

# **The role of derogations from the ECHR in the current ‘war on terror’**

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## **Abstract**

This chapter points out that derogation from the ECHR under Article 15 ECHR was designed after the second World War precisely to allow contracting states to meet emergencies such as the one represented by the current ‘war on terror’, but to remain within the ECHR system, while suspending adherence to certain of the rights on a temporary basis. Article 15 allows states to cease their adherence to a number of the Convention rights, during the period of the emergency. It might be expected therefore that reliance on derogations would be particularly significant at the present time. But the chapter finds that very few derogations have been sought from ECHR contracting states, despite the recent very significant rise in terrorist activity. Given that derogations have played little part in counter-terrorism efforts in most of the ECHR-contracting states, a significant degree of continued adherence to the ECHR has been maintained, but some attention has turned to other methods of exploring evasion of its protections. This chapter explores the reasons behind the lack of reliance on derogations, and the implications of turning to such other methods as alternatives.

## **Key words**

European Convention on Human Rights, Article 15 ECHR, derogations, terrorism, counter-terror measures, control orders, citizenship-stripping

## **Introduction**

Global terrorist activity, linked mainly to ISIS and similar groups, is in some respects of a more concerning nature than previous manifestations of terrorist activity which have also tended to be less widespread. The concern is due to a range of factors: some of it is perpetrated by ‘home-grown’ terrorists who cannot be deported; the attacks are sometimes of a particularly vicious

and also unpredictable nature; there is a lack of likelihood that a political solution can be found since negotiation with groups of this nature is, it is argued, not possible. This chapter focuses mainly on the contracting states of the European Convention on Human Rights (ECHR) and points out that derogation from the ECHR under Article 15 ECHR was designed after the second World War precisely to allow contracting states to meet crisis situations of this nature, but to remain within the ECHR system, while suspending adherence to certain of the rights on a temporary basis. Derogating states would still therefore adhere to the rule of law notions embedded in the ECHR, and the Strasbourg Court would still police their responses to emergencies, and in particular the proportionality of the response.

Article 15 allows states to cease their adherence to a number of the Convention rights, during the period of the emergency. However, no derogation from certain Articles is permitted, as discussed below. Article 15 has been used in the past mainly in respect of terrorist activity and often to derogate from Article 5, the right to liberty. (To date Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom have relied on their right of derogation.) It might be expected therefore that reliance on derogations would be particularly significant at the present time. Western democracies are currently facing an unprecedented terrorist threat – in terms of its widespread nature - which comes mainly from their own citizens, whether from the far right (but the threat appears not to be as great as that from jihadist Islamist groups) or from jihadist Islamist groups. A number of terrorist attacks have occurred in the last five years in Europe (recent attacks causing the greatest loss of life included the 7 January 2015 (Charlie Hebdo) and 13 November 2015 (Bataclan etc) Paris attacks, the 14 July 2016 Nice attack, the 1 January 2017 Istanbul attack and the 22 May 2017 Manchester Arena attack) and a number of plots have been foiled. Thus there is a continuing and very serious threat that attacks may occur. It stems partly from nationals who have travelled abroad (or sought to do so but were stopped) to support ISIS, and have already returned to their own states of origin ('foreign terrorist fighters' - FTFs); some of those that are still in Syria or other conflict zones may now be more likely to return, given that ISIS now holds virtually no territory. (In January 2018 it was estimated that 850 UK nationals of national security concern had returned from the conflict: HC Deb 31 January 2018 Vol 635 Col 941. Europol (2017) reported that in 2016: '135 people were killed in jihadist terrorist attacks in the EU. In total 13 terrorist attacks were reported: France 5, Belgium 4 and Germany 4. Out of these 13 attacks, 10 were completed. A total of 718 people were arrested on suspicion of jihadist terrorism related offences.' In 2015 the UN Security Council estimated that there were almost 25,000

foreign fighters globally, and it was observed that there had been a sharp rise in European fighters.)

