

Chapter Seven

The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into the Boundaries between Human Rights Law and Public Policy

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Introduction

A key question in the political and academic discourse on the legislative response to the threat of international terrorism has been the question of proportionality. While some have argued that the laws enacted to counter terrorism strike the right balance between national security imperatives and concerns for civil liberties and human rights, others have regarded them as disproportionate and as an overreaction.¹ What both sides have in common, however, is that they generally approach the question of proportionality without examining the nature and quality of the terrorist threat and by accepting the executive's assertion that the threat may warrant a range of comprehensive counter-measures.

I would argue that this approach is logically flawed. What proportionality generally requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially proportionality requires one to determine whether a measure of interference, which is aimed at promoting a legitimate public policy, is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals. A decision

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¹ In Australia, commentators who consider Australia's anti-terrorism laws balanced and proportionate include: P Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27(2) *University of New South Wales Law Journal* 254; R Cornall, 'A Strategic Approach to National Security', (Address to the Security in Government Conference, Canberra, 10 May 2005). Authors questioning the proportionality of some of the Australian laws include: G Williams, 'Australian Values and the War against Terrorism' (2003) 26(1) *University of New South Wales Law Journal* 191; G Carne, 'Brigitte and the French Connection: Security Carte Blanche or A La Carte' (2004) 9(2) *Deakin Law Review* 604; C Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25(3) *Sydney Law Review* 275; J Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49(2) *Australian Journal of Politics and History* 355; C Michaelsen, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28(4) *Studies in Conflict & Terrorism* 321.

that takes into account proportionality principles should, inter alia, impair the right in question as little as possible, be carefully designed to meet the objectives in question, and not be arbitrary, unfair or based on irrational considerations.

In order to establish whether counter-terrorism laws and measures meet the objectives in question it is imperative to identify clearly what those objectives are. The objective of anti-terrorism laws is, in most cases, the reduction of the threat of terrorist attacks or activities. Thus it is logically necessary for a thorough proportionality analysis to consider or assess the quality and nature of the threat. I would argue that in the absence of such analysis, any proportionality assessment is incomplete.

Nonetheless, both the European Court of Human Rights (ECtHR) and national courts, most recently the House of Lords, have taken a deferential approach and granted national authorities a wide 'discretionary area of judgment',² or, in the terminology of the ECtHR, a 'wide margin of appreciation' with regard to the existence and analysis of the threat of terrorism that may constitute a so-called 'public emergency'.³ One rationale behind this deferential approach, especially in common law countries, seems to be that in terms of both constitutional competence and expertise in the area of national security it is for government (and perhaps Parliament) rather than the courts to assess whether a public emergency exists.⁴

While not addressing the constitutional implications of this position, I will argue that in the context of international terrorism this rationale is flawed in its logic. Courts can and should be in a position to assess the nature and size of the terrorist threat without necessarily having to have access to specific intelligence. This is not to say that courts should not have access to specific intelligence or classified information held by the government. On the contrary, access to such information may be essential to fulfil fair trial requirements in proceedings against persons accused of terrorism offences. However, the difficulties and challenges that classified information poses for the courts shall not be the subject of analysis here. The argument I am trying to make in this chapter is that in spite of any access to specific intelligence information, courts can and should submit general policy decisions about the threat of terrorism to judicial scrutiny.

The argument has both an international and a domestic dimension (although the domestic dimension is related to the international one). First I will argue that developments in international human rights law provide ample justification for an 'extension' of the competency of the courts — especially the ECtHR — to

² *A and Others v Secretary of State for the Home Department* [2005] 2 AC 68, [37], [39] (Lord Bingham) ('Belmarsh Detainees').

³ See, eg, *Ireland v United Kingdom* (1978) Series A No 35, [78]-[79]; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, [41].

