Let us dwell a bit further on the first (and of course essential) condition for a derogation to be allowable -- i.e., that the country seeking to derogate from certain human rights faces a situation of emergency that is particularly serious. We will then turn to a few exercises.

Consider a contemporary example. Following the 11 September 2001 attacks on New York and Washington, the United Kingdom adopted the Anti-terrorism Crime and Security Act 2001, and the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644). This Derogation Order, adopted pursuant to section 14 of the Human Rights Act 1998, found 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."

The Derogation Order also recalled the case law of the European Court of Human Rights, which as we will see imposes a prohibition on deportation of foreign nationals whenever substantial grounds have been shown for believing that the individual concerned would face a real risk of being subjected to treatment contrary to Article 3 ECHR if removed to another State. This protection from torture or ill-treatment is absolute, in the sense that even very weighty reasons may not justify a State in subjecting an individual to such forms of treatment. Indeed, States must also avoid exposing an individual to the *risk* of such treatment, for instance by extraditing that individual. The implication for the United Kingdom was that there were certain individuals found on its territory who, while representing a threat to the national security of the United Kingdom, could not be deported to their country of origin, in accordance with the requirements of this case law.

The Derogation Order recognized that the extended power in the new legislation to detain a person against whom no action was being taken with a view to deportation might be inconsistent with Article 5(1)(f) ECHR. Indeed, this provision allows for the lawful arrest or detention of a person *against whom action is being taken with a view to deportation or extradition*, which presupposes that removal from the national territory remains a realistic possibility and that it is effectively pursued. Unable to comply with this requirement, the United Kingdom concluded that it was necessary to derogate from the ECHR in this respect. On 18 December 2001, the Secretary-General of the Council of Europe was formally notified, through a '*note verbale*', that the United Kingdom intended to derogate from Article 5(1) ECHR, which guarantees the right to liberty and to security (thus prohibiting arbitrary detention). Corresponding steps were taken to derogate from Article 9 of the International Covenant on Civil and Political Rights, a clause equivalent to Article 5 ECHR.

Under the anti-terrorism legislation covered by the UK derogation, eleven foreigners were initially detained; nine were left after two suspected terrorists left the UK voluntarily. The remaining detainees, known as the "Belmarsh Nine", challenged their detention. They ended up appealing to the House of Lords (as it was then, now renamed Supreme Court of the United Kingdom). The House of Lords delivered its judgment on 16 December 2004 (House of Lords (United Kingdom), *A. (F.C.) and others (F.C.) (Appellants) v. Secretary of State for the Home Department (Respondent), X. (F.C.) and another (F.C.) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) UKHL 56). The majority of the Lords agreed with the leading opinion of Lord Bingham of Cornhill, who argued in particular that

> "If … it was open to the Irish Government in *Lawless* to conclude that there was a public emergency threatening the life of the Irish nation, the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September"

and added that:

> "... great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. ... It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision."

The House of Lords thus considered that there existed a 'public emergency' in the meaning required by Article 15 ECHR or Article 4 ICCPR for derogation powers to be exercised. (However, the House of Lords quashed the Derogation Order, finding that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status).

On the question of whether the UK was faced with a "public emergency threatening the life of the nation", however one of the Lords (Lord Hoffmann) answered in the negative, stating:

> "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 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."

THE NOTION OF PUBLIC EMERGENCY - EXERCISE (3/3 points)

Now, consider the following questions:

1. How do you think the European Court of Human Rights answered?

- The European Court of Human Rights agreed with Lord Hoffmann that the UK's life as a nation was not threatened by the acts of some fanatical groups of terrorists;
- The European Court of Human Rights considered that since the UK had described the threat from Al'Qaida as "a public emergency threatening the life of the nation", but intended to extend the scope of anti-terrorist measures to affiliates of other groups such as the IRA or the Basque ETA, the attitude of the government raised the suspicion that it was instrumentalizing the situation in order to restrict civil liberties;
- The European Court of Human Rights deferred to the judgment of the UK government, shared by the majority of the Lords. ✔

EXPLANATION

The European Court of Human Rights delivered its judgment on 19 February 2009. It agreed with the majority within the House of Lords that the United Kingdom was facing a "public emergency threatening the life of the nation". It did so in part out of deference to the assessment made by the UK authorities: "...the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al' Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency" (European Court of Human Rights (GC), A. and others v. United Kingdom (Appl. No. 3455/05), judgment of 19 February 2009, para. 180)..