Since FTFs and other suspects usually cannot be deported, it would be expected that detention or control measures requiring a derogation, would be put in place. But as mentioned very few derogations have been sought from ECHR-contracting states, despite recent terrorist activity. Certain states have recently sought derogations, as discussed below, but nevertheless there has been a marked reluctance in general in the ECHR contracting states to rely on derogations. In 2018, despite the range of terrorist attacks in 2016-18, only two derogations were in place in the contracting states. One was in Turkey, due to an apparent attempted coup. Also on 5 June 2015 Ukraine notified the Secretary General of the Council of Europe that given the emergency situation in the country due to Russian action it intended to derogate under Article 15.

So despite the recent rise in terrorist activity derogations have played little part counter-terror efforts in the current ‘war on terror’ in ECHR-contracting states, as this chapter documents, but that should not be taken to mean that full adherence to the ECHR is ongoing in the face of the attacks and the terrorist threat in general, especially in parts of Eastern Europe. The reluctance to derogate may be partly due to the decision rejecting the derogations adopted post 9/11 in the UK in *A and others* in 2004, and its counterpart decision at Strasbourg in 2010 (see below). Those decisions may have sent a signal to the other states that use of derogations can be risky and de-stabilising to counter-terror efforts. Given that derogations have played little part in such efforts in most of the contracting states, attention has turned to other methods of exploring evasion of the protections of the ECHR, as discussed below.

This chapter will proceed as follows. It will begin by considering the current terrorist context, which might appear to invite the widespread use of derogations from the ECHR. Secondly, it will examine the stance taken by the Strasbourg Court to the use of derogations, including two decisions against Turkey in 2018, and will comment on the likely response of the Strasbourg Court to derogations sought in response to the increase in terrorist activity in Europe over the last five years. Thirdly it will consider other methods of diminishing the impact of ECHR safeguards for fundamental rights, particularly procedural safeguards, via counter-terror measures explored recently in Europe (and globally) *without* relying on derogations, looking particularly at the case of the UK. Fourthly it will consider evasion of the ECHR via citizenship-stripping. Finally, having explored the general reluctance to rely on derogations,

and the contrasting purported reliance on a derogation in Turkey, it will come to some conclusions as to the current and future role of derogations from the ECHR, given this position, and as to the desirability of relying on derogations in Europe in the current ‘war on terror’. It concludes by considering the lessons that can be learnt from this situation, and in particular from the rejection of reliance on derogations despite the severity of the current emergency.

## **1. The current terrorist context**

The threat from ISIS-supporting nationals and from the far-right (far-right extremists presenting a threat also tend to be ‘home-grown (Pantucci et al 2016) in ECHR-contracting states has led states to consider and introduce an increasing array of counter-terror measures, including non-trial-based measures, creating tensions with human rights norms. That tension is exacerbated where the terrorism threat comes from a states’ own citizens since usually they cannot be deported, as discussed below. Therefore they have to be retained within the borders of the contracting states, prompting the search for counter-terror measures that can be used to control their activities.

The nature of the terrorist attacks themselves is of especial concern when compared, for example, to IRA attacks in the UK. That is, it is argued, for a number of reasons. First, the attacks are largely completely indiscriminate; a number of them have made no distinction between civilians and soldiers or between children and adults; indeed, children have been deliberately targeted (as in the case of the Manchester arena attack in 2017, and in 2018 of incitement to murder Prince George at his school (Siddique and Halliday 2018). Secondly, a large number of the attacks have involved the suicide of the perpetrators, adding an extra dimension of fear and alienation, given that it is harder to deter those who intend to die in carrying out an attack. Examples include the March 2016 Brussels Attacks and May 2017 Manchester Attack. The Manchester arena suicide attack on 22 May 2017 was carried out by Salman Abedi using explosives; it killed 22 people, including a number of children, and injured over 100 (Kerslake 2018).