⁴ See below n 22-38 and accompanying text.

assess the nature and quality of the terrorist threat that is seen to constitute a 'public emergency'. Second, I will argue that an 'extension' of competency of domestic and national courts would also be possible and desirable and, further, that it would also be the logical consequence of findings by the House of Lords in the *Belmarsh Detainees* decision of December 2004.⁵

The Proportionality Principle in the Context of Derogation from the European Convention of Human Rights

An inquiry into the boundaries between human rights law and public policy in the context of counter-terrorism benefits from examining the proportionality principle in light of the international system for protecting rights during states of emergency.⁶ The threat of terrorism has been invoked by governments in the past to justify restricting human rights and/or derogating from obligations contained in international human rights instruments.⁷ It was in the context of the United Kingdom's (UK) derogation from the European Convention of Human Rights (ECHR)⁸ in the aftermath of September 11 2001 (9/11) that the question of proportionality was addressed by the House of Lords in *Belmarsh Detainees*.

Both the ECHR and the International Covenant on Civil and Political Rights (ICCPR)⁹ allow for derogation from certain rights enshrined in these instruments. Article 15 (1) of the ECHR reads:

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 other obligations under international law.

Article 4 (1) ICCPR reads:

⁵ *Belmarsh Detainees* [2005] 2 AC 68.

⁶ For accounts of the international system for protecting rights during states of emergency see R Higgins, 'Derogations Under Human Rights Treaties' (1976-77) 48 *British Yearbook of International Law* 281; T Buergenthal, 'To Respect and Ensure: State Obligations and Permissible Derogations' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 72-91; C Schreuer, 'Derogation of Human Rights in Situations of Public Emergency' (1982) 9 *Yale Journal of World Public Order* 113; J F Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985) 7 *Human Rights Quarterly* 89; D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) 489-507; J A Frowein and W Peukert, *Kommentar – Europäische Menschenrechtskonvention* (2nd ed, 1996) 479-85; A-L Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, Boston: M Nijhoff Publishers, 1998).

⁷ See, eg, *Lawless v Ireland* (No 3) (1961) 1 EHRR 15; *Greek Case* (1969) 12 Yearbook ECHR 1; *Ireland v United Kingdom* (1978) Series A No 35; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553.

⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953).

⁹ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976).

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

The principle of proportionality constitutes a general principle of international law and includes elements of severity, duration and scope.¹⁰ It applies to Article 15 ECHR as well as to Article 4 ICCPR. Both provisions essentially require a derogating state to satisfy two tests. First, the derogating state is required to establish that exceptional circumstances of war or other public emergency threatening the life of the nation do in fact prevail (the '*designation* issue'), and second, that measures taken in consequence of such an emergency are 'strictly required by the exigencies of the situation' (the '*interference* issue').¹¹

As to the *designation* issue, the ECHR and the ICCPR both lack a specific definition of a 'public emergency threatening the life of the nation'. Nevertheless, the international monitoring organs established under the treaties, notably the ECtHR (and previously the European Commission of Human Rights), have extensively interpreted the term and provided jurisprudence valuable for determining its meaning and scope. As the Strasbourg authorities construe the terms of Article 15 according to their natural and ordinary meaning (as required by principles of treaty interpretation), and the derogation clauses of the ICCPR and the ECHR are similar, European decisions and findings are readily applicable to cases arising under the ICCPR.

The first substantive interpretation of Article 15 of the ECHR was made in *Lawless v Ireland*.¹² Confirming the determination by the European Commission of Human Rights that Article 15 should be interpreted in the light of its 'natural and customary' meaning, the ECtHR defined 'time of public emergency' as 'an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed'.¹³ The definition was further developed and clarified in the *Greek Case*.¹⁴ Reaffirming the basic elements of the Court's approach in *Lawless v Ireland*, the Commission emphasised that the emergency must be actual

¹⁰ See, eg, M Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Boston: Martinus Nijhoff, 1993) 125-37.

¹¹ See, eg, S Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68(4) *Modern Law Review* 668.

¹² *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.

¹³ *Ibid* 31.

