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In Times of Terror:
Derogation and Non-Discrimination
in International Human Rights Law

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Abstract

The threat of international terrorism has become an integral part of both political and public debate in many countries and it has grown to become one of the hardest questions for the international community to solve. According to international law states are obliged to act to combat terrorism in various ways, but even during a threat states remain bound by their international human rights obligations. When liberty and security come into conflict, difficult considerations between human rights and a secure society arise. These considerations become especially difficult when the rights of certain groups become more compromised than those of the majority. This tends to happen in counter-terrorism situations, where states devise new ways to combat terrorism by targeting already exposed groups.

In many international human rights instruments, there are possibilities for states to derogate from their obligations under exceptional circumstances. This thesis examines the derogation regimes of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR) and their impact in counter-terrorism situations. The two regimes have very similar wordings, but the analysis in the thesis suggests that their practical effects differ somewhat. The derogation provisions are examined from a non-discrimination perspective in order to address the question how groups and individuals are protected from discriminatory anti-terrorism measures within the derogation system. The discrimination protection is constructed by way of a number of steps where a state action can be found unjustified for different reasons, but the widest protection is afforded by the requirement that measures be necessary and proportional. A new premise for the question of liberty versus security (“Human Security”) is also considered as a future possibility for states to create a new and more dynamic way of looking at security. Within Human Security, human rights are considered the core of a secure society, instead of an obstacle for effective counter-terrorism. At the end of the thesis a critical perspective is applied to discuss whether the derogation regime adequately protects groups and individuals from repressive measures and the thesis argues that both states and their people perhaps could stand to gain from a clearer and more secure discrimination protection.

Sammanfattning

Hotet från internationell terrorism har blivit en del av både den politiska och den offentliga debatten i många länder och vuxit till en av de svåraste frågorna att lösa för det internationella samfundet. Enligt folkrätten är stater skyldiga att agera för att på olika sätt för att bekämpa terrorism, men samtidigt förblir staterna bundna av sina internationella förpliktelser rörande mänskliga rättigheter. Då säkerhet och frihet kommer i konflikt, uppstår svåra avvägningar där rättigheter ställs emot samhällets säkerhet. Särskilt svår blir avvägningen då vissa grupper rättigheter äventyras i större mån än majoritetsbefolkningens. Detta tenderar att ske inom anti-terrorismen, där stater uppfinner nya vägar att motarbeta terrorism genom att sikta in sig på redan utsatta grupper.

I många internationella instrument för mänskliga rättigheter finns möjligheter för stater att under exceptionella förhållanden derogera från sina skyldigheter. Denna uppsats granskar derogationsreglerna i Konventionen om medborgerliga och politiska rättigheter (ICCPR) och i Europakonventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (ECHR) samt deras effekt i terrorismsituationer. De två regleringarna är väldigt lika till ordalydelsen, men analysen i uppsatsen framhåller att de delvis får olika genomslag i praktiken. Derogationsreglerna granskas sedan utifrån ett icke-diskrimineringsperspektiv för att behandla frågan hur befolkningen skyddas från diskriminerande anti-terrorismåtgärder i derogationssystemet. Skyddet består av ett antal steg där åtgärder kan underkännas av olika skäl, men det bredaste skyddet ges av kravet på att åtgärder ska vara nödvändiga och proportionella. Ett nytt perspektiv på förhållandet mellan frihet och säkerhet ("Human Security") lyfts även upp som en möjlighet för stater att i framtiden övergå till en mer dynamisk syn på säkerhet. Inom Human Security betraktas mänskliga rättigheter som grunden för samhällets säkerhet, istället för ett hinder för effektiv terrorismbekämpning.

I slutet av uppsatsen appliceras ett kritiskt perspektiv för att diskutera frågan om icke-diskrimineringskyddet i derogationssystemet är tillräckligt starkt för att skydda individer och grupper från förtryck, och uppsatsen argumenterar för att ett tydligare och säkrare skydd mot diskriminering eventuellt skulle gynna både staterna och deras befolkning.

Abbreviations

ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ Statute	Statute of the International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
UK	United Kingdom
UN	United Nations
UNCh	Charter of the United Nations
UNSC	United Nations Security Council
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

Terrorism is the very antithesis of human rights and in today's world counter-terrorism measures are part of the national security mechanisms of many countries. The measures are considered a necessary step to protect the security of the many, sometimes even at the expense of the human rights of the few. Under international law states are obliged to use their power to protect their people from violence and to cooperate to bring perpetrators to justice. However, even in times of fear and uncertainty states cannot act in any way they please but must make sure that their actions are in accordance with international human rights law.

The pursuit of security often leads to an attempt to find balance between liberty and security, and between the rights of different groups. This balancing act can be considered a necessary feature of a democratic society¹, but where should the limit be drawn for how much freedom we can give up to feel secure? How far can we go in trading off human rights against real or perceived security, if the rights of certain groups are affected more than others'?

