Article:
Wallace, S orcid.org/0000-0001-6871-0074 (2020) Derogations from the European Convention on Human Rights: The Case for Reform. Human Rights Law Review, 20 (4). pp. 769-796. ISSN 1461-7781

https://doi.org/10.1093/hrlr/ngaa036

Title: Derogations from the European Convention on Human Rights – The Case for Reform

Total word count: 14227

Abstract:

This article examines State practice on derogations from human rights protections during states of emergency under Article 15 of the European Convention on Human Rights. The article presents statistical data on the use of derogations, offers analysis of the data and practice and advances a series of reform proposals. It is argued that Article 15 is being misused by States to derogate for protracted periods of time for entrenched emergencies and that emergency measures are remaining in place after declared emergencies have ended. Equally, States are not derogating in circumstances where they should for military operations, particularly extra-territorial military operations. It is argued that the European Court of Human Rights has been deferential in enforcing Article 15 and that reform is needed to address the problems identified. Reforms should include review procedures for emergency measures, enhanced procedures for notifying derogations and an amendment to facilitate extra-territorial derogations.

Derogations from the European Convention on Human Rights – The Case for Reform

Dr. Stuart Wallace*

1. INTRODUCTION

This article examines State practice on derogations from human rights protections during states of emergency under Article 15 of the European Convention on Human Rights (the Convention). The article collates and presents statistical data on the use of derogations, offers analysis of the data and practice and advances a series of reform proposals to address the issues identified.

It is argued that Article 15 is being misused by States to derogate for protracted periods of time for entrenched emergencies. A key benefit provided by derogations is the distinction they create between normality and emergency. This benefit is undermined by entrenched emergencies, which have weakened human rights protections in several States as emergency measures are often kept in place beyond the declared emergency and adopted into the State's normal laws. The implementation of emergency laws in the absence of derogation has also led to significant erosion of human rights protection.

In parallel, as the Convention increasingly extends its application extra-territorially into situations of armed conflict and other military operations, States are not derogating, or possibly unable to derogate, when they clearly should for these military operations. It is argued that the failure to derogate here exposes States to significant liability and further undermines the value derogations have in distinguishing between normality and emergency. In essence, States are derogating when they shouldn't and not derogating when they should. Normal situations are being subjected to emergency measures and emergency situations are being subjected to normal measures, as this article illustrates by reference to measures responding to terrorism and more recently the covid-19 pandemic.

It is also argued that the European Court of Human Rights' (ECtHR) oversight of states of emergency and interpretation of Article 15 is characterised by extreme deference to the State and extraordinary restraint. This restraint has resulted in limited scrutiny of the threats States have utilised to justify derogation and indifference to extremely long derogations. The Court has also been acquiescent on the notification of derogations, turning a blind eye to vague and late notifications by States. This deference and restraint has facilitated the creation of entrenched emergencies. There is a real risk that in its effort to ensure deference and maintain subsidiarity, the ECtHR risks dereliction of duty to properly enforce the Convention's terms.

The article presents a detailed consideration of derogation practice, including the most recent derogations responding to covid-19, which is accompanied by statistical information on every

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derogation made from the Convention. In the final section, the author proposes the introduction of a new protocol to amend Article 15 to address the issues identified. These reforms include express requirements to introduce procedures to review emergency measures domestically and a requirement that emergency measures contain sunset clauses, an amendment recognising that the State's capacity to derogate should be commensurate with its jurisdiction and enhanced procedures for the notification of derogations.

2. ENTRENCHING EMERGENCY SITUATIONS

Article 15(1) of the Convention states that

> 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.[1]

It is clear from the text that derogations are supposed to be used 'in time of war or other public emergency'. In *Lawless v Ireland*, the ECtHR stated that a '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.[2]

The key word is exceptional. The state of emergency and normality should be mutually exclusive.[3] It is a situation in which the State considers the normal rules of the Convention cannot be applied. This is echoed in the *Greek case* where the ECtHR states

> [t]he 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.[4]

This separation is central to the value of derogating. Derogations have a 'shielding value'. They can shield States against legal and economic liability, because a failure to derogate when necessary can expose States to significant legal and economic penalties.[5] Secondly, more importantly, they shield by demarcating a period in which different, divergent interpretations of a given right subsist. The

1 Article 15 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS 005.
2 *Lawless v Ireland* (No 3) Application No 332/57, Merits, 1 July 1961 at para 28.
3 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 at 440; Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1764 at 1769.
4 *The Greek Case* Application No 3321/67, Commission Report, 5 November 1969 at para 153; *Brannigan and McBride v United Kingdom* Application No 14553/89, Commission Report, 3 December 1991 at para 47.
5 Wallace, *The Application of the European Convention on Human Rights to Military Operations* (2019) at 196-197; see also Greene, supra n 3 at 1766.

derogation shields the normal jurisprudence of the court from these exceptional interpretations.[6] Derogations also have a 'declarative value', emphasising the exceptional and, most importantly, temporary nature of any measures restricting rights. This dichotomy between exception and normality is reflected in the idea that emergency powers should be strictly limited in time, they should be temporary.[7] This is why many European States impose time limits on the exercise of emergency powers and require periodic scrutiny of emergency provisions.[8]

Yet, many authors have argued that states of emergency have become so prevalent and enduring throughout the world that they have become entrenched. They argue that it has reached the point where the emergency-normality paradigm is fundamentally in question. Greene argues that perpetual states of emergency have been commonplace across the world throughout the twentieth and twenty-first centuries.[9] The more egregious examples are the protracted emergencies in Syria from 1963 to 2011,[10] and Egypt's entrenched emergency from 1981-2012.[11] Gross notes that crisis and emergency are no longer sporadic episodes in the lives of many nations; they are increasingly becoming a permanent fixture.[12]

This phenomenon of utilising emergency powers over protracted periods is clearly reflected in the data on derogations from the Convention in Annex 1. The longest derogation made from the Convention was the UK's first derogation in Northern Ireland. From the first imposition of emergency measures requiring derogation to their termination, it ran for 11,025 days, over 30 years in total.[13] As Gross notes, emergency has not been the exception in Northern Ireland, it has been the norm.[14] The derogation in Northern Ireland is not an isolated example. The data also shows that the average duration of a derogation from the first adoption of emergency measures requiring derogation to their termination is 1,437 days, approx. 4 years.

We also see States using language that implies continuing threat to justify protracted emergency measures. When France issued a Note Verbale derogating from the Convention in response to terrorist attacks in Paris, it stated that 'the terrorist threat in France is of a lasting nature'.[15] This language echoed the terminology used by the United Kingdom in its Note Verbale following the terrorist attacks in the United States of America on 11 September 2001, where it stated

6 Wallace, supra n 5 at 197; see also Greene, supra n 3 at 1766 and 1783.
7 Human Rights Committee, General Comment No. 29 (para 2), 31 August 2001.
8 See, for example, Article 230-231 Constitution of the Republic of Poland 1997; Article 47(3) Constitution of Malta 1964; Article 16, French Constitution 1958.
9 Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (2018) at 46.
10 Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2012–2013) 34 *Michigan Journal of International Law* 491 at 516; Greene, supra n 9 at 47.
11 Sheeran, supra n 10 at 516-517; Greene, supra n 9 at 46.
12 Gross, supra n 3 at 443.
13 Council of Europe Treaty Office, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms' 29 September 2020 available at https://bit.ly/3ikoH6E last accessed 29 September 2020.
14 Gross, supra n 3 at 472.
15 Declaration contained in a letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015, registered at the Secretariat General on 24 November 2015.

'[t]he threat from international terrorism is a continuing one'.[16] This type of language further erodes the distinction between normality and emergency situations. As Sheeran observes, terrorism can become a form of entrenched public emergency that breaks down the valuable, theoretical distinction between the normal and the exceptional or even stretches the exceptional to become the norm.[17]

The erosion of the distinction between normality and emergency has unfortunately been condoned by the ECtHR. In the case of *A and Others v United Kingdom*, which related to the UK's derogation in the wake of the 11 September 2001 terrorist attacks in the United States of America, the European Court of Human Rights stated

> while the United Nations Human Rights Committee has observed that measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of "an exceptional and temporary nature" […], the Court's case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not "temporary".[18]

The ECtHR's lack of concern over prolonged emergencies is worrying. At a very superficial level, emergency powers tend to empower the executive and marginalise judicial and legislative arms of government and this should be a cause for concern for a Court and system specifically designed to forestall totalitarianism and autocracy.[19] However, the more pressing concern is that states of emergency are often used as a pretext for State repression and utilising derogations carries with it a greater risk of human rights violations.[20] To give a specific example, we can see from the data that the UK declared states of emergency and issued derogations for a number of its colonies as they faced uprisings against colonial rule e.g. Malaya, Kenya, Cyprus, British Guiana and Aden. In the context of each of these derogations, the UK appears to have violated Article 3. The UK held an inquiry into the use of the so-called 'five techniques' during interrogations by British state agents 'where some public emergency has arisen as a result of which suspects can be legally detained without trial'.[21] The