Third, the attacks are, to an extent, more difficult to predict than previous attacks, given the propensity of the attackers to use ordinary objects such as knives or vans to carry them out, and to move abruptly from radicalisation to sudden engagement in terrorist acts. Examples include the Westminster Bridge attack carried out by Khalid Masood – who appears to have moved

from radicalisation to attack mode rapidly - on 22 March 2017 using a vehicle to run down pedestrians and then using knives. 5 people died, and 50 were injured, some of them critically. The method was clearly similar to the Nice truck attack carried out by Lahouaiej-Bouhlel on 14 July 2016 and the Berlin Christmas Market truck attack on 16 December 2016. The London Bridge attack in 2017 was carried out by three men, again using vehicles and knives. Khuram Butt, Rachid Redouane and Youssef Zaghba strapped fake suicide belts to themselves before engaging in a marauding-style attack, using a van to run over pedestrians and then stabbing people in Borough Market. They killed eight people and injured many more. They appear to have intended to kill far more people – blow torches and bottles filled with flammable liquid were found in the van that they used; they had also attempted to hire a large lorry to carry out the attack, which would almost certainly have caused further deaths/injuries, and it has been reported that they may have intended to take hostages to execute them later (see Intelligence and Security Committee 2017). Using such objects means that detection is more difficult, since the attackers do not need outside training or assistance as they would probably do if assembling bombs. (So the comparison is with, for example, the attack planned in Chesterfield at Christmas 2017: see Dodd and Grierson 2017; see also the 2016 Irish Semtex bomb plot: Young 2017; see further Striegher 2013.)

Fourth, the use of the criminal law and criminal justice system is also rendered more difficult in the current situation because a decision has to be taken as to the point at which intervention should occur when a group or an individual appears likely to engage in an attack. The risk cannot be taken of getting too close to that point, but that also means that evidence-gathering is made more challenging, because the persons concerned can argue that the plot was a fantasy which would never have been carried out. This can be a particular issue when very early-stage precursor-offences such as in the UK s58 Terrorism Act (TA) 2000 (possession of information useful for terrorism) or s5 TA 2006 (acts preparatory to terrorism) are charged. The dividing line between terrorist fantasy and genuine preparation for the commission of a terrorist act was central to the case of *R v Samina Malik* ([2008] EWCA Crim 1450). The case concerned a female Muslim who called herself ‘the “Lyrical Terrorist”’; she was initially prosecuted for possessing propagandist material but was acquitted on appeal as the judge’s summing up had failed to consider adequately whether the documents in question were genuinely useful for terrorism (see further below and chap 00, pp 00; Walker 2009).

Fifth, in many European states a very large number of persons have been identified who have

been radicalised and might tip over into carrying out an attack (see Home Affairs Select Committee 2016; Anderson 2017); it is not possible in terms of the available resources to carry out surveillance on all of them (in 2018 in the UK there were over 500 live security operations, 3,000 ‘subjects of interest’ and a further 20,000 people viewed as possibly posing a threat: Home Office 2018), so decisions are constantly taken by the security services and police as to whether to down- or up-grade the risk they represent. Sixth, the use of social media and the internet can make the task of the security services and police harder because terrorists or would-be terrorists can receive inspiration from external jihadist groups, can communicate with each other via the ‘dark web’ or via less policed sites (see eg UNSC 2015, pp 11-12, 18; Intelligence and Security Committee 2017, pp 16-18; less policed sites include eg Telegram), and can also download bomb instructions as well as details as to the places they intend to target, relevant to mounting an attack. ISIS or Al Qaeda-supporting operatives in various parts of the world, including Lebanon, Pakistan, Libya, Syria, are able to communicate via the internet with home-grown sympathisers in various states, and inspire and facilitate attacks in ECHR-contracting states. (The most significant attacks in the UK were perpetrated by British nationals, including the 22 May 2017 Manchester Arena Attack which killed 23 and injured 513, the 22 March 2017 London Attack (Westminster Bridge) killing 5 and injuring 50 using a vehicle a knives, and the 7/7 bombing in London. See MacAskill and Johnson (2016), interview with Andrew Parker, current Head of MI5: ‘There will be terrorist attacks in Britain’: ‘there are about 3,000 “violent Islamic extremists in the UK, mostly British”’. The attacks in January 2015 on Charlie Hebdo, and at a kosher supermarket, and the Paris terrorist attacks in November 2015, were organised and perpetrated largely by ISIS-supporters, some of whom had fought with ISIS, and almost all of whom were French nationals: see Farmer (2016). The Brussels terrorist strike on 22 March 2016, the deadliest act of terrorism in Belgium's history, was perpetrated by at least 3 Belgian nationals (BBC News 2016). The Normandy church attack, 26 July 2016, was perpetrated by French citizens, and the Nice truck attacker Lahouaiej-Bouhlel on 14 July 2016 had a French residency permit.)