1.1 Aim and Research Questions

The objective of this thesis is to examine, in the light of counter-terrorism issues, the derogation regime under two main human rights instruments, the ICCPR and the ECHR. The aim is to explore the requirements for derogation under these instruments and to determine to which extent derogations which directly or indirectly discriminate against certain groups are in accordance with international human rights law. The specific research questions the thesis aims to examine are:

- How can states derogate from their human rights obligations under the ICCPR and the ECHR during a threat of terrorism?
- How does the derogation regime of the instruments protect from state discrimination?

¹ Feinberg, p. 389.

- Does the derogation regime adequately protect the rights of groups which are in peril of being directly or indirectly discriminated against through states' counter-terrorism measures?

1.2 Methodology and Materials

The main method used in this thesis is the legal dogmatic method, which is applied to describe and interpret what the law entails. The method is applied to discover what is established through law and how the law can be used to solve a problem at hand. Authoritative legal sources, such as written law, case law and doctrine, are used to investigate the legal framework.² Which sources can be used depends on the question at hand and the area of law which is being investigated.³ When discussing the law, it is however important to keep in mind that it always, to a certain extent, involves an aspect of justice and morals. So as not to only create a purely descriptive text about the state of the law, the thesis will end with a discussion about *de lege ferenda*, how the law ought to be. The discussion part of the thesis therefore examines the human rights protection under the derogation regime of the instruments through a critical non-discrimination perspective.

The materials used are for the most part based on the authoritative sources of law. Although determining which sources possess authoritative strength can be complex in the field of international law, Article 38(1) of the ICJ Statute can be used to ascertain the relevant sources. I have therefore used international conventions, case law and statements from international courts and organs to form the basis of the material, while relying on legal doctrine to create a fuller picture of the framework. Monographs and articles about the different legal issues have thereby played an important role in filling out and giving context to the law.

1.3 Delimitations

The thesis will not in detail discuss the international or national anti-terrorism regimes or their development. Only the derogation systems included in the ICCPR and the ECHR will be discussed, while other human rights instruments have been left outside the scope of the essay, together with the impact of international humanitarian law in derogation situations. The general

² Kleineman, p. 21.

³ Kleineman, p. 28.

non-discrimination provisions of the instruments will only be discussed very briefly. The thesis will not in detail go into any specific derogation case and its impact on non-discrimination, but will instead keep the discussion on a more general level. Due to space limitations, the question of human security will only be raised as a brief presentation.

1.4 Research Contribution

The derogation systems of the central human rights instruments, the ICCPR and the ECHR, have been examined in many contexts, but they have not been the focus of much deeper research. This can in part be explained by the limited number of derogation situations, the rules only becoming applicable under extraordinary circumstances, and the case-specific considerations required by the necessity standards. There is not much material to be found specifically comparing the two instruments, the ICCPR and the ECHR, in question of derogation standards. The general human rights implications of counter-terrorism have been subject to more research. In his doctoral thesis, which later became the monograph *Human Rights and Non-Discrimination in the 'War on Terror'*, Daniel Moeckli discusses the question of discrimination in counter-terrorism, but he does not specifically examine the effect of derogations on the matter. This thesis aims to concentrate on the specific issue of derogations and non-discrimination and to provide an important new piece of knowledge to the field of human rights and security.

1.5 Outline

This paper will briefly discuss terrorism, how states attempt to combat it and the human rights implications of this. It will then consider the possibilities of derogation from international human rights obligations during a threat of terrorism. The possibilities for derogation will then be examined from a non-discrimination perspective and the thesis will end with a discussion arguing that the derogation regime does not adequately protect individuals and groups from being discriminated against through derogative counter-terrorism measures.

2. Counter-Terrorism & Human Rights

International terrorism has become a prominent issue and part of both political and public debate around the world. The attacks on the US on 11 September 2001 constituted a turning point in the relationship between international law and terrorism, and both states and international institutions responded in a swift and unforeseen manner.⁴ The NATO and the OAS formally considered 11 September an “armed attack” and historically invoked their right to collective self-defence⁵ while the UN Security Council regarded the act as a “threat to international peace and security” and recognized the “inherent right to individual or collective self-defence in accordance with the Charter”.⁶

The saying “one person’s terrorist is another person’s freedom fighter” reflects the political challenge of creating an internationally applicable definition for terrorism. For a long time, states have endeavoured to find a generally acceptable definition for the term, but have time and time again failed to agree. Instead, different states have at various times found ways to create exceptions for political groups or ideological efforts of their liking. Due to the lack of consensus states interested in creating international treaties to outlaw terrorism have had to deal with the issue by prohibiting specific acts of a terrorist nature, such as the taking of hostages and hijacking of civilian aircrafts.⁷

The UN anti-terrorism regime, together with many other post 9/11 legal developments, entail that states are under the obligation to act against terrorism, but have the right to determine through which means action should be taken.⁸ States have approached the issue in different ways, choosing between different courses of action.⁹ This has led to concerns regarding counter-terrorism measures constituting violations of international human rights law. Through Resolution 2178, adopted in 2014, the Security Council reminded UN member states of their obligation to

⁴ Alston and Goodman, p. 388.