16 Derogation contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001.
17 Sheeran, supra n 10 at 545.
18 *A and Others v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009 at para 178.
19 Bates, *The Evolution of the European Convention on Human Rights* (2010) at 4-6; O'Boyle, 'Emergency Government and Derogation under the ECHR' [2016] *European Human Rights Law Review* 331 at 333-334.
20 Sheeran, supra n 10 at 492–4; Cerna, 'The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict' (2011) 2 *International Humanitarian Legal Studies* 3 at 15; El Zeidy, 'The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 *San Diego International Law Journal* 277 at 282–3; Mangan, 'Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform' (1988) 10 *Human Rights Quarterly* 372 at 373.
21 Hubert Parker, *Report of The Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*, 2 March 1972 at 1 available at http://parlipapers.proquest.com:80/parlipapers/docview/t70.d75.1971-060895?accountid=14775 [last accessed 29 September 2020].

resulting report concluded that 'some or all' of the techniques 'have played an important part in counter insurgency operations in […] Malaya, Kenya and Cyprus, […] British Guiana (1964), Aden (1964-67) […] Northern Ireland (1971)'.[22] The use of these five techniques was found to amount to torture by the European Commission in the case of *Ireland v UK*[23] and inhuman treatment by the European Court of Human Rights.[24] It's clear that these techniques were widely used in circumstances where the UK had derogated from the European Convention. Thus, there is a very clear correlation between the existence of derogations and the perpetration of human rights violations across multiple jurisdictions, indicating they warrant close supervision by the courts and other authorities. Before exploring the consequences of creating entrenched emergencies for human rights law, it is worth taking a short detour to address the recent explosion in derogations that has resulted from the covid-19 pandemic.

3. COVID-19: TYPICAL EMERGENCY, ATYPICAL RESPONSE

The covid-19 pandemic has been an unprecedented event in countless ways. In respect of derogations, we seldom see States responding to the *same* emergency simultaneously and it offers an interesting opportunity to compare State practice. The covid-19 pandemic is a textbook example of an emergency warranting derogation: there is a clearly identifiable, extraordinary threat which requires exceptional, temporary measures outside the normal law to respond to it. Yet, State practice on derogations for covid-19 has been far from uniform.

The pandemic has resulted in ten new derogations out of the forty-five made in the history of the European Convention system.[25] It is remarkable that while many States introduced very similar measures to tackle the pandemic e.g. severe restrictions on movement (bordering on deprivations of liberty) and severe restrictions on public assemblies, only ten States have derogated. The Parliamentary Assembly at the Council of Europe observed there was 'a noteable [sic] lack of consistency in national practice' which 'underlines the need for guidance and harmonisation' on this subject.[26] The following sections consider some possible explanations for the divergence in State practice, but it is worth making a few initial general observations.

There was a notable East-West divide in the derogations for covid-19, with the majority of the derogating States comprising what could broadly be described as 'Eastern' European States – Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino, Serbia.[27] The

22 Ibid at 3.
23 *Ireland v United Kingdom* Application No 5451/72, Commission Decision, 1 October 1972.
24 *Ireland v United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978.
25 Council of Europe Treaty Office, 'Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic' 29 June 2020 available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> [last accessed 29 September 2020].
26 Council of Europe Parliamentary Assembly, Report on the impact of the Covid-19 pandemic on human rights and the rule of law, 29 June 2020, AS/JUR (2020) 13 at 5.
27 Council of Europe Treaty Office, supra n 25.

exact reason for this divide is unclear.[28] It has been suggested that variations in the domestic legal orders of these States may account for this difference. Basak Cali argues that the legal systems of States like Latvia and Estonia, for example, permit declarations of states of emergency and are much better aligned with international law, making it easier to derogate. By contrast other States, such as Austria and Sweden, lack clear procedures for declaring a state of emergency and there is a lack of alignment with international legal requirements on derogation.[29]

In addition, we should not overlook the mindset of different States and the purposes for which they have traditionally used derogations. Historically, States have utilised the powers to derogate from the Convention almost exclusively for national security issues such as terrorist attacks,[30] coup attempts[31] and wars.[32] Derogations from the Convention have become virtually synonymous with national security problems, meaning States may not immediately have considered derogation in the context of this pandemic. The closest historical analogue to the derogations for covid-19 is Georgia's brief, solitary derogation for bird flu in 2006.[33] However, the scope and scale of Georgia's derogation pales in comparison to derogations arising from covid-19. The Georgian derogation was confined to a single district (Khelvachauri), while the covid-19 derogations have covered whole countries. In terms of substantive measures, the Georgian measures were much more limited in scope when compared to the measures adopted for covid-19. Georgia only derogated from Article 1 of Protocol number 1 and Article 2 of Protocol number 4, whereas derogations for covid-19 have been much more extensive, as the outline in section 4C below shows. Thus, in terms of scale and substance, there is little comparison between these derogations. Beyond these possible explanations, there is a strong argument to be made that the normalisation of emergency powers arising from prolonged derogations and the erosion of human rights protection arising from past refusals to derogate, discussed in the following sections, have removed the need for derogation among the States that did not derogate when responding to covid-19.

4. EROSION OF RIGHTS PROTECTION

A. Normalisation of Emergency Powers

Prolonged derogations often lead to the emergency measures becoming normalised and forming part of the normal domestic legal system of the State. It is a pattern that has been identified throughout the world. Sheeran notes that a large amount of legislation developed in Israel in response to

28 The same pattern of predominantly eastern European States derogating is evident in the derogations from the International Covenant on Civil and Political Rights. The Council of Europe States derogating from the Covenant were Armenia, San Marino, Latvia, Georgia, Estonia, Romania and Moldova. United Nations Treaty Collection, 'Notifications under Article 4 (3) of the Covenant (Derogations)', 23 July 2020 available at <https://bit.ly/32M8PWf> last accessed 29 September 2020.

29 Cali, "Human Rights vs Covid" (HRvsCovid Webinar, 6 April 2020) <https://youtu.be/Ku1sKgD74Tk> accessed 29 September 2020.

30 See for example the United Kingdom's derogation on 14/12/2001 and the French derogation on 14/11/2015.

31 See for example Turkey's derogation in 20/07/2016.

32 See for example Ukraine's derogation on 21/05/2015.

33 See Georgia's derogation on 26/02/2006.

emergency situations has now become part of its normal legal system.[34]

We can see an example of this process of normalisation following France's derogation from the Convention after terrorist attacks in Paris in 2015. The state of emergency in France was repeatedly extended between November 2015 and October 2017.[35] The emergency laws allowed the authorities to designate security zones where police could stop and search persons and vehicles, allowed prefects to close places of worship without prior judicial authorisation and restrict individuals' free movement to a specific geographic area or impose house arrest.[36] At the end of the derogation period, France introduced a new terrorism law on 30 October 2017. The new law transposed many of the emergency powers into ordinary law, including the measures on closing places of worship, house arrest and security zones.[37] Mariniello contends that the new laws normalised the exercise of these exceptional measures and created 'a perpetual state of emergency'.[38] The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, stated that this law created 'a de facto state of qualified emergency in ordinary French law'.[39] Professor Ní Aoláin also stated that there was a 'significant danger' that these measures would be applied to other contexts, such as public demonstrations.[40]

Basak Cali has linked the absence of derogations among the States introducing legal measures to combat covid-19 to the normalisation of emergency powers. She offers the example of Turkey where laws passed in response to previous emergency situations are now part of the ordinary legal system. These emergency/normal powers, such as the ability of provincial governors to restrict movement of citizens, are now being used to restrict movement to stop the spread of the virus. No significant changes to the law were needed to respond to covid-19 and no derogations were made.[41]

Greene observes that this process of normalisation can have a 'ratcheting effect', whereby the original emergency powers are later seen as insufficient to deal with a new threat. This leads to increasingly draconian responses.[42] The UK's law on pre-charge detention is an example of this. As mentioned above, the UK had a long-standing derogation in place in Northern Ireland for the best part of 30 years. In 1984, the derogation was lifted and the UK government introduced a law which permitted persons suspected of acts of terrorism to be detained initially for 48 hours, then for a further 5 days without charge where permission from the Secretary of State was granted.[43] In the case

34 Sheeran, supra n 10 at 513.
35 Council of Europe Parliamentary Assembly, State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, 27 February 2018, Doc 14506 at 14-15.
36 Mariniello, 'Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system' (2019) 20 *German Law Journal* 46 at 53.
37 Council of Europe Parliamentary Assembly, supra n 35 at 4.
38 Mariniello, supra n 36 at 53.
39 Ní Aoláin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to France, Human Rights Council, A/HRC/40/52/Add.4, 8 May 2019 at para 23.
40 Ibid at para 23fn.
41 Cali, supra n 29.
42 Greene, supra n 9 at 206.
43 s.14(5) Prevention of Terrorism (Temporary Provisions) Act 1984.

of *Brogan v UK*, the ECtHR ruled that detention for between four and six days without being brought before a judicial authority was a violation of Article 5.[44] In response the UK derogated from Article 5 again in order to maintain these provisions.[45] These 'temporary emergency provisions' were then extended to the whole of the UK in 2000 in response to perceived increased threats from terrorism, albeit now subject to a requirement that authorisation for detention be given by a judicial authority.[46] The permitted period of pre-charge detention was then doubled in 2003 to 14 days.[47] By 2006, the UK government sought to increase pre-charge detention up to 90 days. Although this move was defeated in the House of Commons,[48] the maximum permitted duration was instead increased to 28 days, subject to annual review.[49] The maximum duration eventually reverted to 14 days again in 2012, which is still a significant erosion on the earlier position and clearly demonstrates this ratcheting effect.[50]

