

Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights

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Abstract

In the European context, counter-terrorism measures can be legally justified by invoking derogation from the European Convention on Human Rights (ECHR). When derogation is thus invoked, obligations imposed by other international instruments, notably the International Covenant on Civil and Political Rights (ICCPR), continue to apply. Although the ECHR and ICCPR have similar derogation provisions, the ECHR requires derogation to be consistent with other obligations under international law and the jurisprudence of the European Court for Human Rights seems to conflict with some aspects of the Human Rights Committee's interpretation of the ICCPR's derogation clause. A comparison based on General Comment 29 – the Human Rights Committee's authoritative interpretation of the ICCPR's derogation provision – allows for checking of the Court's jurisprudence on derogation against States' obligations under the ICCPR. It reveals that the Court applies a wider measure of discretion than appears permissible under the ICCPR. Other differences are evident with regard to the lawfulness of long-term derogations, notification of measures of derogation, and reluctance by the Court to endorse the Committee's concept of international humanitarian law as the normative 'floor' to derogation. In other parts, the Court's jurisprudence reflects the content of General Comment 29.

Keywords: derogation, international humanitarian law, limitation, margin of appreciation, non-derogable rights, non-discrimination

1. Introduction

Counter-terrorism measures have routinely challenged the demarcation line between what States are allowed to do under international human rights law and what they are not. In the face of terrorism¹, this line may gently move: in weighting acts and proportionality

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¹ For the purpose of this paper, terrorism is understood, with reference to S/Res/1566 (2004) as 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking

assessments, Courts may be prepared to interpret provisions differently if a country faces terrorist risks. The European Court of Human Rights (ECtHR/‘the Court’) did so in *Brogan v. United Kingdom*, when acknowledging that terrorism in Northern Ireland presented the authorities with special problems and, subject to the existence of adequate safeguards, thus had ‘the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 [...], keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.’² Similarly, terrorism may change the outcome of a proportionality assessment under a provision containing a limitation clause.

A more outright way to lawfully move this demarcation line is by invoking derogation, a possibility which most human rights treaties, *inter alia* the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR/‘the Convention’), foresee. Invoking derogation allows a State temporarily to deviate from a provision within a treaty the State is a party to during a time of public emergency that threatens the life of the nation. In the European context, terrorism has proven to be the main trigger for States to invoke derogation: The United Kingdom derogated from the ECHR when facing terrorism in Northern Ireland. Turkey did so in 1957 and again in the beginning of the 1970s due to terrorism occurring during the course of the armed conflict with the Kurdistan Workers Party in its South-Eastern provinces. Most recently, the United Kingdom derogated in the aftermath of the 9/11 terrorist attacks. It is when States are drawn to diminish human rights protection in the face of challenges such as terrorism, that supervision and monitoring are most needed to check domestic measures against abuses of power.³

Derogation is not equivalent to abrogation or abolition of a right. Although drafted to preserve governmental leeway, derogation clauses do not suspend the rule of law. They are rather an expression of it, for they regulate the relationship between the rule and the exception.⁴ Indeed, international law leaves no place for a suspension of the rule of law⁵ and legal principles of general application remain applicable in cases of derogation.⁶

of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.’

² *Brogan and Others v. the United Kingdom*, European Court of Human Rights, No 11209/84, (1988) *European Human Rights Reports*, 11(117), para. 61.

³ Françoise J. Hampson, ‘Study on Human Rights protection during situations of armed conflict, internal disturbances and tensions’, Council of Europe Steering Committee for Human Rights (CDDH), CDDH (2001) 21 rev., October 31, 2001.

⁴ Rosalyn Higgins, ‘Derogations under Human Rights Treaties’, (1978) 48 *British Yearbook of International Law*

286. This view has been criticised by Gross, who claims that the dichotomy of normalcy-rule and exception is unfit to deal with de facto, permanent, institutionalised or entrenched emergencies. Oren Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, (1998) *Yale Journal of International Law* 23(437), pp. 455-456.

⁵ The HRC questioned a constitutional provision allowing the adoption of legislation during emergencies that would otherwise be incompatible with the constitution, CCPR/CO/73/CH, 2001, para.7; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), p. 391.

⁶ E.g. *bona fide*.

The derogation provisions of the ICCPR are similarly worded to those of the ECHR.⁷ Both treaties require derogation to be consistent with other obligations under international law. Thus, in principle, no derogation could be made under the ECHR that is inconsistent with the ICCPR.⁸ Accordingly, the European Court in *Brannigan and McBride v. United Kingdom* was, although not formally applying the Covenant as a matter of law, prepared to examine the applicants' claim that the UK had failed its obligations under the ICCPR.⁹

In order to check the consistency of European derogation practice and the corresponding ECtHR jurisprudence with obligations under the Covenant, it is particularly fruitful to compare the derogation clauses and the respective case law and interpretations of the Human Rights Committee (HRC), as the ICCPR's monitoring body, against that of the ECtHR. This paper therefore analyses whether the European Convention and the Court's jurisprudence are consistent with the HRC's interpretation of the Covenant's derogation clause by the HRC. For the ICCPR, this interpretation is set out in the non-binding but authoritative¹⁰ General Comment 29 of the HRC, on which this Article will focus. There are two main reasons for a focus on General Comment 29. First, case law by the HRC on the topic is considerably out-dated and does not contain general interpretations. Second, applying the principle that a judicial or quasi-judicial body is entitled to decide on its own jurisdiction, the Committee can assess whether or not derogations are in conformity with the Covenant.¹¹ In theory, the Committee may hence assess the legality of derogation in parallel or subject to the ECtHR.¹²

Article 15 ECHR and Article 4 ICCPR are the pertinent provisions within the two treaties; they read as follows:

Article 15 ECHR

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

⁷ Indeed, Article 4 of the International Covenant on Civil and Political Rights was adopted from the European Convention on Human Rights, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights – ICCPR Commentary* (Kehl: N.P. Engel, 2nd ed. 2005), p. 90.

⁸ Christoph Schreuer, 'Derogations of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights', (1981) *Yale Journal of World Public Order* 9(113), pp. 129-131. It has also been argued that because of the reference made to international law in Article 15(1) European Convention on Human Rights, the convention would apply *mutadis mutandis*, Jean Allain, 'Derogation from the European Convention of Human Rights in the light of "other obligations under international law"', (2005) *European Human Rights Law Review* No 480.

⁸ All Council of Europe member States have equally ratified the International Covenant on Civil and Political Rights. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en. Last accessed 28 September 2011.

⁹ *Brannigan and McBride v. United Kingdom*, European Court of Human Rights, No 14553/89, (1993) *European Human Rights Reports* 17(539), para. 72.

