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Ever since the European Convention on Human Rights\textsuperscript{1} (the ECHR or the Convention) was drafted in 1950 and subsequently ratified in 1953, it has been described as being a ‘turning point in history towards peace and diplomacy’,\textsuperscript{2} and has established a benchmark as to what constitutes a human right and to the positive obligations of the contracting states.

The Convention subsequently established a court to protect and enforce human rights, formally recognized as the European Court of Human Rights (ECtHR), a supra-national, independent and impartial court which provides individuals or bodies the possibility to put forward an application alleging that a contracting state violated their human rights.

Even though human rights treaties are essentially drawn up to be observed universally and inalienably,\textsuperscript{3} the ECHR allows contracting states to derogate from its obligations under the Convention. This is provided for in Article 15 of the Convention\textsuperscript{4} which provides that a state may derogate from its obligations under the Convention in situations of war or other public

\textsuperscript{1} European Convention of Human Rights 4 November 1950.
\textsuperscript{4} ECHR Article 15 provides:
‘1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons thereof. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.’
emergency adversely affecting it. In order for the state to derogate from its obligations, Karimova provides that the derogation must be:

subject to the fulfillment of a number of requirements set by the treaty law, such as qualifications of severity, temporariness, proclamation and notification, legality, proportionality, consistency with other obligations under international law, non-discrimination, and lastly, non-derogability of certain rights recognized as such in the relevant treaty.\footnote{\textit{\textsuperscript{5}} Tahmina Karimova, ‘Derogation from Human Rights Treaties in Situations of Emergency Rule of Law in Armed Conflicts Project' (Atlalix.com, 2013) <http://atlalix.com/project-rulac/issues/derogation-from-human-rights-treaties-in-situations-of-emergency/> accessed 23 September 2016.}

Derogation clauses are not merely exclusive to the Convention, but may also be found in other international human rights treaties, such as Article 4 of the International Covenant on Civil and Political Rights (ICCPR)\footnote{\textit{\textsuperscript{6}} ICCPR Article 4 provides:
‘1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation’.\textit{\textsuperscript{6}}}
as well as Article 27 of the American Convention of Human Rights (ACHR).\footnote{\textit{\textsuperscript{7}} ACHR Article 27 provides:
‘1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from \textit{Ex Post Facto} Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. ‘Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension’.\textit{\textsuperscript{7}}}

As outdated as the concept of this right may seem nowadays from an ethical point of view, it is still very much in use nonetheless. In fact, following the devastating attacks in Paris in November 2015, as a prerequisite for the
invocation of Article 15 of the Convention, France informed the Secretary General of the Council of Europe of the various measures undertaken to ensure the safety of its citizens. However, France had to inform the Secretary General that these safety measures could derogate from the obligations conferred upon France by the ECHR. Earlier that year, Ukraine also informed the Secretary General of a possible derogation from the rights, as did Turkey in July 2016. Other countries, such as Armenia, Greece, Ireland, and the United Kingdom, have also invoked this right in the past.\(^8\) The Convention acknowledges the differences in duties and situations between states, and will only grant permission to those states which produce compelling justifications for such measures. Furthermore, the ECHR makes it clear that some measures are not permissible, whatever the emergency, and that the measures undertaken by the defaulting contracting state should not be inconsistent with its obligations, if any, under International Law.\(^9\)

In *Aksoy v Turkey*,\(^10\) due to a conflict between members of the Workers’ Party of Kurdistan (PKK) and Turkish security forces, Turkey, on the basis that the applicant was a suspected terrorist forming part of the PKK, derogated from its obligations under the Convention and from its positive obligation to safeguard the applicant’s Convention rights. Turkey violated the applicant’s human rights as it tortured him and subjected him to inhumane treatment, thereby breaching Article 3 of the Convention, the right to liberty and security under Article 5, as well as the right to an effective remedy under Article 13.

The Court declared that Turkey had violated the applicant’s human rights,\(^11\) and that its derogation from the obligations conferred upon it by the Convention was unlawful. Moreover, it established that a derogation would not have been unlawful as the rights conferred under Articles 3, 5 and 13 of the Convention are intrinsically protected by the Convention and are essentially non-derogable. Hence, the Court left it to the discretion of the contracting states to decide whether Article 15 should be applied or not but the Court would, inter alia, set boundaries for the states to act within.\(^12\)

\(^9\) ECHR Article 15(1).
\(^10\) *Aksoy vs Turkey*, App. No. 21987/03 (ECHR Grand Chamber 18 December 1996).
Notwithstanding the above, Article 15 does not provide a state a unilateral right to derogate from their obligations; rather, it places limitations on the state’s liberty to invoke this provision.

It provides that derogations from the ECHR must be limited ‘to the extent strictly required by the exigencies of the situation’. The derogation must also fit the severity of the situation in question proportionally. Whilst the ICCPR must produce specific justification for the proclamation of emergencies, as well as the measures that ensue, the ECHR takes on a more lenient approach, permitting states a ‘wide margin of appreciation’ in terms of proportionality. Since the Convention is recognizant of the states’ sovereignty and the differences in their respective legislation, it allows the stipulated states to decide on the extent of derogation in the case of emergency, especially in cases of an imminent threat to the nation.