The case of *Brogan* shows that the ECtHR is prepared to counteract ratcheting effects in certain circumstances. When the State has derogated, the Court has tools to counteract ratcheting as the derogation scheme requires that any measures the State adopts must be strictly required by the exigencies of the situation. When used correctly by the ECtHR, this proportionality test can moderate the impacts of emergency measures. The case of *A and Ors* provides an example of this.[51] In that case, the UK derogated from Article 5 to introduce provisions allowing indefinite detention without trial for non-nationals believed to pose a threat to the UK's national security in circumstances where it was not possible to deport the non-national.[52] The House of Lords considered that the measures adopted were a disproportionate response to the threat of terrorism. As the measures focused exclusively on non-nationals, they did not address the threat from nationals suspected of involvement with international terrorism.[53] The legislation also permitted the suspected terrorists to leave the UK and continue their activities elsewhere. As a result, the House of Lords issued a declaration of incompatibility for the legislation indicating that the legislation was incompatible with the European Convention on Human Rights.[54] The ECtHR upheld the decision that the derogation was disproportionate.[55]

B. Consequences of Failing to Derogate – Article 5

In response to the declaration of incompatibility in *A and Ors*, the UK introduced the Prevention of Terrorism Act 2005, which created control orders.[56] There were two types of control order: derogating

44 *Brogan v United Kingdom* Application No 11209/84, Merits, 29 November 1988.
45 See Wallace, supra n 5 at 206.
46 s.41 Terrorism Act 2000; see also the accompanying Schedule 8 at para 29 which specified the duration.
47 s.306, Criminal Justice Act 2003.
48 BBC News, 'Blair defeated over terror laws', 9 November 2005, available at: http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm last accessed on 29 September 2020.
49 s.23 Terrorism Act 2006.
50 s.57 Protection of Freedoms Act 2012.
51 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
52 See Part 4, Anti-Terrorism, Crime and Security Act 2001.
53 *A v Secretary of State for the Home Department* [2005] 2 AC 68 at paras 33-36.
54 s.4 Human Rights Act 1998
55 *A and Others v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009 at para 190.
56 s.1, Prevention of Terrorism Act 2005.

control orders and non-derogating control orders. The former required the State to derogate in advance of their introduction, the latter were applicable under a normal human rights paradigm.[57] Derogating control orders were never used.[58] Control orders allowed the State to impose a variety of restrictions on individuals, including house arrest, limitations on freedom of movement, electronic tagging and forced relocation.[59] The UK's response to the *A and Others* has prompted debate among scholars. Duffy has argued that the UK's policy has been responsive to, and shaped by, judicial decisions in this area.[60] This is exemplified by the series of cases challenging the measures imposed under control orders that followed,[61] which ultimately led to the introduction of Terrorism Prevention and Investigation Measures or TPIMs, which were 'more Article 5-compliant'.[62]

However, it could equally be argued that the UK's response to *A and Others* warranted a derogation from the Convention and that the failure to derogate has had a lasting negative effect on human rights protection. The implementation of control orders exerted pressure on the normal protection offered by several rights, particularly Articles 5 and 6, which led to 'minimal interpretations of certain Convention rights that stripped them of much of their content'.[63] The shielding effect provided by derogations, referred to in Section 2 above, was absent. The legislation also fostered the normalisation of using what are extraordinary measures.[64] This has been described as a 'covert derogation' from the ECHR.[65] In essence, the use of control orders has weakened some human rights protections to such a degree that measures which would arguably have necessitated a derogation in the past, are no longer considered to require a derogation.

This phenomenon is exemplified by the interpretation of 'deprivation of liberty' under Article 5 of the Convention. The ECtHR had already established quite a lenient definition of what constitutes a deprivation of liberty for the purposes of Article 5.[66] It began by accepting that a curfew of 10 hours did not amount to a deprivation of liberty for the purposes of Article 5 in *Raimondo v Italy*,[67] later accepting a longer curfew of 12 hours in *Trijonis v Lithuania*.[68] Control orders pushed the limits much further. While the House of Lords held that a curfew of 18 hours did amount to a deprivation of liberty for the purposes of Article 5,[69] the UK Supreme Court have nonetheless accepted that a curfew of 16 hours would need to have other conditions along with it that were 'unusually destructive of the life

57 s. 2 (non-derogating) and s.4 (derogating), Prevention of Terrorism Act 2005.
58 Fenwick and Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) *McGill Law Journal* 863 at 868.
59 s.1(4), Prevention of Terrorism Act 2005.
60 Duffy, *The 'War on Terror' and the Framework of International Law*, 2nd edn (2015) at 863.
61 See, for example, *Secretary of State for the Home Department v JJ* [2007] UKHL 45; *Secretary of State for the Home Department v F* [2009] UKHL 28; *Secretary of State for the Home Department v AP* [2010] UKSC 24.
62 Fenwick, 'Terrorism and the control orders/TPIMs saga: a vindication of the Human Rights Act or a manifestation of "defensive democracy"?' (2017) *Public Law* 609 at 615; See also Terrorism Prevention and Investigation Measures Act 2011.
63 Fenwick and Phillipson, supra n 58 at 867.
64 Fenwick, supra n 62 at 625-626.
65 Fenwick and Phillipson, supra n 58 at 877.
66 Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd edn (2014) at 293-298.
67 *Raimondo v Italy* Application No 12954/87, Merits and Just Satisfaction at para 39.
68 *Trijonis v Lithuania* Application No 2333/02, Strike Out, 17 March 2005.
69 *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

the controlee might otherwise have been living' for it to amount to a deprivation of liberty under Article 5.[70] The later TPIM legislation replaced curfews with a loosely framed overnight residence requirement,[71] but the government also drafted a bill for enhanced TPIMs to be enacted in an emergency.[72] These enhanced TPIMs allow the government to impose measures akin to those used under the old control orders regime, including curfews. Notwithstanding the fact that this legislation is more draconian than TPIMs, the Home Office has said there will not be a need to derogate before implementing the eTPIM legislation.[73]

Ultimately control orders and their successors have been in place since 2005 and are expected to continue to be available until at least December 2021.[74] Indeed, the UK government recently released proposals to amend the TPIMs legislation, in response to recent terrorist attacks in the UK, which would in the words of the UK's Independent Reviewer of Terrorism legislation would 'roll back the years' to the more restrictive control order regime.[75] This clearly illustrates the ratcheting effect referred to above. It demonstrates a 'complacent acquiescence'[76] in the continued use of these measures and the negative impact that they have had on standards of human rights protection is clear. The measures utilised in control orders arguably warranted a derogation from the Convention, but the UK never derogated. As such, the emergency paradigm has bled into normality, compromising the level of protection normally given by the Convention.

C. Covid-19 and Article 5

This compromised level of protection may explain why some States derogated to introduce measures responding to covid-19 while others did not. The grey area between restricting movement and depriving people of their liberty, created in the cases above, seems to have led to some disagreement between States concerning whether measures introduced to combat the spread of the virus amount to deprivations of liberty or restrictions on movement. Examining the derogations issued, the common denominator among all the derogating States were derogations from Article 11 (Freedom of Assembly and Association) and Article 2 of Protocol number 4 (Freedom of Movement). Estonia and Georgia went further, expressly derogating from Article 5 as well. These derogations were issued notwithstanding specific provisions in each of these Articles for the control of infectious diseases. Article 5 permits the lawful detention of persons for the prevention of the spreading of infectious

70 *Secretary of State for the Home Department v AP* [2010] UKSC 24 at para 4.
71 Horne and Walker, "The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?" (2012) *Criminal Law Review* 421 at 425.
72 Home Office, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill*, (2011) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/98424/etpim-draft-bill.pdf [last accessed 29 September 2020].
73 Home Office, *Review of Counter Terrorism and Security Powers*, 24 January 2011 at 43, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97972/review-findings-and-rec.pdf [last accessed 29 September 2020].
74 See Terrorism Prevention and Investigation Measures Act 2011 (Continuation) Order 2016/1166.
75 BBC News, 'Terror suspects could face indefinite curbs under new legislation', 20 May 2020 available at: https://www.bbc.co.uk/news/uk-politics-52732839 last accessed on 29 September 2020.
76 Fenwick, supra n 62 at 626.

diseases.[77] Article 11 and Article 2 of Protocol number 4 permit restrictions 'for the protection of health'.[78] This suggests that the derogating States considered the measures they had adopted went beyond the limits of this flexibility and the margin of appreciation they would be given. Estonia and Georgia were clearly of the view that their measures potentially deprived people of liberty.

