

The Margin of Appreciation and Human Rights Protection in the ‘War on Terror’: Have the Rules Changed before the European Court of Human Rights?

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The margin of appreciation was created to allow the European Court of Human Rights to balance State sovereignty with the need to safeguard Convention rights and an individual’s rights against the general interest. Domestic counter terrorism measures contain some of the most flagrant violations of the Convention. The events of the 9/11 terrorist attacks have given rise to an insidious ‘war on terror’ rhetoric that threatens to destabilise and weaken international human rights protection. The rhetoric is based on the belief that pre-existing legal regimes are incapable of effectively combating the terrorist threat.

This paper examines the manner in which the European Court of Human Rights has responded to ‘war on terror’ rhetoric and whether it has had any impact on the Court’s application of the margin of appreciation in decisions relating to terrorism post-9/11. This paper scrutinises Convention case law prior to 9/11 in order to outline the ECtHR’s treatment of the margin of appreciation in terrorism cases, then examines the impact of ‘war on terror’ rhetoric on the protection of human rights and fundamental freedoms. Lastly, terrorism cases post-9/11 are examined to discern whether ‘war on terror’ rhetoric has influenced the ECtHR.

Keywords: European Convention on Human Rights, European Court of Human Rights, margin of appreciation, counter terrorism, war on terror

1. Introduction

Since the 11 September 2001 terrorist attacks (9/11), an insidious ‘war on terror’ (WOT) rhetoric has developed that threatens to destabilise and weaken the protection of international human rights. The WOT discourse is based on a recalibrated fair balance approach whereby the risk to national security takes precedence over an individual’s human rights¹ due to what is conceived

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¹ Benjamin Goold and Liora Lazarus, ‘Introduction: Security and Human Rights: The Search for a Language of Reconciliation’ in Benjamin Goold and Liora Lazarus (eds.) *Security and Human Rights* (Oxford: Hart Publishing, 2007).

to be a ‘new threat situation’.² WOT discourse argues that the rule of law and legal regimes that existed prior to 9/11 are incapable of dealing with the threat posed by the exceptional nature of this ‘new’ form of international terrorism.³

Counter terrorism measures enacted by High Contracting Parties since 9/11 illustrate the danger posed by WOT discourse to human rights protection under the European Convention on Human Rights (ECHR or the Convention). While such measures are taken to thwart terrorist threats, they can also represent some of the most flagrant violations of the Convention. In terrorism-related cases, the European Court of Human Rights (ECtHR or the Court) has granted respondents varying degrees of a margin of appreciation⁴ (margin or doctrine) within which they can operate without falling below the standards of protection within the ECHR.

This margin has a significant influence on the final judgment of the Court. A wide margin can permit High Contracting Parties to combat terrorism with minimal European oversight.⁵ Conversely, a narrow margin will mean the operation of greater judicial scrutiny by the Strasbourg organs and may limit the arsenal of counter measures available to national authorities for fear of being in breach of their Convention obligations. Those that use WOT rhetoric to argue for more restrictive measures before the ECtHR contend that States require a wider margin of appreciation or a change in the Convention framework in order to face ‘new’ dangers and the unforeseen difficulties they create.

This article scrutinises the manner in which the Court has utilised this doctrine since 9/11 to demonstrate how concepts arising from the WOT discourse have influenced the reasoning of the ECtHR in this area of Convention law. Post-9/11 case law demonstrates that the Court has permitted arguments arising from WOT rhetoric in some instances to widen the breadth of the margin granted to respondent States.

To underscore the significance of this development, this paper examines the Court’s treatment of terrorism case law prior to 9/11 as well as cases that may have a bearing on how terrorism cases are addressed before the ECtHR, drawing particular attention to the margin of appreciation granted to respondents. This scrutiny focuses on Articles of the Convention that have been the subject of court action relating to terrorism and counter terrorism measures since the 9/11 attacks. Lastly, terrorism cases that have arisen post-9/11 are analysed against the backdrop of the pre-9/11 case law to discern whether WOT rhetoric influences the ECtHR and how it impacts the utilisation of the margin in such cases.

² Daniel Moeckli, ‘Saadi v Italy: The Rules of the Game Have Not Changed’ (2008) *Human Rights Law Review* 8, p. 534.

³ Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario and the Man on the Clapham Omnibus’ in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Oxford: Hart Publishing, 2007), p. 106.

⁴ For more on this doctrine see Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff Publishers, 1996).

⁵ Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Security: 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, p. 625.

2. Terrorism and the Margin of Appreciation before the Strasbourg Organs

The ECtHR recognises that States encounter particular difficulties when combating terrorism, finding that ‘the investigation of terrorist offences undoubtedly presents [...] authorities with special problems’.⁶ While this seems to indicate that domestic authorities are likely to be granted a broad margin in terrorism cases, evoking the threat of terrorist activity and the importance of counter terrorism measures does not result in an automatically wide margin being granted to respondent States. The breadth of the margin depends upon a multitude of different factors, such as the use of the doctrine in the particular article at issue.

The manner in which the doctrine has been treated by the ECtHR in terrorism cases prior to 9/11, and cases that may have a bearing on judgments concerning terrorist activity, are outlined in this section to illustrate this point, beginning with the derogation clause in Article 15. Furthermore, how the Court views the fight against terrorism and the influence, if any, it can have in a particular case is considered. This provides an overview of the position the ECtHR takes on combating terrorism in the Convention system and the level of deference it affords to States, which is used to assess the Court’s position in relation to post 9/11 case law.

2.1. *A double margin of appreciation*

The margin of appreciation has been utilised consistently when dealing with highly sensitive situations. Under the ECHR, there is no greater area of sensitivity than states of emergency and the application of the derogation clause under Article 15. The objective of any derogation from rights enshrined in the ECHR is to bring the crisis to an end and restore the full protection of the Convention.⁷ According to Article 15:

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§1 and 7 shall be made under this provision.⁸

The margin was first introduced into the Convention by way of an Article 15 derogation judgment.⁹ It was reasoned that due to the politically sensitive nature of the decision to derogate from the Convention, leeway should be accorded to respondent States.¹⁰

⁶ *Öcalan v. Turkey* [GC] application no. 46221/99 (2005) ECtHR, para. 104.

⁷ Jean Allain, ‘Derogation from the European Convention on Human Rights in the Light of “Other Obligations under International Law”’ (2005) *European Human Rights Law Review* 5, p. 480.

⁸ European Convention on Human Rights and Fundamental Freedoms (ECHR) ETS no. 005, Rome, 4.XI.1950, Article 15. Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. Last accessed 30th November 2010.

⁹ *Greece v. the United Kingdom*, application no. 176/56 (1958) European Commission of Human Rights (the *Cyprus Case*) para. 136.

¹⁰ Michael O’Boyle, ‘The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?’ (1998) *Human Rights Law Journal* 19, p. 23.

A certain margin has been granted to States in their assessment of whether an emergency exists and whether the measures taken are strictly necessary. As domestic authorities are closer to the emergency, the ECtHR feels that they are better placed, in principle, to make an apposite assessment.¹¹ The jurisprudence of Article 15 has to a large extent developed from applications concerning derogations in response to emergencies arising from terrorist activity.¹² This subsection examines how the margin has been applied to the ‘emergency threatening the life of the nation’ criterion of Article 15 and the requirement that measures be ‘strictly required by the exigencies of the situation’.¹³

In the Greek case, the Commission outlined the criteria for an emergency to be considered a threat to the life of the nation. It reasoned that an emergency had the following characteristics:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.¹⁴

While at first, a certain margin was only granted to States in relation to measures strictly required by the exigencies of the situation,¹⁵ it was soon extended to include analysis of the emergency.¹⁶ Only a *certain* margin was to be afforded to governments, which appears to imply that its scope was, at least theoretically, variable.¹⁷

Some authors believe the conditions constituting an emergency to be capable of objective assessment by the Strasbourg organs and therefore capable of strict review.¹⁸ The ordinary meaning of the emergency criteria seems clear and unambiguous, which should allow the Court to undertake its own investigation of the facts. This would consequently curtail deference afforded to a respondent State’s own assessment of the ‘emergency’ because the ECtHR would make its own appraisal of the facts rather than simply rely on the arguments before it.

¹¹ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) p. 247.

¹² See *Brannigan and McBride v. the United Kingdom*, application nos. 14553/89; 14554/89 (1993) ECtHR; *Aksoy v. Turkey*, application no. 21987/93 (1996) ECtHR.

¹³ ECHR, Article 15. See fn. 8.

¹⁴ The *Greek Case*, application nos. 3321/67; 3322/67; 3323/67; 3344/67 (1969) European Commission of Human Rights, para. 113.

¹⁵ The *Cyprus Case* (see fn. 9). The Commission reasoned that the government should be afforded, ‘a certain measure of discretion in assessing the “extent strictly required by the exigencies of the situation”’ (para. 143).

¹⁶ The Commission in *Lawless v. Ireland* felt that ‘having regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion- a certain margin of appreciation- must be left to the government’ (application no. 332/57 (1959) European Commission of Human Rights, para. 90). Meanwhile the Court in *Lawless v. Ireland (no.3)* stated that the Irish government had ‘reasonably deduced’ that there was a threat to the life of the nation (application no. 332/57 (1961) ECtHR, para. 28). This is considered to import margin analysis into the judgement. (Michael O’Boyle, ‘The Margin of Appreciation’. See fn. 10.)

¹⁷ See for example *Lawless v. Ireland* (see fn. 16); *Greek Case* (see fn. 14).

¹⁸ Timothy H. Jones, ‘The Devaluation of Human Rights under the European Convention’ (1995) *Public Law* 430.

In reality, however, the Strasbourg organs have been extremely reluctant to rule against a respondent State on the issue of whether the conditions present in the State party represent a threat to the nation.¹⁹ The Convention bodies have never found against the respondent State on the existence of an emergency where the government feels that terrorism risks the life of the nation.²⁰

The fact that measures must be ‘strictly required by the exigencies of the situation’ would seem to necessitate the implementation of a more rigorous test of proportionality²¹ and consequently a rather limited application of the margin.²² This discretion should be more limited than that granted under Articles 8-11, which require measures to be ‘necessary in a democratic society.’ Theoretically, this should offset the margin afforded to States when assessing the existence of an emergency.²³

*Ireland v. the United Kingdom*²⁴ however, sets out the approach the Court has consistently taken to date, which is extremely deferential to respondents when it considers the above two criteria:²⁵

*the national authorities are in principle in a better position than the international judge to decide both on the presence of... an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1... leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which [...] is responsible for ensuring the observance of the States’ engagements [...] is empowered to rule on whether the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis.*²⁶ [emphasis added]

Critics of the Court’s approach point to the fact that the Strasbourg organs have rarely undertaken any form of independent fact finding as to whether an emergency exists.²⁷ For example, in *Brannigan and McBride v. the United Kingdom*²⁸ in which the UK derogated from Article 5 as a result of enacting measures to combat IRA activity, the ECtHR refrained from taking any form of independent review. Instead, it based its opinion on the materials before it and on the facts in the *Lawless v. Ireland (no. 3)*²⁹ and the *Ireland v. the United*

¹⁹ Fionnuala Ní Aoláin, ‘The Emergence of Diversity: Differences in Human Rights Jurisprudence’ (1995-1996) *Fordham International Law Journal* 19, p. 101.