¹⁰ Christian Tomuschat, *Human Rights – Between Idealism and Realism* (Oxford: Oxford University Press, 2008), p. 220.

¹¹ International Covenant on Civil and Political Rights, General Comment No 29: States of Emergency (Article 4), 31/08/2001, UN-Doc CCPR/C/21/Rev.1/Add.11 (hereinafter General Comment 29), para. 2.

¹² If such question arises in an individual case, admissibility criteria provide that a complaint is admissible if the same matter is not being examined under another procedure of international investigation or settlement. See, together with the other admissibility criteria, Article 5, First Optional Protocol to the International Covenant on Civil and Political Rights.

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.

ICCPR, Article 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

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

Section two scrutinises the formal conditions of derogation under the ECtHR and ICCPR, including the existence of an emergency, the temporal element of derogation and the procedural requirements to invoke it. The analysis in section three focuses on stipulations for the measures States may take pursuant to derogation, with particular emphasis on the requirement of proportionality and how it relates to the use of limitation clauses. This paper further examines derogation under international humanitarian law, then compares non-derogable rights under the two instruments. The right of non-discrimination is dealt with in the final section.

2. Conditions for Resort to Derogation

2.1 *The existence of an emergency*

According to Hartman, the plain language of Articles 4 ICCPR and 15 ECHR suggests that a fundamental element of statehood must be endangered and that this danger has to be

actual or imminent before resort to derogation is lawful.¹³ Although General Comment 29 does not list criteria for determining the existence of an emergency within the meaning of Article 4, the HRC makes clear two things.

First, disturbances can arise without constituting an emergency threatening the life of the nation.¹⁴ According to the Committee's earlier recommendations, political and social disturbances in the form of protest movements and strikes, or high crime rates, are no such emergencies.¹⁵ On the basis of reviewing the HRC's case law and observations, Svensson-McCarthy has suggested a definition whereby only 'very serious visible and violent political and social confrontations or turmoil that cannot be controlled by ordinary means normally available to the authorities' qualify as emergencies within the meaning of Article 4. Thus, it seems that the principal criterion for the HRC is not the nature of the harm, but the intensity. Whether terrorism can lawfully be used to derogate would hence depend on whether its potential risk or actual harm is high enough.

Second, it is clear from General Comment 29 that armed conflict would be regarded as an emergency for the purpose of derogation.¹⁶ The same holds true for the ECHR, in which Article 15 explicitly mentions 'war' as an example for a public emergency threatening the life of the nation. The wording of Article 15 suggests that emergencies can exist in situations other than war, albeit only when of similar gravity. With regard to counter-terrorism, terrorist acts can occur during and bear connection to an armed conflict, as in the case of South-Eastern Turkey.

The ECtHR has found the natural and customary meaning of an emergency threatening the life of the nation to be clear even before the Covenant was adopted.¹⁷ If this was indeed the case, one would assume that the drafters of the Covenant were aware of such customary meaning and that the definitions were thus consistent. However, the level of scrutiny the Court has applied in the first *Cyprus Case* has left the State authorities a 'certain measure of discretion' as to the existence of a public emergency.¹⁸ In the case of *Lawless v. UK*, in which the Court *inter alia* dealt with the lawfulness of a derogation made in the context of terrorism in Northern Ireland, the Court first used the term 'margin of appreciation'.

The limits to discretion were shown in the *Greek Case*, where the former European Commission for Human Rights (EComHR/'the Commission') developed the framework whereby Article 15 required that the emergency was actual or imminent; that it affected the

¹³ Joan F. Hartman, 'Derogations from Human Rights treaties in Public Emergencies - A Critique of Implementation by the European Court of Human Rights and Human Rights Council', (1981) *Harvard International Law Journal* 22(1), p. 16.

¹⁴ General Comment 29, para. 3. See fn. 11

¹⁵ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague: Martinus Nijhoff, 1998), p. 239.

¹⁶ See fn. 17, chapter 4.

¹⁷ *Lawless v. Ireland*, European Court of Human Rights, No 332/57, (1961) *European Human Rights Reports* 1(15), para. 28. The definition it found is clearly below the threshold of an armed conflict. This was criticised in a dissent by judge Süsterhenn who argued that an emergency under Article 15 required a situation tantamount to war.

¹⁸ *Greece v. United Kingdom*, 1958-1959 Yearbook, European Convention on Human Rights, p. 174.

whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional.¹⁹ The Greek Government had invoked derogation because of ‘Communist danger, crisis of constitutional government and of public order’. The Commission rejected this firmly, stating that ‘a displacement of the lawful Government by force of arms by the Communists and their allies was [not] imminent on [...] [the date of derogation]’ and that ‘the street demonstrations, strikes and work stoppages in the first months of 1967 [did not attain] [...] the magnitude of a public emergency’. Although the demonstrations ‘created anxiety for person and property’, the police controlled the situation at all times.²⁰

Within a context of terrorism, the Court has never questioned the existence of an emergency and indeed broadened the margin of appreciation anew in *Ireland v. UK*.²¹ In response, several authors have criticised the application of the doctrine in the ECtHR as being too lax.²² Gross and Ní Aoláin argue that the broadness of the margin of appreciation States enjoy when invoking derogation cast a doubt on the effectiveness of European supervision by the ECtHR.²³ Because national emergencies posed great danger of ‘dilution and nullification of human rights’, the Court’s supervision should be such that the narrowest possible margin of appreciation, not the widest, is granted.²⁴ They also maintain that some emergencies merit particular scrutiny, notably entrenched emergencies.²⁵ Most recently, in *A and others v. UK*, the Court reaffirmed, but arguably also diluted, the doctrine when scrutinising the derogation notice filed by the UK after 9/11.²⁶ It rejected the restrictive interpretation of Lord Hoffmann in the preceding House of Lords decision,²⁷ who had dissented by saying that an emergency threatening the life of the nation had to pose a threat to the organised life of the community, which went beyond a threat of serious physical damage and loss of life. The Court equally rejected Hoffmann’s argument that Article 15 required a degree of imminence that was not met by the ambiguous terrorist threat after 9/11. The notion of imminence is represented in the French text of the Convention only, and was considered weighty in the *Greek case*.²⁸ Although the list of criteria developed in the *Lawless* case suggested that there is no hierarchy among the elements of nature of harm, imminence and scope, the judgment in *A and others* may be read as an adjustment, upgrading the importance of the nature of the harm.

¹⁹ *Denmark v Greece* (The Greek Case), European Commission on Human Rights (1972) 12 Yearbook, p. 186, para. 113.

²⁰ See fn. 19, para. 119-125.

²¹ *Ireland v. United Kingdom*, 25 European Court of Human Rights, series A, pp. 78-79, para. 207.

