

# Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights

By Alan Greene\*

## A. Introduction

The European Convention of Human Rights<sup>1</sup> (ECHR) is as much a political as it is a legal document. The European Court of Human Rights (ECtHR) constantly walks the delicate tight rope between vindicating human rights and respecting the sovereignty of contracting states.<sup>2</sup> This balancing act is particularly sensitive when a situation of “exceptional and imminent danger”<sup>3</sup> exists. In such instances of national security the state may need to act in a manner beyond the parameters of normalcy in order to neutralize the threat and protect both itself and its citizens. Article 15 of the ECHR therefore allows states to derogate from its obligations under the convention when a state of emergency is declared. On foot of a notice of derogation, a state has more discretion and flexibility to act accordingly to respond to a threat without being constrained by its obligations under the treaty. However, it is also in these conditions that human rights are at their most vulnerable as the state’s response may encroach severely on individuals’ rights and the liberal-democratic order of the state.

On first reading, Article 15 appears to recognize that a dichotomy exists between normalcy and emergency. This assumption is a fundamental aspect of what I shall call the

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols 11 and 14, hereinafter “ECHR”), June 2010, available at [http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (last accessed 29<sup>th</sup> September 2011).

<sup>2</sup> *E.g.* The “margin of appreciation” doctrine, for example, acts as a protector for state sovereignty. See Handyside v. the United Kingdom, Judgment of 7 December 1976, 24 Eur. Ct. H.R. (ser. A, 1976).

<sup>3</sup> Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments concerning situations known as States of Siege or Emergency*, UN Doc. E/CN4/2 of 27 July 1982.

“emergency paradigm.” However, it is this assumption that has come under scrutiny by academics.<sup>4</sup> Events of the 20<sup>th</sup> and early 21<sup>st</sup> centuries, particularly the aftermath of 11 September 2001,<sup>5</sup> have led many to argue that it is no longer possible to separate normalcy from emergency.<sup>6</sup> We are, because of this flawed paradigm, now stuck in a “permanent state of emergency”<sup>7</sup> where so-called temporary powers are perpetuated and human rights encroached upon. As a result, some commentators have turned their back on the emergency paradigm, to investigate alternative models of crisis accommodation, which do not rely on this apparently flawed assumption of a separation between normalcy and emergency.<sup>8</sup> These alternative models strive for an approach that vindicates and protects human rights, while at the same time allowing a state to respond to the threat accordingly.

The aim of this article is to show that the application of Article 15 by the ECtHR is not accurately described by the emergency paradigm, but instead contains elements that correlate with those models of accommodation known as “monism”<sup>9</sup> or “business as usual models;”<sup>10</sup> no distinction is made between normalcy and emergency. Rather the same rules apply both during normalcy and emergency.<sup>11</sup> As a result, to argue that we are now in a permanent state of emergency and that the emergency paradigm is obsolete is rash, as the

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<sup>4</sup> See Mark Neocleous, *The Problem with Normality: Taking Exception to “Permanent Emergency,”* 31 ALTERNATIVES 191, 195 (2006). Neocleous undertakes a literature review in this area to conclude that “permanent emergency” is now the dominant mantra of the left and indeed, of the libertarian right as well.

<sup>5</sup> On 11 September 2001, two hijacked airliners flew into the World Trade Centre Towers, New York destroying them and killing thousands. A third plane crashed into the Pentagon Building, Washington. A final plane crash-landed in Pennsylvania, killing all on board. In total, 2,753 people lost their lives. See generally, National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> (last accessed 29th September 2011).

<sup>6</sup> See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises always be Constitutional?*, 112 YALE L. J. 1011, 1089-1095 (2003).

<sup>7</sup> See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 4 (2005); see also Gross, *id.* at 1089-1094.

<sup>8</sup> For examples of an extra-legal/extra-constitutional approach see Gross, *id.* at 1096; Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, WISCONSIN LAW REVIEW 273, 304-307 (2003). See also Nomi Claire Lazar’s rejection of the state of exception discourse in NOMI CLAIRE LAZAR, *STATES OF EMERGENCIES IN LIBERAL DEMOCRACIES* (2009). Dyzenhaus argues that the rule of law expressly prohibits an exception, either within or outside the legal order. See generally, DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006).

<sup>9</sup> See Ian Zuckerman, *One Law for War and Peace? Judicial Review and Emergency Powers between the Norm and the Exception*, 13 CONSTELLATIONS 522, 524 (2006).

<sup>10</sup> See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* Chap. 2 (2006).

<sup>11</sup> As the US Supreme Court declared of the applicability of the US Constitution in a time of war in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

emergency-normalcy dichotomy has never been properly adhered to. The emergency paradigm is still relevant today, both as a means to allow a state to defend itself, and to protect human rights. Derogation clauses can accordingly be described as a sword and a shield. As the former, they allow a state to breach civil rights and the rule of law that ordinarily constrain them. Yet also, by outlining when such measures may be undertaken, they shield and protect human rights in times when conditions do not equate to an emergency. By arguing in favor of maintaining a clear demarcation between normalcy and emergency, this article does so in order to protect human rights most effectively.

This paper commences with a brief discussion of the emergency paradigm and the fundamental assumptions that underlie it. This shall be compared and contrasted against the “business as usual” model, which does not make the assumption of a separation between normalcy and emergency. Building upon this background, I shall then present a discussion of the text of Article 15 of the ECHR by isolating the “two limbs” it consists of: that there must exist a threat to the life of that nation, and that the measures taken on foot of a declaration of emergency must be proportionate to the exigencies of the situation. Analysis of the relevant jurisprudence on Article 15, principally of *A v. the United Kingdom*<sup>12</sup> (hereinafter “*Belmarsh*”), and *Lawless v. Ireland*<sup>13</sup> will then be undertaken with a view to assess how these two limbs are applied in practice. In light of this assessment, I shall argue that the ECtHR’s jurisprudence on Article 15 is not accurately described as conforming with the emergency paradigm, but instead incorporates elements of a “business as usual” approach. This is done by the ECtHR ignoring the first limb of Article 15, regarding the existence of a state of emergency. The threshold that a phenomenon must cross in order to justify a declaration is set extremely low, and the level of scrutiny the ECtHR applies when assessing this question renders the first limb of Article 15 merely a procedural hurdle to be crossed, rather than an effective line of demarcation between normalcy and emergency. Secondly, by focusing only on whether the measures enacted are proportionate to the exigencies of the situation (the second limb), a state of emergency is viewed no differently than any other ground that may limit the absolute vindication of a right. The ECtHR’s reasoning in *Belmarsh* has advanced this further by emphasizing that a state of emergency does not have to be temporary and in doing so, has abolished the very concept that justifies a state of emergency.<sup>14</sup> Instead, the duration of the emergency is merely another factor to be taken into account when assessing whether the measures taken on foot of a declaration are proportionate to the exigencies of the situation. In light of this, the “shielding” effect of Article 15 is rendered redundant, leaving

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<sup>12</sup> *A v. Secretary of State for the Home Department* 2 W.L.R. 87 (2005); *A and Others v. United Kingdom* [hereinafter “*Belmarsh*”], Judgment of 19 February 2009, 3455 Eur. Ct. H.R. 5 (2009). This case concerned the legality of the indefinite detention of the applicants in Belmarsh Prison, London under s.23 of the Anti-Terrorism, Crime and Security Act 2001.