The issue is complicated by the fact that when we compare derogating and non-derogating States in the context of covid-19, some derogating States imposed measures that were less restrictive of movement than those that did not derogate. To illustrate this, a comparison between Estonia and England can be made. Estonia is chosen because it issued the widest ranging derogation of all the derogating States covering Article 5 (Liberty and Security), Article 6 (Fair Trial), Article 8 (Private and Family Life), Article 11 (Assembly and Association), Article 1 of Protocol number 1 (Property and Possessions), Article 2 of Protocol number 1 (Education) and Article 2 of Protocol number 4 (Freedom of Movement). Estonia was the only State, at the time of writing, to expressly derogate from Article 6 for covid-19. By contrast, the UK did not derogate from the European Convention when implementing its response to covid-19. Before discussing the specific measures adopted restricting movement, it is worth noting that in the UK control over health policy is a devolved issue.[79] This means that each nation in the UK – Scotland, England, Wales and Northern Ireland – adopted their own legal measures to respond to covid-19. This section focuses on the regulations adopted in England exclusively.

In England, the law responding to covid-19 stated that 'no person may leave the place where they are living without reasonable excuse'.[80] This included a non-exhaustive list of reasonable excuses. Estonia did not put in place any similar limitations on leaving home. Estonia banned all public gatherings of more than two people, except for families living and moving around together, and people performing public duties.[81] In England, public gatherings of more than two people were prohibited except for members of the same household, essential gatherings for work purposes, attendance at funerals and other limited circumstances.[82] So why did Estonia derogate from Articles 5, 11 and Article 2 of Protocol number 4 to impose similar, even less restrictive measures than those adopted in England, while the UK did not derogate at all?

There have been arguments on both sides concerning whether the measures adopted in England are compatible with the European Convention on Human Rights.[83] The UK government is

77 Article 5(1)(e) European Convention on Human Rights 1950.

78 Article 2(3) of Protocol Number 4 to the European Convention on Human Rights 1950; Article 11(2) European Convention on Human Rights 1950.

79 The devolution schemes are predicated on reserving certain powers to the government in Westminster, rather than expressly conferring powers on the nations. Health policy is therefore devolved because it is not listed among the reserved powers in legislation see Schedule 5, Scotland Act 1998; Schedule 7A, Wales Act 2017; Schedules 2 and 3, Northern Ireland Act 1998.

80 Health policy is a devolved power in the UK, meaning that Wales, Scotland and Northern Ireland introduced their own legal measures responding to covid-19. The measures in England are analysed as an example.

81 Estonian Government, 'Additional measures to the emergency situation', 24 March 2020 available at https://www.kriis.ee/en/news/additional-measures-emergency-situation
[last accessed 29 September 2020].

82 s.7, The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350.

83 King, 'The Lockdown is Lawful: Part II', UK Constitutional Law Blog (2 April 2020) available at: https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/ [last accessed 29

clearly of the view that the measures adopted are consistent with human rights law because in the memorandum accompanying the regulations, the government minister responsible for them stated 'In my view the provisions of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 are compatible with the Convention rights.'[84] Ministers have a legal obligation to make statements concerning the compatibility of proposed laws with Convention rights.[85] Interestingly, this obligation does not apply to secondary legislation, which was used to implement the measures responding to coronavirus. It is optional, 'good practice' to make such a statement for this type of legislation.[86] In sum, the government went out of its way to assert that the measures were compatible with Convention rights. The UK Parliament's Joint Committee on Human Rights also notably observed that 'provided the measures in response to the COVID-19 outbreak are necessary, justified and proportionate, a derogation should not be needed'.[87]

It should be noted that the UK is not party to Additional Protocol number 4, so it has a freer hand to legally restrict movement than Estonia does. Nonetheless, there was clearly a fear among States that derogated from Article 5 that the measures adopted potentially crossed the line past restriction on movement to deprivation of liberty. Two main lines of argument that a derogation is not needed can be identified. First, the derogation is not needed because the deprivation of liberty is justified under Article 5(1)(e) and second, the derogation is not needed because Article 5 is not even engaged by the English regulations and Article 4 of Protocol 2 is not applicable.

The first argument is that not permitting people to leave their homes without reasonable excuse is a deprivation of liberty justified under Article 5(1)(e) for the prevention of the spreading of infectious diseases. The closest Strasbourg authority we have on this is the case of *Enhorn v Sweden* where the court indicated that two conditions must be met

> whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.[88]

It is notable that the court refers to detention of the 'person infected' indicating that the person is confirmed to have contracted the infectious disease. This could justify the imposition of isolation

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September 2020]; Hoar, 'A disproportionate interference: the Coronavirus Regulations and the ECHR', UK Human Rights Blog 21 April 2020 available at: https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar [last accessed 29 September 2020].

84 Explanatory Memorandum to The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, s.5.1

85 s.19 Human Rights Act 1998.

86 National Archives Legislation Services, "Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them" (5th edn, 2017) at 2.12

87 UK Joint Committee on Human Rights, "Background Paper: Covid-19" 19 March 2020 HC 265 available at <https://committees.parliament.uk/publications/401/documents/1511/default/> last accessed 29 September 2020 at para 3.

88 *Enhorn v Sweden* Application No 56529/00, Merits and Just Satisfaction 25 January 2005 at para 44.

measures on an infected individual, but would not justify the detention of non-infected persons.[89] However, as the Parliamentary Assembly at the Council of Europe has observed 'these measures are often of exceptional scope, being applied not just to specific groups, in certain places, for short periods, but to entire populations for weeks or months on end'.[90] The indiscriminate nature of the lockdown measures, catching both infected and non-infected persons, should therefore be incompatible with Article 5(1)(e).

The second argument is that a derogation is not necessary because the lockdown measures are a restriction on movement rather than a deprivation of liberty, therefore not even engaging Article 5. Indeed, the section implementing the order not to leave home without a reasonable excuse in England is titled 'restrictions on movement'.[91] Defenders of the view that the measures are a restriction on movement and not a deprivation of liberty would argue, per *Guzzardi v Italy*,[92] that the distinction between deprivation of liberty and restriction of movement is a matter of degree and intensity, rather than nature or substance.[93] They would point toward 'limitations' on the degree and intensity of the intrusion on liberty in the regulations, such as allowing people to leave their homes with a reasonable excuse, which would not be possible during a traditional curfew or house arrest, and note the light penalties for non-compliance (a £60 fine initially).[94] There is legal merit to such arguments, but only because the protection provided by Article 5 has become so impotent.

The argument that a derogation is not necessary because Article 5 is not engaged relies on exploiting the grey area between restricting movement and depriving of liberty, which the UK has a history of doing. It was evident in the UK's arguments in *Austin and Saxby v UK* that placing people in a police cordon (sometimes called kettling) for over six hours without permitting them to leave, did not amount to a deprivation of liberty and was merely a restriction on movement. This view was endorsed by the European Court of Human Rights.[95] In tandem, as noted above, control orders and TPIMs have pushed back the acceptable limits of restrictions on movement to a point where orders to stay in a specific place for up to 16 hours a day are not considered deprivations of liberty.[96] This persistent cycle of attrition against the protection of Article 5, has culminated in a situation where the State can reasonably claim that confining millions of completely innocent people to their homes for months on end does not amount to a deprivation of their liberty. The erosion of protection here is clear and engaging in such extensive and draconian restrictions on liberty without the shielding effect of a derogation sets a dangerous precedent.

89 Greene, 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic' Strasbourg Observers 1 April 2020 available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/ last accessed 29 September 2020.

90 Council of Europe Parliamentary Assembly, supra n 26 at 7.

91 s.6, The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350.

92 *Guzzardi v Italy* Application No 7367/76, Merits and Just Satisfaction, 6 November 1980.

93 Ruck Keene, 'Leviathan Challenged — the lockdown is compliant with human rights law (Part Two)', UK Human Rights Blog 11 May 2020 available at: https://ukhumanrightsblog.com/2020/05/11/leviathan-challenged-the-lockdown-is-compliant-with-human-rights-law-part-two/ last accessed 29 September 2020.

94 Ibid.

95 *Austin and Others v UK* Application No 39692/09 Merits and Just Satisfaction, 15 March 2012 at paras 59 and 67.

96 *Secretary of State for the Home Department v AP* [2010] UKSC 24 at para 4.

5. NOTIFICATION PROCEDURES AND BEING 'FULLY INFORMED'

Article 15(3) of the Convention obliges States to

> keep the Secretary General of the Council of Europe fully informed of the measures which it has taken [derogating from its obligations] and the reasons therefor.

This provision has been interpreted by the Court to the benefit of States. Whereas the ICCPR demands that States 'immediately inform the other States Parties' of derogating measures and specify which measures of the ICCPR they are derogating from, the Court's criteria differ in two ways - timing and clarity.