²² Oren Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, (1998) *Yale Journal of International Law* 23(437), pp. 495-496; Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the context of Article 15 of the European Convention on Human Rights’, (2001) *Human Rights Quarterly* 23, pp. 625-649.

²³ See fn. 22, p. 635.

²⁴ See fn. 22, p. 636.

²⁵ See fn. 22, p. 636. Such emergencies are defined as ‘prolonged, de-facto, institutionalised or complex emergencies’.

²⁶ *A and others v. United Kingdom*, European Court of Human Rights, application no 3455/05, judgment of 19 February 2009, Hudoc, para. 180.

²⁷ See fn. 26, paras. 179-180.

²⁸ *Greek case*, para. 112. See fn. 19.

With regard to the HRC and a potential margin of appreciation, General Comment 29 seems to be based on the idea that Article 4 provides an objective framework for the legality of derogation, the compliance with which can best be assessed by the Committee, leaving no room for a wide margin of appreciation. General Comment 29 requires States to provide ‘sufficient and precise information about their law and practice in the field of emergency powers’. In reviewing measures of derogation, the Committee’s views reflect an intention to keep the subjective element of the identification of public emergencies as narrow as possible.²⁹ The denial of a margin of appreciation may also be reflected in the Siracusa Principles, an interpretation of the Covenant’s derogation provisions by international law experts, which influenced the drafting of General Comment 29.³⁰ The principles state that ‘a proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation [...]’.³¹

2.2 Temporal element of derogation

Both Article 4 ICCPR and Article 15 ECHR contain a temporal element; derogation is only permitted ‘in time of’ public emergency which threatens the life of the nation. Svensson McCarthy has pointed out that when considering the United Kingdom’s periodic report in 1995, the HRC implicitly questioned whether derogatory measures in place since 1976 were still necessary to address the situation in Northern Ireland, which at that time had decreased in volatility.³² However, the fact that the necessity of the derogation was not questioned to the same extent in previous reports indicates that a State of emergency may well persist for decades and that for such time a State may derogate.³³ On the other hand, the HRC in its concluding observations on Egypt made clear that it regarded the thirty year-long emergency measures in place a violation of the Covenant.³⁴ The quality of this example remains extremely limited; the case of Egypt may rightly be said to contravene the Covenant, as it has exceeded the time span which the Committee would find permissible.

Arguably, General Comment 29 goes further than the wording of Article 4 in clarifying that measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.³⁵ This could suggest that there may be situations of quasi-permanent emergency in which derogation is initially valid and then ceases to be valid over time.³⁶ For instance, dubious terrorist threats, which may be said to exist permanently, would thus

²⁹ *Landinelli Silva v Uruguay* (1981) HRC Communication No 34/1978, para.8.3; Dominic McGoldrick, *The Human Rights Committee*, (Oxford: Clarendon Press, 1991), p. 313.

³⁰ J.D O’Donnell, ‘Human Rights and States of Emergency: selected developments within the United Nations, 1997-2007’, *Expert Seminar on Protection of Human Rights under States of Emergency, particularly the right to a fair trial*, Geneva, Palais des Nations, 3-4 December 2007.

³¹ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter Siracusa Principles), UN-Doc E/CN .4/1985/4, para.62.

³² Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, p. 223. See fn. 15.

³³ See fn. 32.

³⁴ Report of the Human Rights Committee, GAOR, A/48/40, p. 148, para.704, cited in Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, p. 109, See fn. 32.

³⁵ General Comment 29, para. 2. See fn. 11.

³⁶ Credit goes to Prof. Françoise Hampson on this point.

not be a valid reason for derogation. While the Committee has not explicitly used this language or cited General Comment 29 in its latest concluding observations on Egypt in 2003,³⁷ the Egyptian case illustrates how the threat of terrorism can be cited to institutionalise emergency laws.³⁸ In its 2007 concluding observations on Algeria, however, which maintained a state of emergency for 17 years until lifted in the ‘Arab Spring’ in 2011,³⁹ the Committee has recommended to Algeria to ‘undertake to review the need for maintaining the state of emergency in accordance with the criteria laid down in Article 4 of the Covenant and ensure that its application does not lead to violations of the Covenant.’⁴⁰

As for the ECHR, the Court has never incorporated the temporal requirement into its jurisprudence. In *Brannigan and McBride v. UK*, a case concerning extraordinary powers of detention in Northern Ireland pursuant to a repeated derogation, the Court confirmed the existence of an emergency within the meaning of Article 15. It thereby rejected the *amicus curiae* briefs which subsumed the temporal requirement under the notion of proportionality, submitting that derogation would, in the context of quasi-permanent emergency of Northern Ireland, be allowed only if the situation had deteriorated after the initial derogation notice was withdrawn.⁴¹ As criticised in one of the dissenting opinions, the Court thereby failed to indicate that it accepts derogation only as a strictly temporary measure.⁴² This is in line with the way the Court addressed the prolonged Turkish emergency. According to Gross, although the Court has, at several times, stated that in exercising its supervision, it needs to give ‘appropriate weight’⁴³ to the duration of the emergency, its application of the margin of appreciation in *Aksoy v. Turkey* ‘did not reflect a serious critical attempt to come to grips with the prolonged state of emergency in the jurisdiction.’⁴⁴

More importantly, the Grand Chamber in *A and Others v. UK* stated that derogating measures put in place in the aftermath of 9/11, and reviewed on an annual basis by Parliament, could not be said to be invalid on the ground that they were not ‘temporary’.⁴⁵

³⁷ Concluding Observations of the Human Rights Committee, Egypt, UN-Doc. CCPR/CO/76/EGY (2002), para. 6.

³⁸ For a commentary on this case, see Human Rights Watch, ‘Egypt: Cosmetic Changes Can’t Justify Keeping Emergency Law’ May 2010. Available at <http://www.hrw.org/en/news/2010/05/12/egypt-cosmetic-changes-can-t-justify-keeping-emergency-law>. Last accessed 12 September 2011. The Military Council currently ruling Egypt has declared it intended to scrap the law in September 2011. See AlertNet ‘Amnesty urges Egypt to lift emergency laws’. Available at <http://www.trust.org/alertnet/news/amnesty-urges-egypt-to-lift-emergency-laws/>. Last accessed 29 September 2011.

³⁹ See BBC, 22 February 2011, Algeria’s state of emergency to be lifted ‘imminently’. Available at <http://www.bbc.co.uk/news/world-middle-east-12546346>. Last accessed 29 September 2011. The reason for maintaining the state of emergency was declared by President Bouteflika to be for the only purposes of the fight against terrorism’.

⁴⁰ Concluding observations of the Human Rights Committee, UN-Doc CCPR/C/DZA/CO/3, 12 December 2007, para. 14.