²⁰ Up to 2009, the only case the Strasbourg organs have found against the state is the *Greek Case* (see fn. 14).

²¹ Joan 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 Commission of the United Nations’ (1981) *Harvard International Law Journal* 22, p. 1.

²² Ronald St. J. MacDonald, ‘Derogations under Article 15 of the European Convention on Human Rights’ (1998) *Columbia Journal of Transnational Law* 36, p. 225.

²³ Colin Warbrick, ‘The Principles of the European Convention on Human Rights and the Response of States to Terrorism’ (2002) *European Human Rights Law Review* 3, p. 287.

²⁴ *Ireland v. the United Kingdom*, application no. 5310/71 (1978) ECtHR.

²⁵ *Brannigan and McBride* (see fn. 12); *Aksoy* (see fn. 12).

²⁶ *Ireland v. the United Kingdom*, para. 207. See fn. 24.

²⁷ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002) p. 181.

²⁸ *Brannigan and McBride*, para. 43. See fn. 12.

²⁹ *Lawless v. Ireland (no.3)*. See fn. 16.

*Kingdom*³⁰ decisions, cases that had been decided 32 and 15 years prior to the *Brannigan and McBride*³¹ decision. The inadequacy of the ECtHR’s analysis under this heading is compounded by the fact that it grants an equally broad margin when assessing measures taken by States in response to an emergency.

Gross and Ní Aoláin highlight the Court’s reluctance to find a violation of Article 14 in *Ireland v. the United Kingdom* despite its reasoning to the contrary.³² In that case, the UK had introduced extrajudicial measures of detention to be used specifically against IRA members. The ECtHR said that although reasons for the distinction between republicans and loyalists became less valid over time, it understood the State’s hesitation on how to respond. Based on the information before it and its limited powers of review, the Court could not affirm that the UK had violated Article 14.³³ This decision exemplifies the shear breadth of the margin in Article 15 cases. Even where measures appear to discriminate between different groups, the Court is unlikely to find a violation. The ECtHR has stated in *Brannigan and McBride* that, when assessing the extent of the margin, it would have regard to relevant factors like ‘the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation’.³⁴ These factors seem irrelevant because the proffered margin is so broad as to provide States with extremely flexible discretion to act as they deem appropriate.

The ECtHR has also declined to make a distinction between its approach towards transitory and quasi-permanent emergencies. The *Brannigan and McBride* decision illustrates the ECtHR’s refusal to make any such distinction when undertaking its review.³⁵ The Court has granted a uniformly wide margin though quasi-permanent emergencies do not fit the mould of short-lived crises which Article 15 is supposed to address.³⁶ Gross points out that the scope of the margin granted to a State should be inversely proportionate to the duration of the emergency.³⁷ Where an emergency reaches a situation of quasi-permanency, a stricter level of review should be undertaken by the ECtHR. According to MacDonald, more rigorous scrutiny is warranted in such emergencies in order to prevent the weakening of Convention norms.³⁸

The above analysis reveals that under Article 15 the Court grants States a double margin, both when discerning the existence of an emergency threatening the life of the nation and when assessing the necessity of the measures taken to avert the crisis. Although this approach has largely developed on the back of cases concerning terrorist activity, such Article 15 judgments are not given special treatment merely because terrorism is involved. It is the *general* attitude the ECtHR takes in *all* applications in which Article 15 comes into play; it is not reserved for use only when the emergency happens to arise from terrorism. Article 15

³⁰ *Ireland v. the United Kingdom*. See fn. 24.

³¹ *Brannigan and McBride*. See fn. 12.

³² Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Security’ p. 625. See fn. 5.

³³ *Ireland v. the United Kingdom*, para. 229. See fn. 24.

³⁴ *Brannigan and McBride*, para.43. See fn. 12.

³⁵ Oren Gross, “Once More unto the Breach”: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, (1998) *Yale Journal of International Law* 23, p. 437.

³⁶ Fionnuala Ní Aoláin, ‘The Emergence of Diversity’. See fn. 19.

³⁷ Oren Gross, “Once More unto the Breach”. See fn. 35.

³⁸ Ronald St. J. MacDonald, ‘Derogations under Article 15’. See fn. 22.

applications are typically sensitive in nature, which requires a cautious approach from the ECtHR³⁹ resulting in a broad margin being granted to respondent States.

Gross and Ní Aoláin believe that in order to ensure effective human rights protection, the greatest level of scrutiny should be undertaken at the point at which States are no longer required to adhere to the normal set of Convention obligations. They contend that the approach adopted by the ECtHR puts ‘the pyramid on its head and [goes] the wrong way about ensuring an effective protection for human rights’.⁴⁰ In a dissenting opinion in *Brannigan and McBride*, Judge Makarczyk questioned the position taken by the majority when applying the doctrine. He focuses on how the extremely deferential approach of the ECtHR in Article 15 cases might affect reassurances to the international community of the Court’s ability to ensure the restoration of the Convention’s full applicability in States that have derogated from the ECHR. Instead the Court appears to perpetuate the status quo in such circumstances.⁴¹

2.2. *Limitation clauses and factors Influencing the margin’s application*

The connection between the doctrine and articles containing accommodation clauses has been a facet of the Court’s jurisprudence since its early years;⁴² of these, Articles 8 (the right to privacy) and Article 10 (freedom of expression)⁴³ have been the subject of legal action relating to terrorism since 9/11.⁴⁴ The accommodation clause contained within these articles requires a restriction to be in accordance with law, pursue a legitimate aim and be necessary in a democratic society. For limitations to pass muster before the Court, States must show that the measures were reasonable, sufficient and proportionate to the aim pursued.⁴⁵

When considering restrictions, the need to find ‘some compromise between the requirements for defending democratic society and individual rights’⁴⁶ is inherent in the Convention system.⁴⁷ In turn, the Court attempts to establish a balance between the countervailing interests.⁴⁸ The margin of appreciation relies on the government’s judgement as to what is required in the general interest,⁴⁹ yet this deference is subject to limitations. ECtHR

³⁹ Michael O’Boyle, ‘The Margin of Appreciation’. See fn. 10.

⁴⁰ Oren Gross and Fionnuala Ní Aoláin, ‘From Discretion to Security’ p. 636. See fn. 5.

⁴¹ *Brannigan and McBride*, ‘Dissenting Opinion of Judge Makarczyk’ paras. 1-2. See fn. 12.

⁴² *Iversen v. Norway* (December), application no. 1468/62 (1963) European Commission of Human Rights.

⁴³ Article 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence. Article 10(1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. ECHR, see fn. 8.

⁴⁴ For instance secret surveillance (*Klass v. Germany*, application no. 5029/71 (1978) ECtHR); censorship of materials allegedly supporting terrorism (*Zana v. Turkey*, application no. 18954/91 (1997) ECtHR).

⁴⁵ *United Communist Party of Turkey and Others v. Turkey* [GC], application no. 19392/92,(1998) ECtHR, para. 47.

⁴⁶ Alastair Mowbray, ‘A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights’ (2010) *Human Rights Law Review* 10, p. 289.

⁴⁷ *Öcalan v. Turkey*, para. 88. See fn. 6.

⁴⁸ Eva Brems, ‘The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights’ (1996) *Heidelberg Journal of International Law* 56, p. 240.

⁴⁹ Clare Ovey, ‘The Margin of Appreciation and Article 8 of the Convention’ (1998) *Human Rights Law Journal* 19, p. 10.

supervision still operates; the doctrine does not preclude supranational review but rather sets parameters on the scope of its operation.⁵⁰

The Court will often restrict itself to simply considering whether the balance struck by the State violates the Convention.⁵¹ Where terrorist activity is central to this balance, the ECtHR ‘will [...] take into account the [...] nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention.’⁵² Gerards and Senden argue that because of the Court’s subsidiary nature, States must primarily decide where this fair balance lies, leaving them a choice on the ways and means to meet their obligations under the ECHR.⁵³ The breadth of the margin granted to respondent States in this regard rests on how the Court strikes a balance between the competing factors in each case.⁵⁴ These include the presence or absence of a common approach or an emerging consensus based on present day circumstances, the legitimate aim pursued by the State, the restrictive measures taken, the right at issue, and the applicant’s activities that are curtailed.⁵⁵

The breadth of the margin granted to the respondent State will vary in respect of the specific aim pursued.⁵⁶ The Court has continuously reaffirmed that the fight against terrorism constitutes a legitimate national security aim⁵⁷ and that anti-terrorism measures are also justified to prevent disorder or crime.⁵⁸ The fight against terrorism is treated simply as another factor that must be weighed to discern the breadth of the margin. While it may garner more weight than other issues, cases involving terrorism must still undergo this process where Articles containing accommodation clauses are concerned. What follows is an examination of how the Court offsets the aim of combating terrorism with the other countervailing interests it considers when determining the breadth of the margin to be granted to a respondent State.

Yourow believes national security and crime prevention interests to be closest to ‘the authority priority and furthest from the rights-protection priority’.⁵⁹ They require a wide margin because they are highly sensitive objectives concerning the protection of large numbers of people.⁶⁰ *Aria-Takahashi* considers these aims to be prone to a wide margin

⁵⁰ Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) *European Journal of International Law* 16, p. 907.

⁵¹ *Chassagnou and Others v. France*, application nos. 25088/94; 28331/95; 28443/95 (1999) ECtHR, para. 61.

⁵² *Fox, Campbell and Hartley v. the United Kingdom*, application nos. 12244/86; 12245/86; 12383/86 (1990) ECtHR, para. 28.

⁵³ Janneke Gerards and Hanneke Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’ (2009) *International Journal of Constitutional Law* 7, p. 619.

⁵⁴ Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) *Modern Law Review* 62, p. 671.

⁵⁵ Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 2nd Edition, p. 623. There are other factors, such as positive obligations, that are also considered by the court, however they shall not be dealt with at present as the above mentioned factors in the article text are most frequently considered in terrorism cases.

⁵⁶ Eva Brems, ‘The Margin of Appreciation Doctrine’. See fn. 48.

⁵⁷ *Zana v. Turkey*, para. 50. See fn. 44.

⁵⁸ *Incal v. Turkey*, application no. 22678/93 (1998) ECtHR, para. 42.

⁵⁹ Howard C. Yourow, *The Margin of Appreciation Doctrine*, p. 52. See fn. 4.

