finally, a conclusion will be deduced in the light of the former reviews.

II. SECTION ONE

A. *Problems of Definition Under Article 15*

Emergencies occur during the lifetime of any state, but their nature and character, may vary from one community to another and from one period to another within the same community. Exigencies provoke the use of emergency powers by government authorities. The scope of such powers and the ability to interfere with fundamental human rights and civil liberties and the possibility of their abuse emphasize the need for clearly defining the situations in which they may be invoked and the limitations on the scope of states' powers in such circumstances. Defining a "state of emergency" is no easy task. Drawing up a definition involves using guidelines to avoid authorities having a wide margin of discretion, and even if they could be formulated, that does not guarantee actual exigencies.

Definitions prove difficult. The term emergency is elastic by its very nature, and the difficulty in defining it in advance was cogently captured by Alexander Hamilton when he wrote:

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.¹⁰

10. Oren Gross, *Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J.

The meaning of the word “emergency” itself is capable of covering a wide range of situations—events such as wars, famines, earthquakes, and floods. Yet, it is maintained by the International Law Association that a state of emergency,

is neither desirable nor possible to stipulate in what particular type or types of events will automatically constitute a public emergency within the meaning of the terms; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.¹¹

Nonetheless, in 1959 the phrase “public emergency threatening the life of the nation”, which emerges from Article 15(1) of the ECHR, was first defined by the Commission’s nine members, in its report on the *Lawless* case, 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.”¹² The Court in its judgment of the above, however, adopted a similar but not identical definition. It construed the phrase as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.”¹³ The later definition itself was the starting guideline for the Court’s jurisprudence. Indeed, in 1959 the *Greek* case showed the Strasbourg organs’ evolution from the *Lawless* to the *Greek* cases. The Commission elaborated the *Lawless* definition, and the Court agreed with the Commission, and thus the definition was adopted by the Court’s judgment. What makes it evolutionary, is that the Commission went into a deeper examination and pointed out that the

INT’L L. 437, 439 n.8 (1998) (citing THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

11. *Id.* at 439 n.7.

12. [1960–61] 1 Eur. Ct. H.R. (ser. B), at 82 [hereinafter *Lawless Report*].

13. BRIAN DOOLAN, *LAWLESS V. IRELAND (1957–1961): THE FIRST CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS* 28 (2001); P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 739 (3d ed. 1993); P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 557 (2d ed. 1990); GROSS, *supra* note 10, at 457 n.88 (quoting 3 Eur. Ct. H.R. (ser. A) § 28, at 56). Judge Maridakis in his concurring individual opinion stated:

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.

French authentic text of the *Lawless* judgment, from which the Court adopted its definition, “mentioned not only the word ‘exceptional’, but also the word ‘imminent’,”¹⁴ which created an additional criteria to be examined by both the Court and the Commission. Consequently, the Commission agreed that an emergency must have specific characteristics to be qualified as a “public emergency” in the sense of Article 15, which will be examined together with the preconditions for a valid derogation under Article 15 in the second part of this section.

III. PRECONDITIONS FOR A VALID DEROGATION

Article 15 of the ECHR permits states to restrict the exercise of many of the rights under the ECHR, but it may do so only in certain well-defined and exceptional circumstances, and in accordance with some specific procedures.¹⁵ It is not to be easily invoked, as derogating from human rights obligations is such an extremely serious matter. Article 15 prescribes a very strict standard for states that wish to derogate from these derogable rights under the ECHR, so as to avoid the misuse of this right. Article 15 reads:

- (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.¹⁶

It is deduced from the above that Article 15 lays down three preconditions for a valid derogation: 1) there must be a “war or other public

14. See the French text of the lawless case which states: “...qu'ils designent, en effet, une situation de crise ou de danger exceptionnel et imminent, qui affecte l'ensemble de la population et constitue une menace pour la vie organisee de la communaute' composant l'Etat...”. *Lawless v. Ireland*, Case Judgment, July 1, 1961, A3 para. 28, at 56, *reprinted in* 41A YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 167. It is interesting to note that in the *Greek* case the Commission relied merely on the authentic French text which includes the word “imminent” and overlooked the fact that the initial definition adopted by the Commission in the *Lawless* case includes the same word as well; see also Van Dijk & van Hoof, *supra* note 13, at 736 (3d ed. 1993); van Dijk & van Hoof, *supra* note 13, at 552 (2d ed. 1990).

15. COUNCIL OF EUROPE, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 128 (2d ed. 1998).

16. ECHR, *supra* note 6, art. 15.

emergency threatening the life of the nation”; 2) the derogation must go no further than is “strictly required by the exigencies of the situation”; and, 3) the derogation must not be “inconsistent with [the states’] other obligations under international law.” Additionally, it is provided that there can be no derogation from certain specified rights and freedoms such as the right to life except resulting from lawful acts of war, torture, degrading treatment or punishment, slavery, servitude, and the right not to be subjected to retrospective criminal penalties;¹⁷ and, in addition, there must be a notification of derogations sent to the Secretary General of the Council of Europe.

A. “Public Emergency Threatening the Life of the Nation”

The term “time of war” in the first paragraph of Article 15 is not problematic. A close reading of the language of Article 15 with special attention to the phrase “or other public emergency”, supports the proposition that “war” is meant to be one of the examples of a “public emergency”, which justifies derogations. In the *Lawless* case the majority agreed that there was no ground for limiting the meaning of the phrase “in time of war” to cover only a total war.¹⁸ Thus, it can cover as well “less comprehensive war situations” as long as “they threaten the life of the nation.”¹⁹ P. van Dijk argues that “this situation is present at any rate in case of an official declaration of war on the part of, or directed against the state in question, or when that state is involved in an international armed conflict.”²⁰

Although the phrase “public emergency threatening the life of the nation”, as mentioned before, was defined by the Commission in the *Lawless* case, it was later elaborated in the *Greek* case by the Commission, which built up its opinion on the ground that an emergency must have the following characteristics if it is to be qualified as a “public emergency” in the sense of Article 15:

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.

17. *Id.*

18. Lawless Report, *supra* note 12, at 81–82.

19. ANNA-LENA SVENSSON-MCCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION* 295 (1998).

20. VAN DIJK & VAN HOOFF, *supra* note 13, at 735 (3d ed. 1993).

- (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.²¹

With regard to “actual or imminent”, under international law, “states of emergency” of a preventative nature are not justified. Therefore, it is not acceptable for states to derogate from human rights to face possible “exceptional situations that have not yet arisen. The emergency, therefore, must be present or at least imminent.”²² This was also clarified by the Commission Report in the *Greek case*, when it noted that “with regard to the actual or imminent character of the emergency, it imposes a limitation in time, that is to say, the legitimacy of a derogation undertaken at a certain date depends upon there being a public emergency, actual or imminent at that date.”²³ Upon the Commission’s examination of the evidence before it as to whether there was a situation of such scope and intensity that it constituted an actual or imminent threat to the life of the Greek nation, it concluded that there was no evidence of such a situation was lacking.²⁴

Despite the Court in the *Lawless case*, referred to crisis or emergency, which affects the whole population, while examining the phrase “threaten the life of the nation”, in practice this standard has been relaxed. It has now been accepted that the whole population may be affected by incidents or events in only part of a state and the derogation may be restricted to that part. It has been argued that the *Ireland v. United Kingdom case* reflects the latter view, where disturbances of sufficient intensity within any part of a single European State should be held to fall within the scope of Article 15,²⁵ for when interpreting this characteristic, Mrs. Questiaux, the former special rapporteur of the Commission, argued “that the emergency must affect on the one hand, the whole of the population and, on the other, either the whole of the territory or certain parts thereof” to meet the requirements of Article 15.²⁶ Accordingly, a question might pose itself regarding a public emergency in a localized area of a country and

21. *Id.* at 736 (citing 1 EUROPEAN COURT OF HUMAN RIGHTS, THE GREEK CASE: REPORT OF THE COMMISSION 72 (1969) [hereinafter THE GREEK CASE]. See generally Michael O’Boyle, *Emergency Situations and the Protection of Human Rights: A Model Derogation Provision for a Northern Ireland Bill of Rights*, 28 N. IR. LEGAL Q. 160, 185 (1977); Higgins, *supra* note 4, at 301.

22. ORAA, *supra* note 1, at 27.

23. Gross, *supra* note 10, at 457 n.90.

24. See generally THE GREEK CASE, *supra* note 21. See also Daphna Shraga, *Human Rights in Emergency Situations Under the European Convention on Human Rights*, 46 ISRAELI Y.B. HUM. RTS. 217, 220 (1986).

25. HARRIS ET AL., *supra* note 2, at 493–94.

26. Nicole Questiaux, *Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the Implications for Human Rights of Recent developments concerning situations known as states of siege or emergency*, U.N. Doc. E/CN.4/Sub.2/1982/15, at 15.

affecting only the population living there (i.e. which affects part of the nation). However, Oraá argues that it is hardly imaginable that a grave emergency or disturbance taking place in a dependant territory of a state, which does not affect the nation as a whole, would not affect the whole nations' public order.

The several notices of derogation made by the United Kingdom under the ECHR from 1955 onwards are good examples for the validity of the situation. Nevertheless, "in the ILA Paris Report (1984), an emergency in a part of a territory and affecting only the population established there, is also accepted as a legitimate emergency situation."²⁷ On the same line of argument, Buergenthal has written 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". ...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—for example, one of its provinces, states or cantons—and did not threaten to spill over to other parts.²⁸

The threat not only must be to the very existence of the nation—namely the organized life of the community but also might be to "the physical of the population, or to the functioning of the organs of the State."²⁹

In his commentary on the decision of the *Lawless* case, Professor Ermacora strictly outlined the emergency requirements under Article 15(1), stating that as long as the state's organs are functioning normally and there is no great threat to the organized life of the nation then any emergency measures taken are not legitimate. Despite the aforementioned dissenting opinion, the majority in both the Commission and the Court concluded that, due to the obstacles facing the Government by the IRA terrorists, measures taken by them were in fact legitimate to overcome the imminent danger.³⁰

Therefore, emergency measures must be the final resort when all normal measures are exhausted and have not being sufficient to deal with the threat; this is a guideline for states that must not overstep; otherwise they are violating the principle outlined at Article 15.