⁴¹ *Brannigan and McBride v. United Kingdom*, European Court of Human Rights, No 14553/89, (1993) *European Human Rights Reports*, 17(539), para.45.

⁴² *Ibid*, dissenting opinion of Judge Makarczyk. .

⁴³ See fn. 41, para. 43.

⁴⁴ Gross, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the context of Article 15 of the European Convention on Human Rights’, p. 647. See fn. 22.

⁴⁵ *A and others v. United Kingdom*, para. 178. See fn. 26.

It did so in contrasting the Court's case law with the view of the HRC in General Comment 29.

2.3 Procedural requirements: Proclamation and notification

The ICCPR seems to be more exigent than the ECHR since it provides that the existence of an emergency has to be 'officially proclaimed'.⁴⁶ In General Comment 29, the HRC underlines the importance of this requirement.⁴⁷ In contrast, the ECHR does not require an official proclamation. However, in *Cyprus v. Turkey*, where there was large scale detention of Greek Cypriots and deprivations of their possessions pursuant to the Turkish Invasion, the Commission found that Article 15 required 'some formal and public act of derogation, such as a declaration of martial law or state of emergency'.⁴⁸

Both treaties require notification in order to legitimately invoke the right to derogation. In General Comment 29, the HRC underscores the significance of notification by stating that it is essential for the discharge of the Committee's functions and to permit other State parties to monitor compliance with the provisions of the Covenant.⁴⁹

Neither the Committee nor the Court has accepted derogation without notification.⁵⁰ In reviewing Israel's state reports in 2003, and after noting Israel's position that an armed conflict existed in its territory, the HRC criticised Israel's infringement of provisions other than those from which derogation was notified. These were said to have extended 'beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights' and were qualified as 'derogation'. Earlier, it argued that derogation by the Democratic Republic of Congo had not been in accordance with Article 4 because of, *inter alia*, the lack of notification.⁵¹ However, in a concurring opinion in *Nabil Sayadi and Patricia Vinck v. Belgium*⁵², a Committee member maintained that, 'the absence of compliance with [...] procedural rules [notification, A.N.] [...] cannot be taken as evidence that derogation has not happened or cannot be effected'.⁵³

As regards the ECHR, the EComHR pointed out that notification was 'an essential link in the machinery provided in the Convention for ensuring the observance of the engagements undertaken by the High Contracting Parties' and that without notification, the other Parties would not know whether or not breaches are occurring.⁵⁴ The Commission and the Court

⁴⁶ Article 4(1), International Covenant on Civil and Political Rights.

⁴⁷ General Comment 29, para. 2. See fn. 11.

⁴⁸ *Cyprus v. Turkey*, European Court of Human Rights, (1976) *European Human Rights Reports* 4(482), para. 527.

⁴⁹ General Comment 29, para. 17. See fn. 11.

⁵⁰ See also the Siracusa principles' strict stand on lacking notification, para.47. See fn. 31.

⁵¹ *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, Communication, No 933/2000, UN-Doc. CCPR/C/78/D/933/2000 (2003), para. 5.2.

⁵² *Nabil Sayadi and Patricia Vinck v. Belgium*, 29 December 2008, CCPR/C/94/D/1472/2006.

⁵³ See fn. 52 for a concurring opinion by Nigel S. Rodley. In accordance with this statement, earlier communications indicate that the HRC presumed the existence of *de facto* derogations, Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, p. 226, see fn. 15.

⁵⁴ *Lawless v. Ireland*, Commission Report, Series B, 1960–1961, pp. 74, 335–336 and *Greek Case*, separate opinion by Judge Ermacora.

have thus both been unwilling to accept derogation in the *Greek case*.⁵⁵ Notification under the ECHR encompasses an explanation ‘of the measures [...] taken’, rather than, as in the Covenant, mere identification of the provisions derogated from. Arguably, the former requirement is stricter.⁵⁶ However, General Comment 29 has attempted to level this difference, stating that, ‘[...] [i]n view of the summary character of many of the notifications received in the past, the Committee emphasises that the notification by States’ parties should include full information about the measures taken.’⁵⁷

Finally, under the ICCPR, State Parties invoking the right to derogate shall ‘immediately’ inform the other parties through the intermediary of the UN Secretary-General whereas the ECHR is silent in this regard. Although the EComHR had implicitly imposed a notification ‘without delay’, the Court accepted a twelve day delay in notification in *Lawless v. United Kingdom*.⁵⁸

3. Measures Pursuant to Derogation

3.1 *The relationship between limitation clauses and derogation*

Article 4 ICCPR and Article 15 ECHR are to be distinguished from ‘internal’ limitations clauses, by virtue of which a right may be restricted if so prescribed by law and if necessary for the protection of public safety, order, health, morals or the fundamental rights of others. Just as in the case of derogations, limitation clauses in the Covenant and the European Convention allow for some flexibility by the domestic court in the interpretation of a provision from either treaty. Evidently, before seeking recourse to derogation, a State can justify interfering with the enjoyment of a particular freedom by relying on a limitation power. Ultimately, the question arises whether a State may derogate from a provision containing a limitation clause, in order to narrow its obligation to justify a limitation. The HRC stated that:

The reference in Article 4, paragraph 2, to Article 18, a provision that includes a specific clause on restrictions [...], demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirements specified in Article 18, paragraph 3.

⁵⁵ In the Greek case, the Commission has held the detention of Prisoners of War to be in violation of the Convention, see Françoise J. Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) *International Review of the Red Cross* 90(871), pp. 549-572, at p. 565.

⁵⁶ Hartman, ‘Derogations from Human Rights treaties in Public Emergencies – A Critique of Implementation by the European Court of Human Rights and Human Rights Council’, p. 19. See fn. 13; The *Greek case*, see fn. 19.

⁵⁷ General Comment 29, para. 17. See fn. 11.

⁵⁸ *Lawless v. Ireland*, para. 47. See fn. 17.

The HRC's statement may be applied by analogy to all provisions containing limitation clauses.⁵⁹ General Comment 29 suggests the independence between limitation and derogability *generally*. Paragraph eleven of General Comment 29 explains the rationale behind the non-derogability of Article 18; that it could never become necessary to derogate from this right. Hence, the HRC stated that:⁶⁰

[...] the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (Article 12) or freedom of assembly (Article 21) is generally sufficient during [an emergency] and no derogation from the provisions in question would be justified by the exigencies of the situation.

Regardless of the derogability of other provisions containing limitation clauses, the similar character of these clauses makes it challenging for a State to justify exceeding ordinary limitations. A notable exception could occur during the existence of an armed conflict.⁶¹ Hence, the HRC in General Comment 29 uses the flexibility that limitation clauses offer to raise the threshold for invoking derogation, stressing once again the element of the scope of the harm.