<sup>13</sup> *Lawless v. Ireland* [hereinafter “*Lawless*”], Judgment of 1 July 1961, 3 Eur. Ct. H.R. (ser. A, 1961).

<sup>14</sup> See *Belmarsh*, *supra* note 12, at para. 178.

it only an enabler of encroachment on human rights. This article shall conclude by advocating that the ECtHR apply the first limb of Article 15 and insist on a strict separation between normalcy and emergency. Only by assessing this can the state of emergency collapse in on itself and ensure a restoration of normalcy and human rights commitments.

## B. Legal Approaches to Tackling Crises

### I. The State of Emergency

Crises of various magnitude and urgency are a human universal. Yet not every crisis equates to an “emergency.” Rather, the word describes crises at the extreme end of this matrix of “magnitude” and “urgency.”<sup>15</sup> “Emergency” therefore does not describe a specific phenomenon, but instead is an umbrella term, indicative of a group or set of shared conditions. Underneath this umbrella there is a core meaning of “emergency,” encompassing phenomena (and consequently the necessity for an exceptional response) that undisputedly come under this term.<sup>16</sup> Thus a war or armed insurrection may meet this threshold of magnitude and urgency, as would a serious natural disaster or the outbreak of disease, despite the substantive differences between these phenomena. However, it is in the penumbra that debates arise. This penumbra must be necessarily broad and undefined, given the intangible, sudden and unforeseen nature of “emergency.” Hence, restriction by a more rigorous definition is of minimal assistance.<sup>17</sup> That conceded, if there must exist a core of settled meaning within the term “emergency,” so too must there exist a similar core of settled meaning of instances that do not equate to emergency; i.e. the identification of when an emergency has ended, or when circumstances never equated to an emergency in the first place.

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<sup>15</sup> As delineated by lexicological sources, the Oxford English Dictionary defines an emergency as “a serious, unexpected, and often dangerous situation requiring immediate action;” *Emergency Definition*, OXFORD ENGLISH DICTIONARY (2010), available at: <http://www.oed.com/view/Entry/61130?redirectedFrom=emergency#eid> (last accessed: 27 September 2011); Merriam Webster’s Dictionary defines an emergency as (1) “the unforeseen combination of circumstances or the resulting state that calls for immediate action or (2) an urgent need for assistance or relief;” *Emergency Definition*, Merriam-Webster Dictionary (2010), available at: <http://www.merriam-webster.com/dictionary/emergency> (last accessed: 29 September 2011).

<sup>16</sup> See generally, Herbert Lionel Adolphus Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

<sup>17</sup> Hence the emphasis of the “unforeseen” or “unexpected” nature of the crisis in the lexicological definitions outlined above; see *supra* note 15. See also Oren Gross, *Once More Unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies* 23 YALE J. INT’L L. 437, 438 (1998).

In times of such crises a response is necessary. Consequently, definitions of emergency, both legal and lexicological, not only attempt to identify crises that may qualify as such, but also envisage responses to these events.<sup>18</sup> A “state of emergency” is not merely a description of the status of affairs in existence, but a response by the state to tackle the crisis. While the “phenomenon” and the “response” are two separate components of the notion of emergency, they are inter-related, and are not wholly severable, with each influencing the other. They are two different sides of the same coin that is “emergency.” Just as every crisis may not correspond to an emergency, so too every response to a crisis may not warrant the declaration of a state of emergency. A phenomenon only constitutes an emergency when normal responses to the threat are ineffectual.<sup>19</sup> There must be an essential weakness in the ordinary coping systems that the implementation of an emergency response attempts to rectify.<sup>20</sup> The effect of such a declaration of emergency is to permit and facilitate a response that would not be possible were normal conditions to prevail. It is thus not merely the crisis or phenomenon, but also the response that is beyond the norm. Normalcy is the necessary background against which one can judge the existence of a state of emergency.<sup>21</sup> Once this is declared, normalcy no longer exists, i.e. the two conditions are mutually exclusive, and must be considered in terms of a dichotomized dialectic.<sup>22</sup> Normalcy however, must be the empirical regularity and emergency the exception to it.<sup>23</sup> In light of this aberrational nature, a state of emergency may sometimes be described as a “state of exception.”<sup>24</sup> The aim of the declaration of a state of emergency is to respond to a perceived threat at hand. Once this threat is defeated there is no need for the response to continue. A state of emergency therefore, should be self-destructive, with its ultimate goal being the restoration of normalcy.<sup>25</sup>

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<sup>18</sup> The second definition proffered by Merriam-Webster’s only refers to the response element of emergency, and there is no mention of what phenomenon would induce such a need; see *supra* note 15.

<sup>19</sup> See, for example, Washington State Legislature, *The Washington State Emergency Action Plan*, (2000), available at: [http://www.emd.wa.gov/plans/documents/emergency\\_operations\\_plan.doc](http://www.emd.wa.gov/plans/documents/emergency_operations_plan.doc) (last accessed: 27 September 2011), which includes as an integral part of the definition of emergency that the response must be “beyond routine incident response resources.” Similarly, the Irish Office of Emergency Planning requires the phenomenon to be “beyond the normal capabilities of the principal emergency services” before an emergency can be declared. See Office of Emergency Planning, Department of Defence, *Strategic Emergency Planning Response* (2004), available at: [www.emergencyplanning.ie/media/docs/1SEPG.doc](http://www.emergencyplanning.ie/media/docs/1SEPG.doc) (last accessed: 29 September 2011).

<sup>20</sup> John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 210 (2004).

<sup>21</sup> See Gross, *supra* note 17, at 439-440.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See AGAMBEN, *supra* note 7.

<sup>25</sup> See Richard Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency* 79 AM. J. INT’L LAW 1072, 1073 (1985) [hereinafter “The Paris Minimum Standards”]. See also Questiaux, *supra* note 3, at 15.

Without this, emergency and normalcy would not be framed in a mutually exclusive relationship. Rather an emergency response would merely result in the *alteration* of normalcy.