27. ORAÁ, *supra* note 1, at 28–29 (quoting INTERNATIONAL LAW ASSOCIATION PARIS REPORT (1984)). See also Shraga, *supra* note 24, at 219.

28. Thomas, Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 80 (Louis Henkin ed., 1981).

29. Questiaux, *supra* note 26, at 16; ORAÁ, *supra* note 1, at 29.

30. ORAÁ, *supra* note 1, at 29; DOOLAN, *supra* note 13, at 29, 34–38.

B. “Strictly Required by the Exigencies of the Situation”

If it is established that the first condition of Article 15 is satisfied, it must next be asked whether the measures, which are the subject of the application, were “strictly required by the exigencies of the situation.”³¹ The latter requirement seems to be the most vital precondition to be examined because it reflects the essence of Article 15, which views in reality the machinery of the Strasbourg organs in balancing and assessing the situation, circumstances and measures taken by states during emergencies.

It should be noted, however, that in the determinations of the “strictly required” character of the derogations, three factors, or elements, must be examined:

- (i) The necessity of the derogations to cope with the threat.
- (ii) The proportionality of the measures in view of the threat.
- (iii) The duration of the derogations.³²

Moreover in the *Brannigan & McBride v. United Kingdom* judgment, the Court found additional factors, to give appropriate weight to the previous elements such as the nature of the rights affected by the derogation and the circumstances leading to the derogation itself.³³ Due to the significance of the first two elements mentioned above in (i) and (ii) in the Strasbourg jurisprudence, I shall investigate these elements in the paragraphs below.

1. The Doctrine of State Necessity

The Doctrine of State Necessity is found in principles of the law of state responsibility “as one of the legal justifications excluding responsibility for a breach of international obligation.”³⁴ Arguably, it rendered a general principle of international law.³⁵ Such plea is permissible but only in “exceptional circumstances” and as a final resort of action.³⁶ In the *Polish* case the ILO Special Commission required that the “circumstances [must

31. *Id.*; FRANCIS G. JACOBS, & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 319 (2d ed. 1996).

32. VAN DIJK & VAN HOOF, *supra* note 13, at 737 (3d ed. 1998); VAN DIJK & VAN HOOF, *supra* note 13, at 553 (2d ed. 1990); Shraga, *supra* note 24, at 220–21.

33. *Brannigan & McBride v. United Kingdom*, [1993] Eur. Ct. H.R. (ser. A) No. 258–B.

34. ORAÁ, *supra* note 1, at 221.

35. James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governments Legitimacy*, 98 MICH. L. REV. 1996, 2024 (2000). However, see Eduardo Jimenez de Aréchaga and Attila Tanzi’s different opinions where they stated that “there is no general principle allowing the defence of necessity.” In this respect, see Eduardo Jimenez de Aréchaga et al., *International State Responsibility*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 355 (Mohammed Bedjaoui ed., 1991).

36. Jaime Oraá, *The Protection of Human Rights in Emergency Situations under Customary International Law*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 430–31 (Guy S. Goodwin-Gill et al. eds., Oxford: Clarendon Press 1999).

be] of extreme gravity.”³⁷ States might abuse this right, and thus, it is not plausibly accepted in international law as an excuse unless it is “absolutely of an exceptional nature”; this is the reason why it must be monitored and “subjected to very strict conditions.”³⁸

On one hand, the Doctrine of State Necessity in its classic context involves a conflict between the interest of a state to safeguard one of its vital interests, and the interest of another state to have its rights respected. Probably, the interest of a state to safeguard one of its essential interests prevails, if it is of greater importance, and the “interest of the second state is not seriously impaired by the act”³⁹ of the first. Consequently, the state decides to breach that international obligation in respect to another state to rescue, preserve, or safeguard an essential interest.

On the other hand, necessity in a democratic society in derogations from human rights standards in emergencies involves two conflicting interests; the interest that other states have in the derogating state respecting fundamental human rights obligations or the interest of those under the jurisdiction of the state to have their human rights respected, and the interest of the derogating state in safeguarding the life of the nation or the whole society.⁴⁰

The strict requirements for the application or invocation of the Doctrine of State Necessity are to be found in ILC Draft on State Responsibility.⁴¹ In the thirty-second meeting, Professor Roberto Ago, the former special rapporteur on state responsibility, submitted a draft article on this topic to the Commission.⁴² Article 33 of the draft focused on the Doctrine of State Necessity and set out specific conditions for a valid plea of necessity.⁴³ Among those conditions, that “the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril”⁴⁴ The latter condition is reflected through the language of the derogation clause.

37. *Id.* at 431.

38. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 468 (5th ed., Oxford University Press 2001); ORAÁ, *supra* note 1, at 221–22.

39. MALCOM N. SHAW, *INTERNATIONAL LAW* 561 (4th ed. 2001).

40. ORAÁ, *supra* note 1, at 222–23. Sir Hersch Lauterpacht stated: “It is axiomatic that the natural rights of the individual find a necessary limit in the natural rights of other persons.” Hartman, *supra* note 4, at 11.

41. *Current Developments: The Thirty-Second Session of the International Law Commission*, 74 AM. J. INT’L L. 961 (Stephen Schwebel ed., 1980).

42. *Id.* at 962.

43. *Id.*

44. *Id.* at 962–63.

Oraá has realistically observed this conclusion when he mentioned that the “[l]anguage of some of the principles set out in the derogation clause of the ECHR, such as the threat to the life of the nation must be extremely grave (the Principle of Exceptional Threat), and the derogation from human rights obligations must not be used unless all other legitimate remedies or means have been exhausted.”⁴⁵ Moreover, the Principle of Proportionality must be fulfilled, and the derogation should cease or terminate once the threat or danger has ended (the Principle of Temporariness). The burden of proof relies on the states “pleading necessity that prior conditions have been met.”⁴⁶ Thus, states have to validate their conduct, and demonstrate that the conduct in question is extremely essential to breach an international obligation. The most important case involving this Doctrine was the *Greek* case, which will be examined through the Court’s jurisprudence in the second part of this study.

2. *The Principle of Proportionality*

The Convention is silent regarding the word “proportionality”.⁴⁷ No explicit reference to this term is to be found in its provisions. However, as Professor Higgins has observed that “derogations to human rights obligations are acceptable only if events make them necessary and if they are proportionate to the danger that those events represent.”⁴⁸

The implementation of this principle, or in other words, the assessment of whether the measures of derogation were strictly required by the exigencies of the situation, was one of the most important issues raised in the Strasbourg cases, by which the European organs have always “declared themselves to be competent to check the fulfillment of this substantive issue”—namely, conditions of derogation.⁴⁹ The interpretation of the principle caused some disagreement within the Commission, particularly in the *Lawless* case where the Commission was divided. Some of them favored a strict interpretation of the principle relying on the expression of the derogation clause that the measures should be “strictly required”, and defending the Principle of an Objective Interpretation. Accordingly, the European organs should “analyze whether each measure of derogation is strictly required by the situation.” Consequently, a state is to be found in violation of the Principle of Proportionality if the organs

45. ORAA, *supra* note 1, at 223.

46. *Id.*

47. Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 125 (R. St.J. Macdonald et al. eds., 1993).

48. Higgins, *supra* note 4, at 282–83.

49. ORAA, *supra* note 1, at 144.

discovered that the former have a chance to take alternative measures less prejudicial to individual rights.⁵⁰ This means that the state must prove that it had no other alternative or no other way to deal with the emergency. Accordingly, suspension of rights should be the final resort. Thus, suspension of rights should be the final resort. However, the other part of the Commission interpreted it in a wider sense. It afforded the Government a wide margin of appreciation, as believing that the involved Government is in a better position to know the best action that should be taken to overcome the emergency, and thus, for the Commission or the Court to assess and examine these measures to assure if they met the requirements. Consequently, a less strict interpretation of the principle was followed by the majority.⁵¹

The “strictly required” element with the Principle of Proportionality and the two additional factors will be examined in detail through the Strasbourg jurisprudence in the second part of this study.

3. *The Contents of the Notice of Derogation*

Finally, whereas derogations from certain rights are required under exceptional circumstances such as the threat towards states, these derogations must end when those exceptional circumstances have vanished (Principle of Temporariness). In fact, there is no case law in which duration of the measures has been problematic. Although, it is arguable that measures, which at their beginning were clearly required, could “cease to be so if they proved to be ineffectual or if it could no longer be established that they were strictly required by the situation.”⁵² Nonetheless, in *Ireland v. United Kingdom*, it had been argued by the Irish Government that the “English intermittent measures had proved ineffective and after a given point in time had not therefore been applied.”⁵³ The Court, however, replied that it is “certainly” not the Court’s function to examine efficacy of the measures taken by the respondent Government.⁵⁴ “The Court must do no more than review the lawfulness, under the Convention”⁵⁵ Despite the fact that the applicant state did not argue that the respondent state has

50. *Id.* at 144–45. See also Hartman, *supra* note 4, at 17.

51. *Id.* at 145; see also *Ireland v. United Kingdom*, Case Judgment, Jan. 18, 1978, at para. 207, at 78–79.

52. JACOBS & WHITE, *supra* note 31, at 320.

53. VAN DIJK & VAN HOOF, *supra* note 13, at 553–54 (2d ed. 1990).

54. *Ireland v. United Kingdom*, Case Judgment, *supra* note 51, at para. 214, at 78–79.