The situation described is exacerbated due to the *nature* of the threat from Salafi-Jihadist inspired terrorism which distinguishes it from, for instance, Irish terrorism. In general, the use of terrorism invites political, police-based or military solutions; but a political solution to the problem of this manifestation of terrorism is not feasible because the aims of Salafi-Jihadism are self-evidently irreconcilable with those of democracies. A military solution has already been brought about in Iraq and is currently close to completion in Syria (it may also be sought

in Libya by the Libyan government to repel ISIS militants: see Ross 2016). But given that ISIS and similar groups are about to be entirely ousted via military action from the very small pockets of territory they still currently hold, in order to protect the populations in the member states, the solution must be a police and security service-based one.

## **2. Relying on derogations as part of the counter-terror armoury**

As indicated, despite the recent ratcheting up of the terror threat in European states, especially due to ISIS-linked plots and terrorist atrocities, the use of measures to combat terrorism necessitating reliance on derogations has been conspicuous by its absence. However, if further states had sought derogations in the last five years from Article 5 ECHR (right to liberty) to protect detention without trial, or to introduce lengthy periods of house arrest likely to create a ‘deprivation of liberty’, the Strasbourg Court would have been likely to uphold them, provided the measures were compatible with the State’s other international legal obligations, depending on the precise measures introduced, given the ease with which it is possible to satisfy the jurisprudence governing the tests under Article 15, as discussed below (Article 15(1): ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’). In particular, the Court has tended to defer to the state’s judgment as to the measures needed to combat a state of emergency in the particular circumstances in question. It should be noted that certain rights are non-derogable by virtue of Article 15(2), including Article 2 (the right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (freedom from torture or from inhuman or degrading treatment), 4 (1) (prohibition of slavery) and, notably, 7(1), which prohibits punishment without law.

The fact that when facing somewhat similar emergencies in the past a state has chosen not to derogate would not be relevant to a decision to do so. For example, the UK did not seek a derogation at a number of points in recent years when terrorist activity was especially serious, although not as serious as at the present time, such as after the Omagh bombing (involving a car bomb on 15 August 1998 which resulted in 29 fatalities). Failures to derogate in the past are not directly relevant to any current derogation. The existence of a state of emergency is a

necessary condition for derogation – it does not mandate it, and a state which seeks to adhere to the Convention despite the fact that it could probably defend a derogation at Strasbourg deserves credit for doing so. Conversely, derogations should not be sought on insurance grounds – on the basis that a state of emergency may soon come into being, and stringent measures might suddenly need to be taken.

### *3.1 How is the term 'emergency' understood under Article 15?*

Under Article 15 the first question is whether a 'public emergency threatening the life of the nation', within the meaning of Art 15, is in being. The Court has said on this in *Lawless*:

In the general context of article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to 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" (*Lawless v Ireland (No 3)* (1961) 1 EHRR 15 at [28]; see further de Londras and Dzehtsiarou 2018).

The European Court of Human Rights has often been criticised for its stance at this stage, given that it has only once found that a claim for a derogation is unjustified on the basis that such a state of emergency does not exist. Therefore it can be argued that its understanding of the term 'emergency' undermines Article 15's attempt to balance the requirements of security and rights. For example, Greene criticises the jurisprudence for failing to draw a clear line between normalcy and emergency, with the result that he finds 'the requirement that a state of emergency be declared [to be] little more than an administrative procedure' which enables the erosion of human rights protections (Greene 2011).

The one exception was *the Greek Case* ((1969) 12 YB 1): an emergency was not found to be in being in the very special circumstances of that case. It was found:

Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) The continuance of the organised life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions,



permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate ([153]).