As for the ECHR, in contrast to the ICCPR, all provisions with built-in limitations, including freedom of religion, thought and conscience, are derogable. So far, derogation of a provision containing a limitation clause was only invoked once; the derogation from Articles 8 (Right to respect for private and family life) and 10 (Freedom of Expression) were quashed in the *Greek Case*. Although no State has yet invoked Article 15 to derogate from any provision containing a limitation in a context of terrorism, in *Kilic v. Turkey*, it was argued that the death of a journalist of an alleged PKK-oriented newspaper was in breach of positive obligations under Article 2 (right to life), and in breach of Article 10 (freedom of expression).⁶²

It may be equally difficult to establish the necessity to derogate from provisions with limitation clauses under the ECHR. This is because the standard of necessity in a limitation clause in the ICCPR⁶³ and ECHR, to be 'necessary in a democratic society', is less strict than the standard of necessity required for derogation. Yet, owing to the fact that the European Court has applied its margin of appreciation doctrine to the State's assessment on the existence of an emergency within the meaning of Article 15, and in the determination of whether the measures taken were strictly required,⁶⁴ the General Comment may be said to impose a stricter regime.

⁵⁹ Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) *Human Rights Law Review* 2(1), pp. 81-98, at p. 91.

⁶⁰ General Comment 29, para. 5. See fn. 11.

⁶¹ Françoise J. Hampson, 'Study on Human Rights protection during situations of armed conflict, internal disturbances and tensions, p.11. See fn. 61.

⁶² *Kilic v. Turkey*, no 22492/93, [2000] European Convention on Human Rights 22492/93.

⁶³ See General Comment 27, CCPR/C/21/Rev.1/Add.9.

⁶⁴ See fn. 6, para. 3.3.

3.2 Proportionality

The derogation clauses in the ICCPR and ECHR contain the principle of proportionality by stressing that measures taken pursuant to derogation shall be taken ‘to the extent strictly required by the exigencies of the situation’.⁶⁵ This requirement of proportionality subordinates the State’s subjective digression under a strict standard, to that of absolute necessity. Any violation of the principle renders the respective measure null and void, but does not affect the derogation pursuant to which the measure was taken.

General Comment 29 makes clear that States must ‘provide careful justification [...] for any specific measures based on [a proclamation of the state of emergency]’, justifying that ‘all their measures derogating from the Covenant are strictly required by the exigencies of the situation.’⁶⁶ In a more recent case, the HRC found a presidential decree dismissing a large number of judges in violation of the Covenant, stating that the justification given by the government – the state of emergency – failed to demonstrate why the measures were ‘strictly required’.⁶⁷

Whereas the Committee seems to leave the State Parties a minimal measure of discretion, the European Court has explicitly granted States a wide margin of appreciation on the nature and scope of measures to avert the emergency (i.e. on whether these are strictly required). The Court has applied a negative test on whether a State has exceeded its margin of appreciation and thereby, arguably, in past cases avoided a rigorous review.⁶⁸ The Court has, however, also stated that it was ultimately its role to assess compliance with the principle of proportionality, which has been argued to make the margin of appreciation for the measures taken narrower than the margin of appreciation on the existence of an emergency.⁶⁹ Thus, it found a violation of the principle in *Aksoy v. Turkey*. In that case, the victim was a suspected member of the Kurdistan Workers Party who was tortured in detention, while the Turkish law pursuant to derogation allowed a renewable period of detention of fifteen days without judicial supervision. The Court held that this period, irrespective of the facts that safeguards were insufficient, could not be judged necessary.⁷⁰ In *A and others v. United Kingdom*, the Court held that the measure taken pursuant to derogation of Article 5 was not proportionate after finding that, *inter alia*, the United Kingdom had used an inadequate measure to avert the emergency, notably ‘an immigration measure to address what was essentially a security issue.’⁷¹

⁶⁵ Joan F. Hartman, ‘Derogations from Human Rights treaties in Public Emergencies - A Critique of Implementation by the European Court of Human Rights and Human Rights Council’, p. 17. See fn. 13.

⁶⁶ General Comment 29, para. 5. See fn. 11.

⁶⁷ HRC, Concluding observations of the Human Rights Committee: Israel. 21/08/2003, UN-Doc. CCPR/CO/78/ISR., para. 5.2.

⁶⁸ E.g. in *Brannigan and McBride*, the Court held that the United Kingdom had not exceeded its margin by allowing terrorist suspects to be held for up to seven days without judicial control. See David Harris et al., *Law of the European Convention of Human Rights* (Oxford: Oxford University Press, 2nd ed. 2009), p. 636.

⁶⁹ Higgins, ‘Derogations under Human Rights Treaties’. See fn. 4.

⁷⁰ *Aksoy v. Turkey*, European Court of Human Rights, No 21987/93, (1996) *European Human Rights Reports*, 23(553), para. 83.

⁷¹ *A and others v. United Kingdom*, para. 186. See fn. 26.

4. Derogation and International Humanitarian Law

4.1 *Terrorism and the applicability of international humanitarian law*

As previously mentioned, derogations under both the ECHR and the ICCPR must be consistent with other obligations under international law. General Comment 29 explicitly mentions International Humanitarian Law (IHL).⁷² IHL applies by virtue of the presence of an international or non-international armed conflict, which is a factual concept.

International armed conflicts occur ‘whenever there is a resort to armed force between States’.⁷³ Non-international armed conflicts may, firstly, occur within the meaning of the second Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II)⁷⁴; which applies if there is armed violence beyond internal disturbances and tensions on the territory of a State Party between State armed forces and dissident armed forces that are under responsible command and exercise such control over a part of the State Party’s territory ‘as to enable them to carry out concerted military operations and to implement [...] [the] Protocol.’⁷⁵ Secondly, non-international armed conflicts may occur within the meaning of Common Article 3 to the Geneva Conventions which only requires a certain quality of violence which is beyond internal disturbances and tensions, but which otherwise is not defined. In the past, however, States have rejected the applicability of IHL to terrorist acts,⁷⁶ as the US Government had in arguing that the ‘war on terror’ was an armed conflict within the meaning of IHL.⁷⁷ The sole exception is terrorist acts that are committed during armed conflicts,⁷⁸ and every aspect of the ‘war on terror’ that happens within an armed conflict, for instance, in Afghanistan. In summary, there is no automatism between terrorism and the applicability of IHL.

4.2 *International humanitarian law as ‘normative floor’*

The Human Rights Committee reasons that general international law (i.e. customary and treaty law, flowing from IHL) imposes a normative ‘floor’ to derogation beyond which the restriction of a right cannot be necessary. In this regard, the Committee makes explicit

⁷² General Comment 29, para. 9. See fn. 11.

⁷³ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-AR72, 2 October 1995, para. 70.

⁷⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II), 8 June 1977.