⁶⁰ Clare Ovey and Robin White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press, 2006) 4th Edition, p. 237.

because they are closely related to State sovereignty.⁶¹ In addressing conditions on the protection of national security or the prevention of crime or disorder grounds, the ECtHR makes it abundantly clear that ‘it is not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.’⁶² The Court has also said that the margin available to the State ‘in assessing the pressing social need [...] and in particular in choosing the means for achieving the legitimate aim of protecting national security, [is] a wide one.’⁶³

Although the margin is accompanied by European supervision, Warbrick asserts that the ‘background of terrorism’ can lead to a broad margin and lax review when the ECtHR evaluates a State’s justification for introducing measures beyond those required for ordinary crime, particularly where the Court feels that sufficient safeguards are in place.⁶⁴ However, the manner in which such measures infringe a right will necessarily influence the breadth of the margin granted by the Court.⁶⁵

In *Leander v. Sweden*, the ECtHR recognised that while a wide margin is granted in cases of national security, it must be recalled that a system of secret surveillance risks undermining or destroying the very democratic values it attempts to defend.⁶⁶ A review of safeguards against abuse is therefore required and will necessarily reduce the margin available to States, as national bodies must meet what the Court considers to be a minimum level of protection.⁶⁷ At present, a wide margin is granted to States with regard to the means providing such safeguards. In *Klass v. Germany*, for example, the Court found the limits and safeguards to be sufficient despite the absence of any judicial control.⁶⁸ Likewise, in *Leander v. Sweden* the collection and storage of private information on individuals to be used in citizenship applications and public prosecutions was deemed proportionate chiefly due to the supervision effected by parliamentary bodies and the Chancellor of Justice.⁶⁹

The Court also notes the risks associated with the prior restraint of publications and will only grant a very limited margin, even in cases where there is a ‘background of terrorism’. In *Alinak v. Turkey*, for instance, the Court reasoned that the,

dangers inherent in prior restraint are such that they call for the most careful scrutiny by the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.⁷⁰

The presence or absence of a common approach in the domestic law of the Contracting Parties is another factor that can either broaden the margin available to the respondent State

⁶¹ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, p. 209. See fn. 27.

⁶² *Klass v. Germany*, para. 49. See fn. 44.

⁶³ *Leander v. Sweden*, application no. 9248/81 (1987) ECtHR, para. 59.

⁶⁴ Colin Warbrick, ‘The Principles of the European Convention on Human Rights’ p. 287. See fn. 23.

⁶⁵ Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* p. 632. See fn. 55.

⁶⁶ *Leander v. Sweden*, para. 60. See fn. 63.

⁶⁷ *S. and Marper v. the United Kingdom*, application nos. 30562/04; 30566/04 (2008) ECtHR, para. 99.

⁶⁸ *Klass v. Germany*, para. 56. See fn. 44.

⁶⁹ *Leander v. Sweden*, para. 62. See fn. 63.

⁷⁰ Application no. 40287/98,(2005) ECtHR, para. 37.

or indeed narrow its scope.⁷¹ The evolutive interpretation of the Convention taken in conjunction with the comparative analysis can identify emerging commonalities arising from present day conditions that can also influence the margin’s scope.⁷² For example, measures justified on the grounds of the protection of morals usually garner a wide margin because no uniform European conception of morals is discernable; they are considered to ‘vary from time to time and from place to place’.⁷³ As with the issue of derogating from certain Convention rights discussed in the previous section, domestic authorities are similarly believed to be in a better position than the international judge to ascertain the content and necessity of restrictive measures designed to meet the general interest in a particular case involving Articles containing an accommodation clause.⁷⁴

Warbrick believes measures taken to prevent crime or combat terrorism are not so subjective, and that they are capable of a more objective comparative assessment.⁷⁵ In *S. and Marper v. the United Kingdom*, the Court undertook such an analysis in respect of DNA collection. The ECtHR reasoned that the existence of a common approach among Member States limiting the use and storage of such data considerably narrowed ‘the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere.’⁷⁶ Warbrick asserts that the widespread enactment of special measures to counter terrorism makes it increasingly easy for States to show that the legislation does not cross boundaries set by the margin.⁷⁷

There are instances in which the Court has deemed anti-terrorism and crime prevention measures disproportionate based largely on the importance of the right infringed. Invoking the aim of combating terrorism does not broaden the margin to the point where States can operate as they see fit, nor does it create an exception to the rule where the restriction at issue would normally violate the Convention. In cases related to terrorism, the importance of the right at issue in a democratic society is a crucial aspect when configuring the scope of the margin.⁷⁸ Since the Court avows that democracy is the only political model contemplated by the Convention,⁷⁹ any right designated as important to its functionality will garner a more intense review. In *Sunday Times v. The United Kingdom*, the ECtHR recognised the importance of the freedom of expression in relation to democracy, particularly with regard to the role of the press.⁸⁰

In the case of media censorship arising from a desire to suppress terrorist activity, the Court has emphasised that such restrictions must be subject to a particularly strict form of review. A

⁷¹ Laurence R. Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’ (1993) *Cornell International Law Journal* 26, p. 133.

⁷² Dragoljub Popovic, ‘Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights’ (2009) *Creighton Law Review* 42, p. 361.

⁷³ *Handyside v. the United Kingdom*, application no. 5493/72 (1976) ECtHR, para. 48.

⁷⁴ *Müller and Others v. Switzerland*, application no. 10737/84 (1988) ECtHR, para. 35.

⁷⁵ Colin Warbrick, ‘The European Convention on Human Rights and the Prevention of Terrorism’ (1983) *International and Comparative Law Quarterly* 32, p. 82.

⁷⁶ *S. and Marper v. the United Kingdom*, para. 112. See fn. 67.

⁷⁷ Colin Warbrick, ‘The European Convention on Human Rights’. See fn. 75.

⁷⁸ Howard C. Yourow, ‘The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence’ (1987-1988) *Connecticut Journal of International Law* 3, p. 111.

⁷⁹ Steven Greer, *The European Convention on Human Rights*, p. 199. See fn. 11.

⁸⁰ Application no. 6538/74 (1979) ECtHR, para. 65.

narrow margin can only be afforded to the respondent State because, although the media must not overstep the limits prescribed for the protection of interests such as national security,

it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones [...] Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.⁸¹

There is also little scope for restriction on debate of matters of public interest or on political speech.⁸² In *Erdoğdu and İnce v. Turkey*, the Court pointed out that although States are afforded a wider margin where remarks incite violence, it must be remembered that the scope of permissible criticism against a government is much greater than in the case of a private individual or even a politician. The ECtHR reasoned that in a ‘democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion.’⁸³ Restriction of the freedom of expression has thus been found to violate the Convention in several applications taken against Turkey despite the available margin and the legitimate aim of quelling terrorist activity.⁸⁴

The more tenuous the link is between one’s activities that are alleged to have been violated and the ‘proper functioning of democracy’, the wider the margin that will be granted by the Court.⁸⁵ In cases of religious expression, for instance, a wider margin will be accorded to States, as was the case in *Wingrove v. the United Kingdom*⁸⁶ and *Otto-Preminger v. Austria*⁸⁷ where the artistic form of freedom of expression was at issue. Concomitantly, where a restriction in such circumstances has its basis in the prevention of terrorism or suppression of the promotion of terrorist acts or a particular terrorist group, a wider margin will apply, leaving States even greater discretion to act. Where such expression has a political dimension, such as poems or novels criticising government policies as in the case of *Incal v. Turkey*,⁸⁸ or actions taken by national authorities as in *Alinak v. Turkey*,⁸⁹ the ECtHR is more likely to grant a narrower margin.

A narrower margin may also be given to States where an infringement affects an intimate aspect of an applicant’s private life.⁹⁰ In *S. and Marper v. the United Kingdom* the Court felt that DNA profiles, for instance, should be granted a heightened level of protection. This is due to the particularly sensitive nature of information that can be collected from an individual’s DNA profile, such as the likely ethnic origin of the donor and that such information could seriously affect a person’s private life since it can be used in police investigations.⁹¹ Where the Court makes such a determination, it will require particularly

⁸¹ *Sürek v. Turkey (no.1)* [GC], application no. 26682/95 (1999) ECtHR, para. 59.

⁸² *Erdoğdu and İnce v. Turkey* [GC], application nos. 25067/94; 25068/94 (1999) ECtHR, para. 50.

⁸³ *Erdoğdu and İnce v. Turkey*, para. 50. See fn. 82.

⁸⁴ *Gerger v. Turkey* [GC], application no. 24919/94 (1999) ECtHR; *Incal* (see fn. 58).

⁸⁵ Paul Mahoney, ‘Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments’ (1997) *European Human Rights Law Review* 4, p. 364.

⁸⁶ Application no. 17419/90 (1996) ECtHR, para. 58.

⁸⁷ Application no. 13470/87 (1994) ECtHR, para. 50.

⁸⁸ *Incal v. Turkey*, See fn. 58.

⁸⁹ *Alinak v. Turkey*. See fn. 70.

⁹⁰ Howard C. Yourow, *The Margin of Appreciation Doctrine*, p. 103. See fn. 4.

⁹¹ *S. and Marper v. the United Kingdom*, para. 76. See fn. 67.

serious reasons to be shown for a restriction to be necessary in a democratic society, notwithstanding the breadth of the margin granted to the respondent State.⁹²

2.3. *Due process rights outside derogation cases and the margin of appreciation*

Article 5 is structurally quite different from provisions containing limitation clauses like Article 10. Article 5 (the right to liberty) contains an exhaustive list of legitimate forms of detention.⁹³ Ashworth states that neither the Convention nor the jurisprudence of the ECtHR imply that rights enshrined in Article 5 can be ‘pushed aside for public policy or other consequential reasons, on the ground that such curtailments are proportionate’.⁹⁴ This is so not only for structural reasons, but also because the right to liberty is considered an important aspect of a democratic society⁹⁵ and a prerequisite for the rule of law.⁹⁶

The ECtHR has given autonomous meaning to some terms in Article 5, such as ‘lawful detention’,⁹⁷ which reduce the interpretative ‘creativity’ of Contracting States.⁹⁸ This is because autonomous concepts preclude State discretion because the Court sets a uniform definition.⁹⁹ As a result of the above considerations, there is very little leeway granted to States; the doctrine of the margin of appreciation is not a facet of the ECtHR’s approach to Article 5. Consequently, where States feel they must restrict rights under Article 5, they will generally make use of the derogation clause because due process rights do not offer the same flexibility as personal freedom rights.¹⁰⁰

Despite this, Arai-Takahashi maintains that a certain flexibility is left to States when assessing the conditions leading to the specific arrest and detention at issue because they are better placed to make such evaluations.¹⁰¹ Brems meanwhile emphasises that the abstract nature of some of the terms in these articles necessitate a certain amount of leeway in their interpretation, including terms such as deprivation of liberty in Article 5(1)¹⁰² and ‘promptness’ under Articles 5(2) and 5(3).¹⁰³ The Court has stressed that such flexibility is limited.¹⁰⁴

⁹² *Dudgeon v. the United Kingdom*, application no. 7525/76 (1981) ECtHR, para. 52.

⁹³ ECHR. See fn. 8.

⁹⁴ Andrew Ashworth, ‘Security, Terrorism and the Value of Human Rights’ in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Oxford: Hart Publishing, 2007) p. 215.

⁹⁵ *Winterwerp v. Netherlands*, application no. 6301/73 (1979) ECtHR, para. 37.

⁹⁶ Jeroen Schokkenbroek, ‘The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-law of the European Courts of Human Rights’ (1998) *Human Rights Law Journal* 19, p. 30.

⁹⁷ *Eriksen v. Norway*, application no. 17391/90 (1997) ECtHR, para. 74.

⁹⁸ George Letsas, ‘The Truth in Autonomous Concepts: How to interpret the ECHR’ (2004) *European Journal of International Law* 15, p. 279.

⁹⁹ Dragoljub Popovic, ‘Prevailing of Judicial Activism’. See fn. 72.