A very strict standard was applied in that case; a very narrow margin of appreciation was conceded to the state, a very narrow degree of discretion (see eg: Spielmann 2014; Legg 2012; Letsas 2006) due to the special circumstances pertaining in the situation: there had been a coup d'état and the military had seized control of the state, suspending part of the constitution and declaring a state of emergency. The strict stance was taken due to the fact that a military government was in power, and the European Commission on Human Rights considered that it was resorting to Article 15 in bad faith. Applying that narrow margin, ([201]) the Commission found that the derogation was not justified. The Greek government had argued that there had been a steady decline in public order which had brought the nation almost to a state of anarchy, necessitating the adoption of various measures, including the derogation, in order to prevent a Communist takeover. The Commission, abjuring a stance of deference to the state on this matter, disagreed with the government's assessment of the situation, finding that the life of the nation was not threatened. Strasbourg therefore found that there was no public emergency and thus no valid grounds to derogate.

The situation in *the Greek Case* may be contrasted with the derogation sought by the Turkish civilian administration in 2016 in response to an attempted military coup. The situation in Turkey was, taken at face value, the reverse of the one in Greece. The Turkish civilian administration was threatened with a take-over by a military coup, led by parts of the Turkish armed forces. In order to take various measures in response, as discussed below, Turkey sought a derogation under Article 15. In two cases in 2018, *Mehmet Hasan Altan v Turkey* (application no. 13237/17) and *Sahin v Turkey* (application no. 16538/17) the Court of Human Rights found that “the attempted military coup and its aftermath have posed severe dangers to the democratic constitutional order and human rights, amounting to a threat to the life of the nation” and, noting the broad margin of appreciation accorded to the state in relation to the judgement that such a threat existed (*Mehmet Hasan Altan*, para 87), accepted that the derogation was relevant to its assessment of the merits of the applicant's complaint (ibid, paras 91-91).

On very different facts, in *Lawless v Ireland* ((1961) 1 EHRR 15) the Court of Human Rights had also found that a state of emergency was in being in considering whether Ireland was justified in entering a derogation under Art 15 to Art 5. It found that any terrorist threat must

affect the whole state, must be in being or be imminent, and must have produced a situation in which the usual law enforcement mechanisms are unable to function. It found that these conditions were satisfied in 1957 due to the existence of a “secret army” operating in Ireland and in the UK, and because of the alarming rise in terrorist activities in the previous year:

in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957 ([28]).

The existence of a secret army was found to affect the whole population and relations with its neighbouring state, the UK, were severely affected. Also there had been a steady and alarming increase in terrorist activity due to the increasing readiness of the IRA to use violence to attain its purposes. The state of emergency was inferred from these factors – as opposed to finding that it was due to the actual level of violence – so the requirements were not literally applied: it was not found that the whole nation had to be directly affected.

The later decision in *Ireland v UK* (Series A, No. 25 (1971)) made it clear that the limits on the court's powers of review are particularly apparent where Article 15 is concerned due to the wide margin of appreciation that would be extended to the state:

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

Nevertheless, the states do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the states'

engagements (article 19), is empowered to rule on whether the states have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. ([207])

Unsurprisingly, a derogation from Article 5 was upheld in *Brannigan and McBride v UK* ((1993) 17 EHRR 539) in the context of 3000 deaths attributable to terrorism, caused by over 40,000 terrorist shooting or bombing incidents between 1972-1992. In a fairly similar situation in *Aksoy v Turkey* ((1996) 23 EHRR 553) the Court accepted that there was a state of emergency in South-east Turkey on the basis that there had been on average 3000 deaths related to terrorism a year.

Moreover, while the Strasbourg Court may be prepared to make its own assessment of the situation, albeit while conceding a wide margin of appreciation to the state, which means that it makes little attempt to gather independent evidence, it is placed in a particularly difficult position where a government enters a derogation on partially speculative grounds, based on very sensitive intelligence. The Court may be unable to make any real assessment if the intelligence is viewed as largely undisclosable. It is clearly easier for the Court to make a (tentative) assessment – albeit not one based on close scrutiny - where terrorist activity has already occurred and is continuing, than when intelligence sources suggest, on the basis of circumstantial evidence, that it may occur. That was the situation which arose in *A and others v UK* ((2009) 49 EHRR 29). The legislation in question was the Anti-Terrorism Crime and Security Act 2001 (ACTSA) which inter alia introduced detention without trial (in Part 4) for suspect non-nationals. It was introduced shortly after 9/11 on the basis that Al Qaeda sympathisers were already in the UK, and some of them were attempting to incite others to terrorist acts. Nevertheless, terrorist acts had not been carried out in the UK at that point by such sympathisers. The hasty introduction of ACTSA is illustrative of the tendency of legislators to be pressured too readily into passing anti-terrorism laws hastily, with much too little scrutiny and amendment (see: Ramraj et al 2011, p 119; Ackerman 2006). The detention without trial measure was incompatible with Article 5 ECHR and therefore required a derogation under Article 15.