55. *Id.*

gone to unnecessary lengths with its measures, and in doing so has exceeded the limit of proportionality, the argument is still valid, as this is “a matter of review for conformity with the condition that they must be ‘strictly required’,” and one which the Court must review under the ECHR.⁵⁶

C. *The Consistency With Other Obligations Under International Law*

If it is established that all the conditions set out in Paragraphs (1), (2), and (3) are satisfied, then, these measures must not be inconsistent with the state other obligations under international law. A question may arise concerning the scope of the phrase “such measures are not inconsistent with its other obligations under international law.”

The first reference to the Principle of Consistency is found in the *travaux préparatoires* of the U.N. Covenant on Civil and Political Rights. At the Commission’s fifth session in 1949, the World Jewish Congress proposed that “whatever restrictions on the exercise of human rights permitted by the Covenant, it should be indicated that these do not invalidate obligations resulting from other international conventions or precedents.”⁵⁷ This subject had not been tackled until the Commission’s sixth session in 1950.⁵⁸ The United States proposed a paragraph that points to the consistency of derogation with “international law or international agreements.”⁵⁹ The Belgian delegation made a similar proposal, which was taken as the basis for future work. All of the aforementioned proposals were still placed as paragraph 2 of the derogation article.⁶⁰ However, in the Commission’s eighth session, upon a United Kingdom’s proposal, the consistency requirement was moved to paragraph 1.⁶¹ This change was made for two reasons: first, to keep the derogation clause of the Covenant in “line with Article 15 of the ECHR”; and second, because it is more plausible to place this condition in the first paragraph “so as to link it directly to the exercise of the right to derogation.”⁶² Consequently, the Yugoslavian delegation forwarded a proposal referring to both the U.N. Charter and the Universal Declaration of Human Rights to be added after the term “international law”. Both proposals were rejected. The former was rejected because it was redundant, and it was argued that the latter was not part of international law.⁶³

56. VAN DIJK & VAN HOOF, *supra* note 13, at 553–54 (2d ed. 1990).

57. MCCARTHY, *supra* note 19, at 624–25.

58. *Id.* at 625.

59. *Id.*

60. *Id.* at 625–26.

61. *Id.* at 626.

62. *Id.*

63. ORAÁ, *supra* note 1, at 191–92. However, see McCarthy’s different opinion who mentioned that the reference to the U.N. Charter was rejected because the United

In view of this fact, the reference to international law in the text has the effect of nullity if measures taken relying under Article 15 were inconsistent with states' obligations in general international law or under other treaties. This suggests that measures which are inconsistent with states' other obligations, are considered like measures which "go beyond those 'strictly required by the exigencies of the situation' in their legitimacy."⁶⁴ Moreover, a State could not avail itself of Article 15 to release itself from its obligations. It would be legally barred by Article 53 of the ECHR, which stipulates: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any high contracting party or under any other agreement to which it is a party."⁶⁵

Yet, the question of other obligations under international law has not been clarified. In fact, this refers to the 1949 Geneva Conventions and their additional Protocols, (Article 75 of additional Protocol 1, Common Article 3 to the Geneva Conventions, and the Protocols thereto), which apply during armed conflict and do not allow derogation. Thus, suspension of the rights recognized in the ECHR must be consistent with them (Humanitarian Law), such as: Article 6 (fair trial) under the ECHR⁶⁶ must be nonderogable in time of war. In other words, states that are parties to other human rights treaties, which provide more extensive protection of nonderogable rights, such other obligations must be respected as they prevail over any power under the treaty to derogate.⁶⁷ Another question might arise concerning customary law; probably customary law must abide all members of the international community, whether or not a treaty binds them. In addition, general principles of international law are also considered. It is more compelling to make reference to peremptory norms *jus cogens*. Despite the existence of the aforementioned obligatory norms, the Principle of Consistency has played little part in case law.

States feared that such reference might be interpreted as including Article 2(7) of the Charter, which might impede the "any implementation machinery." MCCARTHY, *supra* note 19, at 627.

64. J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 208 (2d ed. 1993).

65. JACOBS & WHITE, *supra* note 31, at 320.

66. HARRIS ET AL., *supra* note 2, at 502; AMNESTY INT'L FAIR TRIALS MANUAL, ch. 81, available at http://www.amnesty.org/ailib/themes/indxftm_c.htm#31 (last visited Nov. 16, 2002). In this respect a right to a fair trial is nonderogable when applied to civilians or prisoners of war of the occupied territories.

67. *Id.* See also Shruga, *supra* note 24, at 221–24. This is clear and reflected in the wider list of rights set out in the ACHR and ICCPR.

In *Cyprus v. Turkey*, the applicant Government claimed that Turkey should not rely on Article 15 because its “military action” in Cyprus was an aggressive war “not contemplated by Article 15(1)”⁶⁸ and in violation of its obligations under the U.N. Charter. It argued: “[T]he reference to ‘other obligations under international law’ in Article 15(1) excluded wars violating such obligations as those under the United Nations Charter.”⁶⁹ Consequently, the Commission decided that Turkey was not entitled to invoke Article 15 in any event because there was no declaration of derogation with respect to Northern Cyprus and did not address the “aggressive war” claim.⁷⁰ However, one might wonder what would have been the Court’s action towards the Cyprus claim, if there were a declaration of derogation. Arguably, the interpretation of the Principle of Consistency submitted by the applicant Government should have been taken into account in such case. The applicant interpreted the expression “other obligations under international law” by excluding “aggressive war”, as it is considered violating other international obligations under the U.N. Charter. In the *travaux préparatoires* of the ICCPR, Mr. Bracco (Uruguay) upheld a similar interpretation of Article 4; he supported this trend on the ground that the only case in which war could be recognized as giving rise to the right of derogation, is the case of self-defense or for other reasons recognized in the Charter.⁷¹

Despite the fact that the latter was a personal remark; it has merit because the obligations under the U.N. Charter have supremacy over the obligations under any international agreement. Moreover, the U.N. Charter does not justify war acts unless it is legitimate under special circumstances such as self-defense.

Article 103 under the U.N. Charter reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁷² In view of the aforementioned, one could deduce that the referral to the U.N. Charter is another regulated obligation under international law.

In both the *Lawless* case and *Ireland v. United Kingdom*, the Court held that no evidence was found of any infringement of this condition.⁷³

68. *Cyprus v. Turkey*, [1976] 4 Eur. H.R. Rep. 482, 553 (Commission report).

69. *Id.* at 552.

70. *Id.* at 556. “The Commission notes that no communication was made by Turkey, under Article 15(3) of the Convention, with regard to persons or property under her jurisdiction in the north of Cyprus.” *Id.*; ORAÁ, *supra* note 1, at 194; HARRIS ET AL., *supra* note 2, at 503.

71. ORAÁ, *supra* note 1, at 194.

72. U.N. CHARTER art. 103.

73. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 41; *Ireland v. United Kingdom*, Case Judgment, *supra* note 51, at A25 para. 222; J. E. S. FAWCETT, THE

However, in the *Brannigan* case, the applicants argued that the Government had indeed acted inconsistently with the United Kingdom's obligations under Article 4 of the ICCPR, because the derogation was not "officially proclaimed" by the United Kingdom. Accordingly, the Court decided that there was no plausible basis for saying the requirements of Article 4 had not been satisfied,⁷⁴ since the Court observed that the statement of the Home Secretary in Parliament on December 22, 1988 was formal in character and made public the Government's reliance on Article 15 and was sufficient in "keeping the motion of an 'official proclamation'."⁷⁵ In the light of the previous, it is deduced that the referral to international law in Article 15(1) is important not because there are often a large number of emergencies in which it may be applied, but "because in those exceptional situations, the Court can assess the actions of the state in the light of the totality of its international obligations and act more than an organ of the Strasbourg System."⁷⁶

It is no less important to determine the scope of Article 15(2). In fact, it embodies the principle of nonderogability of fundamental rights. The principle of nonderogability of certain rights is considered to be one of the most significant principles in the regulation of human rights in states of emergency contained in the derogation clause.⁷⁷ The second paragraph forbids the derogation even in time of war or public emergency of certain specific rights, namely, deprivation of life except in respect of death resulting from lawful acts of war (Article 2), torture or inhuman or degrading treatment or punishment (Article 3), slavery or servitude (Article 4(1)), and retrospective criminal penalties (Article 7); and, it establishes a clear limitation on the right of states to take measures derogating from human rights standards.⁷⁸

Because certain of these rights are themselves qualified in the articles setting them out, that is to say, in Articles 2 and 7, the inference could be drawn that the only rights under the ECHR, which can be strictly

APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 312 (2d ed., Clarendon Press 1987) (1969); VAN DIJK & VAN HOOF, *supra* note 13, at 554 (2d ed. 1990).

74. *Brannigan & McBride v. United Kingdom*, *supra* note 33, at para. 73; Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 81 (1995).

75. *Brannigan & McBride v. United Kingdom*, *supra* note 33, at para. 73; JACOBS & WHITE, *supra* note 31, at 320.