¹⁰⁰ Edward Bates, et al., *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), 2nd Edition, p. 621.

¹⁰¹ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, p. 20. See fn. 27.

¹⁰² ECHR, Article 5(1): Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. See fn. 8.

¹⁰³ ECHR, Article 5(2): Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Article 5(3). Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a

The ECtHR has frequently affirmed that special features of a specific case must be considered when reviewing the measures at issue.¹⁰⁵ This is true in relation to counter terrorism measures and the interpretation of reasonable suspicion under Article 5(1)(c), particularly with regard to the amount of leeway granted to the level of suspicion required to validate an arrest.¹⁰⁶ In *Fox, Campbell and Hartley v. the United Kingdom*, the ECtHR affirmed that due to the intrinsic difficulties associated with investigating and prosecuting terrorism offences, the ‘reasonableness’ of the suspicion cannot always be judged against the same standards as those applied in cases of ordinary crime.¹⁰⁷ It has been found that the Convention should not place disproportionate difficulties on law enforcement agencies in taking effective measures to counter terrorist activity¹⁰⁸ and that there may therefore be a fine ‘line between those cases where the suspicion grounding the arrest is not sufficiently founded on objective facts and those which are’.¹⁰⁹ In order to safeguard the essence of the right, the State must furnish some facts ‘capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence’.¹¹⁰

Similar considerations also apply to the interpretation of ‘promptness’. Warbrick contends that the *Fox, Campbell and Hartley v. the United Kingdom* decision permitted the extension of what could be considered prompt under Article 5(2) because the individuals in question were suspected of terrorist activity.¹¹¹ In that case, the ECtHR found that it was not necessary to explicitly inform an individual of the reasons for arrest at the actual moment of same; they could be deduced from questioning about a specific offence.¹¹² In another case, *Brogan and Others v. the United Kingdom*, which considered an alleged violation of the right to be brought promptly before a judge after arrest, the ECtHR held that:

the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5(3), [...] keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.¹¹³

While the Court is willing to grant some flexibility in these areas under Article 5 where it considers it necessary particularly in relation to terrorism, ‘this does not mean [...] that the investigating authorities have *carte blanche* under Article 5 [...] free from effective control’

reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. See fn. 8. Eva Brems, ‘The Margin of Appreciation Doctrine’. See fn. 48.

¹⁰⁴ *Brogan and Others v. the United Kingdom*, application nos. 11209/84; 11234/84; 11266/84; 11386/85 (1988) ECtHR, para. 59.

¹⁰⁵ *Brogan and Others v. the United Kingdom*, para. 59 (see fn. 104); *Fox, Campbell and Hartley v. the United Kingdom*, para. 40 (see fn. 52).

¹⁰⁶ ECHR, Article 5(1)(c): the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. See fn. 8. Colin Warbrick, ‘The Principles of the European Convention on Human Rights’. See fn. 23.

¹⁰⁷ *Fox, Campbell and Hartley v. the United Kingdom*, para. 32. See fn. 52.

¹⁰⁸ *Murray v. the United Kingdom*, application no. 14310/88 (1994) ECtHR, para. 51.

¹⁰⁹ *O’Hara v. the United Kingdom*, application no. 37555/97 (2002) ECtHR, para. 41.

¹¹⁰ *Fox, Campbell and Hartley v. the United Kingdom*, para. 34. See fn. 52.

¹¹¹ Colin Warbrick, ‘The Principles of the European Convention on Human Rights’. See fn. 23.

¹¹² *Fox, Campbell and Hartley v. the United Kingdom*, para. 41. See fn. 52.

¹¹³ *Brogan and Others v. the United Kingdom*, para. 61. See fn. 104.

to act whenever they assert that terrorism is involved.¹¹⁴ The level of discretion cannot be so broad as to destroy the very essence of the right in question.¹¹⁵ The fight against terrorism cannot change the limited nature of flexibility available for the interpretation of ‘prompt’ or ‘reasonable suspicion’ in Article 5 cases. The Court in *Brogan and Others v. the United Kingdom* held that to permit even the shortest period of detention in that case to fall within Article 5(3), even in circumstances of combating terrorism, would seriously weaken the procedural guarantee to the detriment of the applicants.¹¹⁶ Bates et al. consider the rationale behind this decision is to stress that if such measures are required, the State must make a derogation under Article 15, rather than attempt to construe Article 5(3) beyond its limits.¹¹⁷

The decision in *Brogan and Others v. the United Kingdom* has been harshly criticised for introducing a balance into Article 5. In doing so, the ECtHR created a window for the use of the margin, where there is no such interpretive room under the Article. The Court asserted that even though there was no operative Article 15 derogation, this did not:

preclude proper account being taken of the background circumstance of the case. In the context of Article 5 [...] it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose.¹¹⁸

Campbell asserts that this reasoning produces ‘a result equivalent to the creation of an accommodation clause’.¹¹⁹ Gross argues that both the Court and the Commission permitted derogation treatment of the case notwithstanding the absence of any request for such treatment. For Gross, this allowed the State to benefit from the fruits of a derogation without incurring any of its political or legal costs.¹²⁰ This element of the *Brogan and Others v. the United Kingdom* decision seems to contradict the general rule that Article 5 can only permit an extremely limited form of flexibility.

2.4. *The margin of appreciation and the prohibition of torture*

Non-derogable rights hold a special position in the Convention. As the term suggests, they cannot be derogated from in any circumstances.¹²¹ Consequently, the Court takes the hardest line of review in cases involving Articles 2 (the right to life), 3 (the prohibition against torture), 4(1) (the prohibition of slavery and forced labour) and 7 (the rule that there should be no punishment without law).¹²² For example, much of its analyses are based on an

¹¹⁴ *Murray v. the United Kingdom*, para. 58. See fn. 108.

¹¹⁵ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* p. 28. See fn. 27.

¹¹⁶ *Brogan and Others v. the United Kingdom*, para. 62. See fn. 104.

¹¹⁷ Edward Bates, et al., *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* p. 170. See fn. 100.

¹¹⁸ *Brogan and Others v. the United Kingdom*, para. 48. See fn. 104.

¹¹⁹ Colm Campbell, ‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict’ (2005) *International and Comparative Law Quarterly* 54, p. 321.

¹²⁰ Oren Gross, ‘“Once More unto the Breach”’. See fn. 35.

¹²¹ ECHR, Article 15(2). See fn. 8.

¹²² ECHR. See fn. 8.

independent establishment and assessment of the facts.¹²³ This is particularly so in cases involving Article 3 where the ECtHR considers the facts to discern whether the treatment in question has reached the level of inhuman or degrading treatment or torture.¹²⁴ The use of autonomous definitions, such as the definition of ‘torture’, also largely precludes any discretion on the part of the respondent State because the Court sets a uniform definition to be applied throughout the Court’s jurisprudence.¹²⁵

Although, under the principle of subsidiarity, it is for the domestic authorities to make the primary determination; the final assessment falls to the ECtHR. Domestic decisions are ‘entirely reviewable’ by the Court and are not afforded any form of ‘attenuated [...] ‘immunity’ conferred by the margin of appreciation’.¹²⁶ This holds true also for cases involving terrorism, as they are not granted any special consideration when an alleged violation of non-derogable rights is at issue. The Court does not refrain from conducting a rigorous analysis when reviewing the treatment of applicants under Article 3 that are suspected of terrorist activity or found guilty of such conduct. Such instances of strict review include, for example, *Öcalan v. Turkey*¹²⁷ and *Aksoy v. Turkey*.¹²⁸ The Court bases its approach to Article 3 not only on its structurally absolute character¹²⁹ but also on the fact that it ‘enshrines one of the fundamental values of the democratic societies making up the Council of Europe’.¹³⁰

The ECtHR has continuously reaffirmed that ‘[e]ven in the most difficult circumstances, such as the fight against terrorism [...] the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment’.¹³¹ Despite this, there have been attempts by States to alter the Court’s approach to Article 3 by introducing a balancing exercise in order to create an exception to Convention law where terrorist activity is involved, specifically with regard to the *non-refoulement* aspect of the Article.¹³²

Although it is not *per se* contrary to Article 3 for a State to extradite an individual for a political offence or to deport aliens, there are exceptional circumstances where such acts will violate Article 3.¹³³ The *Soering v. the United Kingdom* decision is the basis in ECHR case law for the principle that it would be a breach of Article 3 for a High Contracting Party to extradite an individual ‘where substantial grounds have been shown for believing that the individual concerned, if extradited, faces a real risk of being subjected to torture or to

¹²³ Johan Callewaert, ‘Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?’ (1998) *Human Rights Law Journal* 19, p. 6.

¹²⁴ See for example *Tyrer v. the United Kingdom*, application no. 5856/72, (1978) ECtHR; *Soering v. the United Kingdom*, application no. 14038/88 (1989) ECtHR.

¹²⁵ Dragoljub Popovic, ‘Prevailing of Judicial Activism’. See fn. 72.

¹²⁶ Johan Callewaert, ‘Is There a Margin of Appreciation’ p. 8. See fn. 123.

¹²⁷ *Öcalan v. Turkey*. See fn. 6.

¹²⁸ *Aksoy v. Turkey*. See fn. 12.

¹²⁹ Thomas Spijkerboer, ‘Subsidiarity and ‘Arguability’: The European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’ (2009) *International Journal of Refugee Law* 21, p. 48.

¹³⁰ *Vilvarajah and Others v. the United Kingdom*, application nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (1991) ECtHR, para. 108.

¹³¹ *Labita v. Italy*, application no. 26772/95 (2000) ECtHR, para. 119.

¹³² *Chahal v. the United Kingdom*, application no. 22414/93 (1996) ECtHR; *Saadi v. Italy*, application no. 37201/06 (2008) ECtHR.

¹³³ Edward Bates, et al., *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, pp. 79-80. See fn. 100.

inhuman or degrading treatment or punishment in the requesting country’.¹³⁴ This principle was then extended to deportation cases in *Cruz Varaz v. Sweden*.¹³⁵

The *Chahal v. the United Kingdom*¹³⁶ decision is significant as it directly concerns deportation as a result of the security risk the applicant, a suspected terrorist, posed to the respondent State. Despite the absolute nature of the prohibition against torture, the State contended that in such cases ‘various factors should be taken into account, including the danger posed by the person [...] to the security of the host nation’,¹³⁷ thus introducing a balance between the individual’s right against torture and the risk that person poses to society as a whole. This balance would naturally be struck in the first instance by domestic authorities on the grounds of the subsidiary role of the Convention judicial organs. A certain margin would presumably fall to the State if such a balancing exercise were permitted. The State would be in a much better position to evaluate the public interest in such a sensitive area as national security as has been found in the case of Article 15 applications and decisions involving Articles containing limitation clauses.

Reinforcing its previous decisions on the absolute nature of the Article 3 prohibition, the Court affirmed that the interests of the community cannot serve as limiting factors on the protection afforded by the Article, even where an individual poses a risk to national security.¹³⁸ It found that in such circumstances, ‘the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration’.¹³⁹ It further held that there was no room for ‘balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State’s responsibility under Article 3 [...] is engaged’.¹⁴⁰ In reaffirming that community interests do not factor into the application of Article 3 with regard to the level of protection it affords to an individual, the Court effectively removed the possibility of considering any effect allegations of the applicant’s suspected terrorist activities would have on the deportation order, which consequently precluded any introduction of the doctrine to the decision process.