⁵ See NATO Press Release 2001(124) and OAS Resolution RC.24/RES.1/01.

⁶ UN SC Res. 1368, preamble and para 1.

⁷ Alston and Goodman, p. 383f.

⁸ Feinberg, p. 392f.

⁹ See e.g. Buckley and Fawn, p. 2f.

protect international human rights while acting against terrorism.¹⁰ This constituted a move towards including human rights protection as a part of international counter-terrorism, instead of regarding it as an obstacle to it.¹¹ However, strong concerns remain regarding some states' use of counter-terrorism measures to crack down on political opponents and to escape criticism rising from their human rights violations.¹² Concerns have even been raised about the treatment of persons of foreign extraction in Sweden in connection with the international campaign against terrorism.¹³

Typical examples of anti-terrorist measures used by many states are adopting or strengthening the powers of executive or preventive detention, and the according of far reaching powers to law enforcement, both of which were widely applied in the aftermath of 9/11.¹⁴ E.g. the British Government believed the UK to be a likely target for terrorist attacks, the principal threat coming from foreign nationals in the UK, who could not be deported due to the risk of being ill-treated in their home countries. The Government decided to implement a right to extended detention of foreign nationals, but suspected that this might not be consistent with the country's human rights obligations, and therefore issued notice of a derogation from its obligations under the ECHR. The notice set out the provisions of the Anti-Terrorism, Crime and Security Act 2001, which included the power to detain foreign nationals suspected of international terrorism.¹⁵

A more recent example is the French state of emergency, which was declared after the November 2015 terrorist attacks in Paris and is still (22 May 2017) in force. The law in question extends exceptional powers to police and security forces, including the right to search private residences without warrant or judicial oversight, to dissolve associations and cancel public protests, and to put persons suspected of threatening public order under house arrest.¹⁶ By mid-March 2016, a mere four months into the state of emergency, 3 440 searches and 400 house arrests had been made. Of the 464 offences recorded during the searches only 25 were connected to terrorism (21

¹⁰ UNSC, Res. 2178, § 5.

¹¹ Feinberg, p. 400.

¹² See HRW Report, p. 1.

¹³ HRC, CCPR/CO/74/SWE, para. 12.

¹⁴ See e.g. Moeckli, p. 106f and 194ff.

¹⁵ *A. and Others v. UK*, para. 11. See also Anti-Terrorism, Crime and Security Act 2001, Part 4, Section 21-23.

¹⁶ Fredette, p. 101.

of which were glorifying terrorism).¹⁷ Since early on, many concerns have been voiced about the extensions of the emergency powers. In January 2016, a group of UN human rights experts stated that the emergency imposed disproportionate and excessive restrictions on fundamental freedoms and recommended a revision of the provisions, to make sure they comply with international human rights law.¹⁸ Both Human Rights Watch and Amnesty International have severely criticized the French state of emergency for being disproportionate, abusive and discriminatory towards the Muslim population.¹⁹

In the “War on Terror” certain minority groups regularly bear the greatest part of the burden, as their liberty is limited more than that of the majority population. The authorities treat people in different ways depending on e.g. their religion, citizenship or national or ethnic origin, and executives have an image of a terrorist in their minds when they choose their targets.²⁰ In both the aforementioned cases of national anti-terrorism measures, the states were compelled to issue derogation notices towards the ECHR, so as to more effectively combat the threat at hand. Also, both cases either directly or indirectly affected certain groups more than others: in the UK non-nationals were targeted specifically and in France the Muslim population has been the most affected group. These cases therefore serve as good examples of the workings of the derogation systems under the ICCPR and the ECHR, two major human rights instruments which both states are bound by,²¹ and of how derogations affect the international human right to non-discrimination.

¹⁷ FIDH, June 2016, p. 8ff.

¹⁸ OHCHR News, 19 January 2016.

¹⁹ HRW Report on France and Amnesty International Report on France.

²⁰ Moeckli, p. 223f.

²¹ See OHCHR, Status of Ratification, and Council of Europe Treaty Office.

3. Derogation from Human Rights

3.1 Requirements for Derogation

Despite what is sometimes said, the absolute majority of human rights obligations are not absolute²² and many human rights instruments include the possibility for states to derogate from their obligations under international human rights law under exceptional circumstances.