Firstly, instead of immediate notification, the Court requests notification 'without delay'.[97] In *Lawless v Ireland*, the Court did not find a violation of Article 15(3) when Ireland notified the Council of Europe of the derogating measures within 12 days of their adoption.[98] By contrast, in the *Greek case*, although the notification was communicated without delay, the Greek government did not communicate the reasons for derogation until more than four months after their initial notification. This led to a violation of Article 15(3).[99] In the past, the European Commission stated that failure to comply with article 15(3) could potentially nullify a derogation.[100]

However, in practice States have been slow to notify the Council of Europe of derogating measures. Analysis of the data reveals several instances of delayed, even retrospective, notification of derogations to the Council of Europe. In one particularly egregious example, the Isle of Man implemented parts of the Prevention of Terrorism Act 1990, which necessitated derogation from Article 5, on 1 December 1990.[101] However, the UK's derogation for these measures was not registered with the Secretary General of the Council of Europe until 13 November 1998, almost 8 years later.[102] Notwithstanding this exceptional delay, the State did not face any repercussions for the failure to notify without delay. The UK also took almost 6 years to notify the Council of Europe of derogating

97 *Lawless v Ireland (No 3)* Application No 332/57, Merits, 1 July 1961 at para 47.
98 Ibid.
99 *Denmark, Norway, Sweden and Netherlands v Greece* Application No 3321/67, Commission Report, 5 November 1969 at para 79.
100 *Lawless v Ireland (No 3)* Application No 332/57, Commission Report, 19 December 1959 at para 80; *Cyprus v Turkey* Application No 6780/74, Commission Report, 10 July 1976 at para 526.
101 s.12 and paragraph 6 of Schedule 5 to the Prevention of Terrorism Act 1990.
102 See annex 1 and Council of Europe Treaty Office, 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms' 29 September 2020 available at https://bit.ly/3ikoH6E last accessed 29 September 2020.

emergency measures it had introduced in Malaya and Singapore.[103] In several instances, Buganda,[104] Mauritius[105] and Aden,[106] the UK had adopted and discontinued the emergency measures by the time they notified the Council of Europe. It is clearly open to question whether States are informing the Secretary General of the Council of Europe of derogating measures 'without delay' as required by the Convention. Van Der Sloot observes that the notification requirement is seldom, if ever, discussed in the Court's case law and has lost 'most if not all of its importance in the most recent decisions'.[107]

Secondly, the Convention does not provide guidelines on what information must be communicated at the beginning of an emergency.[108] The Convention's adjudicatory bodies have determined that Article 15(3) 'does not oblige the Government concerned to indicate expressly the Articles of the Convention from which it is derogating'.[109] In practice States indicate the content of the measures adopted and this can be used to infer the derogation. This has led to States issuing vague derogations. Writing in 1980s about derogations from ICCPR and Convention, Hartman observed that 'the almost contemptuous vagueness of the notices filed to date is unsatisfactory'.[110] The situation has not improved significantly since then. The French derogation in 2015, for example, stated that the decrees issued by the French government 'may involve a derogation from the obligations under the Convention' without further detail on the specific articles.[111] The later Turkish derogation in 2016 used similar language, which the Court considered acceptable.[112] This practice has clearly continued with the derogations for covid-19. Of the ten States that derogated, four of them - Romania, Armenia, San Marino and Serbia - failed to specify the Articles of the Convention from which they were derogating. The Serbian derogation is emblematic of the problem, the Council of Europe was only notified three weeks after the measures had been adopted, the notification failed to specify articles derogated from and didn't even include a translation in an official language of the measures adopted.[113] Mariniello argues that allowing vague derogations gives the executive arm of government carte blanche to 'vest

103 According to the Council of Europe's records a state of emergency was declared in the Federation of Malaya and colony of Singapore on 18 June 1948, but the Council of Europe was not notified until 24 May 1954 – See annex 1.

104 In Buganda, the state of emergency was declared on 30 November 1953 and ended 31 March 1954, but the Council of Europe was not notified until 24 May 1954 – See annex 1.

105 In Mauritius, the first emergency powers entered into force on 14 May 1965 and ended 1 August 1965, but the Council of Europe was not notified until 20 September 1965 – See annex 1.

106 In Aden, the first emergency legislation [Emergency Regulations 1958 (Aden)] entered into force on 2 May 1958 and ended 1 October 1959, but the Council of Europe was not notified until 5 January 1960 – See annex 1.

107 Van der Sloot, 'Is All Fair in Love and War: An Analysis of the Case Law on Article 15 ECHR' (2014) 53 *Military Law and Law of War Review* 319 at 329-330.

108 MacDonald, 'Derogations under Article 15 of the European Convention on Human Rights' (1998) 36 *Columbia Journal of Transnational Law* 225 at 251.

109 *Denmark, Norway, Sweden and Netherlands v Greece* Application No 3321/67, Commission Report, 5 November 1969 at para 80.

110 Hartman, 'Derogation from Human Rights Treaties in Public Emergencies--A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1 at 20.

111 See Declaration contained in a letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015, registered at the Secretariat General on 24 November 2015 available at https://bit.ly/2MDSRp7 last accessed 29 September 2020.

112 *Sahin Alpay v Turkey* Application No 16538/17, Merits and Just Satisfaction, 20 March 2018 at para 73.

113 Serbian Government, "Note Verbale to All Member States" 7 April 2020, JJ9025C Tr./005-234 available at <https://rm.coe.int/16809e1d98> last accessed 29 September 2020.

itself with a huge discretionary authority in the limitation of fundamental rights'.[114] In this context, it seems prudent for States to at least notify the Court of the specific articles from which they are derogating so that the European Court can perform its function properly. This issue will be discussed further in the section on reform below.

6. DEROGATION PRACTICE DURING MILITARY OPERATIONS

The data also shows frequent derogations for what the Court describes as 'internal conflicts or terrorist threats'.[115] Paradigmatic examples of these derogations include the Turkish derogation in response to the PKK and the UK derogation in response to paramilitary activity in Northern Ireland. At the same time, there have been other instances where high levels of violence within the State did not prompt derogations. The Chechen conflict in 1999-2000 is a prime example; there were several pitched battles between Russian forces and insurgents over a period of months resulting in thousands of casualties. Several academics have argued this reached the threshold of a non-international armed conflict,[116] but Russia never derogated from the Convention during the operations. It is difficult to determine the exact reason for the failure/refusal to derogate. It may be that the Russian government considered that derogating would legitimise opposition forces within the State, conceding that they are succeeding in undermining the integrity of the State.[117]

Contracting States have also not tended to derogate from the Convention when participating in international armed conflicts.[118] The Ukraine's derogation in 2015 following the annexation of Crimea and hostilities between its forces and Russian/Russian-backed armed groups in its eastern oblasts remains an isolated example. Outside of this, States have engaged in various extra-territorial military operations without derogating from the Convention, such as the invasion of Iraq and its aftermath in 2003 and NATO-led interventions in Balkans in 1999 and Libya in 2011. The absence of derogations here is puzzling. Extra-territorial military operations typically involve the use of security detention.[119] Article 5 specifies a finite list of circumstances in which a person can be detained, which does not

114 Mariniello, supra n 36 at 70.
115 *Hassan v United Kingdom* Application No 29750/09, Merits, 16 September 2014 at para 101.
116 Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 549 at 563; Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' [2008] *European Human Rights Law Review* 732 at 733; Abresch, 'A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741 at 754.
117 Michael O'Boyle and Jean Paul Costa, 'The ECtHR and IHL' in Christos Rozakis (ed), *The European Convention on Human Rights, a Living Instrument* (Bruylant Press 2011) at 117–18. The political desire to avoid legitimising armed opposition groups has had a number of legal consequences in this and other conflicts see Abresch, supra n 116 at 756; Elspeth Guild, 'Inside Out or Outside In? Examining Human Rights in Situations of Armed Conflict' (2007) 9 *International Community Law Review* 33 at 37.
118 *Hassan v United Kingdom* Application No 29750/09, Merits, 16 September 2014 at para 101.
119 *Mohammed v Secretary of State for Defence* [2017] UKSC 2 at para 61; see for example *Al-Jedda v United Kingdom* Application No 27021/08, Merits and Just Satisfaction, 7 July 2011; *Behrami and Saramati v France, Germany and Norway* Application No 71412/01, Decision, 2 May 2007.

include security detention and this activity has historically led to violations of the Convention.[120] It has also prompted States to derogate in several domestic situations.[121] Thus, the States that failed to derogate while engaging in extra-territorial security detention exposed themselves to the risk that detainees would bring cases against them alleging violations of Article 5.

The benefits of derogation in this context seem obvious. The failure to derogate exposes the State to significant financial and legal risk. The UK, for example, settled hundreds of claims following *Al-Jedda v UK*,[122] where the ECtHR held that its practice of detaining people in Iraq violated Article 5, even though it was *prima facie* compliant with a UN Security Council Resolution (UNSCR) and international humanitarian law (IHL).[123] It faces further compensation claims from Iraqi civilians unlawfully detained during the UK's military operations there.[124] If a derogation had been in place, many of these claims would not be viable, illustrating the shielding value derogations can have for States mentioned in Section 2 above.