2.5. Does terrorism represent an exception to the rule?

Based on the preceding analysis, it is clear that the Court accords the ‘fight against terrorism’ a special place within the ECtHR’s decision making process. It is generally willing to grant States a wide margin to combat terrorism for the myriad reasons identified above and is prepared to lower certain standards required by the Convention, as can be seen in its treatment of the ‘reasonable suspicion’ criterion of Article 5(1)(c). This does not mean that it considers pre 9/11 terrorism to be exceptional to its jurisdictional framework or beyond the rule of law.

¹³⁴ *Soering v. the United Kingdom*, para. 91. See fn. 124.

¹³⁵ Application no. 15576/89 (1991) ECtHR.

¹³⁶ The case was subsequently followed in *Al-Nashif v. Bulgaria* (application no, 50963/99 (2002) ECtHR) which also involved deportation for national security reasons.

¹³⁷ *Chahal v. the United Kingdom*, para. 76. See fn. 132.

¹³⁸ Hemme Battjes, ‘In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed’ (2009) *Leiden Journal of International Law* 22, p. 583.

¹³⁹ *Chahal v. the United Kingdom*, para. 80. See fn. 132.

¹⁴⁰ *Chahal v. the United Kingdom*, para. 81. See fn. 132.

The fact that terrorism is a circumstantial factor in a case or that the aim of a particular measure is to prevent terrorist activity cannot preclude the application of European supervision. If this were to be permitted, the ECtHR would be in breach of its own responsibilities under Article 19 to ‘ensure the observance of the engagements undertaken by the High Contracting Parties’.¹⁴¹ The fact that there are so many judgments concerning terrorism should be evidence enough that the Court does not consider such cases exceptional to its jurisdiction.

The special position provided by the ECtHR is not unique to terrorism cases. The Court has reasoned, for example, that countering organised crime¹⁴² and espionage¹⁴³ hold analogous positions within the Convention. The attitude taken by the ECtHR towards terrorism does not mean that High Contracting Parties can act in *any* manner they deem most appropriate to defeat the threat.¹⁴⁴ Rather, through the margin, the Court grants them greater flexibility to operate without violating the ECHR and relaxes the level of scrutiny it will undertake.

Similarly, the ECtHR has not gone so far as to develop approaches tailored specifically for judgments that concern terrorism. It does not consider such cases to go beyond the capabilities of the framework it applies to other judgments involving similar rights. This is most evident in the jurisprudence of Articles 8-11 where, instead of creating distinct processes for combating terrorism cases, the Court has treated it as any other community interest that comes under the legitimate aim of national security or the prevention of disorder or crime that must be balanced against conflicting interests.

The ECtHR is unwilling to depart from established interpretations of Convention rights and will not construe an article beyond its limits to accommodate the fight against terrorism. This can be seen in the Court’s treatment of ‘promptness’ under Article 5. With the possible exception of the *Brogan and Others v. the United Kingdom* decision discussed above, which has been criticised for introducing the margin into Article 5, the ECtHR has also rejected respondent arguments vying for the use of the margin in areas of Convention law where the right in question does not permit such use. This is particularly apparent in the *Chahal v. the United Kingdom* decision considered above.

The Court refuses to allow States to combat terrorism without European supervision because it considers the Convention system to be robust and adaptable enough to handle any application that alleges the violation of a right under its jurisdiction, irrespective of the circumstances from which it arises. It believes that States can effectively counter terrorist threats without violating the Convention and where States consider it impossible to do so, they must avail of the derogation clause under Article 15.

3. ‘War on Terror’ Rhetoric and the Shifting Human Rights Paradigm

In order to fully analyse the arguments and concepts that have been raised in the ECtHR since 9/11 pertaining to interferences with applicants’ rights and terrorism, we must examine State

¹⁴¹ ECHR, Article 19. See fn. 8.

¹⁴² *Kennedy v. the United Kingdom*, application no. 26839/05 (2010) ECtHR, para. 190.

¹⁴³ *Klass v. Germany*, para. 48. See fn. 44.

¹⁴⁴ Jan Sikuta, ‘Threats of Terrorism and the European Court of Human Rights’ (2008) *European Journal of Migration and Law* 10, p. 1.

responses to the events of 9/11. WOT discourse must be explored in order to understand what has changed in the political landscape. Is international terrorism since 9/11 exceptional and beyond the capabilities of legal regimes operating prior to this date?

Before 9/11, the rights based model of democracy held sway in most democratic countries where State action had to ‘conform to standards of legality and procedural propriety’ as well as be necessary, suitable and proportionate to the aim pursued.¹⁴⁵ Since the 9/11 attacks, there has been a noticeable shift in the manner in which States view human rights and how they formulate the balance between rights protection and State action to combat terrorist threats.¹⁴⁶

WOT rhetoric originated in the United States where former President George W. Bush considered the belligerent attacks of 9/11 to be an ‘act of war’ and issued a ‘call to arms’ to all other ‘free nations’ of the world.¹⁴⁷ The rhetoric became a steadfast means of describing the struggle against international terrorism and gave States the authorisation to enact measures that would have been considered too draconian before 9/11.¹⁴⁸ Through WOT rhetoric lens, the religious and cultural rationales behind attacks,¹⁴⁹ and the international character of terrorist organisations,¹⁵⁰ constituted a new form of terrorism the world had never seen before¹⁵¹

As the threat itself was considered new, the response from States likewise had to be different. It had to be stronger and more assertive than previous reactions to terrorist acts, because it was believed that the danger was that much greater.¹⁵² This new approach has largely materialised in the form of an increased use by law enforcement and intelligence agencies of pre-emptive measures resulting in a move towards a pre-crime society where emphasis is placed on forestalling risk. The rationale behind this attitude is based on the sheer scale of devastation terrorism can cause.¹⁵³ Bush for instance, advocating for such an approach, stated that ‘[i]f we wait for threats to fully materialise, we will have waited too long’.¹⁵⁴

¹⁴⁵ Dora Kostakopoulou, ‘How to do Things with Security Post 9/11’ (2008) *Oxford Journal of Legal Studies* 28, p. 317.

¹⁴⁶ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*. Available at <http://ejp.icj.org/IMG/EJP-Report.pdf>. Last accessed 21st July 2010.

¹⁴⁷ George W. Bush, ‘Address to the Nation’, Washington, 20th September 2001. Available at <http://www.presidentialrhetoric.com/speeches/09.20.01.html>. Last accessed 20th July 2010.

¹⁴⁸ Such as the control order regime in the UK (Prevention of Terrorism Act 2005 (No. 2/2005)); the Patriot Act (115 Stat. 272 (2001)) is another example which reduced restrictions on law enforcement agencies using methods of covert surveillance.

¹⁴⁹ Tony Blair, ‘Laeken- Prime Minister’s Statement to the Parliament’, Laeken, 17th December 2001. Available at <http://webarchive.nationalarchives.gov.uk/20040117033010/number10.gov.uk/page1676>. Last accessed 20th July 2010.

¹⁵⁰ International Council on Human Rights Policy, *Human Rights after September 11* (Versoix: International Council on Human Rights Policy, 2002) p. 13.

¹⁵¹ Bush referred to it as ‘dangers of a new era’. George W. Bush, ‘Homeland Security Act’, Washington, 25th November 2002. Available at <http://www.presidentialrhetoric.com/speeches/11.25.02.html>. Last accessed 20th July 2010.

¹⁵² Nigel Morris, ‘Reid Says Terror Threat Is Worse Than Cold War’, *The Independent*, 1st November 2006.

¹⁵³ Jude McCulloch and Sharon Pickering, ‘Pre-crime and Counter-terrorism: Imagining Future Crime in the “War on Terror”’ (2009) *British Journal of Criminology* 49.

¹⁵⁴ George W. Bush, ‘Commencement Address at the United States Military Academy at West Point’, New York, 1st June 2002. Available at <http://www.presidentialrhetoric.com/speeches/06.01.02.html>. Last accessed 20th July 2010.

By referring to the threat as an exception to the norm requiring a new approach, political actors call into question the operation of the rule of law in such circumstances.¹⁵⁵ Johns contends that the exception permits executive decision making powers to operate without being subsumed by existing norms.¹⁵⁶ National authorities reason that such action is required in order to better enforce the law to eventually reassert the ‘normal’ regime that it has displaced.¹⁵⁷ Johns further argues that in such exceptional spaces, norms are held in suspension or open to transformation where domestic authorities can reframe certain paradigms or even create new categories in order to effectively meet the threat.¹⁵⁸

High Contracting Parties might argue that the ECHR and the margin of appreciation are incapable of dealing with the new terrorist threat. Alternatively, they could maintain that States should be shown more deference when it comes to combating terrorism, thus necessitating a much broader margin or introduction of the doctrine into areas of Convention law where it has not been used before.

The fear is that exceptional frameworks, resulting from the continued struggle against international terror, have now *become* the norm, permanently displacing prior human rights based regimes.¹⁵⁹ It seems that counter terrorist measures introduced since 9/11 are not simply geared towards meeting the immediate crisis, but are in fact intended to function for the long-term.¹⁶⁰ Former American Vice President Dick Cheney has argued that the emergency is the ‘new normalcy’,¹⁶¹ while Hazel Blears, a former British Home Office Minister, said that Britain had to become accustomed to permanent counter terrorist laws.¹⁶²

The rhetoric of exceptionalism and the ‘war on terror’ place human rights in a precarious position. Liberal governments now view human rights as luxuries¹⁶³ that seriously undermine their ability to defend against terrorist activity.¹⁶⁴ This has resulted in calls for the balance between security and human rights to be reconsidered.¹⁶⁵ Loader contends that a ‘new political common sense informs us that to continue to insist on the primacy of human rights is to take a large and unjustifiable risk with people’s quality of life, or even life itself’.¹⁶⁶

¹⁵⁵ Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario’ p. 106. See fn. 3.

¹⁵⁶ Fleur Johns, ‘Guantanamo Bay and the Annihilation of the Exception’ (2005) *European Journal of International Law* 16, p. 613.

¹⁵⁷ Jason Ralph, ‘The Laws of War and the State of the American Exception’ (2009) *Review of International Studies* 35, p. 631.

¹⁵⁸ Fleur Johns, ‘Guantanamo Bay and the Annihilation of the Exception’. See fn. 156.

¹⁵⁹ Benjamin Goold and Liora Lazarus, ‘Introduction’, p. 3. See fn. 1.

¹⁶⁰ Andrew Blick, Tufyal Choudhury and Stuart Weir, ‘The Rules of the Game: Terrorism, Community and Human Rights’. Available at <http://www.jrrt.org.uk/index.php?page=publication&showpublication=8>. Last accessed 22nd July 2010.

¹⁶¹ Dick Cheney, ‘Remarks to the Republican Governors Association’, Washington D.C., 25th October 2002. Available at <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20011025.html>. Last accessed 10th January 2011.

¹⁶² Andrew Blick, Tufyal Choudhury and Stuart Weir, ‘The Rules of the Game’. See fn. 160.