76. MERRILLS, *supra* note 64, at 208.

77. ORAA, *supra* note 1, at 87–88.

78. FAWCETT, *supra* note 73, at 312.

described as fundamental and inalienable are those guaranteed by Articles 3 and 4(1).⁷⁹ Notwithstanding that the list of nonderogable rights under Article 15(2) comprises only four, a state which is a party to both the ECHR and the ICCPR is precluded from derogating under the ECHR from those excessive nonderogable rights listed in Article 4(2) and absent in Article 15(2)—the right not to be imprisoned for the non-fulfillment of a contractual obligation (Article 11), the right to be recognized as a person before the law (Article 16), and the right to freedom of thought (Article 18).⁸⁰

Moreover, despite the fact that other than the four mentioned rights should be derogable, practically some are unqualified by their very nature, such as Article 14. Therefore, a state cannot discriminate because it is not allowed to suppress those rights. This provision supports the enjoyment of those rights, and thus, when applied to nonderogable rights, itself is entrenched from derogation.⁸¹ In addition, the rights, which are not listed as nonderogable, do not mean that they could automatically be derogated from, due to the existence of the Principle of Proportionality, which should be applied strictly.⁸² Thus, it might be argued that the application of the Principle of Proportionality varies from one case to another, and thus does not guarantee the strict application in all cases. Accordingly, significant rights that are not listed as nonderogable should be embodied in the list of nonderogable rights.⁸³

D. *The Notification Process*

Lastly, if it is established that all of the previous preconditions were satisfied then a final condition is required from a state availing itself the right of derogation.

1. *The Principle of Notification*

Article 15(3) requires that states, which avail themselves of the right of derogation, must inform the Secretary-General of the measures they have taken and the reasons for doing so. This is an indispensable safeguard because the Secretary-General informs the other parties to the ECHR about the notice of derogation, and thus, “puts on notice that there is a situation, which demands states’ consideration.”⁸⁴

79. *Id.* at 312–13.

80. VAN DIJK & VAN HOOF, *supra* note 13, at 555 (2d ed. 1990); HARRIS ET AL., *supra* note 2, at 503.

81. ORAÁ, *supra* note 1, at 102–03.

82. *Id.* at 94.

83. ECHR, *supra* note 6, arts. 5–6.

84. HARRIS ET AL., *supra* note 2, at 505.

In fact, one of the most important procedures under the ECHR is that of the presenting of an inter-state complaint against the derogating state if the applicant sees that a violation of the standards has taken place. This procedure or right would not be possible if state parties to the ECHR were not fully informed of the measures of derogation through notification.⁸⁵ Moreover, the process of notification facilitates the implementation of the mechanism of monitoring by the international organs.⁸⁶ In the *travaux préparatoires* of the ICCPR from which the derogation clause of Article 15 was borrowed, Mr. Oribe (Uruguay) pointed out that the derogation clause set “a new principle in international law that of responsibility of states towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms.”⁸⁷ Thus, to clarify what is required for a valid notification, two elements must be examined: 1) the element of time; and, 2) the contents of the notice of derogation.

a. *The Element of Time*

Even though, Article 15 does not refer to the word “immediately” as it does in both the ICCPR and the ACHR,⁸⁸ the European organs’ jurisprudence confirmed that the notice of derogation and information should be sent “without any avoidable delay”; meaning that it must be sent within a reasonable time.⁸⁹ A question may arise concerning whether the notice must be sent prior to the derogation. The answer is clarified in the *Lawless* case, whereas the Irish notice of derogation was sent twelve days after taking the measures and was accepted. In fact, the crux is—what exactly constitutes a reasonable time to send the notice of derogation? In *Ireland v. United Kingdom*,⁹⁰ the British Government delayed its notification from August 9, 1971 to August 20, 1971, after the implementation of internment so that no persons whom it was desired to detain might have notice and escape. One might observe that the notice was sent eleven days after the derogation had entered into force.⁹¹ The Court, however, accepted this justification relying on its

85. ORAÁ, *supra* note 1, at 58.

86. MCCARTHY, *supra* note 19, at 683.

87. ORAÁ, *supra* note 1, at 59.

88. ICCPR, *supra* note 4, art. 4; ACHR, *supra* note 9, art. 27.

89. ORAÁ, *supra* note 1, at 60.

90. *Ireland v. United Kingdom*, Case Judgment, *supra* note 51, at A25 para. 223.

91. HARRIS ET AL., *supra* note 2, at 505; ORAÁ, *supra* note 1, at 60.

earlier jurisprudence in the *Lawless* case, where a twelve-day delay in notification was accepted “without being considered unjustified delay.”⁹² On the contrary, in the *Greek* case, there was a four-month delay between the “implementation of suspended measures and notification,” whereas the Commission concluded that late notification would not justify action taken before the actual notification.⁹³ Moreover, in the *Brogan* case, the U.K. Government informed the Secretary-General of the Council of Europe on August 22, 1984 prior to the acts of detention, that they were withdrawing a notice of derogation under Article 15. Consequently, the Court said: “There is no call in the present proceedings to consider whether any derogation from the United Kingdom’s obligations under the Convention might be permissible under Article 15” Obviously, that derogation could not apply retrospectively. Accordingly, the Court did not rely on Article 15.⁹⁴ Yet, the question is not expressed. Apparently, the European organs considered that the period of twelve days met the requirements of Article 15(3). Furthermore, they considered a subsequent notice sent by the United Kingdom forty-three days after the approval of the terrorist order by the House of Commons, January 23, 1973 met the requirements also,⁹⁵ although they considered a period of four months in the *Greek* case, failed to comply with this time requirement.

Is the period in between the forty-three days and the four months the required one? What is the criterion followed by the organs? In fact, the Strasbourg jurisprudence has not reached a settlement regarding this point other than the above-mentioned. However, it is interesting to analyze the Commission’s decision in the *Greek* case concerning the four-month delay. This analysis suggests that the Commission’s decision was based on the inadequacy of the information sent with the Government’s first notice (one month of the declaration of the emergency) and not only because of the four-month delay. In other words, this suggests that the Commission’s decision concerning the failure of the Government to comply with Article 15(3) was based on the grounds of two combined factors. First, the inadequacy of information sent with the first notice; second, the four-month delay to send the reasons for the derogation with the second notice. This finding suggests that part of the information would not be sufficient to fulfill the requirements of Article 15(3). In other words, all the necessary information must be sent in time.

92. HARRIS ET AL., *supra* note 2, at 505.

93. JACOBS & WHITE, *supra* note 31, at 321; HARRIS ET AL., *supra* note 2, at 371.

94. *Brogan and Others v. United Kingdom*, [1988] 11 EUR. H.R. REP. 17, No. A/145-B, at para. 48.

95. ORAÁ, *supra* note 1, at 60.

b. *The Contents of Derogation*

Clearly, the first elements, which must be indicated in the notice of derogation, are the provisions that the state has derogated from.⁹⁶ The problem that might arise here is the impact of excluding one of the articles from the notice sent by the Government. Would this lack of indication deprive the Government the possibility of suspending that right?

This issue arose in the *Ireland v. United Kingdom* case when the applicant claimed that the United Kingdom could not derogate from Article 14 of the ECHR (the discrimination provision) because it was not mentioned in the respondent's notice of derogation. The Commission preferred to analyze the situation and find first whether the measures taken by the United Kingdom had been applied with discrimination contrary to Article 14. Therefore, subsequent to a thorough analysis, the Commission found that the evidence to demonstrate this discrimination was lacking. Consequently, the Commission did not need to answer the question; and thus, the issue was not resolved.⁹⁷ On the other hand, in the *Greek* case, the Commission held that paragraph three did not oblige the respondent to indicate precisely the articles of the ECHR that had been suspended from on the ground that "this was done indirectly by the [respondent] when it communicated the full text of the articles in its Constitution."⁹⁸ Despite the fact that the European organs did not solve this problem, the Human Rights Committee solved it with respect to the similar Article 4 of the ICCPR relying on the Optional Protocol. Thus, it held that a state is legally barred from relying on the right of derogation from one article of the covenant "if the notice of derogation, or the information under that procedure, does not state that it is going to do so."⁹⁹ Paragraph three also confirms that states must keep the Secretary-General "fully informed" of all the measures taken. This was the reason

96. *Id.* at 61.

97. *Id.* at 62. However, *see* Judge Matscher's separate opinion: there is discrimination within the meaning of Article 14 of the Convention when a measure—in itself conforming to the requirements of the system of protection of fundamental rights guaranteed by the Convention—is applied differently to different individuals or groups of individuals falling within the jurisdiction of a State Party to the Convention and such differentiation in treatment is not justified by objective and reasonable grounds. . . . The grounds given by the defendant Government to justify such differentiation do not convince me.

Ireland v. United Kingdom, [1979–80] 2 Eur. H.R. Rep. 146–47.

98. ORAÁ, *supra* note 1, at 61; Hartman, *supra* note 4, at 19.

99. ORAÁ, *supra* note 1, at 62.

why the Commission held that the Greek Government had not complied with paragraph three, because it had failed to provide information on the texts of a number of legislative measures of the new Greek Constitution 1968. It expressed its view that the Government must “furnish sufficient information concerning them (the measures in question) to enable the other High Contracting Parties and the Commission to appreciate the nature and extent of the derogation from the provisions of the ECHR which these measures involve.”¹⁰⁰

States must also indicate the reasons for this derogation to enable the other state parties to realize the situation and assess the need of derogations. It is sometimes done through a historical explanation of what leads to the emergency. Moreover, the statement of reasons for derogation is required, and was referred to by the Commission in the *Lawless* case.¹⁰¹ Finally, states are obliged according to the notification requirement to make a further communication of the date on which these measures have ceased and the treaty provisions are again in force; two separate notifications are required, at least one at the beginning of the derogation and the second at the end. A question may arise, concerning the impact of the failure to comply with the notification requirement on the right of derogation and the measures taken. Because the ECHR does not explicitly lay down such consequences as seen in the language of the Article itself, a number of probabilities might take place. Failure to inform the Secretary-General might rule out reliance on the Article for the justification of derogation measures taken. Second, there is the possibility that non-compliance of paragraph three has no legal effect.¹⁰² This problem arose in the joined applications of *Cyprus v. Turkey*, *Greece v. United Kingdom*, and the *Lawless* case, but in a more indirect way.¹⁰³ In the *Lawless* case, an interesting debate concerning the interpretation of the notification requirement between the Irish Government and the Commission took place. The applicant contended that the Irish notice of derogation was not valid according to Article 15(3). The Irish Government replied that, the right of derogation was not conditional on giving such information, and construed paragraph three as imposing an independent liability on the derogating Governments. Accordingly, the failure could never attract the sanction of nullity.¹⁰⁴ What is interesting is that the Commission replied that it

100. *Lawless Report*, *supra* note 12, at 73; VAN DIJK & VAN HOOF, *supra* note 13, at 742 (3d ed. 1993); VAN DIJK & VAN HOOF, *supra* note 13, at 556 (2d ed. 1990).