⁷⁵ See fn. 74, Article 1(i).

⁷⁶ Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Boston: M. Nijhoff, 1996), 128, in Gabor Rona, ‘Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”’ (2003) 27 *The Fletcher Forum of World Affairs* No 2, pp. 55-75. See fn. 38.

⁷⁷ O’Connell, Mary Ellen, ‘Defining Armed Conflict’, (2008) *Journal of Security and Law*, 13(3), pp. 393-400; Orakhelasvili, Alexander, ‘The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?’, (2008) *European Journal of International Law* 19(1), pp. 161-182, at p. 166.

⁷⁸ See Hans-Peter Gasser, ‘Acts of terror, “terrorism” and international humanitarian law’ (2002) *International Review of the Red Cross*, 84(847), pp. 547-570.

reference to elements of the right to a fair trial.⁷⁹ The reasoning is also evidenced by the fact that some of the non-derogable elements in the Committee's illustrative list have a counterpart in treaty IHL, notably the standards imposed by Common Article 3 to the Geneva Conventions of 1949⁸⁰ and the prohibition of forced movement of population.⁸¹

Despite this, the Committee does not so explicitly shed light on the relationship between derogation and the applicability of IHL in the presence of an armed conflict.⁸² As has been explored above, an armed conflict is a public emergency for the purpose of the ECHR's and the Covenant's derogation clauses. It is, however, questionable whether resort to derogation makes IHL applicable or is permissible only in the event of an armed conflict.⁸³

Section 2.1 of this paper suggests that the strict principle of necessity imposed by General Comment 29, at least in the case of provisions with built-in limitations, restricts the lawfulness of derogation to situations of armed conflict. Although the Committee does not seem to deem derogation necessary *generally*, only in cases of armed conflict, General Comment 29 is worded very cautiously in this respect:⁸⁴

If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances [...].

The question elucidated is not of mere theoretical nature. Treaty IHL offers some additional protection to the Covenant's regime and is non-derogable. IHL sets out important fair trial guarantees and Article 3 common to the Geneva Conventions of 1949 provides, 'in all circumstances', for humane treatment 'without any adverse distinction' of

⁷⁹ General Comment 29, para.16. See fn. 11. Article 3 common to the Geneva Conventions of 1949 reads 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b. taking of hostages;
- c. outrages upon personal dignity, in particular humiliating and degrading treatment;
- d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.'

⁸⁰ General Comment 29, para. 13(a)-(b). See fn. 11.

⁸¹ Article 49 Fourth Geneva Convention and Article 17 Additional Protocol 2 to the Geneva Conventions.

⁸² Parts of international humanitarian law are equally applicable in cases of occupation.

⁸³ Françoise Hampson argues that a State invoking the right to derogation should be estopped from claiming that Article 3 common to the Geneva Conventions is not applicable. See Françoise J Hampson, 'International Humanitarian Law in Situations of Acute Crisis', *Conference on The Promotion and Protection of Human Rights in Acute Crisis*, London, 11-13 February 1998. Available at <http://www.essex.ac.uk/rightsinacuteecrisis/report/hampson.htm>. Last accessed 9 August 2011.

⁸⁴ General Comment 29, para. 3. See fn. 11.

persons taking no active part in hostilities.⁸⁵ This prohibition goes further than that imposed in case of derogation (where, for instance, nationality is a legitimate distinction).

In other cases, norms of IHL, if applied in place of a respective norm of human rights law, would lower the level of protection established by human rights law. A notable example is internment. Yet, where IHL is *lex specialis*⁸⁶, the HRC would have to take IHL into account as a matter of law, and may do so through the prism of defining ‘arbitrary’ in Article 6 (fair trial rights) and Article 9 (right to liberty and security of person). It cannot, however, review the conduct of a State under a customary or treaty law provision of IHL alone.⁸⁷

As for the European Court, there may be cases in which the Court would hold derogation unlawful by virtue of the requirements of proportionality/necessity *rather than the additional protection of IHL*. The Court is very cautious in applying IHL as a matter of law.⁸⁸ In cases involving the extraterritorial acts by British Armed Forces in Iraq, the Court has found the ECHR applicable subject to a hybrid model of spatial and individual jurisdiction.⁸⁹ In cases of extraterritorial detention, the practice of internment is more problematic than jurisdictional issues.⁹⁰ Since the exhaustive list on grounds of detention in Article 5 ECHR does not include internment, it can be lawful under the ECHR only in the case of derogation in accordance with Article 15, or if the Court recognises the applicability of IHL in an international armed conflict or occupation, trumping Article 5.⁹¹

Most recent case law shows that it does not. In *Al Jedda v. United Kingdom*, which concerns the internment of a British national by British armed forces in Basra/Iraq for more than 2.5 months, the Court was neither ready to accept that derogation was unnecessary for conduct outside national territory,⁹² nor did it consider that, given the

⁸⁵ Article 3(1) common to the Geneva Conventions of 12 August 1949.

⁸⁶ To explore the appropriate relationship between IHL and IHRL for complementary protection in cases of public emergencies would go beyond the scope of this Article. For the debate and issues, see, for instance, William Schabas, ‘Parallel applicability of international humanitarian law and international human rights law: *lex specialis*? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of *jus ad bellum*’, (2007) *Israel Law Review* 40(592), Special Issue Summer 2007.

⁸⁷ General Comment 29, para. 10.

⁸⁸ See below on the *Al Jedda* case. The European Court of Human Rights in this practice is opposing the Inter-American Court of Human Rights which has ascertained the direct applicability of international humanitarian law in *Bamaca-Velasquez v. Guatemala*, Inter-American Court of Human Rights (Ser.C) 70 (2000).

⁸⁹ See *Al-Skeini v. United Kingdom*, No 55721/7, judgment of 7 July 2011. See also commentary by Marko Milanovic, ‘European Court Decides *Al-Skeini* and *Al-Jedda*, EJIL:Talk!. Available at <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>. Last accessed 30 September 2011.

⁹⁰ *Al-Saadoon and Mufdhi v. United Kingdom*, European Court of Human Rights, No 61498/08, Fourth Section Decision as to the admissibility, paras. 84-89 and judgment of 4 October 2010, Hudoc.

⁹¹ Which explicitly permits internment in international armed conflict and occupation, see Article 41(1); 78(1) Fourth Geneva Convention. However, there is no explicit basis for internment for non-international armed conflict. This will also be the problem in *Al-Jedda v. United Kingdom*, a case currently pending before the European Court of Human Rights (House of Lords, [2007] United Kingdom House of Lords 58).