¹⁶³ Oren Gross and Fionualla Ní Aoláin, ‘From Discretion to Security’. See fn. 5.

¹⁶⁴ Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario’ p. 100. See fn. 3.

¹⁶⁵ Andrew Blick and Stuart Weir, ‘The Rules of the Game: The Government’s Counter Terrorism Laws and Strategy’. Available at http://www.jrrt.org.uk/uploads/terrorism_scoping_report.pdf. Last accessed 22nd June 2010.

¹⁶⁶ Ian Loader, ‘Cultural Lives of Security and Rights’ in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Oxford: Hart Publishing, 2007), p. 36.

Dworkin points out that the vast majority of people will not ‘feel’ the curtailment or erosion of rights because they will not be put in a position to experience these limitations. As such, the protection of human rights is more likely to be seen as an aid to suspected terrorists.¹⁶⁷

Gross and Ní Aoláin emphasise that rationality is often overshadowed by public fear and hatred toward the ‘other’, resulting in radical measures being taken, while concepts like the rule of law and human rights are pushed into the background.¹⁶⁸ As a result, arguments in favour of greater security measures and the exercise of more authoritarian powers at the expense of human rights often garner more weight in the public eye than calls for their protection. The ability to ‘turn off’ certain rights in the wake of the ‘overriding’ interest of national security is thus often seen as reasonable under the current circumstances.¹⁶⁹

States seem to forget that the human rights regimes created under international and regional instruments were established in the aftermath of genocide and cataclysmic war. The Eminent Jurists Panel claim that their,

very *raison d’être* [...] is to provide States with [a] framework that allows them to respond effectively to even the most serious of crimes. Accordingly, human rights are not, and can never be, a luxury to be cast aside at times of difficulty.¹⁷⁰

The Panel also contends that human rights regimes acknowledge that there may be instances when States are unable to meet human rights obligations and have therefore made provision for such emergencies in the form of derogation clauses. Responding to these arguments, governments frequently claim that the current threat was not envisaged when the Conventions and Universal Declaration were drawn up.¹⁷¹ Bigo and Guild contest this assertion, arguing that the 9/11 attacks did not sufficiently break from any previous pattern of terrorism, but, were ‘merely an exception in terms of the scale of both the violence and the response of the authorities’.¹⁷² They did not warrant the military response that was subsequently endorsed to bring the perpetrators to justice.

4. The ‘War on Terror’ Rhetoric before the European Court of Human Rights

The nature of the WOT, as shown in the previous section, has the potential to corrode hard earned human rights the international community has sought to protect. National governments are enacting legislation that seriously curtails individuals’ rights for the protection of society as a whole. The supervisory role that international and regional human rights systems fulfil has become all the more vital to ensure human rights standards are not swept aside for the sake of national security.

The post-9/11 case law that stands to be examined in this section threatens previously established ECtHR standards. It does so by introducing WOT rhetoric into ECHR jurisprudence in order to influence the Court, so as to ensure that security interests are given

¹⁶⁷ Ian Loader, ‘Cultural Lives of Security and Rights’. See fn. 166.

¹⁶⁸ Oren Gross and Fionuallach Ní Aoláin, ‘From Discretion to Security’. See fn. 5.

¹⁶⁹ Benjamin Gould and Liora Lazarus, ‘Introduction’ p. 4. See fn. 1.

¹⁷⁰ International Commission of Jurists, *Assessing Damage, Urging Action* p. 18. See fn. 146.

¹⁷¹ International Commission of Jurists, *Assessing Damage, Urging Action* pp. 18-19. See fn. 146.

¹⁷² Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario’ p. 109. See fn. 3.

greater consideration. Whether counter terrorism measures enacted on the basis of the rhetoric have led to altering the established Convention standards outlined above, either by way of extending the margin granted in similar cases or introducing the doctrine into new areas of Convention law, is examined below.

4.1. *The difficulty faced by high contracting parties*

Respondent States seem reluctant to make express reference to the ‘exceptional’ character of the ‘new’ form of terrorism. While they readily refer to the 9/11 terrorist attacks,¹⁷³ they appear unwilling to assert that this form of terrorism represents a break away from the ‘traditional’ form of terrorist activity. The Italian Government in *Saadi v. Italy* came closest to making such a claim when it argued that ‘[o]rganised crime of a terrorist nature had reached, in Italy and in Europe, very alarming proportions, to the extent that the rule of law was under threat’.¹⁷⁴

The Court has also refrained from explicitly making any distinction between terrorism prior to and after the events of 9/11. In *Saadi v. Italy* for instance, the Court recognised that ‘States face immense difficulties in modern times in protecting their communities from terrorist violence [and...] cannot [...] underestimate the scale of the danger of terrorism today and the threat it presents to the community’.¹⁷⁵ In making this assertion, the Court referred to previous case law thereby implicitly linking its views of fundamentalist international terrorism with terrorist activity embodied in those cases. As such, it would appear that the ECtHR’s approach to terrorism cases since 9/11 is not different from previous case law.

This is apparent in *Gillan and Quinton v. the United Kingdom*¹⁷⁶ where random stop and search police powers were at issue. In that case, the ECtHR undertook an exacting review of the safeguards under s.s 44-47 of the Terrorism Act 2000 that purportedly acted to limit the wide discretion granted under the provisions¹⁷⁷ and held that ‘the safeguards provided by domestic law [were] not demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference’.¹⁷⁸

The Court’s reluctance to move away from well-established standards can also be seen in *A and Others v. the United Kingdom* where, under Article 5(4), the ECtHR analysed the non-disclosure of evidence and related safeguards in the Special Immigration Appeals Commission (SIAC). The ECtHR based its decision on its well-established jurisprudence concerning the ‘equality of arms’ principle. The UK was granted a certain margin as to the means undertaken to meet the standards required for procedural fairness and the Court felt that non-disclosure in SIAC proceedings could be considered necessary due to the terrorist threat created by Al Qaida. However, the ECtHR felt that some of the applicants could not give the special advocate effective instruction since they were not provided with sufficient

¹⁷³ *Leroy v. France*, application no. 36109/03 (2009) ECtHR, para. 31; *Saadi v. Italy*, para. 102 (see fn. 132).

¹⁷⁴ *Saadi v. Italy*, para. 169. See fn. 132.

¹⁷⁵ *Saadi v. Italy*, para. 137. See fn. 132.

¹⁷⁶ Application no. 4158/05 (2010) ECtHR.

¹⁷⁷ *Gillan and Quinton*, paras. 76-87. See fn. 176.

¹⁷⁸ *Gillan and Quinton*, para. 79. See fn. 176.

information regarding the allegations against them. The advocate could not therefore counterbalance the difficulties created by the ‘closed hearings’.¹⁷⁹

Notwithstanding such decisions, there have been instances where either WOT rhetoric or the actual events of 9/11 appear to have influenced the Court and the manner in which it applies the margin. In particular, it would seem that the ECtHR’s approach to the freedom of expression and incitement of terrorism, along with its attitude towards derogation clause cases, has shifted to take account of 9/11 and WOT rhetoric. There have also been efforts, particularly by British representatives, to build on the *Brogan and Others v. the United Kingdom* decision, which introduced a balance into Article 5, as well as reattempts to establish a balancing exercise in Article 3 between national security and the protection of an individual’s human rights.

4.2. *Incitement of terrorism*

The decision in *Leroy v. France*¹⁸⁰ has been criticised for its reversion to the ‘context-based democratic necessity approach’ on publication censorship taken by the Court in the *Zana v. Turkey*¹⁸¹ case, for example, over the more ‘speaker-based incitement approach’ outlined in a number of subsequent cases in 1999, in which terrorism acted as the contextual background.¹⁸²

The ‘speaker-based incitement approach’, as evidenced in *Sürek v. Turkey (no1)*,¹⁸³ examines whether the articles or literary works in question could be considered to incite hatred or violence among the populace, while also taking into account the general context within which the piece was published.¹⁸⁴ Although the ECtHR recognises that a certain margin is granted to States,¹⁸⁵ it seems to use it in a purely rhetorical sense, as the Court’s assessment is intense and reaffirms its ability to make the final ruling on the restriction’s reconcilability with Article 10.¹⁸⁶ Instead of focusing on the proportionality of the restriction, the Court independently and objectively reviews the words used in the publication in question due to the importance of the right at issue.¹⁸⁷

Taking its approach from *Zana v. Turkey*, in *Leroy v. France* the ECtHR did not mention the incitement criterion. Rather it focused its assessment on the temporal and geographical aspects of the case. While it did examine the words used by the author and felt they glorified the attacks, the Court seemed to give particular weight to the fact that the satirical piece was published in a regional paper in the politically sensitive Basque Country two days after 9/11.

¹⁷⁹ *A and Others v. the United Kingdom*, application no. 3455/05 (2009) ECtHR.

¹⁸⁰ *Leroy v. France*. See fn. 173.

¹⁸¹ *Zana v. Turkey*. See fn. 44.

¹⁸² Stefan Sottiaux, ‘Leroy v France: Apology of Terrorism and the Malaise of the European Court of Human Rights’ Free Speech Jurisprudence’ (2009) *European Human Rights Law Review* 3, p. 415.

¹⁸³ *Sürek v. Turkey*. See fn. 81.

¹⁸⁴ *Öztürk v. Turkey* [GC], application no. 22479/93 (1999) ECtHR, para. 64.

¹⁸⁵ *Başkaya and Okçuoğlu v. Turkey*, application nos. 23536/94; 24408/94 (1999) ECtHR, para. 61.

¹⁸⁶ *Erdoğan and İnce v. Turkey*, para. 47. See fn. 82.

¹⁸⁷ *Polat v. Turkey* [GC], application no. 23500/94 (1999) ECtHR, paras. 44-49.

Similarly, in the *Zana v. Turkey* decision the ECtHR paid particular attention to the temporal dimension of the case, noting that the ‘interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time’.¹⁸⁸

In both cases, the ECtHR seems to grant the State a much wider margin than in the incitement approach. It also made specific reference to striking a fair balance between the individual’s rights and the need to protect democratic societies from terrorism, something it refrained from doing in the cases from 1999, mentioned above.¹⁸⁹ While the Court moved towards the ‘speaker-based incitement approach’ after the likes of the *Zana v. Turkey* case in the context of Turkish terrorist activity, it would appear that by reverting to the ‘context-based democratic necessity approach’ in connection to 9/11, the Court implies that a more deferential approach is warranted and that current international circumstances are that much more sensitive than the Turkish situation, necessitating a wider margin.

Sottiaux believes that it is one thing to *glorify* terrorism and quite another matter entirely to actually *incite* terrorist activity.¹⁹⁰ He argues that while glorification may lead to incitement, it does not equate to the same thing. More startling for Sottiaux is the explicit acknowledgement of the ECtHR that the applicant’s intentions play no part in the prosecution and conviction of apology.¹⁹¹ This is despite its reference to the Council of Europe Convention on the Prevention of Terrorism, which emphasises the importance of a *mens rea* element in an offence of incitement.¹⁹² Unfortunately the Court’s approach appears to echo that of Security Council Resolution 1624¹⁹³ and domestic legislation¹⁹⁴ relating to glorification and incitement of terrorism. Roach contends that Resolution 1624 on the regulation of terrorist speech resonates with elements of the ‘militant democracy’ doctrine, which ‘suggests that democracies need to be more aggressive towards those who do not believe in democracy’.¹⁹⁵

Voorhoof contends that the decision in *Leroy v. France* opens the ‘possibility for authorities to prosecute and convict media content and journalism in a way that forms a real threat for independent and critical journalism, and hence for democracy and pluralism itself’.¹⁹⁶ He argues that although incitement is a legitimate restriction on the freedom of expression, one should be cautious in prohibiting other forms of political or journalistic expression. There is a risk that a chilling effect will materialise as a consequence of the decision because it may

¹⁸⁸ *Leroy v. France*. See fn. 173.