3.1.1 The International Covenant on Civil and Political Rights

The ICCPR is an important universal human rights instrument, which protects many fundamental civil and political rights. However, a State Party may, in accordance with Article 4, under limited circumstances, take measures derogating from their obligations under the Covenant. For such a derogation to be lawful there must exist a public emergency which threatens the life of the nation and which has been officially proclaimed. Measures can only be taken to the extent “strictly required by the exigencies of the situation” and they can neither be inconsistent with other obligations under international law or solely based on discriminatory grounds.²³

To guide State Parties in their use of Article 4, the HRC has adopted General Comment no. 29, in which the Committee states that the article is of paramount importance for the human rights regime under the Covenant. Public emergency can only be invoked where “the life of the nation itself” is being threatened. Not “every disturbance or catastrophe” will reach the high threshold and even armed conflict does not automatically qualify as public emergency. During an armed conflict the ICCPR is designed to work together with IHL, which will serve to prevent abuse of the State’s emergency powers. The requirement that the state of emergency be proclaimed in advance is of vital importance for the requirements of legality and rule of law, which become even more important in an emergency.²⁴

The public emergency can only be invoked as long as the derogation is strictly necessary and the main objective of the derogation is to restore normalcy and full respect for human rights.²⁵ The

²² Moeckli, Shah and Sivakumaran, p. 110 and 113.

²³ ICCPR Article 4.1.

²⁴ Moeckli, Shah and Sivakumaran, p. 113 and HRC, General Comment 29, p. 234, para. 2 and 3.

²⁵ HRC, General Comment 29, p. 234, para. 1.

measures must be strictly required in relation to duration, geographical coverage and material scope of the emergency and in accordance with the principle of proportionality.²⁶ The State must be able to justify not only that the situation constitutes a public emergency, but also that every measure taken under the derogation is strictly required by the exigencies of the situation.²⁷ Clearly, according to the HRC the right to derogation is in fact very limited and requires the State to justify each action separately, with no possibility to derogate from rights at will or “just in case”.

3.1.2 The European Convention on Human Rights

Let us now consider the derogation provision under the ECHR. Article 15 of the ECHR allows a state to derogate from the obligations under the Convention under certain exceptional circumstances. “In time of war or other public emergency threatening the life of the nation” derogations can be made “to the extent strictly required” by the situation, as long as the actions are not in violation of the state’s other obligations under international law.²⁸ The state must also keep the Secretary General of the Council of Europe fully informed.

State claims that questions relating to Article 15 should fall outside the competence of the ECtHR altogether have been rejected, but cases concerning derogation have been handled rather carefully. The instances of derogation have been few and the great majority of states has not applied the article at any time.²⁹ As of today (22 May 2017) three countries, Ukraine, Turkey and France, have informed the Secretary General of an ongoing state of public emergency and the subsequent use of Article 15. All the current derogation notifications refer to terrorism as one of or the main reason for derogation.³⁰

Like the ICCPR, the ECHR gives right to derogation during a “public emergency threatening the life of the nation”, but differs in the aspect that also “war” is expressly included as a situation giving the right to derogation. In the ECtHR case *Lawless v. Ireland*, the Court wrote that “other

²⁶ Ibid. para. 4.

²⁷ Ibid. para. 5.

²⁸ See also *Lawless v. Ireland (no. 3)*, The Law, para. 22.

²⁹ Harris, O’Boyle, Bates and Buckley, p. 824.

³⁰ See French Declaration, p. 2, Ukrainian Declaration, p. 2 and Turkish Declaration, p. 2.

public emergency threatening the life of the nation” should be understood as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.³¹ It falls to each State to determine whether a public emergency threatening the life of the nation exists and how to overcome the emergency, as “the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.”³² A wide margin of appreciation is therefore afforded to the State. Nonetheless, it is up to the Court to determine whether a State has gone beyond “the extent strictly required”.³³ The Court has however in several cases sided with the government, stating that the measures taken were necessary, with regards to the margin of appreciation.³⁴

The case *A. and Others v. UK* dealt with the UK derogation from the ECHR in the aftermath of 9/11. The Court stated that States do enjoy a wide margin of appreciation, but not unlimited discretion regarding derogations.³⁵ The Court accepted that a credible danger existed, despite that no al’ Qaeda attack had taken place in the UK at the time, since one could be considered to be “imminent” in light of the situation at the time.³⁶ The threat was also considered to be of a nature which threatened the life of the nation.³⁷ The Court noted that the HRC has stated that measures derogating from the ICCPR must be of a “temporary nature”, but maintained with support of the Court’s case law that a public emergency could be applicable for many years and that the Court had never incorporated the requirement that a derogation be temporary in its case law.³⁸

In its deliberations of whether a measure is “strictly required” the Court has delved into a number of considerations, such as examining why the usual law or action available to the state and compatible with the Convention is not sufficient to combat the threat and why the extraordinary

³¹ *Lawless v. Ireland (no. 3)*, “The Law”, para. 28.

³² *Aksoy v. Turkey*, para. 68

³³ *Ibid.*

³⁴ See *Lawless v. Ireland (no. 3)*, *Ireland v. the United Kingdom* and *Brannigan and McBride v. the United Kingdom*.