By declaring a state of emergency, a country is free from the ordinary shackles that constrain it. In a liberal democratic order, these constraints are generally human rights, the separation of powers doctrine and the rule of law. This article is primarily concerned with derogation clauses and human rights— namely Article 15 of the ECHR. As suggested, Article 15 permits a state to derogate from its human rights obligations under the ECHR, by enacting laws and other measures that may encroach upon the freedoms and principles the ECHR seeks to protect. Once a state recognizes that there are instances in which these principles do not apply, it is essentially admitting that these fundamental principles are conditional, and not absolute.<sup>26</sup>

The assumption of a separation between normalcy and emergency is the cornerstone of the emergency paradigm. This notion is often traced back to the Roman Dictatorship— the archetypal emergency response mechanism.<sup>27</sup> The emergency-normalcy dichotomy is aided by geographical, individual and temporal demarcations.<sup>28</sup> The geographical impact zone of an emergency should be clearly identifiable from unaffected areas. Thus, the scene of devastation in the aftermath of a natural disaster, or a war zone, would look substantially different from other areas not afflicted.<sup>29</sup> Individual separation focuses on the idea of a clear distinction between “friend” and “enemy.”<sup>30</sup> Thus, the enemy soldier in uniform is distinguishable from the state’s own soldiers, or its civilians. Finally, as mentioned previously, the notion of an exception envisages a situation that is temporary. Once the threat it defeated, normalcy resumes and the emergency is over. It is this temporality of emergency that makes often-draconian measures palatable. Once the emergency is over, these measures should also cease to exist.

Many academics argue however, that as empirical evidence in modernity has shown, the state of emergency has now become so frequent that it is essentially permanent.<sup>31</sup> Numerous states from a variety of cultural and legal backgrounds have experienced

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<sup>26</sup> See CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 294 (2002).

<sup>27</sup> See ROSSITER, *id.* at Chap. 1; NICCOLO MACHIAVELLI, DISCORSI SOPRA LA PRIMA DECA DI TITO LIVIO (The Discourses on Livy) Chap. XXXIII-XXXV (ca. 1517); GROSS & NÍ AOLÁIN, *supra* note 10, at 17-26; Ferejohn & Pasquino, *supra* note 20, at 211-213, 223-228.

<sup>28</sup> See Gross, *supra* note 6, at 1073-1082.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See AGAMBEN, *supra* note 7; see also Gross *id.* at 1089-1094.

declarations of emergency that have endured for decades.<sup>32</sup> Similarly, so called “temporary” legislation is repeatedly extended and renewed, despite the presence of sunset clauses designed to provide a temporal limitation on such powers.<sup>33</sup> If it can be shown that the emergency paradigm is incapable of restoring normalcy, it must be rejected, as such a mechanism, which was inspired by the Roman Republic over 2,000 years ago is no longer suitable for modernity. Rejection of the emergency paradigm appears to stem from the notion that the phenomena in modernity that trigger a state of emergency are often incapable of separation from the background of normalcy, resulting in an “entrenched” or “perpetual” emergency.<sup>34</sup> Modern threats to the state often come in the intangible form of terrorism.<sup>35</sup> The perpetrators of such acts wear no identifiable uniform in order to blur the distinction between friend and enemy.<sup>36</sup> The *modus operandi* of the terrorist in turn distorts the lines between war and the criminal justice system,

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<sup>32</sup> *E.g.* Ireland was under an official declaration of emergency in accordance with Art.28(3)(3) of its constitution from the outbreak of World War II in 1939 until 1976. The day after it was lifted, a new state of emergency was declared to deal with the increasingly violent situation in Northern Ireland. This lasted until 1995; See the Constitution of Ireland, enacted 1 July 1937. Israel has effectively been in a state of emergency since its inception as a sovereign state in 1949. See Adam Mizock, *The Legality of the Fifty-Two Year State of Emergency in Israel*, 7 DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 223 (2001). Egypt has been in a persistent state of emergency since 1981, and for all but four years since 1957. Despite a popular movement that ousted President Hosni Mubarak in February 2011, at the time of writing (July 2011), the state of emergency he declared in 1981 remains in force. On 24 February 2011, Algeria lifted its 19-year state of emergency following a period of popular public protest. The state of emergency proclaimed in Syria on 9 March 1963, effectuating Legislative Decree No. 51 of 22 December 1962, remained in force until 21 April 2011. However, one can hardly describe the condition in Syria at the time of writing to correlate with normalcy, equating instead with a *de facto* state of emergency. See Questiaux, *supra* note 3, at 26.

<sup>33</sup> *E.g.* The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, also known as the Patriot Act, enacted in the aftermath of 11 September 2001, originally contained 16 provisions due to sunset on 31 December 2005. 14 of these were made permanent, and the remainder repeatedly renewed. They are now expected to sunset on 1 June 2015. The Northern Ireland Emergency Powers Act 1973 (EPA), was renewed in 1978, 1987, 1991 and 1996, before being replaced by the Terrorism Act 2000 (2000 Act). The 2000 Act re-enacted the EPA 1996 provisions under Part VII, subject to annual renewal. This lapsed on 31 July 2007, ending the 34-year life of the so-called “emergency provisions.” Similarly, the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA) despite a sunset clause that was repeatedly renewed repeatedly every 5 years, until replaced by the Terrorism Act (2000), which made the measures permanent.

<sup>34</sup> See Neocleus, *supra* note 4, at 191-194. Neocleus himself rejects this argument, suggesting instead that “permanent emergency” is primarily caused by the use of emergency powers to deal with an increasing array of phenomena of ever-decreasing severity.

<sup>35</sup> This is illustrated by the fact that “terrorism” avoids a universally accepted legal definition. See Jorg Friedrichs, *Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism* 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 69 (2006).

<sup>36</sup> The “terrorist” shares many of the same substantive characteristics of the “partisan” fighter: an irregular soldier who generally utilizes hit-and-run tactics against a militarily superior force. It is therefore in the advantage of the partisan to blend into the background of the ordinary population in order to evade detection and by extension, attack the enemy most effectively. See generally CARL SCHMITT, *THEORY OF THE PARTISAN* (2007).

creating a novel challenge to the response mechanisms of the state.<sup>37</sup> Terrorist acts are not confined to the battlefield but take place primarily in urban areas where every day life happens. The physical, economic, emotional and political effects of these actions may be felt far beyond the immediate zone of a specific attack. In the aftermath of 11 September 2001, the UN Security Council passed Security Council Resolution 1368 (2001) requiring all member states to pass laws dealing with terrorism. The impact of the attack on the United States (US) transcended borders and plunged the world into an emergency. The United Kingdom (UK), thousands of miles away from “Ground Zero” lodged a derogation notice under Article 15 with the ECHR as a response to the apparent threat posed by Al Qaeda.