¹⁸⁹ *Zana v. Turkey*, para. 55 (see fn. 44); *Leroy v. France*, para. 37 (see fn. 173).

¹⁹⁰ While beyond the remit of this article, another question that should be considered is whether the ECtHR or the public equate incitement of violence with terrorism and the possible implications that could arise from this assumption.

¹⁹¹ Stefan Sottiaux, ‘Leroy v France’. See fn. 182.

¹⁹² See the Council of Europe Convention on the Prevention of Terrorism, ETS no 196, Warsaw, 16.V.2005, Article 5(1). Available at <http://conventions.coe.int/Treaty/en/treaties/html/196.htm>. Last Accessed 14th December 2010.

¹⁹³ UN Doc. S/Res/1624 (2005), 14th September 2005.

¹⁹⁴ For example, the UK introduced a broad offence of incitement where an individual may be prosecuted if they *recklessly* or actually intend to incite or glorify terrorist activity (Terrorism Act 2006 (No.11/2000) s.1).

¹⁹⁵ Kent Roach, ‘Sources and Trends in Post-9/11 Anti-terrorism Laws’ in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Oxford: Hart Publishing, 2007) p. 245.

¹⁹⁶ Dirk Voorhoof, ‘European Court of Human Rights: where is the ‘chilling effect?’ Available at http://www.coe.int/t/dghl/standardsetting/media/confantiterrorism/ECHR_en.pdf. Last accessed 23rd June 2010.

deter other individuals in comparable situations from commenting on the attacks for fear of prosecution.¹⁹⁷ The Court has been notably reluctant in the past to permit infringements where they are considered likely to have such an effect.¹⁹⁸ However, this did not seem to factor into its decision in *Leroy v. France*.

4.3. The ‘war on terror’ and Article 15

The majority of High Contracting Parties did not introduce derogations from the ECHR in response to 9/11. This indicates that, contrary to WOT rhetoric, which espouses the exceptional nature of international terrorism, States believe that they can operate within the Convention system and still adequately deal with the threat.¹⁹⁹ Only the UK has sought to derogate from the Convention since 9/11. Its derogation notice emphasised the continuing nature of the threat, particularly from foreign nationals present in the UK and the risk to national security this caused.²⁰⁰ Through the notice to the General Secretary of the Council of Europe, the UK derogated from Article 5(1)(f)²⁰¹ as it believed the form of detention envisioned by the Anti-terrorism, Crime and Security Act 2001 would violate the Convention.²⁰²

The Court was required to pass judgement on these matters in *A and Others v. the United Kingdom* and found against the respondent State, stating that the measures were not strictly required by the exigencies of the situation.²⁰³ Taking a different position from that in *Ireland v. the United Kingdom*,²⁰⁴ the Court in *A and Others v. the United Kingdom* held that the measures did not effectively address the security risk and imposed ‘a disproportionate and discriminatory burden of indefinite detention on one group of terrorists’.²⁰⁵

The government specifically referred to the margin of appreciation, arguing that the House of Lords should have afforded the executive a much wider margin as to whether detention was necessary. The Court made its position on the doctrine very clear. It reaffirmed that it grants States a wide margin under Article 15 to decide on the existence of a crisis and the derogating measures deemed necessary to avert the emergency. However, the Court went on to state that ‘[t]he [...] margin [...] has always been meant as a *tool to define relations between the domestic authorities and the Court*. It cannot have the same application to the relations between the organs of [S]tate at the domestic level.’²⁰⁶ [emphasis added]

¹⁹⁷ Dirk Voorhoof, ‘European Court of Human Rights’. See fn. 196.

¹⁹⁸ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. See fn. 27.

¹⁹⁹ Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11’ (2004) *European Journal of International Law* 15, p. 721.

²⁰⁰ *A and Others v. the United Kingdom*, para. 10. See fn. 179.

²⁰¹ ECHR, Article 5(1)(f): the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. See fn. 8.

²⁰² *A and Others v. the United Kingdom*, para. 11. See fn. 179.

²⁰³ *A and Others v. the United Kingdom*, para. 190. See fn. 179.

²⁰⁴ *Ireland v. the United Kingdom*, para. 229. See fn. 24.

²⁰⁵ *A and Others v. the United Kingdom*, para. 186. See fn. 179.

²⁰⁶ *A and Others v. the United Kingdom*, paras. 183-184. See fn. 179.

The ECtHR seems to stress that States do not have a margin as of right, echoing Judge Martens in his dissenting opinion in the *Cossey v. the United Kingdom* decision.²⁰⁷ Rather, the doctrine is simply a tool of judicial restraint used by the Court, which cannot exist outside the European system.²⁰⁸ It is therefore a misnomer to speak of the margin in the context of national courts and other domestic authorities.

Even though the decision seems to mark the introduction of a new, more robust attitude to review in Article 15 cases, Elliot emphasises that it is in no small part due to the House of Lords decision. He feels it is difficult not to conclude that the Court readily set aside its characteristically deferential approach in Article 15 decisions due to the robustness of the Law Lords’ review, which also found the measures to be unjustified.²⁰⁹ Importance was attached to the fact that national courts should also constitute a domestic authority to which a wide margin is afforded.²¹⁰ This is evidenced in the decision where the ECtHR considered that it would ‘be justified in reaching a contrary conclusion *only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.*’²¹¹ [emphasis added]

Elliot questions this attitude towards national courts. He queries whether the ECtHR should rely on domestic court decisions in such situations at all. Elliot contends that while it may have resulted in the correct decision being made in the given case, the fact that domestic courts will generally take a deferential approach to executive decisions in such circumstances leaves the Court open to the risk that its role as the ultimate monitoring body may evaporate entirely.²¹² It would seem that the Court has further removed itself from any form of effective scrutiny under Article 15 because there is now the possibility for the double margin afforded to States in such cases to be applied to national court decisions that may in the first place be deferential to the executive. This is especially so where the ECtHR will only take a contrary position if it is shown that the national decision was manifestly unreasonable or that Convention jurisprudence was misapplied or misinterpreted.²¹³

Perhaps more troublesome for the purposes of this work is the Court’s attitude towards the imminence of the threat posed to the life of the nation. The Court declared that the ‘requirement of imminence cannot be interpreted so narrowly as to require a [S]tate to wait for disaster to strike before taking measures to deal with it’.²¹⁴ The ECtHR also held that there is no explicit requirement that an emergency be temporary in nature and acknowledged that an emergency may continue for many years as evidenced in a number of cases involving Northern Ireland. The Court made these assertions while attaching weight to executive, parliamentary and national court decisions with regard to the existence of an emergency,

²⁰⁷ *Cossey v. the United Kingdom*, application no. 10843/84 (1991) ECtHR, Dissenting Opinion of Judge Martens, para. 3.6.3.

²⁰⁸ Jeroen Schokkenbroek, ‘The Basis, Nature and Application of the Margin-of-Appreciation Doctrine’. See fn. 96.

²⁰⁹ Mark Elliott, ‘Torture, Deportation and Extra-Judicial Detention: Instruments of the “War on Terror”’ (2009) *Cambridge Law Journal* 68, p. 245.

²¹⁰ Sangeeta Shah, ‘From Westminster to Strasbourg: A and Others v United Kingdom’ (2009) *Human Rights Law Review* 9, p. 473.

²¹¹ *A and Others v. the United Kingdom*, para. 174. See fn. 179.

²¹² Mark Elliott, ‘The “War on Terror”, UK style: The Detention and Deportation of Suspected Terrorists’ (2010) *International Journal of Constitutional Law* 8, p. 131.

²¹³ Mark Elliott, ‘The “War on Terror”, UK style’. See fn. 212.

²¹⁴ *A and Others v. the United Kingdom*, para. 177. See fn. 179.

stating that they were better placed to assess the evidence relating to the existence of a crisis.²¹⁵

This position clearly relates back to assertions arising from WOT rhetoric that the threat posed by international terrorism requires State pre-emptive action in order to avert any possible disaster, as well as confirming that draconian counter terrorism measures may remain enacted for some time. Both WOT discourse and the Court explicitly emphasise that governments cannot wait for disaster to strike before measures can be taken. The explicit recognition of the possibility of entrenched emergencies raises concerns that derogations can remain in force for the long term, effectively becoming the norm, which would prevent the Court from undertaking stricter forms of review, which it utilises outside of emergency situations. Fitzpatrick foresaw such a realignment of derogation preconditions by human rights treaty bodies. She bases this forewarning on the recontextualisation of counter terrorism measures from a crime control to an armed conflict paradigm.²¹⁶

The ECtHR’s assertions seem to override or at least stretch the condition set out in the *Greek* case that requires a threat to be either actual or imminent.²¹⁷ The Court countenanced the derogation despite declarations from both the Secretary of State and the House of Commons Select Committee on Defence on the Threat from Terrorism that there was no evidence of a particular threat.²¹⁸ The ECtHR appears to willingly alter its conditions or at any rate, find room within its requirements for the extension of the ‘immanency’ criterion within the wide margin afforded to the UK. The margin in this case regarding the existence of the emergency seems to be at the very least broader than that conceived in *Ireland v. the United Kingdom*.²¹⁹

To take such an approach reduces the level of danger that must be met before derogating measures can be taken, and with the threat of a prolonged ‘war’, there is the fear that such measures could become entrenched in national legislative frameworks.²²⁰ The greatest risk to human rights does not arise from individuals or even groups, but from national authorities themselves.²²¹ While this is clear from accommodation clause jurisprudence,²²² it is especially evident in the context of derogation measures because they curtail rights beyond that which the Convention will permit.²²³ Lowering the threshold required by Article 15 seems contrary to the very *raison d’être* of international human rights bodies to ensure that States adhere as closely as possible to their obligations to further the realisation and protection of human rights.²²⁴

The Court has permitted States to lead the way rather than reign in their activities in this area of Convention law because of the sensitivity of the circumstances. For the ECtHR, this necessitates the accommodation of the widest possible discretion to the point where

²¹⁵ *A and Others v. the United Kingdom*. See fn. 179.

²¹⁶ Joan Fitzpatrick, ‘Speaking Law to Power: The War Against Terrorism and Human Rights’ (2003) *European Journal of International Law* 14, p. 241.

²¹⁷ The *Greek Case*, para. 113. See fn. 14.

²¹⁸ *A and Others v. the United Kingdom*, para. 18. See fn. 179.

²¹⁹ See *Ireland v. the United Kingdom*, para. 207. See fn. 24.

²²⁰ Andrew Blick, Tufyal Choudhury and Stuart Weir, ‘The Rules of the Game’. See fn. 160.