In Ireland v UK the Court left it to the discretion of the national authorities to decide how far they should go in emergency situation. This was also seen in Brannigan and McBride v UK, wherein the Court held that the state has discretion of the state to decide on the derogation, as well as the extent of the measures to be taken to overcome the crisis situation.

Derogations may only be invoked in times of absolute emergency, such as during war, or any other exceptional cases that could affect the life of the state. In 2001, the UK claimed that it had a national emergency following the 9/11 attacks in the United States and subsequently invoked the right issued by Article 15. However, seeing as only the UK itself would have proof of this emergency, the chances of successfully proving its legitimacy were fairly slim. This is the perfect example of the possibility of states abusing of such a right, even with the presence of imposed limitations preventing this. For this right to work as it was designed to, it is a prerequisite to use the right to breach human rights law out of sheer necessity, as well as not having the adequate national legislation to deal with the issue.

References:
13 ECHR Article 15(1).
What constitutes a ‘national emergency’ is not provided for in the Convention. Rather, it was up to the European Commission of Human Rights in Denmark, Norway, Sweden, and the Netherlands v Greece, also known as ‘the Greek case’ to define the parameters of a ‘public emergency threatening the life of the nation’. It provided that for an emergency to be construed as a ‘public emergency threatening the life of a nation’, it must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; 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.

In the case of Lawless v Ireland the applicant was accused of being a part of the Irish Republican Army (IRA), and was held in detention without being given the chance to defend himself in trial. The European Court of Human Rights examined the case and discovered that the situation was indeed one of ‘crisis or emergency that affects the whole population’, thus giving rise to the conclusion that it was impossible to follow normal laws, and exceptional measures needed to be taken.

A similar situation was seen in the case of Ireland v United Kingdom. This case concerned the detention of suspected terrorists, who later alleged that that they were subjected to inhumane treatment and detained without a fair trial, and that the state had been in violation of the rights conferred upon by Article 3 (relating to inhumane treatment and torture), Article 5 (the right to liberty and security) and Article 6 (the right to a fair trial). The respondents claimed a national emergency, which entitled their use of Article 15. The ECtHR found that there was in fact a case of inhumane treatment but not torture. Although the ECtHR did in fact find the UK guilty of inhumane treatment, it ruled against there being the use of torture. It also found that Article 15 left a wide margin of appreciation for the states themselves to declare a national emergency and the types of measures to turn to. Even though the Court is to decide whether the states have gone beyond

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23 Ireland vs UK, App. No. 5310/71 (ECtHR Plenary Court 18 January 1978).
the boundaries laid down by Article 15, it found that the UK was not ‘exceeding the extent strictly required by the exigencies of the situation.’

When discussing the efficacy of Article 15, it is essential to keep in mind both sides of the coin. It has stirred a great deal of controversy between states, mostly because of the intentional derogation of human rights described by the Convention as ‘the foundation of justice and peace’. This inadvertently leads to the fundamental questions: Does the common good override the rights of an individual? Is Article 15 prioritizing states’ security over individual security, thus moving away from the proper notion of inalienable, non-transferable, and universal human rights?

It is worth considering that what is needed for the collectivity of individuals may not necessarily be beneficial for the sole individual himself. In late 2003, the United Nations Committee on the Elimination of Racial Discrimination suggested to the UK government balancing the concerns of national security with ‘the protection of human rights and its international legal obligations’.

It should also be taken into consideration, however, that even though some human rights are essentially being ignored, the most fundamental human rights of the individual are safeguarded by the Convention, such as through Article 2, which protects the right to life and Article 3, which protects the prohibition of inhumane, torturous or degrading treatment. These rights are non-derogable to ensure that the state does not abuse of its power to the point that it becomes a dictatorship and rules by fear. Furthermore, as seen in the cases of Aksoy v Turkey and Ireland v United Kingdom. Crimes against humanity are not considered to be derogable, regardless of the urgency or imminence of the situation. Nonetheless, despite these articles being non-derogable, this does not necessarily mean that a state has a unilateral right to derogate from the other provisions in the Convention. Rather, the derogation, if any at all, would depend on the exigencies of the situation.

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25 ECHR Article 15.
Another issue that follows as a consequence of such liberty is the possible deviation from in-treaty commitments that a signatory state is bound to. This is another limitation offered by this article, as it provides that the derogation of human rights must not be followed by the derogation of obligations to the Convention. Hence, if a state chooses to apply Article 15 in the case of an emergency, it must not abuse of other articles within the Convention. Kirchner states that 'the question is therefore whether the Convention also allows states to restrict rights guaranteed under the Convention to a degree which would be inconsistent with the spirit of the Convention'.

The article itself was not designated to restrict human rights, but it is meant to give states the opportunity for flexibility, which ultimately does affect whether human rights will be respected by the state. Perhaps it should not be the article that should endure such controversy, but it should be the risk of abuse from the state that should be feared, which in spite of the limitations of the article, continue to abuse of it. Despite the derogability of certain human rights, it is, by virtue of the limitations of the article and the supremacy of those articles protecting rights that cannot be derogated, that the individual’s human rights are safeguarded. It can be concluded therefore that Article 15 is intended to create a balance between the needs of the state and the rights of the individual; however, it is at the discretion of the states to abide by it.

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