101. ORAÁ, *supra* note 1, at 62–63.

102. VAN DIJK & VAN HOOF, *supra* note 13, at 742 (3d ed. 1993).

103. *Id.*

104. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 46; ORAÁ, *supra* note 1, at 65.

would keep its own position open for future cases. However, an examination of the language of the text indicates its position. The Commission seemed to answer the question by saying: “The Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of Article 15 attract the sanction of nullity of the derogation or some other sanction.”¹⁰⁵ Furthermore, in contrast to the argument opinion of P. van Dijk,¹⁰⁶ an examination of the language used by the Commission suggests the possibility of attracting legal sanctions as a result of failure to comply with the provisions of Article 15(3).

The Commission observed that the requirement or obligation to inform the Secretary-General was an “essential link in the machinery provided in the ECHR for ensuring the observance of the engagements taken by the States; without such information, the other state parties to the ECHR would not know their positions concerning inter-state complaints.” Moreover, the efficiency of the Commission to act could be negatively affected if those facts or informations were hidden. Additionally, there could be “cases of bad faith in which the Government might deliberately withhold information from the Secretary-General, to misuse the right and attract attention to controversial measures.”¹⁰⁷ This argument suggests a reasonable justification for the Commission to attract “the sanction of nullity or any other sanction” in such circumstances. An important problem may arise as well concerning the total failure to meet the notification requirement. In other words, no notification was sent at all and the state is facing emergency. Should the European organs apply the derogation clause?

In the *Lawless* case the main problem discussed was whether a failure to comply with the notification requirement would attract the sanction of nullity of the derogation or not, but in the present situation it seems to be more complicated. Oraá argues that, “if the derogation clauses are construed in human rights treaties as a sovereign right of the state,” so the state itself only has the right to rely on it.¹⁰⁸ In other words, the organs could not apply the right to the state because exercising it only belongs to the state. On the other hand, it seems unrealistic to accept the standards applicable by the European organs, which should be applied in

105. ORAÁ, *supra* note 1, at 65–66.

106. VAN DIJK & VAN HOOFF, *supra* note 13, at 742 (3d ed. 1993).

107. ORAÁ, *supra* note 1, at 65–66.

108. *Id.* at 67.

peacetime for emergency situations pursuant to states failure to notify for the emergency. One could say that is true only when the organs apply human rights standards as a fact-finding body and not through adversarial proceedings.¹⁰⁹ “The risk is that an *ex officio* application of the derogation clause without notification would weaken the requirement.”¹¹⁰ In fact, the most interesting case that faced the Commission raising the latter question was the *Cyprus* case, where the Commission had to face for the first time a state of emergency without any notification. Cyprus recognized that the situation was a public emergency. However, it argued that the Commission should not apply the derogation clause because Turkey had neither relied on the derogation clause nor had it notified the other state parties pursuant to Article 15(3). The Commission was in a difficult situation. On the one hand, it was clear that a state of emergency exists and recognized by both parties. On the other hand, Turkey did not formally invoke the right of derogation and did not give notification of it.¹¹¹ Therefore, could the Commission apply the derogation clause? Despite the fact that the Commission replied that “in the present case the Commission still does not consider itself called upon generally to determine the above question,”¹¹² an examination of the language of the text suggests that, a formal proclamation is an essential requirement according to Article 15 and, without it the right of derogation, cannot be exercised. The meaning was expressed in the following words:

It finds, however, that, in any case, Art. 15 requires some formal and public act of derogation, such as declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from so, Art. 15 cannot apply.¹¹³

Mr. Ermacora discussed this question and concluded that, the right of derogation is for the state that can trigger it. The notification is an essential condition, which should be satisfied by the state in order to avail itself the right to derogate. Accordingly, the Commission cannot apply the derogation clause.¹¹⁴ In fact, the aforementioned opinions concerning the Principle of Notification suggests that, the problem stems from the absence of these provisions in the text of Article 15 itself. The time scale should have been included in the text to deter states abusing this right. Moreover,

109. *Id.*

110. *Id.*

111. *Id.* at 68.

112. VAN DIJK & VAN HOOFF, *supra* note 13, at 743 (3d ed. 1993).

113. *Cyprus v. Turkey*, *supra* note 68, at 556; VAN DIJK & VAN HOOFF, *supra* note 13, at 557 (2d ed. 1990).

114. *Id.* at 569–71 (Ermacora, J., separate opinion).

setting a precise criterion to be followed by the European organs to deter discrepancy in the Court's decisions regarding convergent circumstances is required. Finally, the inclusion of sanctions in the text are required, as a result of non-compliance with the requirements laid down in the Article, and act as a guide to both states and organs.

Pursuant to the previous survey on the preconditions for a valid derogation, the different debates and opinions concerning this issue, it is of great significance to examine the Court's jurisprudence in the light of applying these conditions—especially its approach and role in protecting the fundamental rights set down in the ECHR. Thus, the following section is dedicated to focus on this issue.

IV. SECTION TWO

A. *The Strasbourg Machinery in the Protection of Human Rights in States of Emergency Under Article 15*

Lord Denning once said, “[w]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. These words are equally apt to describe the impact of the European Convention.”¹¹⁵ The Court constantly deals with various issues of law and policy, which have been considered as a matter of domestic jurisdiction. This raises the most serious problem concerning the authority of the Court in scrutinizing the laws and practices of the contracting states and assessing them against the ECHR.¹¹⁶ In fact, the Strasbourg system was not set up for the destruction of their national sovereignty and authority. As a result some matters must be left to them to regulate, while the Court and the other organs exercise a degree of control through their decisions to achieve the main object and purpose of the ECHR, which is an effective and uniform standard of protection for human rights.

To achieve this purpose proportionally, the Court has developed a concept known as the “margin of appreciation” by way of leaving, to the contracting parties an area of discretion with respect to many matters—because the national authorities are in a better position to decide than the European organs. The latter supervise and guarantee that states’ appreciation

115. MERRILLS, *supra* note 64, at 136.

116. *Id.*

is at least on the margin of the powers conferred:¹¹⁷ to review the lawfulness of the measures, and to be sure that the state has not exceeded its margin of appreciation. This concept was afforded substantive weight in the examination of the jurisprudence of Article 15. It was the main tool they created to rely on when dealing with emergency cases. It was significant to refer to the concept because, as it will be seen from the examination of the jurisprudence of Article 15, both the Commission and the Court apply this concept. Although its application varies from one case to another, it, accordingly, produces an effect upon human rights protection. To discover how the Court protects human rights, it is necessary to know that such a concept exists and was applied by the Strasbourg organs as one of the main machineries to achieve the above-mentioned purpose. In fact, the Court dealt with few emergency cases since the Convention entered into force. At the time of this writing, the court examined for example, the *DeBecker* case in 1956, the *Lawless* case in 1961, the *Greek* case in 1967, the *Brogan* and *Brannigan* cases in 1988 and 1989, the *Aksoy* case in 1996, and the *Demir* case in 1998, *inter alia*. During these periods the courts' approaches developed and differed from one case to another. Inevitably, it is impossible to exhaust all of the emergency cases even by a thorough examination in this study. Thus, this section will focus on some of the early significant cases, which played an indispensable, major role in interpreting and developing the requirements of Article 15.

I. *The Lawless Case*

This was one of the most important cases that dealt with Article 15 while facing a political situation. Lawless, a member of the Irish Republican Army claimed that the procedures and conditions of his detention by the Irish Government constituted a violation of Articles 5 and 6 of the ECHR. The Court set the criteria for evaluating the existence of the preconditions dictated by Article 15(1), and extended the motion of a measure of discretion, which they first adopted in the (first) *Cyprus* case, applying it "not only to the question of whether the measures taken by the Government were 'strictly required by the exigencies of the situation' but also to determine whether a 'public emergency threatening the life of the nation' existed."¹¹⁸ Did the Court succeed to protect these rights which claimed to be violated? The Irish Government argued that its decision to decide whether an emergency exists could not be challenged because the ECHR provided no machinery

117. *Id.*

118. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 30; HARRIS ET AL., *supra* note 2, at 368.

to do so. Furthermore, it was inconceivable that the Government acting in good faith should be held to be in breach of their obligations under the ECHR merely because its appreciation of the circumstances, or of the measures necessary to overcome the emergency, was different than that of the Commission or the Court.¹¹⁹ This argument suggests that the Government's assertions aimed to abrogate the judicial responsibility of both the Commission and the Court. Despite this suggestion, the Commission disagreed and urged the Court to assess the Government's arguments, "in view of the limitations of its competence and grant the Government a significant margin of appreciation."¹²⁰ Due to these conflicting arguments as to its competence, the Court decided that it should review the situation, which had led to the Government's action, by stating: "It is for the Court to decide whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled."¹²¹

This meant that the Court decided to make supervision on the appreciation granted to the Government to decide whether the facts and circumstances, which had prompted the Irish Governments actions, exceeded the margin. Despite the arguments of the minority that detention involved a violation of two of the most important rights in the Convention involving the right to liberty, and a fair trial, Articles 5 and 6,¹²² the Court held that "the existence at the time of a public emergency threatening the life of the nation was reasonably deduced by the Government,"¹²³ and therefore, the measures taken were required. The Court deduced the existence of a public emergency from a combination of several factors:

- (1) [T]he existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes;
- (2) [T]he fact that this army was also operating outside of the territory of the State, thus seriously jeopardising the relations of the republic of Ireland with its neighbour;
- (3) [T]he steady and alarming increase in terrorist activities.¹²⁴

119. MERRILLS, *supra* note 64, at 137.

120. *Id.* at 137–38.

121. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 22; MERRILLS, *supra* note 64, at 138.

122. O'BOYLE, *supra* note 1, at 46.

123. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 28; MERRILLS, *supra* note 64, at 138.

124. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 28; HARRIS ET AL., *supra* note 2, at 368.

The above-mentioned wordings suggest that the Court applied the doctrine of “margin of appreciation” without using the actual term. A question may arise concerning the measures of derogation taken where they “strictly required by the exigencies of the situation”. In fact, it is a matter of compliance with the Principle of Proportionality. Special attention should be attached to the necessary safeguards taken by the Government to avoid abuses and to meet the requirement of proportionality (strictly required by the exigencies). This was one of the significant principles established by the European organs in the present case, where the derogation measure from Article 5 of the ECHR, detention without trial, “was accompanied by a number of safeguards.”¹²⁵ The Court tried to justify the lawfulness and legality of the measures taken by the Government in its judgment as follows:

(1) The application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland. The ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; . . . the amassing of the necessary evidence to convict persons involved in activities of the IRA . . . was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population. . . . The sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency.¹²⁶

Moreover, the offenses against the State (Amendment) Act of 1940 (Act), was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention. The application of the Act was subject to constant supervision by Parliament; a detention Commission to review detentions and with the power of ordering the release of detainees if the detention was no longer justified. Furthermore, the Government offered to release the detainees, if they gave an undertaking to respect the Constitution and the law, and not to engage in any legal activity against the Republic.¹²⁷ The European Court concluded: “The detention without trial, subject to the above-mentioned safeguards, appears to meet the strictly required by the exigencies of the situation” requirement within the meaning of Article 15.¹²⁸

It follows that the Court’s approach appeared wide. It did not, however, seem to limit its examination to the dangers of the situation. But on the contrary, it took into consideration the existence of a number

125. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 37; ORAÁ, *supra* note 1, at 149.

126. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 36.

127. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 paras. 36–37; HARRIS ET AL., *supra* note 2, at 368–69.

128. *Lawless v. Ireland*, Case Judgment, *supra* note 14, at A3 para. 37; ORAÁ, *supra* note 1, at 149.

of safeguards created to avoid abuses in the operation of the system of administrative detention.¹²⁹ Despite the fact that the above-mentioned circumstances and safeguards afforded by the Irish Government seem to be justified and conceivable, the Court's decision was criticized.

One of the criticisms raised was, that the scope or protection afforded to the individual was undermined. The crux of the criticism was based on the ground that there was, in fact, no emergency that "threatened the life of the nation" but rather, in line with the minority members of the Commission, there was only a threat to public order that could have been dealt with by an alternative measures, which still could be less detrimental towards individual rights.¹³⁰ A second criticism of the decision of the Commission gave rise to the "pernicious idea" that special Courts are not as adequate to deal with emergency situations as internment without trial. Finally, a third criticism surrounded the validity to introduce a system of internment without trial, in situations less than a public emergency, provided there exist several safeguards.¹³¹ Despite the well-constructed arguments of the above-mentioned criticisms, the decisions taken by both the Commission and the Court must be explained in the light of a political consideration—meaning that it must be taken into account that the present case was examined in 1961, eight years after the ECHR entered into force. Accordingly, both the Commission and the Court had to live with the fact that not all European states had signed or adhered to the ECHR at this period, or accepted the compulsory jurisdiction of the Court.

Moreover, they also feared that states would withdraw from the ECHR if the Court or the Commission acted in a strict manner towards their conduct in safeguarding the public interest. It does not follow that the state is never to be found in violation, but means that the organs have to deal with these kinds of cases in a sensitive manner. Article 15 should not be interpreted in a strict form unless there is a clear violation of the ECHR.

In response to the second criticism, it may be a fact that the decision of the Commission gave rise to the idea that special Courts are not as adequate to deal with emergency. However, it is not a definite rule because the approach of the organs differs from one case to the other. At the present case, the decision was that domestic Courts could not suffice to restore peace and order, while in other cases the situation and circumstances might be different.

129. ARMAND L.C. DE MESTRAL ET AL., *THE LIMITATION OF HUMAN RIGHTS LAW IN COMPARATIVE CONSTITUTIONAL LAW* 26 (Yvons Blais Inc. 1986).

130. O'BOYLE, *supra* note 1, at 49–50.

131. *Id.* at 52.

In response to the third criticism, it has to be taken into consideration that even in situations less grave than public emergency, the Government will still suspend some of these rights and, if the Court refused to permit relying on Article 15, the Government will suspend these rights without providing even such safeguards which were initially afforded. Any Government seeks to safeguard its own interests. Thus, it will act by all means to reach its trend: whether Article 15 is invoked or not. Consequently, affording these safeguards in such situations under the supervision of the monitoring organs is a sort of guarantee for the protection of human rights.

In fact, in the context of the *Lawless* case, and the scope of Article 15 we must be aware of being the first case to raise in detail the issue of Article 15. It establishes and provides guidelines for states considering the measures available to them in emergency situations. Moreover, the first definition and detailed interpretation of Article 15 was established and adopted in the present case. The Strasbourg organs acted in a conceivable conduct in balancing between safeguarding individual rights and a state's public interest.

2. *The Greek Case*

From the *Lawless* case, this subsection now focuses on the *Greek* case, one of the most serious inter-state cases the ECHR institutions have had to deal with. In April 1967, there was a *coup d'etat* in Greece.¹³² A month later the permanent representative of Greece addressed a letter to the Secretary-General of the Council of Europe in which he invoked Article 15 of the ECHR and stated that the application of various articles of the Greek Constitution had been suspended in view of internal dangers threatening public order and the security of the state. Subsequently, letters were sent in regard to Article 15. In September 1967, the Governments of Denmark, Norway, and Sweden submitted applications referring to the suspension of the provisions of Greek Constitution and the violation of Articles 5, 6, 8, 9, 10, 11, 13, and 14 of the ECHR. Subsequently, they extended their original allegations to Articles 3 and 7 of the ECHR and Articles 1 and 3 of the First Protocol.¹³³ The respondent submitted that, according to the Commission's jurisprudence, a Government enjoyed a "margin of appreciation" in deciding whether there existed a public emergency threatening the life of the nation and, if so, what exceptional measures were required.

132. JACOBS & WHITE, *supra* note 31, at 318.

133. A. H. ROBERTSON & J. G. MERRILLS, *HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 116 (3d ed., Manchester University Press 1989).

In fact, in the present case, the Commission reviewed the evidence at its disposal and analyzed it deeply due to the sensitivity of this situation. While examining the existence of a public emergency threatening the life of the nation, it elaborated the former definition set by the Commission in the *Lawless* case, and adopted a precise interpretation for the above-mentioned term,¹³⁴ and concluded that in April 1967 there had not been a public emergency threatening the life of the nation. It was not, therefore, necessary to consider whether the measures taken were “strictly required by the exigencies of the situation”. Nonetheless, due to the seriousness of the situation, the Commission decided to examine that question also, on the hypothesis that there was a public emergency in Greece threatening the life of the nation. Despite this deep analysis taken by the Commission, it held that, even on that hypothesis, the measures taken could not be justified under Article 15, because they have not met the requirement and went beyond what the situation required.¹³⁵ The final outcome of the *Greek* case gave rise to two critical points, which merit analysis. First, the argument of the applicant Governments concerning the application of Articles 17 and 18 under the ECHR. Second, the recommendation of the Consultative Assembly of the Council of Europe, which was based on Articles 3 and 8 of the Statute to the Committee of Ministers urging the latter to expel the Greek Government from the organization.

With regard to the first argument, the purpose of Article 15 is derogation in exceptional cases and circumstances for the purpose of protecting democratic institutions rights and freedoms. The Greek Government had introduced a totalitarian regime and thus destroyed those rights and freedoms.¹³⁶ Accordingly, the Commission should have applied Articles 17 and 18 under the ECHR. Despite the fact the Commission found that there was no need to examine this important point because of its finding that there was no emergency, both Mr. Busuttil and Mr. Ermacora, in their opinions, felt that the decision of the Commission was based on this important point.¹³⁷ In other words, they felt that the derogation was excluded on this ground. This suggests that the acts and regime of the Government showed bad faith, by disregarding the aims of the ECHR and meeting the essence and language of both Articles 17 and 18.

134. VAN DIJK & VAN HOOF, *supra* note 13, at 736 (3d ed. 1993).

135. JACOBS & WHITE, *supra* note 31, at 319.

136. O'BOYLE, *supra* note 1, at 65.

137. *Id.* at 65–66.

Consequently, in May 1969, strong pressure was put on the Committee of Ministers to implement the Consultative Assembly's recommendation, and at a dramatic meeting in London, during which a draft resolution for the expulsion of Greece was circulated and received a broad measure of support, the Greek foreign Minister announced that the Government had decided to withdraw from the Council of Europe and denounce the ECHR.¹³⁸ In fact, the *Greek* case is certainly the most serious situation the ECHR institutions have had to deal with and demonstrates both the strengths and limitations of the Strasbourg System. On the one hand, Greece being a party to the ECHR prevented neither the revolution, nor the large-scale violations of human rights, which were among its consequences. While on the other hand, both the withdrawal of Greece from the Council of Europe and the decision of expulsion, which was circulated, had various effects, positive and negative.