Derogating from Article 5 would also provide the State with a consistent legal framework during extra-territorial military operations as the nature of an operation changes over time. The conflict in Iraq, for example, changed from an international armed conflict, to a belligerent occupation, to a UN-sanctioned operation to support an interim government in Iraq.[125] The UK engaged in security detention throughout each phase, but the legal basis for this detention changed as the operation changed, leading to difficult questions over the continued legality of detention operations.[126] A derogation would have removed much of the uncertainty, from a human rights standpoint at least, by persisting through different phases of the operation. Indeed, the UK has indicated that the desire for States to make operational and strategic decisions against a 'clear legal framework' provides an incentive to derogate.[127]

So why have States not used derogations in this context? As I have argued elsewhere, historically States may not have thought it necessary to derogate, either because they did not believe they were exercising jurisdiction, or that the *lex specialis* principle meant that authorisations for security detention in IHL, or even UNSCRs,[128] trumped human rights law.[129] It has since become blatantly obvious that the Court does not favour the so-called 'strong *lex specialis*' approach, where

120 *Hassan v United Kingdom* Application No 29750/09, Merits, 16 September 2014 at para 97; *Al-Jedda v United Kingdom* Application No 27021/08, Merits and Just Satisfaction, 7 July 2011.
121 See, for example, the Irish derogation in *Lawless v Ireland (No 3)* Application No 332/57, Merits, 1 July 1961 and the prolonged derogation for internment in Northern Ireland discussed above.
122 *Al-Jedda v United Kingdom* Application No 27021/08, Merits and Just Satisfaction, 7 July 2011.
123 Wallace, supra n 5 at 196-197.
124 *Alseran v Ministry of Defence* [2017] EWHC 3289.
125 Wallace, supra n 5 at 196-197.
126 *Al-Jedda v United Kingdom* Application No 27021/08, Merits and Just Satisfaction, 7 July 2011 at paras 87-110.
127 Secretary of State for Defence, 'Letter to the Chair of the Joint Committee on Human Rights' (28 February 2017) at para 17 available at: https://old.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301_SoS_to_Chair_re_Derogation.pdf last accessed 29 September 2020.
128 *Al-Jedda v United Kingdom* Application No 27021/08, Merits and Just Satisfaction, 7 July 2011 at para 100.
129 Wallace, supra n 5 at 196-198.

IHL supersedes the Convention,[130] and that the Court is prepared to find jurisdictional links to contracting States during extra-territorial military operations in a wide range of circumstances.[131] It is no coincidence, in my view, that the UK is actively considering derogation for future extra-territorial military operations following these legal developments.[132] Thus, we may see a change in practice in this area, which begs the question of whether extra-territorial derogations are even possible under the current derogation scheme or whether an amendment is required, this will be addressed in the next section.

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7. REFORM

Having clearly established several issues with the interpretation and practical application of Article 15, we turn our attention to what can be done about the situation. States are derogating when they probably shouldn't, for example, for entrenched emergencies and not derogating when they probably should, for military operations. At the same time, the ECtHR's scrutiny of this entire area leaves much to be desired. These developments can be counteracted through changes in practice and an additional protocol amending Article 15.

A. Review Procedures

Many years ago, both MacDonald and Mangan argued that the system for derogations in the Convention should include a mechanism for the Court to provide advisory opinions on whether emergency measures are compatible with the Convention before they are adopted by a State.[133] This, they argued, would prevent delays in assessment arising from bringing a case to Strasbourg, would discourage draconian measures and facilitate selection of the least intrusive measures.[134] Mangan suggested the procedure could be confidential and its outcome non-binding on the State to de-politicise any evaluations. It is worth pointing out that although the contracting States have since adopted protocol 16, which allows domestic courts to seek advisory opinions from Strasbourg on

130 See generally *Hassan v United Kingdom* Application No 29750/09, Merits, 16 September 2014; Landais and Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97 *International Review of the Red Cross* 1295 at 1307.

131 Such as international armed conflicts - *Cyprus v Turkey* Application No 6780/74, Commission Decision, 10 July 1976; *Georgia v Russia (II)* Application No 38263/08, Decision, 13 December 2011; occupied territories - *Al-Skeini and Others v United Kingdom* Application No 55721/07, Merits and Just Satisfaction, 7 July 2011; peace support operations - *Behrami and Saramati v France, Germany and Norway* Application No 71412/01, Decision, 2 May 2007.

132 Ministry of Defence, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' available at: https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations last accessed 29 September 2020. A bill currently before the UK parliament at the time of writing, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, proposes to create a duty to a duty to consider derogation from the Convention for overseas operations.

133 MacDonald supra n 108 at 250-251; Mangan, supra n 20 at 387-394.

134 Mangan, supra n 20 at 392-394.

questions of principle arising in cases pending before the domestic courts,[135] protocol 16 could not discharge the same function as the process suggested because an active domestic case is required before an advisory opinion can be sought under Protocol 16.

While there is clearly some merit in Mangan and MacDonald's suggestion, there are several issues. Firstly, as the pre-review system is optional and States will often be acting under severe time constraints in responding to an emergency, it is unclear whether States would make use of the facility. Secondly, while the notified measures may appear legitimate and proportionate on paper, in practice they may be applied in a way that disproportionately interferes with rights. If the Court had previously endorsed the derogation, it could discourage applicants from taking a case or even lead the Court to dismiss valid cases. Finally, the supervision of states of emergency by a supra-national institution is always going to be a contentious issue, raising questions about the role the Court should play in the European legal sphere. The pre-review approach advocated by Mangan and MacDonald seems anachronistic and it is open to question whether such a solution would be acceptable to contracting States clamouring greater deference from the Court to national authorities.[136] It is difficult to see States accepting such oversight, which is why an alternative solution may be preferable.

Article 15 should instead be amended through an additional protocol. First, Article 15 should require that emergency measures put in place in derogation from the Convention should contain 'sunset clauses', which would terminate the emergency measures after a specified time. Second, the Court has previously stated that Article 15 requires 'permanent review of the need for emergency measures'.[137] This requirement should be expressly written into the terms of Article 15. The State should be required to introduce independent review mechanisms to scrutinise both the threat justifying derogation and measures taken by the State in response. This could take the form of review by a parliamentary committee, like the Joint Committee on Human Rights, or a particular office holder, akin to the independent reviewer of terrorism legislation in the UK.[138] As the ECtHR seems concerned to give leeway to States in this context, its role could be confined to ensuring that adequate procedures for periodic review were put in place domestically and supervising the implementation of those procedures to ensure they were applied properly. This approach would be consistent with the current zeitgeist of the Convention system. The ECtHR's new president vaunts the 'age of subsidiarity'[139] and the Court's movement toward a 'procedural embedding phase' of development, where the ECtHR's role is to examine 'whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles'[140] rather than 'infusing Convention

135 Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 214 with Explanatory Report.

136 See Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 213, which amended the preamble of the Convention to include references to subsidiarity and the margin of appreciation.

137 *Brannigan and McBride v United Kingdom*, Application No 14553/89, Merits and Just Satisfaction, 26 May 1993 at para 54.

138 Hall, 'Independent Reviewer of Terrorism Legislation' available at https://terrorismlegislationreviewer.independent.gov.uk/ [last accessed 29 September 2020].

139 Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

140 Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473 at 480-481.

principles into the legal systems of the Member States'.[141] This approach would be entirely consistent with the Court occupying this role and these provisions would help to combat the risk of entrenched emergencies and the normalisation of emergency measures.

An insistence on procedural elements to oversee and ensure protection of Convention rights is nothing new, the Court has insisted on such measures for Articles 2, 3 and 4.[142] The ECtHR could also take a similar approach to derogations as it has for other sensitive topics related to national security. In *Janowiec and Ors v Russia*,[143] for example, Russia abruptly discontinued an investigation into the so-called Katyn massacre, which involved the deaths of hundreds of Polish people during World War 2. Russia then classified the decision to discontinue the investigation as top secret and refused to disclose the decision to the ECtHR claiming its top-secret status meant it was legally precluded from transferring the information to an international organisation like the ECtHR.[144]

The idea of a supra-national court scrutinising the validity of 'top secret' material is perhaps even more contentious than scrutinising the validity of states of emergency, but the ECtHR deftly sidestepped the subsidiarity issue. The ECtHR found there was a violation of Article 38, which obliges States to furnish all necessary facilities to the ECtHR when investigating cases. The ECtHR noted the domestic decisions on classification did not specify the exact nature of the security concerns justifying their secret classification. While the ECtHR was loathe to challenge the judgments of national security authorities, it was apparent that there was insufficient legal oversight of the decision and that the domestic courts had not balanced the national security claims against the legitimate public interest in the disclosure of the documents.[145] Thus, the ECtHR was prepared to respect the decisions on classification as long as they are subject to sufficient domestic scrutiny. A similar approach should be adopted in respect of derogations.

B. Jurisdiction

The text of Article 15, which specifies that there must be a war or other public emergency threatening the life of the nation before a derogation can be adopted, presents a possible barrier to extra-territorial derogation. Several academics and judges have questioned whether this criterion can ever be satisfied where States elect to participate in peace-keeping/enforcement missions or other military operations extra-territorially.[146] On the opposite side, Milanovic and Sari have argued that the failure to derogate does not prove that the State considered itself unable, as a matter of law, to derogate

141 Ibid at 475-476.
142 *Rantsev v Russia and Cyprus* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010 at para 288.
143 *Janowiec and Others v Russia* Application No 55508/07, Merits and Just Satisfaction, 21 October 2013.
144 Ibid at para 192.
145 Ibid at para 214.
146 *Smith and Others v Ministry of Defence* [2013] UKSC 41 at para 60; O'Boyle and Costa, supra n 117 at 116; Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119 at 125-126; Rooney, 'Extraterritorial Derogation from the European Convention on Human Rights in the United Kingdom' [2016] *European Human Rights Law Review* 656 at 660; *R. (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 at para 38; *Mohammed v Secretary of State for Defence* [2017] UKSC 2 at para 45.

during extra-territorial military operations.[147] Da Costa and Loucaides argue just because a State does not derogate does not mean that a derogation is not necessary or possible.[148]