Identification of when a certain terrorist threat is neutralized and normalcy restored is particularly difficult. The conflict in Northern Ireland, drawn out over 30 years, only came to an end once the Belfast Agreement 1998 was signed between respective political parties. For those three decades, “the troubles” became an everyday occurrence and emergency became the norm. Indeed, certain dissidents, dissatisfied with the agreement, still continue their campaign, albeit with diminished capabilities. The propensity for an emergency to become perpetuated and entrenched increases substantially when dealing with a group like Al Qaeda, without a centralized command structure,<sup>38</sup> and with the ambitious goal of the destruction of Western Civilization.<sup>39</sup> The improbability of this goal coupled with a splintered command structure results in a threat, the neutralization of which becomes increasingly difficult to identify. The improbability of this goal coupled with a splintered command structure results in a threat, the neutralization of which becomes increasingly difficult to identify. Hence, the appointment by Al Qaeda of Ayman Al-Zawahiri as a new leader of Al Qaeda suggests that the “war on terror” will continue beyond the “watershed”<sup>40</sup> moment of the killing of former Al Qaeda leader Osama Bin Laden on 2 May

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<sup>37</sup> See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

<sup>38</sup> Al Qaeda has been described loosely as merely constituting a shared ideology as opposed to an organization. See Burke Jason, *Al Qaeda*, FOREIGN POLICY (FP) 18 (2004). Naim considers Al Qaeda to be a “loose network of individuals united by a shared passion for a single cause,” similar to NGOs. See Moises Naim, *Missing Links: Al Qaeda, the NGO*, FP 100 (2002). General consensus appears to be that Al Qaeda, particularly in the aftermath of 11 September 2001, operates as a loose network of independent cells, with a diminished centralized command structure. See Chesney & Goldsmith, *supra* note 37, at 2109.

<sup>39</sup> Burke argues that Al Qaeda seeks not to conquest, but to beat back western crusades from Islamic territory. Nevertheless, Wedgwood describes Al Qaeda’s methods as shifting from pogrom to extermination of western peoples. See Ruth Wedgwood, *Al Qaeda, Military Commissions, and American Self-Defense*, 117 POLITICAL SCIENCE QUARTERLY 357 (2002). This is corroborated by the severity of the attacks of 11 September 2001, which undermines the now-defunct idea that terrorist groups would limit the magnitude of their attacks in order to prevent would-be sympathizers to their cause from becoming disenfranchised. See Chesney & Goldsmith, *supra* note 37, at 1094.

<sup>40</sup> As described by UN Secretary General Ban ki-moon: *Bin Laden’s death is ‘watershed moment’ says Ban Ki Moon (sic)*, BBC NEWS, May 2, 2011, available at: <http://www.bbc.co.uk/news/world-us-canada-13260609> (last accessed: 27 September 2011).



2011.<sup>41</sup> The resultant effect of the modern terroristic threat is that emergencies are now intangible, and no longer easily identifiable or limited to individual, spatial or temporal contexts.

This article will show that these arguments, which suggest it is impossible today to separate normalcy from emergency, due to the more dangerous, factual conditions of modernity, do not adequately explain why the “state of emergency” is now the norm. Emergencies ideally constitute a threat to the life of the nation. In utilizing emergency responses when dealing with increasingly less serious threats, the state erodes this definition, by lowering its threshold to encompass instances that do not threaten the existence of the state, and stretching it to a point where it absorbs phenomena that exist in normalcy. Consequently, there appears a negligible difference between normalcy and emergency, and emergency responses become viewed as increasingly normalized.

## II. “Business as Usual” Models

The emergency paradigm endorses the view that there are situations that the ordinary legal system cannot deal with. The liberal-democratic order therefore, becomes qualified to do so, and may only exist when the requisite conditions in which this liberal democratic order may be realized to also exist. For Carl Schmitt, this represented the fundamental flaw in liberalism.<sup>42</sup> Admission that liberalism is insufficient to protect the security of the state and its citizens means that the liberal democratic order of the state must reach for a more violent, direct, and ultimately (from a liberal point of view) hypocritical mechanism to ensure the survival of the state. For Schmitt, this fundamental flaw leads to the rejection of liberalism, and an endorsement of a sovereign dictatorial regime.<sup>43</sup> For others, this leads to the rejection of the emergency paradigm.<sup>44</sup>

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<sup>41</sup> Michael Jansen, *Zawahiri announced by Al Qaeda as successor to late Bin Laden*, IRISH TIMES, Jun. 17, 2011, available at: <http://www.irishtimes.com/search/archive.html?rm=listresults&filter=dateasc&keywords=Zawahiri+announced+by+Al+Qaeda+as+successor+to+late+Bin+Laden&daterange=&day1=1&mon1=1&year1=1859&day2=1&mon2=1&year2=1859> (last accessed: 27 September 2011). See also President Barack Obama’s indications that the war on terror is likely to continue: CNNPolitics, *Statement from President Obama on death of Osama bin Laden*, CNN, May 2, 2011, available at: [http://articles.cnn.com/2011-05-02/politics/statement.obama\\_1\\_qaeda-bin-terrorist-attacks?s=PM:POLITICS](http://articles.cnn.com/2011-05-02/politics/statement.obama_1_qaeda-bin-terrorist-attacks?s=PM:POLITICS) (last accessed: 27 September 2011).

<sup>42</sup> See generally, CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1988).

<sup>43</sup> *Id.*

<sup>44</sup> See the above discussion at note 8.

“Monism”<sup>45</sup> or “business as usual”<sup>46</sup> models of crisis management reject the notion that emergencies justify any alteration in the ordinary scheme of governance. The legal system is perceived as able to accommodate any situation that it faces. Emergency therefore creates no additional power that the state may use to defend itself.<sup>47</sup> Under this construction, it would appear that the executive and other national authorities are afforded no more leeway than in ordinary times to promote and protect the common good. The above rationalizations for an emergency response— flexibility, urgency, and necessity are not considered to warrant a deviation from the liberal-democratic order’s respect for the rule of law, the separation of powers doctrine, and for human rights.<sup>48</sup>

“The United States represents a prime example of ‘business as usual.’”<sup>49</sup> Apart from the provision that Congress may suspend the writ of habeas corpus in a time of war, the US Constitution is silent on emergency powers. This has led the US Supreme Court to hold in the *ex Parte Milligan* case,<sup>50</sup> that the same law applies in war as in peace. The idea that emergency could create additional powers for the executive or other branches of governance was rejected by Justice Davis, arguing that this would lead to the usurpation of liberty by those more interested in power than in benevolent rule.<sup>51</sup> One could therefore envisage the “business as usual” approach to offer a more robust defense of human rights than the state of emergency, which permits derogations from prescribed norms from which an aggrieved individual has no recourse. Instead, these norms continue to bind the state, legitimizing only that action permitted by the parameters of the liberal democratic constitution. In reality however, the perceived perception of the necessity of draconian measures often results in emergency powers becoming cloaked in a “veil of normalcy,”<sup>52</sup> leading to the “normalisation of the exception.”<sup>53</sup> Instead of human rights in a period of emergency being afforded the same level of protection as in normalcy, those during the latter state are diminished to the same level as in the time of the former. This is illustrated by the *Korematsu*<sup>54</sup> case, in which the US Supreme Court held that the removal and

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<sup>45</sup> See Zuckerman, *supra* note 9, at 524.

<sup>46</sup> See GROSS & NÍ AOLÁIN, *supra* note 10, Chap. 2.

<sup>47</sup> *Id.*

<sup>48</sup> See Zuckerman, *supra* note 9, at 524.

<sup>49</sup> See GROSS & NÍ AOLÁIN, *supra* note 10, at 89.

<sup>50</sup> See *ex Parte Milligan*, *supra* note 11.

<sup>51</sup> *Id.* at 125.