The Strasbourg Court accepted in *A and others v UK* that in introducing a derogation in respect of Part 4 ACTSA a political decision had been made as to whether an 'emergency' was in being; the decision was found to relate to the institutional competence of the executive. The

Attorney General, representing the Home Secretary, had submitted previously in the House of Lords that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. He further argued that the Government, ‘responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking’ (*A and Others v Secretary of State for the Home Department* [2004] UKHL 56 [25]). He also submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues (*ibid* [39]). The importance of deference to the judgement of the government was also argued before Strasbourg in *A and Others v UK* ((2009) 49 EHRR 29 [150]).

The applicants argued in *A v UK* that there had been no public emergency threatening the life of the British nation when ACTSA was introduced, for three main reasons: ‘first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other states, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established’ (*ibid*, [175]). Thus the applicants interpreted the wording in Art 15 as regards an ‘emergency’ as requiring a threat to the organised life of the community which went beyond a *threat* of serious physical damage and loss of life. However, the Court found that in previous cases it had been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the “nation”. Also it pointed out that it would allow the state in question a broad margin of appreciation on that issue. In that instance it found that weight also had to be attached to the view of the national courts on the matter – the House of Lords in *A and others* had also found that a state of emergency was in being.

If the Court could accept fairly readily that a state of emergency was in being in 2001 due to the 9/11 attacks, although, while there were Al-Qaeda sympathisers in the UK, terror attacks in the UK itself had not occurred, it would clearly accept that a state of emergency was in being in European states between 2013-18 when a number of attacks have taken place in Europe. Obviously the point at which a state sought a derogation would be relevant to the severity of the emergency, but the decision in *A and others v UK* indicates clearly that had derogations

been sought by a number of European contracting states in those years to aid in combatting terrorism, this first test would have been found to be satisfied.

### *3.2 Are the measures taken 'strictly required by the exigencies of the situation' (the proportionality analysis)?*

Once it is found to be the case, taking the margin of appreciation conceded to states into account, that an emergency was in being in respect of a derogation, then the Court must consider the question of proportionality (this requirement, in addition to the requirement that only certain rights may be derogated from, has been termed the 'substantive requirement; see eg de Londras and Dzehtsiarou 2018). The assessment of whether a measure is strictly required by the exigencies of the situation by the Court of Human Rights obviously requires weight to be given to 'the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation' (*Brannigan and McBride v UK* (1993) 17 EHRR 539 [43]; *A and others v UK* (2009) 49 EHRR 29 [173]; Harris et al 2014). In coming to a conclusion as to whether a measure is strictly required, the Court has found that it will assess the merits of such a claim (*Mehmet Hasan Altan v Turkey* (application no. 13237/17) [94]; *Sahin Alpay v Turkey* (application no. 16538/17) [78]; see also European Court of Human Rights Directorate of the Jurisconsult 2018) and the severity of the 'emergency' is obviously relevant to the nature of the powers taken, at this second stage.

Initially it appeared, as evidenced in certain decisions, including *Brannigan*, that the Court would take the view that the margin of appreciation conceded would not differ at this second stage. But in more recent cases – *Aksoy, A and others v UK* – a change in that stance became apparent and the margin appears to have narrowed at the second stage, enabling the Court to come to a judgment differing from that of the member state. That stance was confirmed in *Sahin Alpay v Turkey* and *Mehmet Hasan Altan v Turkey* both in 2018.