¹⁴ *Greek Case* (1969) 12 Yearbook ECHR 1.

or at least ‘imminent’.¹⁵ In order to constitute an Article 15 emergency, the Commission held that a ‘public emergency’ must have the following four characteristics:¹⁶

- it must be actual or imminent;
- its effects must involve the whole nation;
- the continuance of the organised life of the community must be threatened;¹⁷ and
- 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.¹⁸

As to the *interference* issue, a fundamental requirement for any measures derogating from the ECHR or the ICCPR is that such measures are limited ‘to the extent strictly required by the exigencies of the situation’. Derogation measures must thus be strictly proportionate. In *Handyside v United Kingdom* the Strasbourg Court expressly differentiated the ‘strictly required’ standard in Article 15 from the ordinary standard of ‘necessity’ or proportionality that is found in some provisions of the ECHR. The Court articulated three tiers of standards found in the Convention: ‘reasonableness’ (see, eg, arts 5(3) and 6(1) ECHR), ‘necessity’ (see, eg, art 10(2) ECHR) and ‘indispensability’.¹⁹ Indispensability was associated with the phrase ‘strictly required’ in Article 15 ECHR and the phrase ‘absolutely necessary’ in Article 2(2). The Court has since stated in *McCann and Others v United Kingdom* that:

the use of the term ‘absolutely necessary’ in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is ‘necessary in a democratic

¹⁵ The notion of imminence is present in the Merits judgment in French (authentic version) but not in the English version. The relevant part of the Merits judgment in French reads: ‘*Une situation de crise ou de danger public exceptionnelle et imminente ...*’.

¹⁶ *Greek Case* (1969) 12 Yearbook ECHR 1, [153].

¹⁷ Some members of the Commission argued that when the organs of the state are functioning normally, there is no grave threat to the life of the nation and, therefore, emergency measures are not legitimate. However, the majority in the Commission did not follow this reasoning. In practice, both the second and third criteria are generally applied in a rather relaxed way.

¹⁸ Evidence of these requirements being recognised as general legal standards in the process of determining the meaning of ‘public emergency’ can also be found in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (‘*Siracusa Principles*’), reproduced in ‘*Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*’ (1985) 7(1) *Human Rights Quarterly* 3. The *Siracusa Principles* were drafted by a group of 31 distinguished experts in international law convened in Siracusa, Italy, in Spring 1984, by a number of well-respected organisations such as the International Commission of Jurists. In addition, these criteria are contained in the International Law Association’s (ILA) work on the issue: ILA, *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (‘*Paris Minimum Standards*’), reproduced as ‘*The Paris Minimum Standards of Human Rights Norms in a State of Emergency*’ (1985) 79 *American Journal of International Law* 1072.

¹⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737, [48].

society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.²⁰

By contrast to Article 2 ECHR, the stricter standard of necessity is justified in the context of Article 15 ECHR not by the importance of the right at stake but by the nature of the measure, which is to take a state outside the human rights regime. Any derogation measure must fulfil the following five basic requirements:

- the measures must be strictly required (ie, actions taken under ordinary laws and in conformity with international human rights obligations are not sufficient to meet the threat);
- the measures must be connected to the emergency (ie, they must 'prima facie' be suitable to reduce the threat or crisis);
- the measures must be used only as long as they are necessary (ie, there must be a temporal limit);
- the degree to which the measures deviate from international human rights standards must be in proportion to the severity of the threat (ie, the more important and fundamental the right which is being compromised, the closer and stricter the scrutiny);
- effective safeguards must be implemented to avoid the abuse of emergency powers. Where measures involve administrative detention, safeguards may include regular review by independent national organs, in particular, by the legislative and judicial branches.

As stated by the European Commission in the *Greek Case*, and by the Human Rights Committee in its *General Comment 29*, the states parties bear the burden of proof in establishing the existence of a 'public emergency'.²¹ However, in assessing whether a 'public emergency' exists and what steps are necessary to address it, states are granted a so-called 'margin of appreciation'. The doctrine of margin of appreciation embodies the general approach of the Strasbourg Court to the difficult task of balancing the sovereignty of contracting parties with their obligations under the Convention.²² As Ronald St James Macdonald, a former judge of the ECtHR, observed, it is the doctrine of margin of appreciation that allows the Court to escape the dilemma of 'how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognising the

²⁰ *McCann and Others v United Kingdom* (1995) 21 EHRR 97, [149].