<sup>52</sup> See GROSS & NÍ AOLÁIN, *supra* note 10, at 103.

<sup>53</sup> Jean Cohen, *Whose Sovereignty? Empire or International Law?* 18 ETHICS AND INTERNATIONAL AFFAIRS 1 (2004).

<sup>54</sup> *Korematsu v. United States*, 323 U.S. 214 (1933).

internment of all Japanese-US citizens along the Pacific coast of the US was compatible with the US Constitution.

The “business as usual” model is therefore, often criticized as naive and hypocritical, standing vastly out of line with reality.<sup>55</sup> The forceful language of the US Supreme Court in *ex Parte Milligan* was enounced in 1864, once the guns of the US civil war were silent and the Union secured.<sup>56</sup> In contrast, *Korematsu* was decided at the height of World War II. Judicial activism and oversight of the executive appears to be tempered during periods of extreme crisis, i.e. a level of flexibility is afforded the executive, regardless of what the law insists.<sup>57</sup> However, as this flexibility itself becomes law, it sets a precedent that fundamentally alters the base of US constitutional law, which itself leads to the “normalization of the exception.”<sup>58</sup>

From this very brief analysis of emergency responses, we can glean a constant theme that recurs both in the “business as usual” and the emergency paradigm approach— that the executive or political sphere is best placed to assess the existence of a state of emergency, or to determine the necessity of an extraordinary response.<sup>59</sup> Emergencies are by definition, unforeseen and require swift and immediate action. As the legal sphere and indeed, the legislature are often slow in decision-making, they are not (particularly the judiciary) considered appropriate forums in which to decide the above issues.<sup>60</sup> In addition, the assessment of the factual situation may require debate of issues of national state security, the revealing of which could jeopardize the emergency response effort.<sup>61</sup> As the executive is generally afforded a level of secrecy, it is often considered best placed to assess the threat.<sup>62</sup> Consequently, judges often defer on the issue of the existence of a state of emergency, leaving the issue to political actors and according them a wide margin

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<sup>55</sup> See GROSS & NI AOLÁIN, *supra* note 10, at 95.

<sup>56</sup> *Id.* at 96.

<sup>57</sup> Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 18 HARV. L. REV. 2673, 2675 (2005).

<sup>58</sup> See Zuckerman, *supra* note 9, at 532-533.

<sup>59</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* 45 (2007). See also Gary Lawson, *Ordinary Powers in Extraordinary Times: Commons Sense in Times of Crisis*, 87 B. U. L. REV. 289, 311 (2007).

<sup>60</sup> Commentators such as Ackerman envisage a role for the legislature in determining the existence of an emergency. However, these models often leave it to the executive to make the initial declaration, which is subsequently scrutinized by the legislature. For Ackerman, each subsequent renewal of a declaration of emergency would require an increasing majority. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

<sup>61</sup> See POSNER & VERMEULE, *supra* note 59.

<sup>62</sup> *Id.*

of discretion.<sup>63</sup> That conceded, there is considerable debate as to whether the decision to declare a state of emergency is primarily a political one.<sup>64</sup> While the declaration of whether a state of emergency exists or not has legal ramifications, there is no consensus, both among different states and academics, as to the actual legal status of this issue. At the most simplistic level, this debate has two sides— those who think it is a legal question, and hence reviewable by the courts, and those who consider the existence of a state of emergency is a purely political issue, removing all scope for judicial review of such a declaration.<sup>65</sup> Carl Schmitt went so far as to base his definition of the sovereign on one who has the power to declare a state of emergency (“[S]overeign is he who decides the exception”); therefore, not only is this a political question, it is the *defining* political question.<sup>66</sup> As with most things however, the application of these various approaches is not as clear-cut in practice.

### C. Article 15: Theory and Application

Mirroring<sup>67</sup> the language used in Article 4 of the United Nations International Covenant on Civil and Political Rights (ICCPR),<sup>68</sup> Article 15 of the ECHR states the following:

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.

Article 15 contains two principle limbs.<sup>69</sup> First, there must exist a “war or other public

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<sup>63</sup> Fiona de Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD JOURNAL OF LEGAL STUDIES 19 (2010).

<sup>64</sup> See generally, Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976). See also DAVID DYZENHAUS, *supra* note 8, at 18-19.

<sup>65</sup> See Henkin, *id.*

<sup>66</sup> See CARL SCHMITT, *supra* note 42, at 5.

<sup>67</sup> Council of Europe, *Preparatory Work on Article 15 of the European Convention on Human Rights* 5 (1956). The British submission that there should be a derogation clause was seen to be an almost “textual reproduction” of Article 4 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

<sup>68</sup> ICCPR, *id.*

<sup>69</sup> Article 15 of the ECHR also recognizes that some rights, such as the right to life (article 2) and the right to be free from torture or cruel and inhumane punishment (article 3) may not be deviated from, even during a state of emergency. See ECHR, *supra* note 1.

emergency threatening the life of the nation.” The ECHR therefore expressly concedes that there are instances when the ordinary human rights obligations of states may not be followed. This is recognition of the liberal democratic order’s inability to accommodate every scenario presented to it. Originally, the drafters of the ECHR considered the general limitation clause sufficient to deal with emergency conditions.<sup>70</sup> Such an approach would have been a clear endorsement of the “business as usual” model. Article 15 was only included primarily at the behest of the British government during the drafting of the Convention.<sup>71</sup> Accordingly, the first limb of Article 15 appears to be a classical representation of the emergency-normalcy dichotomy.

Article 15 does not afford a state *carte blanche* to deal with a threat as it sees fit, once a state of emergency is declared. Rather the second limb of Article 15 requires that such measures be “proportionate to the exigencies of the situation.” Thus, the ECtHR still applies a proportionality test to the measures enacted to test their compatibility with the ECHR. This second limb envisages a role for the ECtHR identical to that played by it during normalcy. Despite the declaration of a state of emergency under Article 15, it is still “business as usual” as far as the ECtHR’s approach and role is concerned. Ideally, the two limbs of Article 15 would act together as a “double-lock” protection against unnecessary human rights encroachments.

### *I. The Two Limbs of Article 15 in Practice*

The phrasing of “in time of war or other public emergency” reflects a belief that “war” or “public emergency” constitute objective factual conditions capable of identification and separation from the ordinary background of normalcy. An emergency would only be declared when these conditions exist. Equally, an emergency would cease to exist once these conditions have been extinguished and normalcy has been restored. These factual conditions are however, framed in quite broad language. Thus, although war, as understood by its every day meaning, would constitute a “core” instance of a phenomenon triggering a state of emergency, the phrase “...or other public emergency” expands the penumbra of “public emergency” to cover a potentially infinite array of crises within the ambit of Article 15.

*Lawless v Ireland*<sup>72</sup> was the first case to assess the existence of a state of emergency under Article 15, and the first to be heard before the ECtHR, which, according to Dickson, was

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<sup>70</sup> Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies* 22 HARV. INT’L L. J. 5 (1981)

<sup>71</sup> See *Preparatory Work on Article 15 of the European Convention on Human Rights*, *supra* note 67.