³⁵ *A. and Others v. the United Kingdom*, para. 173.

³⁶ *Ibid.* para. 177.

³⁷ *Ibid.* para. 179.

³⁸ *Ibid.* para. 178.

measures are.³⁹ The Court has also taken into account the existence of safeguards against arbitrary actions⁴⁰ and the proportionality between the emergency and the measure taken.⁴¹

3.2 Non-Derogable Rights

Even under special circumstances such as public emergency, not all human rights are automatically inoperable and some rights are completely non-derogable due to their status as norms *jus cogens*⁴², which entails that no exceptions can be made from them. This means that *jus cogens* norms form the top of the hierarchy of sources of international law and limit states' possibility to enter into treaties by binding all states.⁴³ It is not clear exactly which norms constitute *jus cogens*,⁴⁴ however some are widely accepted as having reached the necessary status, such as the prohibitions on unlawful aggression, slave trade, piracy and genocide.⁴⁵ Also the prohibitions on torture and discrimination have in court practice been treated as *jus cogens* norms.⁴⁶

The different human rights instruments also include certain limitations on the right to derogation. In the ICCPR certain rights have been made non-derogable, e.g. the right to life (Article 6), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7) and freedom of thought, conscience and religion (Article 18).⁴⁷ Furthermore, the HRC has stated that also other provisions are non-derogable, even though they are not included in the list in Article 4(2). These include the respectful and dignified treatment of persons deprived of their liberty; the prohibitions against taking of hostages, abductions or unacknowledged detention; the discrimination, deportation and forced transfer of minorities; and the incitement to violence, discrimination or hostility through the advocating of national, racial or religious hatred.⁴⁸

³⁹ See *Lawless v. Ireland*, para. 36, and *Ireland v. the United Kingdom*, para. 212.

⁴⁰ See *Brannigan and McBride v. the United Kingdom* and *Aksoy v. Turkey*, para. 83-84.

⁴¹ See e.g. *Ireland v. the United Kingdom*, para. 212.

⁴² VCLT Article 53.

⁴³ Moeckli, Shah and Sivakumaran, p. 84.

⁴⁴ Shaw, p. 126.

⁴⁵ ILC Yearbook, 1966, vol. II, p. 248.

⁴⁶ *Furundžija case*, p. 58f.

⁴⁷ ICCPR Article 4(2).

⁴⁸ HRC, General Comment 29, HRI/GEN/1/Rev.9 (Vol I) p. 238 para. 13.

The ECHR likewise includes non-derogable rights, as is evident by Article 15(2), which prohibits any derogation in respect to the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery and servitude (Article 4(1)), and “no punishment without law” (Article 7). Derogation is also not allowed in respect to Article 1 of Protocol no. 6 and Article 1 of Protocol no. 13 to the Convention, abolishing the death penalty, or from Article 4 of Protocol no. 7, the right not to be tried or punished twice.⁴⁹ Since Article 3 is a non-derogable provision the British Government was unable to derogate from it in December 2001 with the purpose of deporting suspected international terrorists when there was a risk of breaching the Article.⁵⁰

3.3 Derogation and Non-Discrimination

The notion that fundamental human rights should be enjoyed by everyone without distinction was codified in the UNCh after World War II and one of the basic purposes of the UN is to promote equality and non-discrimination.⁵¹ Non-discrimination and equality before the law constitute general and essential principles for the protection of human rights.⁵² However, not all distinctions between persons and groups can be regarded as discrimination and differential treatment can be justified if it is reasonable and used for an objective and legitimate purpose. Sometimes legitimate differentiation can even be required to secure true equality.⁵³

In the ICCPR the right to equality and freedom from discrimination is protected by several provisions, such as Articles 2(1), 20(2), 14(1) and 25. It is however Article 26 which forms the cornerstone of the protection against discrimination, as it gives an “autonomous right” to equality and prohibits all discrimination by public authorities.⁵⁴ Discrimination is prohibited on any grounds “such as race, colour, sex, language (...) or other status”.⁵⁵ Although nationality is not expressly listed as a prohibited grounds for discrimination, the HRC has held that nationality falls within the Covenant’s reference to “other status”.⁵⁶

⁴⁹ ECtHR Factsheet, p. 1.

⁵⁰ Harris, O’Boyle, Bates and Buckley, p. 825f.

⁵¹ UNCh Article 1(3).

⁵² HRC, General Comment 18, p. 195, para. 1.

⁵³ HRC, General Comment 18, p. 198, para. 13.

⁵⁴ OHCHR Manual, Chapter 13, p. 638.

⁵⁵ ICCPR Article 2(1) and 26.

⁵⁶ See *Gueye v. France*, para. 9.4 and HRC, General Comment 15, p. 189 para. 2.