⁹² This was doubted in the House of Lords in the case of *R (on the application of Al-Jedda) v. Secretary of State for Defence*, where Lord Bingham maintained that a public emergency within the meaning of the Convention could hardly ever be met in an overseas peacekeeping operation. See United Kingdom House of Lords 58, § 38

applicability of IHL, the internment had been lawful. On the first point, the United Kingdom had argued that ‘the proposition that it would have been possible [...] to derogate under Article 15 in respect of an international conflict was not supported by *Banković and Others v. Belgium and Others*’⁹³ The Court stressed that under its case law, internment is unlawful if States did not derogate.⁹⁴

Prior to finding a violation of Article 5 the Court’s statement that ‘The Government do not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15’ suggests that the Court considers that derogation for conduct outside the national territory is necessary. In practical terms, States have thus far possibly avoided derogation for situations outside the national territory in order not to create an estoppel which would preclude them from arguing that the Convention would not apply. On the second point, the government had argued that they were, as an occupying power, exercising ‘specific authorities, responsibilities and obligations’ under IHL, including the ‘obligation to use to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence.’⁹⁵ The Court stated that there was no obligation under IHL to use internment but that ‘it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort.’⁹⁶ In other words, because there was no such *obligation* and because IHRL was applicable in parallel in situations of armed conflict, the Court allowed the ECHR provision prevail. The Court did not deal with the question why an authorisation by IHL is insufficient. The Court’s reasoning could point to an approach of ‘belt and suspenders’⁹⁷ which would indeed level the problem discussed.

5. Non-derogable Rights

The most controversial⁹⁸ aspect of General Comment 29 is arguably the statement that some rights are non-derogable, albeit they are not explicitly mentioned in Article 4 and are not *jus cogens*.⁹⁹ This is closely connected to another innovative element of the General Comment, that every provision of the Covenant has a non-derogable core. The rationale behind these statements is twofold: yet again, the Committee puts forward the requirement of proportionality; adherence to this principle would make it impossible for a State Party to completely disregard a Covenant provision.¹⁰⁰ Besides, non-derogable elements may be

⁹³ *Al Jeddah v. United Kingdom*, No 27021/08, judgment of 7 July 2011, Hudoc, para. 92.

⁹⁴ See fn. 93, para. 99.

⁹⁵ See fn. 93, para. 107.

⁹⁶ See fn. 93, para. 107.

⁹⁷ See fn. 86.

⁹⁸ Sarah Joseph, ‘Human Rights Committee: General Comment 29’, p. 91. See fn. 59.

⁹⁹ General Comment 29, paras. 11,13: all persons deprived of their liberty shall be treated with humanity and respect for the dignity of the human person; prohibitions against taking hostages, abductions or unacknowledged detention; elements of the international protection of the rights of persons belonging to minorities; deportation or forcible transfer of population; propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; right to a remedy; principles of legality and the rule of law; presumption of innocence; habeas corpus.

¹⁰⁰ General Comment 29, para. 6. See fn. 11.

regarded as ‘infrastructural’ to, or may ‘protect’¹⁰¹, the non-derogable rights mentioned in Article 4. Thus, in an observation given after the issuance of General Comment 29, the Committee argued that measures derogating from Article 9 of the Covenant will limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment, ‘[...] and derogating from Article 9 more extensively than what in the Committee’s view is permissible pursuant to Article 4.’¹⁰² What is more, the Committee maintains in General Comment 29 that ‘Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights.’¹⁰³

This rationale can equally be found in jurisprudence of the ECtHR. The Court has elaborated on the idea of a core content of a provision (‘the essence of a right’), in relation to the right of access to a court (Article 6(1)), notably in the proportionality test.¹⁰⁴ The same test and wording was later used in relation to Article 5 (Right to liberty and security,) in *Brogan and Others v. United Kingdom*, where the Court stated that the circumstances of a case ‘can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is to the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority’ [emphasis added].¹⁰⁵ In the ECtHR admissibility decision in the case of *Al-Moayad v. Germany*, the Court stated that denial of *habeas corpus*, as well as the deliberate and systematic refusal to grant access to a lawyer were extinguishing the very essence of the right to a fair trial under Article 6.¹⁰⁶ This appears akin to recognising *habeas corpus* as effectively non-derogable, just as the Committee does in General Comment 29.¹⁰⁷ The jargon of an ‘essence’ of a right is, however, not uniquely used in relation to the right to fair trial. Den Heijer, with reference to expulsion cases, notes that the Court was ‘quite familiar in distinguishing between core components of a right and more peripheral elements.’¹⁰⁸ Finally, the notion of ‘infrastructure’ was mentioned in *Aksoy v. Turkey*, where the Court stated that the detention of a terrorist suspect for fourteen days, without safeguards and judicial intervention, left the applicant ‘vulnerable [...] to torture’.¹⁰⁹

¹⁰¹ See fn. 100, para. 16.

¹⁰² HRC, Concluding observations of the Human Rights Committee: Israel. 21/08/2003, UN-Doc. CCPR/CO/78/ISR., para.12. See also General Comment No 20, para. 11. Note also Article 10 of the International Covenant on Civil and Political Rights (together with General Comment 29, para. 13a) In *Arzuaga Giboa v. Uruguay*, the Committee has found incommunicado detention to have contributed to a violation of Article 10.

¹⁰³ General Comment 29, para. 15. See fn. 11.

¹⁰⁴ *Ashingdane v. the United Kingdom*, No 8225/78, (1985) *European Human Rights Reports* 7(528), para. 57.

¹⁰⁵ *Brogan and Others v. the United Kingdom*, para. 62. See fn. 2. *Mckay v. United Kingdom*, European Court of Human Rights, No 543/03, (2006) *European Human Rights Reports* 44(827).

¹⁰⁶ *Al-Moayad v Germany*, application no 35865/03, European Court of Human Rights 20 February 2007, para. 101, cited in Den Heijer, Maarten ‘Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. (2008) *European Journal of Migration and Law* 10, pp. 277-314, at p. 311.

¹⁰⁷ General Comment 29, para. 16. See fn. 11.

¹⁰⁸ Den Heijer (2008), p. 311. See fn. 106.

¹⁰⁹ *Aksoy v. Turkey*, para. 78. See fn. 70.

6. Non-Discrimination

The most obvious difference between the derogation provisions in the ICCPR and the ECHR is the additional requirements in Article 4 ICCPR regarding non-discrimination. Article 4 provides an exhaustive list of non-justifiable grounds of discrimination (e.g. race, colour, sex, language, religion or social origin) in measures taken pursuant to derogation. In contrast, it may be lawful to differentiate on such grounds listed in Article 2 and not appearing in Article 4, namely political or other opinion, nationality, property birth or other status. However, such differential treatment would have to comply with the principle of proportionality, which includes an assessment as to its necessity. With the Committee in General Comment 29 setting high thresholds for necessity in general, and the strong weight that can be attached to the principle as expressed by the HRC in General Comment 18,¹¹⁰ such compliance is difficult to establish.