<sup>72</sup> *Lawless*, *supra* note 13.

arguably a significant factor in its unanimous decision.<sup>73</sup> Lawless was a member of the Irish Republican Army (IRA), an illegal organization that was interned in Ireland under the Offences against the State (Amendment) Act 1940, the provisions of which were subject to a derogation notice lodged with the ECHR in accordance with Article 15. The ECtHR therefore had two issues to decide. First, whether there existed a state of emergency in Ireland as defined by Article 15, and if so, whether the measures introduced were proportionate to the exigencies of the situation.

On the first issue, where the Commission was divided by a majority of nine to five in favor of the existence of a state of emergency that threatened the life of the nation, the ECtHR was unanimous.<sup>74</sup> The ECtHR held that the phrase “public emergency threatening the life of the nation,” when given its natural and customary meaning, referred to “... [A]n exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed....”<sup>75</sup> These conditions were deemed to exist for three reasons: First, that there was a secret army operating within the state engaged in unconstitutional activities; second, that this same army was also operating beyond the state in Northern Ireland, jeopardizing the relations between Ireland and its neighbor; and finally, that there was a marked increase in terroristic activities from autumn 1956 to July 1957.<sup>76</sup>

The ECtHR’s rationale in *Lawless* has been subject to substantial criticism,<sup>77</sup> yet the decision has never been over-ruled, but rather, has been endorsed.<sup>78</sup> Gross and Ní Aoláin argue that the factual conditions the ECtHR uses to corroborate its assertion of the existence of a state of emergency stands vastly out of line with the natural and ordinary meaning of the phrase “public emergency threatening the life of the nation.”<sup>79</sup> Gross and

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<sup>73</sup> BRICE DICKSON, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONFLICT IN NORTHERN IRELAND* 37 (2010).

<sup>74</sup> *Lawless*, *supra* note 13, at para. 28

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See for example, Gross, *supra* note 17, at 460-464.

<sup>78</sup> *Ireland v the United Kingdom*, Judgment of 18 January 1978, 25 Eur. Ct. H.R. (ser. A, 1978).

<sup>79</sup> The Siracusa Principles have attempted to shed some light on the equivalent phrase contained in Article 4 of the ICCPR, declaring that in order for conditions to amount to a threat to the life of the nation, they must constitute a situation of exceptional and actual or imminent danger. See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* 7 HUMAN RIGHTS QUARTERLY 3,7 (1985). Similarly, the Paris Minimum Standards outline that “public emergency” means “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population, or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.” See Lillich, *supra* note 25, at 1073.

Ní Aoláin particularly criticize the notion that a state of emergency may be deduced, due to the deterioration of foreign relations with another state.<sup>80</sup>

Although not expressly mentioned in *Lawless*, Gross and Ní Aoláin argue that the language used by the ECtHR shows that a state enjoys a certain margin of appreciation when deciding whether an emergency exists or not.<sup>81</sup> The ECtHR therefore defers to the national authorities, as these are considered best placed to assess whether an emergency exists or not. Nevertheless, the ECtHR did expressly declare that it had jurisdiction to the existence of an emergency.<sup>82</sup> The issue therefore, is a legal one. That conceded, the “margin of appreciation doctrine” shows that the ECtHR recognizes that it is, nevertheless, a highly politicized legal issue.<sup>83</sup> Thus, as *Lawless* was its first decision its legitimacy could have been seriously threatened were it to undermine the decision of a sovereign state.<sup>84</sup> *Lawless* presents the image of a judicially active court, declaring its jurisdiction to review the decision of a sovereign state as to the existence of an emergency. In reality, this is substantially tempered by the wide margin of appreciation afforded to a state when assessing whether an emergency exists or not. *Lawless* therefore does not successfully answer whether the issue of the existence of emergency is up to the legal or political spheres to decide. Rather, we are presented with the view that a state of emergency is a legal issue, but the effectiveness of judicial oversight and its deference to “national authorities” on this issue means that the *de facto* existence of a state of emergency is left to the political sphere. As a result, the severity threshold in *Lawless* that a crisis must cross in order to declare a state of emergency is set extremely low, potentially encompassing mundane phenomena which do not threaten to usurp the state. Thus, despite *appearing* to assess whether a state of emergency exists or not, the ECtHR’s approach in *Lawless* renders the first limb of Article 15 redundant, as *serious* scrutiny of whether such a state exists is not undertaken.

Instead, *Lawless* results in the ECtHR focusing on the second limb: whether the measures enacted were proportionate to the exigencies of the situation. As this is effectively the application of a proportionality test— the same methodology employed by the ECtHR when assessing alleged encroachments on human rights— it would appear that the only redress an individual may have in succeeding under Article 15 is to show that the measures

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<sup>80</sup> See GROSS & NÍ AOLÁIN, *supra* note 10, at 271.

<sup>81</sup> Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 3 HUMAN RIGHTS QUARTERLY 623, 631-634 (2001). The “margin of appreciation” doctrine was subsequently expressly referred to in *Ireland v. the United Kingdom*, *supra* note 78.

<sup>82</sup> See Dickson, *supra* note 73, at 37.

<sup>83</sup> See GROSS & NÍ AOLÁIN, *supra* note 81.

<sup>84</sup> See Dickson, *supra* note 73, at 37.

are not proportionate, i.e. a “business as usual” approach. Nevertheless, in *Lawless*, Ireland was found to have satisfied both limbs of Article 15; a state of emergency did exist and the measures were proportionate to the exigencies of the situation. Accordingly, the dominance of the second limb of Article 15 is not clear-cut from the analysis of *Lawless* alone. The subsequent *Belmarsh Case* is a further example of when a state of emergency was deemed to exist, but the measures enacted were not proportionate to the exigencies of the situation.

## II. The *Belmarsh Case*

The “margin of appreciation doctrine” was utilized in *Belmarsh* both by the House of Lords<sup>85</sup> and the ECtHR,<sup>86</sup> when asked to rule on whether a state of emergency existed in the United Kingdom (UK) in the aftermath of the attacks on the US on 11 September 2001. In *Belmarsh*, the ECtHR declared that “the national authorities are, in principle, better placed than the international judge to decide .... on the presence of such an emergency.”<sup>87</sup> Accordingly, a wide margin of appreciation should be left to the national authorities. The declaration of a state of emergency by the UK was therefore not challenged, despite the fact that it was the only Council of the European Union Member State to lodge a derogation notice under Article 15 of the ECHR, even though it was not the only country at risk of a terrorist attack. Indeed, Spain, which suffered a significant terrorist attack in 2003, did not declare a state of emergency in accordance with Article 15 of the ECHR. The ECtHR relied on the finding in *Lawless* that a terrorist attack could constitute an emergency and hence, an emergency could reasonably be inferred to exist. Such reasoning however, completely avoids any engagement with the concept of terrorism, a phenomenon that avoids a universal definition.<sup>88</sup> Like “emergency,” “terrorism” is an umbrella term encompassing disparate groups, goals and methods. A so-labeled terrorist attack may be devastating, on the scale of 11 September 2001, or substantially less destructive, akin to more mundane criminal activity. To broadly infer that all terrorist threats constitute an emergency is spurious. Terrorism therefore is a phenomenon that lies under the “penumbra” of emergency, where the extremes of “magnitude” and “urgency” can be used to distinguish between the various events labeled as terrorist activity.<sup>89</sup>

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<sup>85</sup> See *Belmarsh*, *supra* note 12.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at para. 173.