²¹ Human Rights Committee, *General Comment 29, States of Emergency* (Article 4), [4], [5], UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

²² See R St J Macdonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds), above n 10, 83.

diversity of political, economic, cultural and social situations in the societies of the Contracting Parties'.²³

In the context of derogation in times of 'public emergency threatening the life of the nation', the margin of appreciation represents the discretion left to a state in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction.²⁴ In *Ireland v United Kingdom*, the ECtHR held that:

it falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation.²⁵

In *Brannigan and McBride v United Kingdom* the Court held that:

it falls to each Contracting State, with its responsibility for 'the life of [its] nation,' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities ...²⁶

The margin of appreciation is thus granted to the national authorities both in relation to the existence of a public emergency — the *designation* issue — and in determining whether derogation measures are strictly required by the exigencies of the situation; the *interference* issue.

Justifications for the Margin of Appreciation

Three main reasons have been advanced by the Court and commentators for applying a wide margin of appreciation in the context of derogations. First, it was argued by Michael O'Boyle, for instance, that given their perceived vital interests were at stake, governments could respond to an adverse decision by the Court regarding derogation by denouncing the Convention, or withdrawing

²³ Ibid.

²⁴ See, eg, T A O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4(4) *Human Rights Quarterly* 474.

²⁵ *Ireland v United Kingdom* (1978) Series A No 35, [78]-[79].

²⁶ *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, [41].

recognition of the Court's jurisdiction or competence to receive individual petitions. To avoid losing state support in this way, the Court should reject derogation only in the most transparently spurious cases.²⁷

Second, the ECtHR held in *Ireland v United Kingdom*, that it was inappropriate to decide with the benefit of hindsight on issues that a government must necessarily address urgently and on the basis of information that it may not be capable of publicising.²⁸ This view is shared by J G Merrills, for instance, who argues that the determination that an emergency existed, and what measures were necessary to counter it, was a political judgment in relation to which judges were 'ill-equipped and improper arbiters'.²⁹ In addition, national authorities, Merrills argued, were in a much better position than a supranational institution like the Court to assess the situation on the ground. The government's discretion thus needed to be respected, especially as it was the government's responsibility to ensure law and order. The Court, on the other hand, served the public interest in effective government by ensuring that the government's conduct in relation to a proclaimed emergency is at least 'on the margin' of the powers conferred by Article 15 ECHR and Article 4 ICCPR.³⁰

Third, and related to the second argument, emergencies exert great pressures against continued adherence to protection of human rights. As Oren Gross and Fionnuala Ní Aoláin pointed out, governments often consider protecting human rights and civil liberties to their fullest extent as a 'luxury that must be dispensed with if the nation is to overcome the crisis it faces'.³¹ Moved by perceptions of physical threat both to the state and to themselves and motivated by growing fear and by hatred toward the 'enemy', the citizenry may support the government to employ more radical measures against the perceived threats. In these circumstances, notions of the rule of law, rights, and freedoms are legalistic niceties that bar effective action by the government. Exigencies tend to provoke the 'rally around the flag' phenomenon,³² or, as Mark Nolan has pointed out, a 'siege mentality', in which governmental actions perceived as necessary to fight off the crisis garner almost unqualified popular support.³³ In this situation there was no role for a supranational institution, like the ECtHR, to play.

²⁷ See, eg, M O'Boyle, 'Torture and Emergency Powers under the European Convention on Human Rights: Ireland v the United Kingdom' (1977) 71 *American Journal of International Law* 705.

²⁸ *Ireland v United Kingdom* (1978) Series A No 35, 214.

²⁹ See, eg, J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester, New York: Manchester University Press, 1988) 37.

³⁰ *Ibid.*

³¹ O Gross and F Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625, 638-39.

³² *Ibid.*

³³ Nolan, Chapter 6 this volume.

Critique of the Justifications for the Margin of Appreciation

I would argue that all three arguments need to be revisited and ultimately rejected in the context of legislation enacted to counter the current threat of terrorism.

First, the ECHR and the Court in Strasbourg — like the Council of Europe itself — have become cornerstones of modern-day Europe. As such it is unthinkable in the realm of contemporary international politics that a Council of Europe member state would withdraw its recognition of the Strasbourg Court's jurisdiction or competence to receive individual petitions as a result of an unfavourable decision. This argument is supported, *inter alia*, by various unfavourable judgments of the Court in relation to the conflicts in Chechnya and South-Eastern Turkey, for instance. A similar argument can be made in relation to the ICCPR, which has become a universally accepted core instrument of international human rights law.