The ECHR in turn differs from other general human rights instruments by not including an independent prohibition of discrimination, only a provision linked to the enjoyment of the rights protected by the Convention, Article 14. This has been partly amended by the adoption of Protocol no. 12, which includes a general prohibition on discrimination.⁵⁷ However, several State Parties have not ratified the Protocol, including large states such as France and the UK,⁵⁸ which means that Article 14 remains the key provision on discrimination. Although the provision has not always had the strongest of impacts, the ECtHR has more recently taken a more positive approach to the article, created a richer jurisprudence and strongly condemned racism and ethnic hatred towards vulnerable minorities.⁵⁹

The non-discrimination provisions are not included in the list of non-derogable rights in either of the instruments, which means that states are in principle free to derogate from them. The HRC has however stated that there are dimensions of the prohibition of discrimination which can never be derogated from.⁶⁰ The Committee does not however elaborate which dimensions are indicated. The derogation system also includes other mechanisms to stop discriminatory measures.

The most obvious difference between the derogation provisions of the ICCPR and the ECHR is the requirement of non-discrimination in Article 4 ICCPR, which is not included in Article 15 ECHR. The ICCPR prohibits derogatory measures involving “discrimination solely on the ground of race, colour, sex, language, religion or social origin.” It is worth noting that the limitation only requires that a derogation is not made *solely* based on one of the aforementioned grounds and that some typical grounds for discrimination, such as political opinion, nationality and place or birth, are not included.

Article 15 of the ECHR does not explicitly forbid a derogation from being discriminatory. This does not however mean that states are free to under the guise of derogation discriminate freely.

⁵⁷ OHCHR Manual, Chapter 13, p. 646.

⁵⁸ Council of Europe Treaty Office, Protocol No. 12.

⁵⁹ Harris, O’Boyle and Warbrick, p. 821f.

⁶⁰ HRC, General Comment 29, p. 237 para. 8.

In its early case law the ECtHR has established that racial discrimination may in some severe cases be a violation of Article 3 by constituting degrading treatment.⁶¹ In other derogation cases the Court has also examined Article 14, despite it not being a non-derogable provision. In its case *Ireland v. UK*, the Court found differential treatment of Republican terrorists justified and not in violation of Article 14, due to there being objective and profound differences in both the violence perpetrated by Republicans versus Loyalists, and in the possibility to bring terrorists belonging to the different groups to justice through conventional means.⁶²

In *A. and Others v. the United Kingdom* the European Court of Human Rights considered immigration measures adopted by the UK in the aftermath of 9/11. The eleven applicants complained that the detention of non-nationals suspected of terrorism merited inhuman or degrading treatment, that the detention system was discriminatory towards non-nationals and that the derogation was disproportionate.⁶³

The Court found the detentions not to have been in violation of Article 3.⁶⁴ As the Court moved on to determine whether the measures were “strictly required by the exigencies of the situation” it stated that for a measure to be justified:

“[...] the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse [...]”⁶⁵

The Court agreed with the House of Lords that the detention powers should not be regarded as an immigration issue, where a distinction between nationals and non-nationals would be legitimate, but as a question of national security. The threat which was posed by nationals and non-nationals alike was not adequately addressed by the immigration measure in question and detention

⁶¹ *East African Asians v. the United Kingdom*, para. 209.

⁶² *Ireland v. UK*, para. 225-232.

⁶³ *A. and Others v. the United Kingdom*, para. 114, 145 and 191.

⁶⁴ *Ibid.* para. 136.

⁶⁵ *Ibid.* para. 184.

imposed a discriminatory and disproportionate burden on a certain group.⁶⁶ The measures were therefore unjustified.

It has however been remarked that although the Court in the case in question followed the line of reasoning of the British House of Lords, it does not necessarily mean that the Court will be undertaking a more precise review of cases than previously.⁶⁷ As the Court itself stated, the situation in *A. and Others v. UK* was unusual, due to the fact that the highest national court, which is part of the national authorities enjoying a wide margin of appreciation, had already condemned the measures as unjustified. The Court therefore considered that

“it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was manifestly unreasonable”.⁶⁸

⁶⁶ Ibid. para. 186.

⁶⁷ Harris, O’Boyle, Bates and Buckley, p. 843.

⁶⁸ *A. and Others v. the United Kingdom*, para. 174.

4. An Outlook: Human Security

So, what is the way forward in the issue of liberty versus security? Recently an increasing criticism has emerged towards the view of human rights and security as naturally at odds with each other, arguing that true security is ultimately about securing full human rights for everyone. A new concept of “Human Security” has emerged, based on the argument that human rights and individual freedom are in fact not in opposition with security, but instead make up its very core. Seen from this angle it seems unnecessary and problematic to try to choose or to balance the two, but in practice the concept of a choice seems to still be prevailing, at the expense of other solutions based on creating a functional mixture of the two.⁶⁹

The idea of human security is built on the premise that the best way to lessen the risks of conflict at the end of the day is to strive towards respecting and protecting human rights. Conflict prevention strategies should therefore be built on the promotion and protection of human rights, instead of on dismantling them.⁷⁰ Human Security also strives to lift the question of the security of the individual to the same level as the security of the state. The goal is to create more lasting security by going beyond the traditional national security approach, to also consider the type of security concerns which do not stop at borders and to establish a concept of a global citizen.⁷¹ Although the concept is still not fixed and clearly defined, Human Security and human rights are increasingly affecting the development of international law, but there is still a long way to go.⁷²

⁶⁹ Feinberg, p. 390f.