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2. In the 2004 judgment cited in the preceding question, the United Kingdom House of Lords adopts a "hands-off" approach to the assessment made by the Executive concerning the threat faced by the UK and the potential danger to public security that the "Belmarsh Nine" represented. Is this consistent with the approach adopted by the European Court of Human Rights, in the *A. and others v. the United Kingdom* judgment it delivered, on 19 February 2009, in the same case?

- Yes. Courts, both domestic and international, should defer to the judgment of the Executive on security issues;
- No. Domestic courts are well positioned to assess, adopting a strict standard of scrutiny, whether the judgment of the Executive is well founded, whereas international courts may have to be more deferential; ✔
- Both domestic courts and international courts should strictly scrutinize the assessment by the Executive of the need to declare a public emergency.

EXPLANATION

The answer is no. It is true that this is an area in which the European Court of Human Rights has traditionally deferred to a large extent to the assessment made by the national authorities. In fact, it is in this context that the notion of a "margin of appreciation" that should be recognized to the national authorities first appeared. In the 1978 judgment it delivered in the *Ireland v. United Kingdom* case, the Court noted (in para. 207): "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 those authorities a wide margin of appreciation." It is however noteworthy that such margin of appreciation is recognized to the "national authorities", which includes domestic courts, and not to the national Executive alone. Indeed, in *A. and others v. the United Kingdom*, the Court explains that it "accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency" (para. 180).

It would appear therefore that the notion of a "margin of appreciation" benefits national authorities (to the assessment of facts of which the international court may defer to a certain extent), but should not benefit to the same extent the Executive vis-à-vis domestic courts: domestic courts should on the contrary take a "hard look" at the facts presented to them, in order to assess whether the evaluation made by the government is defensible. In his 2002 opinion on the 2001 UK derogation from Article 5 para. 1 ECHR, Mr Alvaro Gil Robles, the Commissioner for Human Rights of the Council of Europe, noted the following:

"8. Effective domestic scrutiny must ... be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures.

9. It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights.".

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3. Article 4 of the International Covenant on Civil and Political Rights adds that the existence of the public emergency justifying the derogation must be 'officially proclaimed'. In its General Comment No. 29, the Human Rights Committee noted that such official proclamation "is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4" (para. 2). In contrast, the requirement of an official proclamation of the state of emergency is explicitly stated neither in the European Convention on Human Rights nor in the American Convention on Human Rights. Do you think that it nevertheless should be seen as implicit? If so, why?

- (•) Yes, because an obligation to formally proclaim a state of emergency allows control by the parliament and by public opinion; ✔
- ( ) No, since the list of conditions imposed for derogations to be filed under the ACHR and the ECHR is a limited one;
- ( ) No, since an obligation to formally proclaim a state of emergency serves no useful purpose.

EXPLANATION

It is arguable that such an official proclamation, stating the reasons for the state of emergency, is a condition for effective parliamentary control at domestic level; as we have seen, it is such a safeguard that may justify recognizing to the domestic authorities a broad margin of appreciation. These requirements of transparency and parliamentary review are illustrated by the above-mentioned opinion delivered on the 2001 UK derogation from Article 5 para. 1 ECHR by Mr Alvaro Gil Robles, the Commissioner for Human Rights of the Council of Europe. Mr Gil Robles took the view that derogations should be subjected to parliamentary scrutiny by the national parliament concerned, requiring that the Executive publicly announce the state of emergency and that a debate may take place, in which the political opposition may participate, as to the validity of the reasons advanced for that proclamation. In fact, in his contribution, he regrets that the House of Lords was asked to debate the Human Rights Act 1998 (Designated Derogation) Order 2001 made by the Home Secretary on 19 and 21 November 2001, and only later was asked to approve the measures contained in the Anti-terrorism, Crime and Security Bill 2001. Though a first draft of this anti-terrorist legislation was laid before Parliament on 12 November 2001, Mr Gil Robles noted, "the practice of designating a derogation prior to the debating of the derogating measures risks not only eliminating an effective scrutiny of the order itself, but also potentially reducing the urgency of a detailed scrutiny of the subsequent measures. This will especially be the case where the derogation order enables the Secretary of State to make a declaration of compatibility in respect of the Bill he wishes to put forward. In effect, two small parliamentary hurdles are substituted for one large one." Whether you agree or not with these particular implications drawn by the Commissioner for Human Rights, the need for a robust parliamentary scrutiny of derogation measures adopted by the Executive seems clear: indeed, as Mr Gil Robles notes, this may be seen as precisely the reason why a broad margin of appreciation is recognized to the national authorities concerned. It would seem to follow that the derogation measures should be transparently and publicly announced, for domestic safeguards to be able to apply.

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