First, both of the above mentioned decisions, combined together, had the effect of isolating the state and strengthening its democratic regime for a return to democratic values, and, accordingly, act upon respecting human rights. Second, the preparation of the draft resolution of the expulsion of Greece had an international impact on state parties to the ECHR, with regard to their respect to human rights.

Finally, the Committee's resolution against Greece has had a serious impact on protecting human rights. Despite the fact that Greece had violated most of the fundamental rights laid down under the ECHR, the decision of both the Commission and Committee of Ministers was harsh and led to a double impact. On a positive note, states will have more respect for human rights, and will be more cautious when suspending them. On the negative side, it is a back door for the Government to pursue violating more rights without any monitoring from the organs.

3. *The Brogan and Brannigan Cases*

This subsection shall focus on the most recent important cases concerning the United Kingdom, *Brogan and Others v. United Kingdom* and *Brannigan & McBride v. United Kingdom*. Despite the fact that the *Brogan* case was not a derogation case, the very similarity of its facts to the *Brannigan* case makes it important that they be examined together. In 1988, a case, *Brogan and Others v. United Kingdom*, was brought to Strasbourg and addressed the applications of four persons arrested in Northern Ireland under the provision of Section 12 of the 1984 Act, which provided for special powers of arrest without warrant. The applicants were detained for periods from four days and six hours to six days and sixteen and one-half hours, during

138. ROBERTSON & MERRILLS, *supra* note 133, at 117–18.

which the police interrogated and informed them that the reason of suspecting them was their involvement in the commission, preparation, or instigation of acts of terrorism connected with the affairs of Northern Ireland. They were cautioned that they need not say anything, but that anything they did say might be used in evidence.¹³⁹ None of the four was brought before a judge, and none was charged after subsequent release.

Consequently, the applicants alleged a breach of Articles 5(1)(c), 5(3), 5(4), 5(5), and 13 of the ECHR. On August 22, 1984, the Government withdrew a notice of derogation under Article 15, which had relied on emergency situation in Northern Ireland. Accordingly, the Commission declared “the derogation did not apply to the area of law in issue in the present case,” and the examination of the case must proceed on the basis that the articles of the ECHR in respect of which complaints have been made are fully applicable. However, this does not preclude proper account being taken of the background circumstances of the case.¹⁴⁰

Both the Commission and the Court “took notice of the growth of terrorism in modern society and recognized the need, inherent in the ECHR system, for a proper balance between the defense of the institutions of democracy in the common interest, and the protection of individual rights.”¹⁴¹ Such language stresses the exceptional nature of the situation, and the need to return to ordinary legal practices as soon as normality is restored. But, if the situation had been so exceptional, posing a grave threat to the population, why did the British Government withdraw its former derogation notices at a time when such exceptional circumstances still existed in Northern Ireland? The answer to the latter question will emerge later. In fact, in relation to this case, the Court found no violations except of Article 5(3) and (5).

Despite the finding of the above-mentioned violations, the Court’s decisions may still be questioned. The applicants argued that there was a breach of Article 5(4), which provides: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a Court and his release ordered if the detention is not lawful.”¹⁴²

The paragraph refers to the remedy of *habeas corpus*, which both the respondent and the Commission argued was available to them (applicants) though they chose not to avail of it. Accordingly, the applicants should

139. Brogan and Others v. United Kingdom, *supra* note 94, at paras. 22–23.

140. *Id.* at para. 48.

141. *Id.*

142. *Id.* at para. 65; ECHR, *supra* note 6, art. 5(4).

have had available to them a remedy allowing the competent domestic Court to examine not only compliance with the procedural requirements set out in Section 12 of the 1984 Act, but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuring detention. The review by the domestic court will encompass compliance with the technical requirements and extend to an inquiry into the reasonableness of the suspicion grounding the arrest. In addition, a detention, that is technically legal, may also be reviewed on the basis of an alleged misuse of power, or for unlawful purpose.¹⁴³

On the hypothesis that *habeas corpus* was available, was it practically available? It could be argued that such a remedy was available in theory. However, it was absent in practice. An examination of the contradictory arguments and defenses raised by the Government itself while examining the alleged breach of Article 5(3) suggests so. The Government argued with the Commission that there was a pressing need for extensions of detention beyond the initial forty-eight hour period without being controlled or authorized by a judge, and pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in Court. In addition, according to the Government, neither the detained person nor his legal advisers could be present or told any of the details.

On the other hand, the Advisory Commission on Human Rights pointed out that the courts in Northern Ireland were frequently called on to deal with submissions based on confidential information; for example, in bail applications there were sufficient procedural and evidential safeguards to protect confidentiality where judges were required to act on the basis of material that would not be disclosed either to the legal advisor or to his client.¹⁴⁴

The latter paragraph supports the view that *habeas corpus* was available in theory and not in practice, because the Government's assertion seems to contradict the Human Rights Commission's finding. It also serves to show the contradiction of both the Government's and the Commission's arguments and the Court's decision.

Moreover, the contradiction emerges from the Court's decision in finding a violation under Article 5(3) and not finding it also under Article 5(4). The Court did not rely on the above-mentioned arguments raised by the respondent while examining the alleged breach under Article 5(3). Accordingly, it found a violation under Article 5(3). On the contrary, while examining the alleged breach under Article 5(4), the

143. Brogan and Others v. United Kingdom, *supra* note 94, at para. 40.

144. MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 365-66 (Clarendon Press 1995).

Court relied on the same ignored arguments. Consequently, it found no violation under Article 5(4). Accordingly, it is deduced that, the Court accepted the position of the Government and was ready to treat this case as if it were an emergency case, and when it arrived to the examination of the alleged breach of Article 5(3) it was paralyzed to find no violation under Article 5(3) without claiming that a public emergency existed and relying on Article 15. Furthermore, the Court, while examining the applicant's contention, according to Article 5(1)(c), seemed to give it a wider interpretation to find a back door for the Government and restated its approach, when it said:

The Court is not required to examine the impugned legislation *in abstracto* The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5(1)(c). As the government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement Such evidence may have been impossible to produce in court without endangering the lives of others¹⁴⁵

The above-mentioned wording designates and points out the Court's approach and its decision, which suggests that it was influenced by the exceptional circumstances existing in Northern Ireland. In addition, there are great merits in Judges Walsh and Carrillos' opinion that the arrest and detention in the present case were for the purpose of interrogation and gathering information "without evidential basis for bringing any charge against him." The circumstances of the arrest and detention did not fulfill the requirements of Article 5(1)—namely the presumption of innocence as a fundamental right and accordingly it had been infringed.¹⁴⁶

Despite the fact that the Court did not consider that the four days detention falls inside the strict constraints as to time permitted by the first part of Article 5(3), following the very limited interpretation in applying the notion of "promptness", a wide "margin of appreciation" was offered to the Government during the assessment of the whole case while the purported European supervision seems unlikely to be effective.

It seems that the above answers the question as to why the British Government withdrew its former derogation notices at a time when such exceptional circumstances still existed in Northern Ireland. Furthermore, based on this clarification, it might be deduced that there are no more probabilities than the situation during the alleged period was not a

145. Brogan and Others v. United Kingdom, *supra* note 94, at para. 53.

146. GROSS, *supra* note 10, at 479.

“public emergency threatening the life of the nation” within the meaning of Article 15, or in the Government’s “persuasion”. The domestic emergency law was sufficient to deal with the circumstances without the need to derogate. Both probabilities lead to one conclusion: There was not a public emergency during the alleged period to afford the Government this wide discretion; however, the Court treated this case too close to an emergency case, aiming to justify Governmental actions that in fact derogated from protected rights. However, in light of the foregoing, one might speculate as to the decision of the Court, if it was examining the case under Article 15. The answer to this speculation may be found in its consort, the *Brannigan* case.

On December 23, 1989, following the *Brogan* judgment, the United Kingdom informed the Secretary-General of the Council of Europe that the Government had availed itself of the right of derogation conferred by Article 15(1) to the extent that the exercise of powers under Section 12 of the 1984 Act might be inconsistent with the obligations imposed by Article 5(3) of the ECHR.¹⁴⁷ In a further notice dated December 12, 1989, the United Kingdom informed the Secretary-General that the derogation would remain in place for as long as circumstances required.¹⁴⁸ The applicants, Mr. Brannigan and Mr. McBride, were detained under Section 12(1)(b) of the 1984 Act in early January 1989, very shortly after the Government’s derogation of December 23, 1988 under Article 15 of the ECHR. Their detention lasted for periods of six days, fourteen hours, and thirty minutes; and, four days, six hours, and twenty-five minutes respectively.¹⁴⁹ They complained of violations of Article 5(3) and (5) of the ECHR, as they were not brought promptly before a judge. Consequently, by a majority (twenty-two to four) the Court found no violation to the above-mentioned articles.

In fact, Brannigan and McBride coerced the Commission and the Court to rule on the sensitive issue of permanent emergency and “its problematic relationship with the purpose and language of Article 15.” Both the Court and the Commission recalled that the power of arrest and detention has been considered necessary since 1974 in dealing with the threat of terrorism.¹⁵⁰ They based their opinion on the previous circumstances, which prevailed for almost fifteen years and proved to be permanent. Nevertheless, on the contrary, emergency, by its very nature, is temporary. “When Brannigan and McBride were arrested under such circumstances, how are notions of temporariness and

147. *Brannigan & McBride v. United Kingdom*, *supra* note 33, at para. 31.

148. *Id.* at para. 32.

149. *Id.* at paras. 10–11.