⁷⁰ Ramcharan, p. 4f.

⁷¹ Benedek, p. 7.

⁷² Benedek, p. 17.

5. Analysis: Derogation and Non-Discrimination During a Terror Threat

The impact of terrorism on the international community and state practice cannot be denied and it is the main national security concern of many countries. This is reflected in the states' actions in general, but also in the cases of derogations, which tend to be used to combat terrorism.

Despite the strict wording of the derogation provisions in both the ICCPR and the ECHR, the jurisprudence of the ECtHR makes it clear that derogations can be made in a wider variety of cases than one might initially think. E.g. in *A. and Others v. UK*, the derogation due to an imminent terrorist threat was found acceptable, despite that at the time no al 'Qaeda attack against the state in question had occurred.

Of the two main instruments that have been considered in this paper, neither explicitly include the prohibition of discrimination on their list of non-derogable rights. Instead the discrimination protection is built up of a number of steps. First of all, discriminatory derogations which fall within the scope of a non-derogable right will always be unlawful, but due to the small number of non-derogable rights most issues will naturally fall outside their scope. The HRC has stated that certain aspects of non-discrimination cannot be derogated from, but it is unclear which aspects this includes.

Secondly, Article 4 ICCPR prohibits derogation measures solely based on discrimination, but the use of the word solely indicates that as long as the discriminatory measure can be attributed to another cause, the prohibition is no longer effective. The Article also excludes certain discrimination grounds, for example nationality, which means that the level of protection varies between different discriminatory measures. The fact that nationality is not included can be regarded as a weakness, especially when considering counter-terrorism situations, in which non-nationals and ethnic minorities tend to be perceived as a threat. The ECHR in turn lacks the sort of prohibition included in Article 4 ICCPR and remains silent on the issue.

Thirdly, differential treatment will always need to pass the test of “strictly required” and proportional to be justified. With the bar for necessity in the ICCPR set high by the HRC, compliance will be hard to establish for measures which directly discriminate towards a certain group. The requirement should also set a stop to the most blatant cases of discrimination under the ECHR, as seen in *A. and Others v. UK*, where discrimination between nationals and non-nationals was considered disproportionate. The ECtHR seems however in its case law to have set the bar lower than the HRC, awarding states a wide margin of appreciation to allow state authorities to decide on the best way to handle a threat, especially in cases concerning terrorism. This has been the stance taken in e.g. *Ireland v. UK*, where differential treatment was considered justified. With the Court putting increasingly higher demands on non-discrimination outside the derogation system, it can be questioned whether a similar development can be expected in the jurisprudence of Article 15. But, considering the Court’s decision in *A. and Others v. UK* seeming to be largely based on judgement by the House of Lords, it appears the margin of appreciation awarded for derogations may conflict with such a development. The ECtHR seems hesitant to change the ruling of a national court in a derogation issue, unless a clear mistake has taken place, thereby putting the responsibility to control a state’s use of derogation primarily on the national courts.

To be lawful, derogations under both instruments must also not be inconsistent with the state’s other international obligations. This means that a state bound by both would in principle be unable to derogate from one instrument if the derogation was in violation of the other. Considering the bar for derogations seeming to be somewhat lower according to the ECHR, this could cause problems for states attempting to derogate while being bound by the ICCPR. The ECtHR has however in its case law chosen not to follow the higher level of protection afforded by the ICCPR, but has instead applied its own standards, including the margin of appreciation.

Also worth noting is that the prohibition of discrimination has in international court practice been considered a rule of customary international law and in some cases even a peremptory norm with jus cogens status. This would mean that at least clear discrimination is unlawful, no matter what the derogation provisions say. The issue does however not seem to have received very much

consideration by the ECtHR or the HRC, which have concentrated on the provisions in their respective instruments.

It seems that the discrimination aspect of derogations has been given surprisingly little attention, considering the importance of non-discrimination in the human rights field and the tendency of derogations to target certain groups. Although the HRC seems to be advocating a very high threshold for derogations, this has had limited practical effect, whereas the ECtHR has taken a careful approach to derogation issues in general, leaning on their margin of appreciation doctrine and not wanting to limit states too much. The discrimination protection within the derogation system is built up of several levels, but seems to lean heavily on the general requirement for necessity and proportionality, which is considered case-by-case and does therefore not provide a very secure ground to stand on when trying to decide the legitimacy of a specific derogation.