<sup>88</sup> See Friedrichs, *supra* note 35.

<sup>89</sup> *Id.* at 88.



The House of Lords echoed the same sentiments as the ECtHR, by stating that terrorism can constitute an emergency. Lord Hoffmann however, argued that a state of emergency did not exist in the aftermath of 11 September 2001, as no threat to the “life of the nation” was posed by Al Qaeda,<sup>90</sup> instead comparing it to the Spanish Armada or Nazi Germany.<sup>91</sup> The latter two threatened the life of the nation not because of the loss of life their actions would entail, but because they would overthrow British rule and make its institutions subject to the rule of others. The very existence of the nation was threatened in such an instance. Al Qaeda, in contrast, did not pose such a threat.

Lord Hoffmann did however concede that the IRA posed a threat to the life of the nation, as it was an organization dedicated and to the potential to threaten the territorial integrity of the UK.<sup>92</sup> However, this is not an endorsement of the ruling of *Lawless*, as that case referred to a state of emergency in the Republic of Ireland, not the UK. Lord Hoffmann’s reasoning on what constitutes a threat to the life of the nation separates the existence of the state from the life of its citizens. The state is a metaphysical institution that is independent from the lives of its citizens,; hence its ability to survive over generations. The Attorney General’s (AG) submissions<sup>93</sup> therefore, of Al Qaeda’s ability to cause severe destruction of life and property does not necessarily entail a threat to the “life of the nation.” Lord Hoffmann’s judgment concludes by warning that

[T]he real threat to the life of the nation....comes not from terrorism, but from laws such as these. They are the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.<sup>94</sup>

Instead, the decisions of both the House of Lords and the ECtHR in *Belmarsh* focused on the second limb of Article 15— on whether the measures were proportionate to the exigencies of the situation. Following the same reasoning as the Special Immigration Appeals Commission, the majority of the House of Lords (9:6) found that the measures enacted by the British Government were disproportionate and discriminatory, as they differentiated arbitrarily between non-nationals suspected of international terrorism, and UK citizens who were considered to present the same threat qualitatively.<sup>95</sup> Lord Walker

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<sup>90</sup> See *Belmarsh*, *supra* note 12, at para. 96.

<sup>91</sup> *Id.* at 134.

<sup>92</sup> See *Belmarsh*, *supra* note 12, at para. 96.

<sup>93</sup> See *per* Lord Bingham’s summary in the House of Lords, *supra* note 12, at 110.

<sup>94</sup> *Id.*

<sup>95</sup> See *Belmarsh*, *supra* note 12, at paras. 96-97.

dissented, as he endorsed the position of the UK Court of Appeal and the AG's submission that on matters of national security, courts should defer to the executive and legislature, as these were questions of a political nature.<sup>96</sup> The ECtHR took an almost-identical position to the majority, focusing little attention on whether an emergency existed, concentrating instead on whether the measures enacted were proportionate to the exigencies of the situation. However, the ECtHR differed from the House of Lords in respect of who constitute the "national authorities" capable of declaring a state of emergency.<sup>97</sup> The ECtHR considered the House of Lords as competent to review the decision of declaring emergency, and as the latter was satisfied that the executive acted legitimately, so too was the ECtHR. This however, was despite the fact that the House of Lords, with the exception of Lord Hoffmann's minority judgment, proffered little scrutiny of the decision to declare a state of emergency, but also deferred to the executive's assessment of the situation.<sup>98</sup> *Belmarsh* presents both the ECtHR and the House of Lords as focusing only on whether the measures enacted are proportionate to the exigencies of the situation. Such is the foreseeable consequence of *Lawless*, which sets the threat severity threshold very low, and defers to the national authorities regarding the existence of a state of emergency.

#### D. The Jurisprudence of the ECHR: A Permanent Emergency?

Derogation clauses can be used as both a sword and a shield. It is in their role as the former— protection of human rights and of the system of normalcy— that the delineation of an emergency as a "threat to the life of the nation" becomes paramount. The approach of the ECtHR and the House of Lords in *Belmarsh* essentially ignores the issue of the existence of a state of emergency. Lord Walker defends this approach, suggesting that the severity threshold a threat must meet in order to qualify as an emergency should not be set too high, given the requirement that the response be proportionate to the exigencies of the situation. That is, one need not worry about the first limb of Article 15, as the second limb is there to protect human rights. This shielding effect of the state of emergency is weakened further, albeit from an already diminished position, given the low threat severity threshold and the wide margin of appreciation afforded to national authorities in *Lawless*. Michael O' Boyle's assertion that the Strasbourg Machinery provides "an outer bulwark of defense against arbitrary or panicky invocation of emergency

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<sup>96</sup> See *Belmarsh*, *supra* note 12, at para. 209.

<sup>97</sup> See DYZENHAUS, *supra* note 8, at 179.

<sup>98</sup> *Id.*

powers” is therefore unrealized.<sup>99</sup> By deferring to national authorities, namely the executive, on the existence of a state of emergency, the phrase “threat to the life of the nation” is stretched to the point whereby it becomes useless in controlling a state’s actions. To date, there is only one example, *The Greek Case*,<sup>100</sup> in which a declaration of emergency was rejected by the Commission (the case never made it before the ECtHR). However, Gross and Ní Aoláin argue that this decision has more to do with the fact that it was an anti-democratic regime that declared the state of emergency in Greece, rather than an objective analysis of whether or not a serious threat was posed to the state by communist insurgents.<sup>101</sup>

The ECtHR in *Belmarsh* further damages this shielding effect by eliminating the exceptional nature that phenomena must constitute to trigger a state of emergency, by declaring that emergency under Article 15 does not necessarily have to be temporary.<sup>102</sup> Instead, “duration” becomes merely another factor in determining whether the measures undertaken were proportionate to the exigencies of the situation.<sup>103</sup> This fundamentally uproots Article 15 as a representation of the normalcy-emergency dichotomy, as the goal of restoring the latter is abandoned by the ECtHR. Article 15 may no longer be described as a shield, protecting against encroachments on human rights, as normalcy and emergency are not mutually exclusive states. Rather, they are posited in an inversely proportional relationship to each other by dominance of the “business as usual” limb of Article 15. Thus, the *status quo* fluctuates between varying degrees of “normalcy” and “emergency.” Sometimes it may be more akin to “normalcy” than “emergency”, in which case the exigencies of the situation would not permit serious encroachments on human rights. Conversely, when the situation is “less normal” i.e. more emergency-like, more draconian measures may be permitted. The result is that Article 15 has been interpreted to corroborate more accurately to a view that states of emergency are merely another factor restricting the absolutist claims of certain human rights. Much as the right to free speech is limited by another person’s right to his or her good name, so too must the right to liberty, privacy and other rights that may be derogated from during an emergency be limited by another person’s right to security.<sup>104</sup> Accordingly, Article 15’s singular role as a “sword” remains.