Second, the Strasbourg authorities themselves have confirmed that states do not enjoy an unlimited discretion in relation to the determination of a public emergency and that the domestic margin of appreciation is accompanied by 'European supervision'.³⁴ It is noteworthy that dissenting votes in the case law have repeatedly questioned the practice of granting states a wide margin of appreciation. In *Lawless v Ireland*, a minority of the Commission members rejected the margin of appreciation doctrine altogether, arguing that evaluation of the existence of a public emergency ought to be based solely on existing facts without regard to any account of subjective predictions as to future development.³⁵ They also argued that the Commission ought to review *de novo* the existence of a public emergency in a given situation without assuming an *a priori* deferential attitude towards the respondent government.

Interestingly, the Human Rights Committee also seems reluctant to grant a wide margin of appreciation, if it recognises the application of such a doctrine at all. In *Landinelli Silva v Uruguay*, for instance, the Committee found that 'the State Party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes Article 4(1)' and that it is the Committee's function 'to see to it that States parties live up to their commitments under the Covenant'.³⁶ Similarly, the *Siracusa Principles* explicitly state that the principle of strict necessity shall be applied in an 'objective manner' and, moreover, that 'the judgment of the national authorities cannot be accepted as conclusive'.³⁷

But perhaps most questionable in the context of international terrorism is the argument that national authorities are in a better position to assess whether

³⁴ *Ireland v United Kingdom* (1978) Series A No 35, 207.

³⁵ *Lawless v Ireland* (No 3) (1961) 1 EHRR 15, 32.

³⁶ *Landinelli Silva v Uruguay* (1981) HRC Comm No 34/1978, [8.3].

³⁷ See No 54 and 57 of the *Siracusa Principles*, see above n 18.

circumstances that constitute a public emergency do in fact prevail. Unlike its previous manifestations, contemporary terrorism is hardly attributable to a confined number of terrorist organisations, even though it has been mainly associated with Al Qa'ida.³⁸ In other words, the threat is much more diffuse and abstract. In most circumstances the existence of a 'public emergency threatening the life of the nation' is or will be claimed in relation to a threat. In consequence, there has to be an assessment of the risk of the realisation of the threat, as well as its seriousness. Because the terrorist threat is usually 'international' and non-specific, the government's burden of justification in respect of the existence of a 'public emergency' is particularly high. The margin of appreciation granted to individual states in assessing the existence of a 'public emergency' and the proportionality of response measures thus need to be reconsidered and adjusted. The more global and non-specific the threat, the less the amount of discretion left to the state. As the threat of international terrorism is global, national authorities are not necessarily in a better position to decide on the imminence of a 'public emergency'. Quite the opposite: other countries might even have superior intelligence on specific terrorist threats.

It is equally debatable whether the highly politicised discourse on terrorism and counter-terrorism is conducive to rational and calm consideration and an appropriate balancing of the competing interests at stake. Thus, it may well be that a supranational institution like the ECtHR, detached and removed from the immediate political debate, is better placed to judge matters more clearly and more accurately. It is the Court, therefore, that is in a better position than the national government to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.

The Court should also be less deferential to a government's assessment that a state of emergency exists where the emergency is possibly a permanent one, given that the concept of an emergency permitting derogation, which is embodied in the relevant clauses of the ECHR and ICCPR, is necessarily a temporary one, the logic being that rights may be temporarily suspended, not that they may simply be destroyed.³⁹ This is particularly the case in the context of international terrorism and the aftermath of 9/11 where the threat that is supposed to constitute a public emergency has become permanent. The Court should refrain from granting a wide margin of appreciation but rather should submit governmental

³⁸ For an assessment of the threat of contemporary terrorism see, eg, J Burke, 'Think Again: Al Qaeda' (2004) 142 *Foreign Policy* 18; B Hoffman, 'The Changing Face of Al Qaeda and the Global War on Terrorism' (2004) 27(5) *Studies in Conflict & Terrorism* 549; B Hoffman, 'Al Qaeda, Trends in Terrorism, and Future Potentialities: An Assessment' (2003) 26(6) *Studies in Conflict & Terrorism* 588; P Bergen, *Holy Terror, Inc.: Inside the Secret World of Osama bin Laden* (New York, Simon & Schuster, 2001).