²²¹ Michael O’Boyle, ‘The Margin of Appreciation’. See fn. 10.

²²² For example see *Leander v. Sweden*, para. 60. See fn. 63.

²²³ Michael O’Boyle, ‘The Margin of Appreciation’. See fn. 10.

²²⁴ ECHR, Preface and Article 1. See fn. 8.

international supervision seems illusory and has created the space for WOT rhetoric to creep into ECtHR case law.

4.4. *Balancing the individual against the nation*

WOT rhetoric champions the introduction of a balance between the State and individual rights to ensure the security of its citizens.²²⁵ This is particularly evident where an Article governing an aspect of everyday life only grants limited, if any, flexibility to States regarding the means taken to defend their interests. States have rarely been quiet in the Court arguing for such a balance, the *Chahal v. the United Kingdom* decision being the most blatant example. The case for a reconfigured balance between security and human rights has resurfaced with greater fervour in the ECtHR since 9/11, particularly in relation to the *non-refoulement* principle and the right to liberty.

The British representatives in *Saadi v. Italy* argued that the rigidity of the *non-refoulement* principle precluded governments from taking legitimate action under immigration legislation to protect themselves from external risks to national security. They argued that High Contracting Parties were under a positive obligation to ensure that individuals are not deported in circumstances where there is a serious risk of torture or inhuman or degrading treatment. They also asserted that when assessing positive obligations, the Court has accepted that an applicant’s rights can be weighed against community interests.²²⁶ In *A and Others v. the United Kingdom*, the British government maintained that when making an assessment under Article 5(1)(f), one must be mindful of the fair balance that underlies the entire Convention.²²⁷ It would appear that by introducing the concepts of positive obligations and fair balance, the government was attempting to alter the interpretation of the ECHR and establish a certain margin for States in such circumstances. This is since the ECtHR will usually be reluctant to review the State’s assessment of what should be considered in the community’s interest because States are better placed to make such an analysis than an international judge.²²⁸

The above assertions acted as the basis for the government’s contention in *Saadi* that where a person is to be deported, the threat the individual poses to national security should stand as a factor to be assessed in relation to the likelihood and nature of the potential ill-treatment. It asserted that only in this way would the proper balance be struck between the individual’s rights under Article 3 against the right to life secured to all other members of the community. The terrorist threat posed by an individual would also influence the burden of proof that the applicant has to satisfy. Where an individual poses such a threat to national security, stronger evidence would have to be adduced illustrating the risk of ill-treatment.²²⁹

The Court rejected both instances of introducing the fair balance principle into Article 3 and Article 5(1)(f). It asserted that such an approach under Article 5(1)(f) would be inconsistent with the jurisprudence of the ECtHR and the structure of Article 5(1)(a-f), as these provisions represent an exhaustive list of circumstances in which deprivation of liberty is permitted.

²²⁵ Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario’. See fn. 3.

²²⁶ *Saadi v. Italy*. See fn. 132.

²²⁷ *A and Others v. the United Kingdom*, para. 148. See fn. 179.

²²⁸ Clare Ovey, ‘The Margin of Appreciation and Article 8 of the Convention’. See fn. 49.

²²⁹ *Saadi v. Italy*, para. 122. See fn. 132.

Measures taken to counter terrorism must fit within these provisions. They cannot be forced to fit within Article 5(1) by appealing to the need to balance interests of the nation against those of the applicant.²³⁰ In reaffirming *Chahal v. the United Kingdom* and the absolute nature of Article 3, the ECtHR stressed in *Saadi* that the nature of the offence allegedly committed by an individual cannot be taken into account in relation to deportation procedures.²³¹ The Court thus precluded any introduction of the margin in these instances, as the State’s assessment of the circumstances was not given any substantive weight, which resulted in the Court rigorously scrutinising the violations at issue.²³²

In *Saadi v. Italy*, the ECtHR considered that balancing the danger an individual poses to a community against the risk of ill-treatment was misconceived as concepts of ‘risk’ and ‘dangerousness’ cannot be weighed against each other; they exist independently.²³³ The fact that an individual may present a particular threat to society does not affect the probability of ill-treatment that person may suffer.²³⁴ The Court also rejected the second contention concerning a higher burden of proof for similar reasons.²³⁵

Saadi v. Italy and *A and Others v. the United Kingdom* clearly contradict the current development flowing from WOT discourse, requiring a shift in the human rights paradigm to incorporate national security concerns. The ECtHR holds firm to its standards in these instances, negating any function a balance or margin could perform, despite the world-wide trend aided by decisions such as *Suresh v. Canada (Minister of Citizenship and Immigration)*.²³⁶ By doing so, the Court asserts that it remains capable of monitoring counter terrorism measures and that the fight against terrorism has not shifted beyond its legal regime.

The concept of striking a fair balance between security and human rights put forward by governments in both *Saadi v. Italy* and *A and Others v. the United Kingdom* implies that someone is capable of judging when a proper balance is found. Dworkin considers such metaphors as ‘balance’ and ‘trade-off’ to be ‘deeply misleading’.²³⁷ They connote a certain level of objectiveness that does not exist and oversimplifies the countervailing interests, because some interests will garner more weight than others, particularly in a majority versus minority situation. It tends to gloss over hard questions about who should make such decisions and who is most likely to be affected by the resulting restrictions.²³⁸

Such means of combating terrorism create a situation in which ‘our’ rights come absolutely first over those of the ‘other’. The rights of the ‘other’ are infringed in order to ensure ‘our’ safety. Dworkin believes that this mind set, creating a new balance between security and human rights, is incorrect. Our legal regimes do not operate on a ‘sliding scale’ of rights protection depending upon the level of risk an individual poses to society. Rather we should

²³⁰ *A and Others v. the United Kingdom*, para. 171. See fn. 179.

²³¹ *Saadi v. Italy*, para. 127. See fn. 132. The decision was upheld in *Ben Khemais v. Italy*, application no. 246/07 (2009) ECtHR.

²³² *Saadi v. Italy*, para. 128 (see fn. 132); *A and Others v. the United Kingdom*, paras. 161-172 (see fn. 179).

²³³ *Saadi v. Italy*, para. 139. See fn. 132.

²³⁴ Daniel Moeckli, ‘Saadi v Italy’, p. 534. See fn. 2.

²³⁵ *Saadi v. Italy*, para. 140. See fn. 132.

²³⁶ (2002) 1 *Supreme Court Reports, Canada* 3.

²³⁷ Ronald Dworkin, ‘The Threat to Patriotism’ (2002) *The New York Review of Books* 49(3), p. 44.

²³⁸ Didier Bigo and Elspeth Guild, ‘The Worst-case Scenario’ p. 113. See fn. 3.

consider ‘what justice requires even at the expense of our interests, out of fairness to other people’ and be mindful of those who are ‘ensnared in the less protective and more dangerous legal system’ that has been created since 9/11.²³⁹ He believes that this new system is contrary to the principle of shared humanity, that every human life has an inherent value that is equal to all other lives.²⁴⁰

In reality, these new legal instruments unduly restrict the rights of minorities for the good of the majority, the discriminatory effect of which largely goes unacknowledged because the majority remain unaffected.²⁴¹ It in no way detracts from the oppressive nature of measures taken to counter terrorist activity. This approach appears contrary to the well-established concept of democratic societies in ECHR jurisprudence, which emphasises not only majority rule but also the need to ensure fair treatment of minorities and avoidance of abuse of a dominant position.²⁴²

Kola considers the search for a fair balance, particularly in relation to torture, to be nothing more than a ‘cost benefit’ analysis and believes that it is based on utilitarian reasoning where torture or the likelihood of such treatment is seen as a matter to be weighed against the means necessary to save the lives of many. Such reasoning hides the true cost of torture, that is the violation of the individual’s rights.²⁴³ The Court was correct in rejecting the governments’ contention that such a balance is necessary within both Articles 3 and 5(1) because it would grant WOT rhetoric and the margin footholds from which to develop in these areas of Convention law. When States proceed on such a basis, they express the view that human rights are ultimately expendable, which Ignatieff believes ‘is antithetical to the spirit of any constitutional society’.²⁴⁴

5. Conclusion

The margin of appreciation is an important interpretive tool²⁴⁵ for the Court when ruling on sensitive issues, terrorism arguably being one of the more delicate matters. Prior to 9/11, the Court considered the threat of terrorism to create particular difficulties both for States and the ECtHR alike; however, it was not the only area that was designated as such. The fight against organised crime, for instance, created comparable difficulties. The ECtHR also generally took a staunch position against introducing any form of margin or balancing exercise where such concepts were not already integrated either within the structure of the Convention or the Court’s jurisprudence.

Rhetoric surrounding the ‘war on terror’ seems to elevate the threat of fundamentalist terrorism by stressing its exceptional nature and the level of sheer destruction and loss of life it can cause. It calls into question whether national security should be impeded by the

²³⁹ Ronald Dworkin, ‘The Threat to Patriotism’. See fn. 237.

²⁴⁰ Ronald Dworkin, ‘Terrorism and the Attack on Civil Liberties’ (2003) *The New York Review of Books* 50(17) p. 37.

²⁴¹ Andrew Ashworth, ‘Security, Terrorism and the Value of Human Rights’ p. 209. See fn. 94.

²⁴² *Young, James and Webster v. the United Kingdom*, application nos. 7601/76; 7806/77 (1981) ECtHR, para. 63; *Chassagnou and Others v. France*, para. 112. See fn. 51.

²⁴³ Fatima Kola, ‘Torture and Terrorism: A case study’ (2007) *UCL Jurisprudence Review* 13, p. 85.

²⁴⁴ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh: Edinburgh University Press, 2004) p. 143.

²⁴⁵ George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) *Oxford Journal of Legal Studies* 26, p. 705.

protection of human rights. For these reasons, it has been argued that the ‘rules of the game’ have changed²⁴⁶ and that the world should reassess its position on human rights in relation to the overwhelming need to secure nations against further attacks. The danger for human rights is clear. The Court has asserted that it is ‘business as usual’ since 9/11;²⁴⁷ the need to eliminate the danger arising from international terror cannot alter the pre-established framework. Thus the Court continues to take a staunch position against introducing a margin into new areas within this framework. However, where the margin or striking a fair balance is already part of the case law, the ECtHR is willing to grant these arguments normative weight and has altered its approach.

While this is disappointing, it must be remembered that the Court created the doctrine to allow for such difficulties, to grant it the elasticity to take on new and shifting challenges while granting State decisions the appropriate amount of respect. However, the Court must not forget its duties under Article 19 in light of the ‘war on terror’. As the ultimate human rights decision making body in Europe and the most sophisticated human rights system in the world, many look to it for guidance on how to move forward in times such as these when the very reason for its creation is never more evident. It is in times of crisis that our adherence to the very principles upholding society itself is tested. The ECtHR must act to ensure that human rights do not suffer permanent damage because of the ‘war on terror’, for it is in times of terror and upheaval, when fear and rash action are at their peak, that we should hold firm to such foundations of society.

²⁴⁶ Tony Blair quoted in D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Hampshire: Ashgate, 2007) p. 5.

²⁴⁷ Joan Fitzpatrick, ‘Speaking Law to Power’ p. 242. See fn. 216.