150. *Id.* at paras. 36, 50–51.

exceptionality relevant?” Actually, there is no point “in theorizing about the extraordinary nature of emergencies and the need to normality since both of them became one.”¹⁵¹

The Court dealt with the case ignoring the above-mentioned fact, which led to its final decision, which shall currently be contested. Obviously the 1988 notice of derogation was a direct impact following the *Brogan* judgment. The Government found no other way to follow its policy in the arrest and extended detention up to the seven days except by derogating from Article 5(3), rather than amending its legislation by the embodiment of the judicial review. The latter showed bad faith, because the Government, while reviewing its annual reports on the 1984 Act, which were supposed to be presented in 1984 to the Parliament, alleged that there was a pressing need of special powers of arrest and detention, due to the grave situation.¹⁵² If so, why did the Government withdraw the notice of derogation at the same period? This suggests quite simply that the situation was not as grave a public emergency within the meaning of Article 15(1).

Meanwhile, in examining the conformity with the requirements of Article 15, the Court referred to its approach by stating:

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 the matter a wide margin of appreciation should be left to the national authorities . . . nevertheless, contracting parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the states have gone beyond the “extent strictly required by the exigencies of the crisis.” The domestic margin of appreciation is thus accompanied by a European supervision (*ibid.*). At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.¹⁵³

On the one hand, the above-mentioned words clarify the Court’s approach in affording the Government a wide margin of discretion. On the other hand, it stresses and assures that the latter is accompanied by supervision. Did the Court succeed in applying this supervision? The

151. GROSS, *supra* note 10, at 483.

152. Brannigan & McBride v. United Kingdom, *supra* note 33, at paras. 14–15.

153. *Id.* at para. 43.

Court rebutted the submissions concerning the withdrawal of the Government's notice of derogation in 1984, and couched in the negative by underlining the primacy of the State's assessment, when it stated, in curious language:

It does not judge it necessary to compare the situation which obtained in 1984 with that which prevailed in December 1988, since a decision to withdraw a derogation is, in principle, a matter within the discretion of the state and since it is clear that the Government believed that the legislation in question was in fact compatible with the Convention.¹⁵⁴

Moreover, the Court ignored the fact that Article 5(3) of the ECHR is an essential safeguard against arbitrary executive arrest or detention—failure to observe its provision could easily give rise to complaints under Article 3, which is nonderogable. Thus, interrogating Brannigan on forty-three occasions during his period of detention, on average every two and one-half hours assuming he was allowed a period of eight hours free from interrogation every twenty-four hours, falls into the category of inhuman or degrading treatment.¹⁵⁵ Furthermore, the Court did not examine the fulfillment of the expression “promptly” in Article 5(3). Unlike in the *Brogan* case, the Court made the assessment of “promptness” in the light of the object and purpose of Article 5 having regard for the importance of this Article in the ECHR as it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the state. Despite the fact that, in the present case, the right to prompt judicial control was derogable, the Court should have examined it in the light of the strictly required to obviate the unlimited periods of detention without judicial reviews.¹⁵⁶ Notwithstanding that the situation in the present case is different as the Government relied on Article 15, still the latter went beyond what is strictly required. The aim was not proportionate to the means.

It has been argued that the judgment in the *Brannigan* case left room to criticism because it did not respond or satisfy the concerns of Amnesty International in its intervention concerning the safeguards and the degree of their importance. They were necessary not only to protect against “unnecessarily prolonged detentions, but also to protect detainees who might be detained [without communication] during the first [forty-eight] hours of detention.” The existence of evidence worldwide concerning the abuse of persons detained without supervision during interrogation is strong.¹⁵⁷

154. *Id.* at para. 47.

155. *Id.* at para. 10.

156. *Brogan and Others v. United Kingdom*, *supra* note 94, at para. 58.

157. *HARRIS ET AL.*, *supra* note 2, at 500; *see Brannigan & McBride v. United Kingdom*, *supra* note 33 (Petitti, J. dissenting).

Although the Court in fact was satisfied with the safeguards claimed to be afforded, “the British Government succeeded in rebutting the claim that there were no effective safeguards against abuse of the extended detention power.”¹⁵⁸ The actual arrest remained challengeable by *habeas corpus*. There was a right to see a solicitor after forty-eight hours of detention, access to a doctor, etc. Despite the successfulness of the Government in satisfying the Court with the above mentioned safeguards, Judge Walsh’s dissenting judgment referred to the Government’s suggestion, and opposed that in *habeas corpus* proceedings the genuineness of the “reasonable belief” may be tested as secret sources, would not be required to be disclosed in any Court, is plausible.¹⁵⁹ Additionally, a *habeas corpus*, in theory, should be sought within one hour or so after an arrest, within the period encompassed in the expression “promptly” in Article 5(3). That procedure, if it is possible to avail of it, could impart the disadvantage to the police secrecy that the respondent Government claims it is entitled to avoid, and the Government has not sought to explain this inconsistency.¹⁶⁰

Meanwhile, the delay of forty-eight hours for access to a solicitor was not proved to be subject to a judicial review in the present case (insufficient safeguards). Furthermore, it was stated in the Government’s submissions of reports of the 1984 Act, that there were not criteria governing decisions to extend the initial period of detention except these reports. The Court relied on these statistics and on the Government’s view by affording it a wide margin of discretion, opening a back door for subsequent violations of both Articles 3 and 5.¹⁶¹

In reality, the words used in the *Brannigan* case emphasized the “primacy of the state’s assessment of what is strictly required.” At one stage, the Court followed both the Commission and the Government’s view, that the latter had not overstepped their margin of appreciation. This is obviously a “negative review, which takes into account matters of evidence, necessity, proportionality, and adequacy of safeguards,” without an intrusive review as the wording and decision of the judgment opens for the derogating state—an unlimited possibility of applying extended administrative detention for an uncertain period of time ignoring judicial reviews.¹⁶²

158. HARRIS ET AL., *supra* note 2, at 500.

159. See *Brannigan & McBride v. United Kingdom*, *supra* note 33 (Walsh, J. dissenting).

160. *Id.*

161. *Id.* at para. 23.

162. HARRIS ET AL., *supra* note 2, at 501–02.

Neither the Commission nor the Court appeared eager to take on-board the real issue of whether any form of judicial protection could be afforded to those detained for questioning for lengthy periods. In spite of both the *Brogan* decision and the obligations set out in Article 5, most measures they might have considered would probably have rendered the derogation unnecessary, because they would have met the requirements of Article 5.

V. CONCLUSION

From the precedent survey, it was clarified that emergencies were seen to predicate acute forms of tension between individual rights and collective interests. The nation must be saved, however, the rights of individuals must be respected also. It is commonly maintained that what is required is a balance between individual rights and collective interest.

Provisions such as Article 15 occupy a central place in the discourse of human rights during “emergency” situations and are seen as setting the parameters within which the balance is to be established. The existence of such a provision is required to set criteria for both the states and the international organs while dealing with emergencies.

States take measures to overcome the given emergency, while the international organs monitor the legitimacy and the lawfulness of those measures.

It was seen from the review, the machinery of the Strasbourg organs while examining emergency cases they faced fundamental dilemma. The dilemma is due to the formulation of Article 15 itself.

Firstly, it permits derogation from specific rights such as Articles 5 and 6 that are no less fundamental than those already listed as non-derogable. Accordingly, in applying these derogable rights in such a discretionary manner, situations occurred where nonderogable rights were infringed.

For instance, in the *Brannigan* case, the fact that he was interrogated so intensively in such a short period, it can be easily conceived that this constituted a form of degrading and inhuman treatment.

Secondly, there is no specific criterion defining the required time period for proper notification in accordance with paragraph three. In addition, the total lack of sanction mechanism concerning the notification process gives too much maneuverability to states. Therefore, when the Court is faced with such situations, it has no stepping-stones on which they can rely. The combination of the above-mentioned factors led to wide spread confusion.

Both the Court and Commission announced an elaborate rhetoric, in a feeble attempt to smoke screen the great level of deference they gave to the decisions of national Governments and to the manner in which those Governments exercise their discretion. Moreover, the Court’s shortcomings

can best be summarized in the following manner: First, the Court fails to remember that it is the defender of rights, not of Governments. Exacting standards of human rights enforcement sends a direct signal to Governments and the world community that violation is intolerable, and that exceptions that allow coercive state action are limited and closely monitored. The alternative signal, if high standards of application are missing, is that signing human rights conventions is a window dressing exercise. In such a case, the state is given a wide measure of tolerance in its behavior towards its citizens. Second, the fluidity of the interpretative process leaves an indeterminate power with the judicial branch. This power has been insufficiently exercised in favor of limiting state prerogatives in opposition to strengthening individual protection in situations of exigency.

Despite the fact that the doctrine of margin of appreciation is the stem of the Strasbourg organs specifically when applying Article 15, it was misused in a few cases. Both the Commission and the Court afforded states a wider margin during long emergency situations. An inverse relationship should exist between the scope of the margin of appreciation and the duration of the emergency situation; the longer the emergency, the narrower, not wider, ought the margin of appreciation allowed the state to be.

Although the role and the approach of the Court may be perceived as unsatisfactory, the politically sensitive nature inherent in emergency situations affects the lens through which the Court looks at the issues presented to it. The Court was coerced to accept the semi permanent emergencies which existed in Turkey, and the United Kingdom, while ignoring the temporary nature of emergencies. In contrast, the Strasbourg organs displayed effectiveness when dealing with situations beyond the scope of emergencies.

This is best exemplified in *Soering v. United Kingdom*, where the Court was able to protect one of the nonderogable fundamental rights enshrined in Article 3 under the ECHR by using well-constructed argumentation enabling it to conclude that it had jurisdiction over the matter as well as the presence of an imminent breach of the ECHR regarding the death-row phenomenon.¹⁶³

163. *Soering v. United Kingdom*, [1989] 11 Eur. H.R. Rep. 439.