6. Discussion: Does the System Adequately Protect Human Rights and Stop Implementation of Discriminatory Measures?

What can be said about the adequacy of the existing protection for human rights and specifically non-discrimination within the derogation regime of the instruments? The derogation system plays an important role in the human rights system, as states may at certain times need to act swiftly and effectively to protect the people within their jurisdiction. However, it is important to keep in mind that the anti-terrorism actions taken by states tend to have an impact on the rights and liberties of certain groups more than others, like in our two examples: the anti-terrorism measures in the UK and France, where non-nationals and the Muslim population were affected adversely.

With non-discrimination being such a fundamental part of the human rights regime, I think that states should be very careful in creating counter-terrorism regimes which target minority groups. Not only is there the risk of alienating the targeted people and of thereby possibly playing into the hands of terror groups, one can also not disregard the effect of discriminatory counter-terrorism measures on the general population. With the state targeting a certain group over and over, it is only a matter of time before suspicion towards the group becomes an accepted emotion amongst the public, creating tensions and fragmentations within the state. This in its turn can lead to more and other types of discrimination, such as discrimination among the public and between groups. Ultimately a discriminatory state will erode its legitimacy and lose the very security it has been trying to achieve.

When a derogation can be made as a pre-emptive measure or due to a continuing threat of terror, the question also becomes when such an imminent threat will come to an end. How long can a derogation and a state of emergency continue in a country which is being targeted by terror groups? The “War on Terror” lacks a clear ending date and in today’s state of affairs the threat of terrorism does not seem to be going anywhere. The continuing state of emergency in France is a good example of a situation where a derogation, initially only meant to be in place for a few

weeks, has been extended time and time again due to continuing attacks. If these attacks cannot be stopped, a “temporary measure” may continue for longer than anyone expected. Furthermore, there is the risk of the extraordinary becoming the new normal; measures which bring about greater control can be easier to renew than to remove.

Another problem arises when one attempts to closer consider the legitimacy of a trade-off between rights and security. Due to the secretive nature of counter-terrorism and the fact that it is mostly deployed to disrupt attacks before they occur, it is in practice very hard to determine whether the measures are in fact necessary and proportionate, and whether they really lead to greater security. People are asked to blindly trust the authorities and to give up some of their liberty to create better security, while certain groups stand to lose much more rights than the majority.

I would therefore argue that a development where discriminatory derogation measures become the new norm, while the legitimacy of the state’s actions can be questioned, will not lead to greater security, but to the exact opposite. Considering the analysis above, it does not seem as if the discrimination protection of the derogation regime is adequate to protect the right to non-discrimination in today’s anti-terrorism world. As counter-terrorism measures tend to hit certain ethnic or national groups the hardest, it is my opinion that the non-discrimination protection should be strengthened. Although states may at times need to be able to act effectively against a threat, it should not be an option to do this through discrimination and intimidation. Instead more sustainable and legitimate courses of action should be taken.

National courts naturally play an important role in controlling the state’s actions and making sure these are in accordance with international human rights obligations, but in my opinion international courts and actors must play a more active role in the monitoring states’ actions during an emergency and putting a stop to opportunistic and discriminatory measures. For although the authorities may be best suited to judge what measures are needed during a crisis, it is the human rights bodies which are best suited to view the matter objectively and to understand the human rights regime. States cannot be presumed to automatically protect non-discrimination, without the support of international organs.

A possibility for change in the future can be seen in the rise of the idea of human security. For states to make a shift from considering human rights to be in the way of effective security mechanisms, to seeing them as an obvious part of a secure society, would be to create a new way of thinking of counter-terrorism. For what is it the states are really trying to protect, the institutions and authority or the people? If human rights and freedom made up the core of security, it would be counterproductive to create repressive and discriminatory counter-terrorism regimes to dismantle the human rights protections which are already in place. Instead new room and incentive would appear for more modern and just solutions to threats.

7. Concluding Remarks

Terrorism and counter-terrorism are unequivocally a part of the modern world and a great challenge for both states and international organizations to deal with. However, it can be worth considering, that maybe terrorism at its core is not very different from any other kind of crime. Maybe taking away some of the fear surrounding the term would lead to a more rational and less repressive ways of dealing with the issue.

States are generally obliged to respect the principle of individuals' equality before the law and to not violate the prohibition of discrimination. The existence of a terrorist threat does not in itself change this obligation, and any differential treatment must be based on objective and justifiable grounds. Nonetheless, the prohibition of discrimination has in the derogation regime of the ICCPR and the ECHR been given some flexibility, so that the protection in practice becomes diminished during an emergency. This, to me, seems like a clear weakness of the derogation system, which should receive more attention from international organs, whose responsibility it is to monitor state action.

In times of crisis, the need for strong human rights is greater than ever, and to create true security in the long term we should work to strengthen the protection against violations and discrimination, not minimize it. For how can we expect to create a more secure society for everyone, while trading off the rights of vulnerable groups and treating people like enemies?

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