In *Lawless* the introduction of special powers in Ireland, including internment in 1971 (detention without trial for IRA members), necessitated a derogation from Article 5; the applicant was an Irish citizen detained without trial for 5 months in 1957 because he was a member of the IRA. The powers were found to be justified on the basis that the use of the ordinary law was found to be insufficient to meet the challenges created by the state of emergency caused by an upsurge in terrorist activity, together with serious and prolonged

rioting (*Ireland v UK* A 25 (1978) [23]), and also because the powers were found to have been used for the purpose of meeting the emergency; further, their use was subject to a number of safeguards, including referral of disputed cases to a quasi-judicial commission (*Ireland v UK* A 25 (1978) [36-38]). Furthermore, it was found to be significant that the need for the derogation was kept under review (*ibid*, [54]). However, had the situation still fallen within the category of an ‘emergency’ under Art 15, but been found to be at the less serious end of the spectrum denoted by that term, possibly the nature of the powers might not have been found to be justified.

The powers at issue in *Brannigan and McBride v UK* ((1993) 17 EHRR 539) were not of such a significant nature. The Government had introduced special powers to deal with terrorist suspects: they could be held for 48 hours and the time period could be extended by the state for up to 5 days. The powers required a derogation from Art 5(3) which requires that after arrest a suspect must be brought ‘promptly’ before a judge. In other words, a person could only remain in police detention for a certain period without judicial authorisation of the continued detention. When the applicant challenged the derogation the Court found, as discussed above, that there was a public emergency, but went on to consider whether the measures taken were “strictly required” by the exigencies of the situation. The Government argued that, within the framework of the common-law system, it was not feasible to introduce a scheme which would be compatible with Article 5 para 3 (*ibid*, [51]) and yet would not weaken the effectiveness of the response to the terrorist threat. It was pointed out that the training of terrorists in remaining silent under police questioning hampered and protracted the investigation of terrorist offences. Therefore, in consequence, the police were required to undertake extensive checks and inquiries; they therefore needed more time to retain terrorist suspects in detention. It was also argued on behalf of the UK that involving the judiciary in the process of granting or approving extensions of detention created a real risk of undermining their independence as they would inevitably be seen as part of the investigation and prosecution process. The Court granted the UK a very wide margin of appreciation – it stated that it was not its role to substitute its view as to the measures that would be most appropriate or expedient at the relevant time to deal with an emergency situation, and emphasised the state’s duty to protect the Article 2 (right to life) and Article 3 (prohibition of torture) rights of its citizens who could become potential victims of the terrorist violence ((1993) 17 EHRR 539 [41]).

Furthermore, the Court accepted that the measure was a ‘genuine response’ to the situation (ibid, [51]). The Court also noted that the Government had the direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and for respecting individual rights on the other (ibid, [59]). It was also accepted that in the context of Northern Ireland, where the judiciary was small and vulnerable to terrorist attacks, public confidence in its independence was understandably a matter to which the Government had attached great importance. The Court concluded that in the light of those considerations it could not be said that the Government had exceeded its margin of appreciation in deciding, in the prevailing circumstances, against judicial control (ibid, [60]).

But those findings in *Brannigan* can be contrasted with the findings in *Aksoy v Turkey* ((1997) 23 EHRR 553), which also concerned a derogation from Article 5(3) in a terrorist situation. In that instance the applicant was detained for at least fourteen days without being brought before a judge or other judicial officer. That period was longer than the one at issue in *Brannigan and McBride*. The Government sought to justify the measure by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support. The Court said that it had accepted, as it had also expressed in the past, that the investigation of terrorist offences clearly presents the authorities with special problems (ibid, [78]). Nevertheless, the Court did not accept that it was necessary to hold a suspect for fourteen days without judicial intervention. The Court found that that period was exceptionally long, and left the applicant vulnerable, not only to arbitrary interference with his right to liberty, but also to torture, and emphasised the lack of effective judicial oversight which could protect against such mistreatment in detention (ibid, [76-78]). The Government, it was found, had also failed to adduce any *detailed* reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable (ibid, [78]). Thus, although Turkey was allowed a margin of appreciation in relation to the determination as to the measures to be taken, the lack of safeguards available – such as, for example, no prompt remedy of habeas corpus nor legally enforceable rights of access to a lawyer (ibid, [81]), and the length of detention without judicial intervention - (ibid, [83]) was found to mean that Turkey had exceeded its margin of appreciation: the derogation was not therefore upheld.