The ECHR is silent on discrimination. This lack of a prohibition of discrimination in Article 15 ECHR goes in line with the peculiar stand the ECHR takes on discrimination generally, with Article 14 (non-discrimination) invoked only in conjunction with a breach of a substantive article. Despite this, Article 14 has been invoked in several cases involving public emergencies. In the Irish case, the Court considered whether the United Kingdom had, pursuant to derogation, used emergency powers exclusively against the IRA, rather than against both the IRA and Loyalists.¹¹¹ In *Cyprus v. Turkey* the Commission found racial discrimination contrary to Article 14 in conjunction with various provisions.¹¹² Just as any other right, non-discrimination under the ECHR during a public emergency can be secured in additional ways. These measures arise from the following analysis.

Prima facie discrimination can be deemed unlawful if the measures taken, pursuant to derogation, discriminate while falling into the ambit of a non-derogable right. It is noteworthy that it is established case law under the Commission and ECtHR that discrimination on grounds of race may amount to a violation of Article 3 (right to life), which itself is a non-derogable right.¹¹³

A *prima facie* discriminatory measure of derogation is unlawful if it is disproportionate. In assessing the validity of derogation notice by the United Kingdom, the Court has found in *A and Others v. United Kingdom* that discrimination between nationals and non-nationals as part of a derogation measure was disproportionate.¹¹⁴ The Court has also found some badges of *prima facie* discrimination to require ‘very weighty reasons’ for being justifiable, namely nationality.¹¹⁵ Non-discrimination may, therefore, be effectively non-derogable, because the necessity cannot be established.

¹¹⁰ International Covenant on Civil and Political Rights, General Comment No 18: Non-discrimination, 11 October 1989.

¹¹¹ *Ireland v. United Kingdom*, 25 European Court of Human Rights, Series A, no 25, p. 86.

¹¹² *Cyprus v. Turkey*, Report of the Commission, vol. I, p. 156, para. 503.

¹¹³ *East African Asians v. United Kingdom*, European Court of Human Rights, No 14116/88, *European Human Rights Reports* 3(76), Com Rep; *Moldovan and others v. Romania*, European Court of Human Rights, No 41138/98 and 64320/01, (2005) *European Human Rights Reports* 44(302).

¹¹⁴ *A. and others v. United Kingdom*, para. 186. See fn. 26.

¹¹⁵ *Gaygusuz v. Austria*, European Court of Human Rights, No 17371/90, (1996) *European Human Rights Reports* 23(365).

Similarly, the measure cannot be deemed lawful if inconsistent with other obligations under international law. For State Parties to the ECHR, these obligations stem, *inter alia*, from the ICCPR. The HRC in General Comment 18 identifies non-discrimination as a basic and general principle of human rights protection.¹¹⁶ Non-discrimination on racial grounds is well established under other instruments, including IHL.¹¹⁷

7. Conclusion

Both the HRC, in its General Comment 29, and the ECtHR in cases arising from contexts of terrorism, have set limits to derogation. This paper has cursorily compared aspects of their readings of the respective derogation clauses along with the derogation clauses themselves. Ten years after ‘9/11’ and after the adoption of General Comment 29, the HRC has not had the opportunity to apply the General Comment in an individual case. In its concluding observations, notably in the case of Egypt’s emergency law, it has, however, not used the General Comment, arguably because it had made its position clear before the General Comment was adopted. Whether the Committee would indeed apply the progressive interpretation set out in the General Comment in future cases remains questionable.¹¹⁸ However, it seems as though the jurisprudence of the European Court is, at least in part, inconsistent with the HRC’s interpretation in General Comment 29. On the other hand, the Courts jurisprudence reflects the content of General Comment 29 and may have even influenced its drafting. The principal conclusions reached in this paper can be summarised in the following points:

- i. The European Court has granted States a relatively wide margin of appreciation as to the assessment of the existence of an emergency and less discretion over whether the measures taken pursuant to derogation are proportionate.¹¹⁹ In contrast, the Committee has neither used such terminology nor appears to apply anything similar.
- ii. The European Court has explicitly opposed the Committee’s interpretation in General Comment 29 that measures to avert an emergency must be temporary.
- iii. A minor procedural difference exists with regard to notification, where the European Court appears to have a permissive interpretation of what constitutes a delay.
- iv. There is a clear relationship between derogation and IHL. Although IHL imposes a normative floor to measure derogation from the Covenant and the Convention, the European Court faces challenges in applying IHL as a matter of law and has been reluctant to do so.

¹¹⁶ See also Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 5th ed. 1998), p. 602.

¹¹⁷ Notably the Convention on the Elimination of Racial Discrimination, which does not contain a derogations clause, and Additional Protocol 1 to the Geneva Conventions of 1949, Article 85.

¹¹⁸ Credit goes to Professor Françoise Hampson on this point.

¹¹⁹ As noted already by Higgins, see fn. 61.

- v. The HRC arguably applies a higher standard of necessity than the ECtHR, in that its starting point seems to be that derogation, in cases other than armed conflict, is, *prima facie*, unnecessary.
- vi. Under both instruments, derogation of provisions containing limitation clauses may be disproportionate. The Committee uses the flexibility of limitation clauses to raise the threshold for derogation.
- vii. From the list of elements of rights that the Committee regards as non-derogable, the jurisprudence of the ECtHR has effectively recognised *habeas corpus*. It has also held discrimination on the ground of nationality unnecessary in a measure on security. It reflects the rationale of General Comment 29 to identify core elements of rights.

Judging from the interpretation of the HRC in General Comment 29, and using normative terms, the Committee's view appears to be stricter in respect of all temporal requirements imposed by the Covenant, whereas other differences may not be so classified. The interpretations by the Committee are only binding to the extent that they reflect treaty or customary international law.

In the context of counter-terrorism efforts, this certainly has the greatest ramifications when derogation becomes protracted. The practice of derogation in Europe has already revealed that terrorism may in the future lead to such long-term derogation, which negates the latter and the spirit of derogation in international human rights law.

Because the ECHR warrants consistency of derogation with other obligations under international law, and because of the progressiveness of General Comment 29, States should endeavour to adopt the interpretation of the HRC when developing, implementing and enforcing counter-terrorism measures. Similarly, the European Court, in monitoring counter-terrorism of State Parties, must strive to establish the greatest possible consistency between the Covenant and Convention. Its recent disregard of General Comment 29 in *A and others v. United Kingdom* was an unfortunate missed opportunity, particularly since complaints challenging derogation are scarce. While the Committee has not yet applied General Comment 29, the Court could apply the argumentation from General Comment 29 to further shape its jurisprudence with regard to derogation and to non-derogable core rights in future cases.