³⁹ O Gross, "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437.

claims to strict scrutiny, in relation to both designation and interference issues: the longer the emergency, the narrower ought the margin of appreciation be.

The Question of Proportionality and the *Belmarsh Detainees* Decision

The ECtHR has yet to address the question of whether the post-9/11 threat of terrorism may constitute a ‘public emergency threatening the life of the nation’ as well as the issue of what domestic measures might be necessary and proportionate to counter it. Both issues, however, were addressed by the House of Lords in the recent *Belmarsh Detainees* decision. From an international human rights perspective, the case is of particular interest as it deals with both the *designation* and *interference* issues in the context of the *Human Rights Act 1998* (UK), which incorporates the ECHR into domestic British law.

The case was brought by nine foreign (non-UK) nationals who had been certified by Britain’s Home Secretary under s 21 of the *Anti-Terrorism, Crime and Security Act 2001* (‘ATCSA’) as suspected international terrorists and who had been detained under s 23 of the Act which allowed for detention without charge.⁴⁰ Section 23(1) ATCSA reads as follows:

a suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.⁴¹

The claimants challenged the legality of both these provisions and the Government’s decision to derogate from Article 5 ECHR in respect of the detention provision.⁴² The challenge had previously been unsuccessful before the Court of Appeal.

The Lords essentially had to address two central issues. The first was whether the Government’s derogation from the ECHR in respect of the detention measures was lawful. The second was whether the statutory provisions under which the

⁴⁰ A Tomkins, ‘Legislating against Terror: the Anti-Terrorism, Crime and Security Act 2001’ (2002) (Summer) *Public Law* 205; H Fenwick, ‘The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to September 11?’ (2002) 65 *Modern Law Review* 724.

⁴¹ Section 23 has been repealed in the wake of the House of Lord’s decision in *Belmarsh Detainees* [2005] 2 AC 68.

⁴² In asserting the existence of a public emergency in the UK, the British Government stated that: ‘There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.’ See the *Human Rights Act 1998* (Designated Derogation) Order 2001, No 3644, which came into force on 13 November 2001.

appellants had been detained were incompatible with the ECHR. The Lords thus addressed the *designation* issue as well as the *interference* issue. By an eight-to-one majority, the derogation by the UK Government from the ECHR was quashed and a declaration issued to the extent that s 23 ATCSA was incompatible with the *Human Rights Act 1998* (UK).⁴³

The House of Lords judgments can be divided into three camps. Seven members of the Court — Lords Bingham, Nicholls, Hope, Scott, Rodger, Carswell, and Baroness Hale — held that, while a 'public emergency threatening the life of the nation' could be said to exist, the detention provision could not be said to be 'strictly required' by that emergency. It was disproportionate and discriminatory and hence unlawful. One judge — Lord Walker — dissented. He held both that there was a public emergency threatening the life of the nation and that the detention provision of s 23 ATCSA was neither discriminatory nor disproportionate to the aim the measure sought to achieve. Lord Hoffmann agreed with the majority that the provisions in question were incompatible with the ECHR. However, he was the only judge who held the derogation unlawful on the ground that there was no 'war or other public emergency threatening the life of the nation' within the meaning of Article 15 ECHR.

The Majority Approach to the Threat of Terrorism

Lord Bingham's lead judgment represents the *ratio decidendi* as it had the agreement of six of the Lords. Unlike Lord Hoffmann, Lord Bingham was not prepared to hold that no public emergency threatening the life of the nation existed. Nevertheless, he upheld the appeal on the grounds that the detention powers were disproportionate and discriminatory. In relation to the *designation* issue, Lord Bingham's approach essentially absolved the Government from advancing clear and convincing evidence to Parliament (and the courts) to demonstrate that a public emergency threatening the life of the nation actually existed.

Lord Bingham approved and applied the case law of the ECtHR on Article 15 ECHR granting a wide margin of appreciation. He found that to hold that there was no public emergency in cases where, 'a response beyond that provided by the ordinary course of law was required, would have been perverse'.⁴⁴ This reasoning, however, is illogical as it essentially bases the determination of the question of whether a public emergency exists on the measures taken to address it. As Tom Hickman has observed, 'if one is to infer from the fact that exceptional

⁴³ *Belmarsh Detainees* [2005] 2 AC 68, [73] (Lord Bingham). See also the judgments of Lords Nicholls, Hope, Scott, Rodger, Carswell, and Baroness Hale at [85], [139], [160], [190], [240] and [239] respectively.