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<sup>99</sup> Michael O’Boyle, *Emergency Situations and the Protection of Human Rights A Model Derogation Provision For a Northern Ireland Bill of Rights*, 28 NORTHERN IRELAND LEGAL QUARTERLY 160, 182 (1977).

<sup>100</sup> A discussion of this case may be found at GROSS & NÍ AOLÁIN, *supra* note 10 at 273-276.

<sup>101</sup> *Id.*

<sup>102</sup> See *Belmarsh*, *supra* note 12, at para 178.

<sup>103</sup> *Id.*

<sup>104</sup> This is essentially the theory propounded by Nomi Claire Lazar *in supra* note 8.

The requirement that an emergency must be declared under Article 15 may, to some extent, shield human rights, as the jurisprudence of Article 15 is easily distinguished from that of normalcy. The “creeping effect”<sup>105</sup> or “normalization of the exception” is thus mitigated. However, the low threat severity threshold a crisis must cross in order to constitute an emergency, coupled with a lack of due scrutiny of this decision makes this differentiation merely formalistic. In *Brannigan and McBride*,<sup>106</sup> the ECtHR upheld the detention of the petitioners under the Prevention of Terrorism (Temporary Provisions) Act 1984, as there was no breach of their right to liberty under article 5 of the ECHR, owing to the declaration of emergency by the UK in accordance with Article 15. This is in spite of an earlier decision in *Brogan and Others v. the United Kingdom*,<sup>107</sup> an almost identical case factually. Here, it was held that the petitioners’ rights were infringed, as at the time no derogation order had been lodged with the ECHR. The declaration of emergency before *Brannigan* therefore seems primarily motivated by the decision in *Brogan*.<sup>108</sup> One could argue that Article 15 does insist on a strict separation between normalcy and emergency, and *Brogan* and *Brannigan* illustrate the legal differentiation between them. This is however not grounded by a factual distinction between the two. Instead, owing to the motivation behind the declaration of a state of emergency in the aftermath of *Brogan* (rather than two separate legal regimes being created), the first limb of Article 15 operates merely as a procedural barrier for a state. It is nothing more than administrative protocol which must be followed, than a clear demarcating line between normalcy and emergency.

Once this formal barrier is crossed, the only mechanism to temper a state’s actions under Article 15 is the proportionality test of the second limb— that the measures enacted be proportionate to the exigencies of the situation. This is indistinguishable from the ECtHR’s methodology in non Article 15 cases.<sup>109</sup> In effect, the ECtHR acts in a “business as usual” manner. However, this proportionality test is subject to a wide margin of appreciation, resulting in a substantial level of deference to national authorities in much the same way as the US Supreme Court has deferred to the executive in periods of emergency, despite the insistence that the same law applies in both war and peace.

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<sup>105</sup> See Andrew Ashworth, *Crime, Community and Creeping Consequentialism*, CRIMINAL LAW REVIEW 220 (1996).

<sup>106</sup> *Brannigan and McBride v. the United Kingdom*, 258 Eur. Ct. H.R. (ser. A, 1993).

<sup>107</sup> *Brogan v. the United Kingdom*, Judgment of 29 November 1988, 145-B Eur. Ct. H.R. (ser. A, 1988).

<sup>108</sup> See GROSS & NÍ AOLÁIN, *supra* note 10, at 278-279.

<sup>109</sup> See Y ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 14 (2001).

### E. Conclusion

Describing the two limbs of Article 15 as two barriers protecting human rights is inaccurate. The requirement that a state of emergency must exist in order to derogate from treaty obligations does little to protect human rights. Ideally, it should create a clear demarcation between normalcy and emergency, allowing the latter to be declared only when there is a situation “threatening the life of the nation.” The exception should be contained firmly within these lines of demarcation, protecting human rights when conditions of normalcy prevail. Instead, the requirement that a state of emergency be declared is little more than an administrative procedure, facilitating the encroachment of human rights, rather than containing them. Focus on whether the measures are proportionate to the exigencies of the situation blurs these lines of demarcation between normalcy and emergency further.

The normalizing of the exception and the creation of a permanent state of emergency is not driven merely by factual conditions.<sup>110</sup> Deference to the executive’s assessment of these factual conditions and the existence of an emergency is a major contributor to perpetuated emergencies, given the propensity of a state to over-estimate its security needs in a time of crisis.<sup>111</sup> This article seeks to present a case for a less deferential role of the judiciary in assessing the existence of an emergency. This could be done by the ECtHR giving effect to the “natural and ordinary meaning” of the phrase “...threatening the life of the nation,” i.e. an approach following the same scrutiny and reasoning employed by Lord Hoffmann in *Belmarsh*. It is impossible and counter-intuitive to define or list exhaustively the phenomena that may give rise to a state of emergency in a concrete and juridical manner. However, that is not to say that one cannot always clearly differentiate between normalcy and emergency. It is around the penumbra of settled meaning, particularly regarding threats labeled as “terrorist” where problems of identification arise.<sup>112</sup> Focusing only on whether the measures are proportionate to the exigencies of the situation is not sufficient, and only serves to further blur the distinction between normalcy and emergency. The emergency paradigm is thus not obsolete. Only by realizing Article 15’s potential to act not only as a sword for derogating from human rights, but also as a shield for protecting them, can one vindicate human rights.

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<sup>110</sup> See Neocleus, *supra* note 34.

<sup>111</sup> Ignatieff argues that the state’s politicians have an incentive to prefer a strong executive response, given the political gain this can incur and conversely, the adverse consequences of the public perceiving politicians to be under reacting to a terrorist threat. See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 58 (2005); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002).

<sup>112</sup> See Hart, *supra* note 16.

This paper recognizes instances where human rights and other liberal democratic obligations may not be met. It does so due to the fundamental flaws of the “business as usual” approach. However, while recognition of the need for a suspension of liberalism is a paradox, it is not, as Schmitt argues, a fatal paradox.<sup>113</sup> Paradoxes should not exist. However, the paradox can itself ensure this by collapsing in on itself.<sup>114</sup> Once the threat is defeated, the need for such measures also disappears. States of emergency are therefore, self-destructive when properly deployed. The ECtHR must ensure this by effectively scrutinizing the decision of a Member State to declare a state of emergency in the first instance.

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<sup>113</sup> See generally, SCHMITT, *supra* note 43. See also Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825, 1847-1848 (2000); DYZENHAUS, *supra* note 8, at 35-54.

<sup>114</sup> As per the UN Human Rights Committee’s General Comment on Article 4, a discussion of which can be found at: Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUMAN RIGHTS LAW REVIEW 81, 82 (2002).