The Court has not made a determination either way, but seemed open to the idea of States derogating extra-territorially in *Hassan v UK*, a case involving extra-territorial security detention, when it stated

> Article 15 of the Convention provides that "[i]n time of war or other public emergency threatening the life of the nation", a Contracting State may take measures derogating from certain of its obligations under the Convention, including Article 5. In the present case, the United Kingdom did not purport to derogate under Article 15 from any of its obligations under Article 5.[149]

One would expect that if the Court considered that element of Article 15 to pose a serious barrier to derogation, it would have said so. In the past, the European Commission on Human Rights seemed to consider that once jurisdiction was established, it was open to the State to derogate.[150] Sassòli argues that 'one cannot simultaneously hold a State accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that State's own territory. An emergency on the territory where the State has a certain limited control must be sufficient'.[151] This position is supported by many others.[152]

The central issue here is the application of a territory-centric derogation scheme[153] to a jurisdiction scheme that is increasingly decoupled from territory, focusing instead on other forms of jurisdiction, such as State agent authority or personal jurisdiction.[154] The logical solution to this seems to be to amend Article 15 to expressly affirm that the State's capacity to derogate is commensurate with the scope of the State's jurisdiction under the Convention, whatever the ECtHR may determine it to be. This would partly solve the situation identified above, but many would argue that the mere existence of extra-territorial jurisdiction, perhaps arising as a result of war overseas, ought not to be enough to justify derogation.[155] Under the existing derogation regime, there are qualitative elements concerning the nature of the situation that limit the State's capacity to derogate. There needs to be a

147 House of Commons Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations: Twelfth Report of Session 2013–14* (The Stationery Office 2014) Evidence 55; Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (2016) at 57.

148 da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012) at 133 and Loucaides, 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic case' [2006] *European Human Rights Law Review* 391 at 396.

149 *Hassan v United Kingdom* Application No 29750/09, Merits, 16 September 2014 at para 98.

150 *Cyprus v Turkey* Application No 6780/74, Commission Decision, 10 July 1976 at paras 525-528.

151 Sassoli, 'The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?' (2009) 85 *US Naval War College International Law Studies* 431 at 438.

152 Dennis, supra n 146 at 476; Milanovic, supra 147 at 71; *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 at para 155.

153 *Sakik v Turkey* Application No 23878/94, Merits and Just Satisfaction, 26 November 1997 at paras 34-39.

154 Wallace, supra n 5 at 43-72.

155 O'Boyle, supra n 19 at 337.

threat to the State's physical population, its territorial integrity or the functioning of the State's organs.[156] How should this qualitative element translate into the extra-territorial context?

It is worth noting that the Court has interpreted the 'threat to the nation' criterion in Article 15 quite liberally in its jurisprudence, allowing States a significant margin of appreciation.[157] In *Ireland v UK*, for example, the Court showed a high level of deference to the domestic authorities when it observed that

> 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.[158]

The Court accepted a very low-level threat in *Lawless v Ireland*,[159] and a prospective threat in *A and Ors v United Kingdom* as justifications for derogation.[160] It is possible that the Court could change its interpretive approach within the existing derogation scheme. It has been suggested, for example, that the term 'war or other public emergency threatening the life of the nation' could cover a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.[161] Alternatively, Habteslasie argues that Article 15 could be read so that the 'threat to the life of the nation' element only applies to public emergencies, but not to wars. Thus, war would serve as a legitimate justification for derogation regardless of whether it presented a threat to the life of the nation derogating.[162] However, in my view, it would be preferable not to encourage further liberalisation in the interpretation of Article 15. This article has shown that the ECtHR's interpretations of Article 15 have weakened several of the features of Article 15, which safeguard against abuse of the provision by States. Several academics have rightly voiced criticism of the Court's 'light touch' in assessing whether a State was justified in declaring an emergency, arguing this has stifled effective scrutiny of the measures taken by States.[163] As such, it would be preferable to amend Article 15 to expressly cater for these extra-territorial derogations, rather than punching further holes in the already threadbare structure of Article 15.

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156 McGoldrick, 'The Interface Between Public Emergency Powers and International Law' (2004) 2 *International Journal of Constitutional Law* 380 at 393–4; although see *A and Others v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009 at para 179 for more clarification of the nature of the threat to the State's institutions.

157 Crysler, 'Brannigan and McBride v. U.K. – A New Direction on Article 15 Derogations under the European Convention on Human Rights' (1996) 65 *Nordic Journal of International Law* 91 at 99.

158 *Ireland v UK* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978 at para 207.

159 *Lawless v Ireland (No 3)* Application No 332/57, Merits, 1 July 1961 at para 28; see Sheeran, supra n 10 at 532.

160 *A and Others v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009 at para 179; Bates, 'A 'Public Emergency Threatening the Life of the Nation'? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the 'A' case' (2005) 76 *British Yearbook of International Law* 245 at 280.

161 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 at para 157.

162 Habteslasie, 'Derogation in Time of War: The Application of Article 15 of the ECHR in Extraterritorial Armed Conflicts' (2016) 21(4) *Judicial Review* 302 at 312-14; for an opposing view see O'Boyle, supra n 19 at 337.

163 Bakircioglu and Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 *International and Comparative Law Quarterly* 263 at 268; Greene, supra n 3 at 1766.

Any measure permitting States to derogate for their actions extra-territorially should be consistent with other provisions of international law, in particular *jus ad bellum*. There needs to be a nexus between the legitimacy of an extra-territorial derogation and the legality of the State's use of force where that results in the exercise of extra-territorial jurisdiction.[164] Any substantive restriction on extra-territorial derogations should facilitate actions taken by contracting States in self-defence and actions taken pursuant to UN Security Council Resolutions.[165] In light of the widespread collective self-defence arrangements to which contracting States are party,[166] any amendment permitting extra-territorial derogations should also encompass actions taken in collective self-defence. This must cover contracting States where they are not the direct object of attack, but use force in discharge of their collective self-defence obligations.

C. Enhanced Notification Procedures

Finally, there needs to be enhanced scrutiny and reform of the notification procedures for derogations to combat the laxity and vagueness of derogations identified above. To combat vagueness, Article 15 should be amended to ensure clearer derogations. As O'Boyle notes, reservations of a general nature to the Convention are not permitted,[167] so why should the ECtHR accept derogations of a general nature? Amending the Convention to align it with the ICCPR's derogation clause which demands that the State immediately inform the State 'of the provisions from which it has derogated', could be an option. However, there are shortcomings to such an approach. It is debatable whether demanding 'immediate' notification of derogating measures is fair to States responding to an emergency and a mere statement of the articles being derogated from without the text of the measures themselves offers little guidance on the measures that the State is taking.[168] Article 15(3) should instead be amended to require states to both notify the Secretary General of the specific articles the State is derogating from and the content of the measures adopted. This should be coupled with a change in practice so that a failure to promptly notify the Secretary General of derogations results in a procedural violation of Article 15(3). This will encourage States to take their obligation to inform the Council of Europe and other contracting States of their derogation more seriously and also facilitate external scrutiny of the notifications made to the Secretary General.[169]

8. CONCLUSION

In conclusion, the current derogation scheme under the European Convention is in need of reform. This article clearly shows that States are not derogating when they should be and are derogating when they shouldn't. The entrenchment of emergencies has become commonplace, which has led to the

164 For some discussion see Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Sheeran and Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) at 652-655.
165 See Article 2(4), Chapters 6 and 7, Charter of the United Nations 1945 1 UNTS 16.
166 Article 5 North Atlantic Treaty 1949 (adopted 4 April 1949) 34 UNTS 243.
167 See Article 57 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS 005; O'Boyle, supra n 19 at 335.
168 Hartman, supra n 110 at 20.
169 Council of Europe Parliamentary Assembly, supra n 26 at 13.

normalisation of extraordinary measures compromising human rights protection. The use of TPIMs, control orders and more recently implementation of 'lockdown' measures to respond to covid-19 without derogating have reshaped the boundaries between deprivation of liberty and restrictions on movement. This has resulted in significant erosion of the human rights protection provided by Article 5. The derogation scheme also seems ill-suited to covering the extra-territorial activities of States, potentially limiting their capacity to derogate when this is necessary. States have also been lax in notifying and keeping the Council of Europe fully informed about derogations from the Convention. In order to combat these developments, this article suggested amendments to Article 15 to facilitate extra-territorial derogations, to incorporate periodic review mechanisms and improvements to the notification procedures for derogations. While these reforms are necessary, it would also be beneficial for States to change their mindset toward derogation. The idea that derogations are bad for human rights protection needs to be seriously challenged. Derogation is not, and should not be, considered an afront to human rights protection. It should be considered a signal of respect for human rights. The longer we persist in views to the contrary, the greater the damage we may inflict on hard-won human rights protections.

ACKNOWLEDGEMENTS

The author would like to thank Dr. Ilias Trispiotis, Dr. Rebecca Moosavian and Dr. Cornelius Wiesener and the anonymous reviewers and editors for their helpful comments on earlier drafts.

Annex 1 – Statistics

As part of the research for this article data on every derogation ever made from the European Convention on Human Rights has been compiled. The data is derived from the Council of Europe records between 05/05/1949 and 29/09/2020, which are publicly available. The information was gathered through the Council of Europe's Treaty Office.[1] This involved a search in the reservations and declarations section limited to the European Convention on Human Rights (Treaty 005 in the ETS records) and searching for a complete chronology of the records where the 'nature of declaration' was limited to derogations.[2] The information produced by this search was used to compile a list of the derogations, they are listed in alphabetical order by State and chronological order where multiple derogations concern the same State.