⁴⁴ *Ibid* [28] (Lord Bingham).

measures have been taken that such measures are legitimate then the criteria of legitimacy (ie, public emergency) is relieved of substance'.⁴⁵

Lord Bingham went on to hold that it was for the appellants to demonstrate that the Government's claim that there was an emergency that required derogation from the ECHR was 'wrong and unreasonable'.⁴⁶ The appellants, however, had 'shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question'.⁴⁷ Lord Bingham's reasoning is highly problematic. This reversal of the burden of proof in relation to the existence of a public emergency threatening the life of the nation raises serious concerns from a purely practical perspective. It is difficult to see how individuals will ever be able to disprove the government's view that an emergency exists, not least because the relevant evidence will be in the hands of the government.⁴⁸ Lord Bingham's view also runs contrary to the approach taken by the ECtHR. As indicated earlier, the Strasbourg authorities have repeatedly confirmed that the burden is not upon the individual, but upon the government to demonstrate that there exists a national emergency that requires derogation from international human rights obligations.⁴⁹ It is noteworthy that the Human Rights Committee in its *General Comment 29* has taken a similar view.⁵⁰

With regard to the *interference* issue, Lord Bingham held that the detention power was not rationally connected to the objective of addressing the imminent threat of terrorism as it did not correspond to that objective in several respects. First, and assuming that the terrorist threat constituting a national emergency stemmed from Al Qa'ida, the detention power set forth in s 23 ATCSA powers applied to non-Al Qa'ida terrorists as well. Second, it applied to Al Qa'ida supporters who posed no direct threat to the national security of the UK. Third, it did not apply to the threat from terrorists who were UK nationals. And fourth, it allowed any 'suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs'.⁵¹ This, said Lord Bingham, was 'hard to reconcile with a belief in [the terrorists'] capacity to inflict serious injury to the people and interests of this country'.⁵² As a result, the measure taken (ie, s 23 ATCSA) was not strictly required by the exigencies of the situation and the derogation was hence unlawful.

⁴⁵ T R Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68(4) *Modern Law Review* 655.

⁴⁶ *Belmarsh Detainees* [2005] 2 AC 68, [29] (Lord Bingham).

⁴⁷ *Ibid.*

⁴⁸ See also Hickman, above n 45, 663.

⁴⁹ See above n 20 and accompanying text.

⁵⁰ Human Rights Committee, *General Comment 29*, above n 21, [4]-[5].

⁵¹ *Belmarsh Detainees* [2005] 2 AC 68, [33] (Lord Bingham).

⁵² *Ibid.*

From a purely logical perspective, Lord Bingham's reasoning with regard to the *interference* issue is not entirely consistent, especially in light of his findings in relation to the *designation* issue. He essentially held that it was not for the Court but for government to assess whether the threat of terrorism constituted a public emergency. Nonetheless, Lord Bingham then went on to hold that s 23 ATCSA was not rationally connected to the emergency and thus not suitable to reduce the imminent threat. He failed to explain, however, how he was able to conclude that a measure was not connected to the national emergency, or not suitable to reduce the imminent threat, when the nature and quality of the threat itself was not something that the Court was able to examine or determine. I would argue that this is a logical gap in the majority decision of the House of Lords in *Belmarsh Detainees* and also in the case law of the ECtHR in the area of emergency derogations more generally. From a logical standpoint, it is simply impossible to determine whether an emergency measure is suitable to address a threat or a crisis without establishing what the nature or quality of the threat or crisis is in the first place.⁵³

The Dissident Approach to the Threat of Terrorism

Lord Hoffmann, on the other hand, chose to undertake an examination of the quality and nature of the threat of terrorism to the UK and found that it did not constitute a 'war or other public emergency threatening the life of the nation'. He further held that it was insufficient merely to produce evidence of a credible plot to commit terrorist outrages since that did not meet the need to show that the threat of terrorism constituted a public emergency threatening the life of the nation. According to Lord Hoffmann:

The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity ... I am willing to accept that credible evidence of such plots exists. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one ... This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the

⁵³ I acknowledge that it is possible — for practical reasons — to deal with the issue of proportionality solely by focusing on the discrimination issue in cases where blatantly and invidiously discriminatory measures are adopted. Nonetheless, the lack of consideration of the nature of the threat still leaves an undesirable hole and makes a thorough proportionality analysis incomplete.

balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.⁵⁴

Lord Hoffmann explicitly held that there were legal limits to the Government's capacity to determine when a situation of public emergency existed, and further, that the Government was in fact wrong to declare a situation of public emergency in the aftermath of 9/11. In doing so, he did not grant the Government a wide margin of appreciation with regard to the *designation* issue. As a consequence, he also did not address the question of whether the Government's measures adopted in s 23 ATCSA were 'strictly required' (ie, the *interference* issue).

What is remarkable about Lord Hoffmann's judgment is that he is able to determine, without access to specific intelligence information, that the current threat of terrorism to the UK does not threaten the life of the nation. In fact, he explicitly accepts that there is a serious terrorist threat to the UK. But this threat is put into perspective by drawing comparisons both to historical threats to the UK and more recent manifestations of terrorism like the 9/11 attacks and the Madrid train bombings. And so the Government's general policy decision about the nature and quality of the threat of terrorism is submitted to judicial scrutiny despite lack of access to specific intelligence information.

Conclusion

The ECtHR as well as the House of Lords in the *Belmarsh Detainees* decision have taken a deferential approach in relation to the *designation* issue in the context of Article 15 ECHR and have granted national authorities a 'wide margin of appreciation' or 'discretionary area of judgment' with regard to the existence and analysis of the threat of terrorism that constituted a public emergency threatening the life of the nation. Leaving this discretion to national authorities absolved the courts from examining in greater detail the nature and quality of the threat that justified derogating from international (or domestic) human rights obligations. However, a closer analysis of the rationale behind the margin of appreciation doctrine reveals that several arguments that have been advanced to justify granting national governments a 'wide' margin are outdated as well as inapplicable in the context of the threat of international terrorism. Developments in soft law such as the *Paris Minimum Standards of Human Rights Norms in a State of Emergency* or the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, which in some cases find their origins in dissenting opinions by judges of the Strasbourg authorities, as well as observations by the Human Rights Committee,

⁵⁴ *Belmarsh Detainees* [2005] 2 AC 68, [91], [94], [96] (Lord Hoffmann).

suggest that the discretion left to governments should be re-considered and adjusted. This is particularly the case in circumstances where the emergency becomes 'entrenched' with the threat of terrorism likely to remain present for several years.

In addition, I would argue that granting government a wide discretionary power (with little judicial supervision) in relation to the existence of a public emergency is problematic in light of a further requirement of lawful derogation, that is, that the measures taken pursuant to such derogation need to be 'strictly required by the exigencies of the situation' (the *interference* issue). From a logical perspective, it is difficult to see how it is possible to assess whether measures are 'strictly required' to address an emergency effectively when an analysis of the nature and scope of the threat that constitutes such emergency is not undertaken. This is a logical gap which is evident particularly in Lord Bingham's judgment in *Belmarsh Detainees*.

An analysis of the nature and size of the terrorist threat that may constitute a public emergency does not necessarily require the courts to have access to specific or classified intelligence that governments are understandably reluctant to release. Lord Hoffmann's opinion in the *Belmarsh Detainees* decision is a case in point. While not questioning the existence of a serious terrorist threat to the UK, he nonetheless remained to be convinced that atrocities like the 9/11 attacks or the Madrid train bombings of March 2003 threatened the 'life of the nation'.⁵⁵ As a result, Lord Hoffmann did not see a need to examine whether the UK Government's counter-measures (ie, s 23 ATCSA) were 'strictly required by the exigencies of the situation'. Lord Hoffmann's approach is refreshingly progressive. It remains to be seen, though, what impact it will have on future decisions of national courts as well as of the European Court of Human Rights.

⁵⁵ Ibid [96] (Lord Hoffmann).