Column headings

Start Date – the date presented is the date on which the State declared a state of emergency. Where States have not/cannot declare a state of emergency, the date listed is the date on which legal measures (decrees, statutes etc.) necessitating derogation were brought into force, each of these measures is footnoted.

Registration at COE - date that the derogation was registered by the Secretariat General of the Council of Europe.

End Date – the date indicated in the State's Note Verbale to the Secretariat General of the Council of Europe on which the legal emergency measures or state of emergency ceased to have effect.

Registration of Withdrawal – date that the withdrawal of the derogation was registered by the Secretariat General of the Council of Europe.

Reason - a brief indication of the reason for the derogation.

Duration - the number of days between the start date and end date.

A dash (-) indicates the derogation is still in place at the time of writing.

1 http://conventions.coe.int/

2 The results of the search can be seen here https://bit.ly/3ikoH6E.

State	Start Date	Registration at COE	End Date	Registration of Withdrawal	Reason	Duration
Albania	02/03/1997	10/03/1997	24/07/1997	24/10/1997	Albanian Civil War	145
Albania	24/03/2020[1]	31/03/2020	24/06/2020	25/06/2020	Covid-19 pandemic	92
Armenia	01/03/2008	04/03/2008	20/03/2008	21/03/2008	Protests	17
Armenia	16/03/2020	19/03/2020	16/09/2020	16/09/2020	Covid-19 pandemic	184
Estonia	12/03/2020	20/03/2020	18/05/2020	16/05/2020[2]	Covid-19 pandemic	67
France	12/01/1985	08/02/1985	30/06/1985	03/09/1985	New Caledonia	170
France	14/11/2015	24/11/2015	01/11/2017	06/11/2017	Paris terrorist attacks	719
Georgia	26/02/2006	03/03/2006	16/03/2006	28/03/2006	Bird flu	19
Georgia	07/11/2007	09/11/2007	16/11/2007	19/11/2007	Attempted coup	10
Georgia	21/03/2020	23/03/2020	-	-	Covid-19 pandemic	
Greece	21/04/1967[3]	03/05/1967	13/06/1970	17/12/1969[4]	Coup	1150
Ireland	08/07/1957[5]	22/07/1957	09/03/1962	06/04/1962	Paramilitary activity	1706
Ireland	16/10/1976[6]	21/10/1976	16/10/1977	24/10/1977	Terrorism	366
Latvia	12/03/2020	16/03/2020	10/06/2020	10/06/2020	Covid-19 pandemic	90
North Macedonia	18/03/2020	01/04/2020	24/06/2020	30/06/2020	Covid-19 pandemic	99
Moldova	17/03/2020	19/03/2020	15/05/2020	20/05/2020	Covid-19 pandemic	63
Romania	16/03/2020	17/03/2020	14/05/2020	15/05/2020	Covid-19 pandemic	60

1 Albania declared a state of natural disaster under its Constitution.
2 Pre-notification of withdrawal of derogation.
3 Greece issues Royal Decree No. 280 of 21st April 1967 suspending certain articles of the Constitution.
4 Ends with Greek denunciation of the Convention per Article 58. Advance notification given on 17 December 1969, treaty ceases to apply from 13/06/1970 also ending the derogation.
5 Entry into force of Part II of the Offences against the State (Amendment) Act, 1940.
6 Entry into force of Emergency Powers Act, 1976.

San Marino	05/03/2020[7]	10/04/2020	30/06/2020	08/07/2020	Covid-19 pandemic	118
Serbia	15/03/2020	06/04/2020	-	-	Covid-19 pandemic	
Turkey	01/06/1960	28/02/1961	19/12/1961	19/12/1961	Coup	567
Turkey	21/05/1963[8]	28/05/1963	29/07/1964	29/07/1964	Coup	436
Turkey	16/06/1970[9]	19/06/1970	19/09/1970	29/09/1970	Demonstrations	96
Turkey	26/04/1971[10]	04/05/1971	26/09/1973	27/09/1973	Active plots	885
Turkey	20/07/1974[11]	24/07/1974	12/11/1975	14/11/1975	Martial law	474
Turkey	26/12/1978[12]	28/12/1978	19/07/1987[13]	27/05/1987[14]	Martial law	3128
Turkey	10/05/1990[15]	07/08/1990	29/01/2002	29/01/2002	SE Turkey (PKK)	4283
Turkey	20/07/2016	21/07/2016	19/07/2018	09/08/2018	Attempted coup	730
Ukraine	21/05/2015[16]	09/06/2015	-	-	Annexation of Crimea	
UK	18/06/1948	24/05/1954	31/08/1957[17]	12/12/1963	Coup (Malaya)	3362
UK	18/06/1948	24/05/1954	16/09/1963[18]	12/12/1963	Coup (Singapore)	5569

7 Entry into force of first emergency degree for this crisis Decree-Law no. 43 of 5 March 2020.
8 Turkey adopted a new Constitution in 1961. Article 124 allowed the Council of Ministers to declare a state of siege and impose martial law.
9 Turkish Council of Ministers declare a state of siege and impose martial law.
10 Turkish Council of Ministers declare a state of siege and impose martial law.
11 Turkish Council of Ministers declare a state of siege and impose martial law.
12 Turkish Council of Ministers declare a state of siege and impose martial law.
13 Between 1978 and 1987 there was an extended political crisis in Turkey. During this period, Turkey extended and at times rescinded martial law in several of its districts. Martial law was extended to the entire country on 12 September 1980, before gradually being withdrawn as the political situation stabilised. It was eventually rescinded throughout the country in July 1987. I have treated this period as a single derogation, even though there were various declarations varying the scope of martial law during this period.
14 Advance notification of withdrawal of martial law in final provinces.
15 On this date Decrees with force of law Nos. 424 and 425 entered into force. The scope of the derogation was later reduced but a derogation from Article 5 remained in place through to 2002.
16 Ukrainian parliament approves Resolution №462-VIII derogating from international human rights law obligations.
17 Independence from UK from this date.
18 Independence from UK from this date.

UK	20/10/1952	24/05/1954	12/12/1963[19]	12/12/1963	Kenya - Mau Mau uprising	4071
UK	08/10/1953[20]	24/05/1954	23/11/1957	16/12/1958	Guiana 1	1508
UK	30/11/1953	24/05/1954	31/03/1954	24/05/1954	Buganda	112
UK	16/06/1954[21]	27/06/1957	22/08/1984	22/08/1984	Northern Ireland 1	11025
UK	16/07/1955[22]	07/10/1955	16/06/1959	19/06/1959	Cyprus	1432
UK	11/09/1956[23]	19/08/1957	16/11/1962	16/11/1962	Northern Rhodesia	2258
UK	02/05/1958[24]	05/01/1960	01/10/1959	05/01/1960	Aden 1	517
UK	03/03/1959[25]	26/05/1959	15/03/1961	16/03/1961	Nyasaland	744
UK	02/06/1961[26]	06/12/1961	20/12/1962	18/03/1963	Zanzibar	567
UK	10/12/1963	01/09/1966	30/11/1967	30/11/1967[27]	Aden 2	1452
UK	13/06/1964[28]	30/11/1964	26/05/1966	26/05/1966[29]	Guiana 2	713
UK	14/05/1965[30]	20/09/1965	01/08/1965	20/09/1965	Mauritius	80
UK	29/11/1988[31]	23/12/1988	26/02/2001	19/02/2001[32]	Northern Ireland 2	4473

19 Independence from UK from this date.
20 Entry into force of first laws allowing emergency powers per Note Verbale.
21 Entry into force of first laws allowing emergency powers per Note Verbale.
22 Entry into force of first laws allowing emergency powers per Note Verbale.
23 Entry into force of first laws allowing emergency powers per Note Verbale.
24 Entry into force of Emergency Regulations 1958 (Aden).
25 Entry into force of Emergency Regulations, 1959 (Nyasaland).
26 Entry into force of Emergency (Miscellaneous) Regulations, 1961 (Zanzibar).
27 Independence from UK from this date.
28 Entry into force of Emergency Powers (Amendment)(No 2) Regulations 1964 (Guiana) [details available from Council of Europe Treaty Office]
29 Independence from UK from this date.
30 Entry into force of first laws allowing emergency powers per Note Verbale.
31 European Court of Human Rights hands down *Brogan v United Kingdom* Application No 11209/84, Merits, 29 November 1988.
32 Pre-notification of withdrawal of derogation.

UK	01/12/1990[33]	13/11/1998	04/05/2006	05/05/2006	Channel Islands Terrorism Legislation	5634
UK	14/12/2001[34]	18/12/2001	14/03/2005	16/03/2005	9/11 Terrorist Attacks	1186

33 Section 12 and paragraph 6 of Schedule 5 to the Prevention of Terrorism Act 1990 entered into force on 1/12/1990 on the Isle of Man, 01/01/1991 in Guernsey and 01/07/1996 in Jersey.

34 Anti-Terrorism, Crime and Security Act 2001 enters into force.