The House of Lords in the UK reached a similar conclusion in *A and others (A and Others v Secretary of State for the Home Department* [2004] UKHL 56). The derogation in question was intended, as indicated above, to cover the introduction of detention without trial under Part

4 Anti-Terrorism Crime and Security Act 2001 (ACTSA). ACTSA was rapidly passed in the Commons, despite its introduction of draconian powers (see Fenwick 2002). The performance of the US Senate in relation to the US PATRIOT Act, also passed in response to September 11<sup>th</sup>, and also providing for the detention of foreign nationals without trial, as well as numerous other controversial extensions of state power, likewise disclosed virtually no will to resist such encroachments upon civil liberties: just one Senator voted against the proposals. The Parliamentary Joint Committee on Human Rights (JCHR) in the UK had already concluded that even if the requisite state of emergency existed, it doubted whether the measures in the Bill could be said to be strictly required by the exigencies of the situation, bearing in mind the array of measures already available to be used against terrorism, and the fact that no other European country had derogated from Article 5 (Joint Committee on Human Rights 2001). It returned to this issue in its Sixth Report on the Bill and found that the case for a derogation had still not been made to Parliament (Joint Committee on Human Rights 2004; see also 2003). Other legal opinion on this issue at the time was quite firmly to the effect that the derogation was unjustified on the basis that the measures taken went further than was required by the exigencies of the situation (see eg Anderson and Stratford 2001, for the group JUSTICE on this issue, which came to the conclusion that the derogation was unjustified, considering that Part 4 went beyond what was strictly required by the exigencies of the situation in covering a wide range of suspected international terrorists).

Having found, deferring to the expertise of the executive on the matter, that a state of emergency was in being at the time in question (by a majority), the Lords then considered the question of proportionality under Art 15. The House of Lords was invited by the Attorney General to defer generally to the view of the Government on the necessity for the detention without trial measure under the 2001 Act. The House refused and drew a clear distinction between the first and second issues under Article 15. The question whether there was a ‘public emergency threatening the life of the nation’ was something, it was found, which was primarily for the Government to decide, subject to a fairly restrained review by the courts: that was on the basis of the Government’s expertise in assessing intelligence and levels of threat (*A and Others v Secretary of State for the Home Department* [2004] UKHL 56 [27]-[29]). But in contrast, the Lords found, the proportionality of the measures required to combat that threat, and in particular whether they were rationally connected to their objective, *was* a matter for the courts.



The Lords accepted the argument that the measures did not satisfy the test of proportionality on a number of grounds. Sections 21 and 23 ACTSA did not, it was found, rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters, on three grounds. Firstly, the powers did not address the threat presented by UK nationals, and there was no evidence that the threat posed by nationals was clearly lower than that posed by non-nationals. Secondly the sections permitted foreign nationals suspected of being Al-Qaeda terrorists, or their supporters, to pursue their activities abroad if there was any country to which they were able to go. Thirdly, the sections on their face permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qaeda terrorists or supporters. Part 4 potentially could have covered groups entirely unconnected to Al Qaeda, including groups, such as the PKK, who have apparently renounced violence and in any event have not committed acts of terrorism in the UK (see *R (on the application of the PKK) v the Home Secretary* [2002] EWHC 644). Part 4 on that basis should have been designed to be applicable only to members or supporters of Al Qaeda, and other violent groups with similar aims, given that it was introduced to combat the threat emanating from such groups post 9/11.

The House of Lords therefore found that the measures were both under- and over-inclusive, and were not therefore suitable to achieve the security objective in question. Part 4 was found to be too broad to be covered by the derogation since it went further than strictly required by the exigencies of the situation, given that the threat posed by *national* suspects could apparently be addressed *without* resorting to detention without trial. The deference paid to the executive was more minimal at the second stage under Article 15 since the Lords found that the determination to be made at that stage was not to be viewed as a political judgement but as a judicial one since it concerned proportionality; in that sense the Lords created differentiation between the two stages under Art 15. The Lords then made a declaration of incompatibility between Part 4 ACTSA and Articles 5 (right to liberty) and 14 ECHR (right to freedom from discrimination on a number of grounds including nationality) under s 4 Human Rights Act 1988 (HRA). That did not affect the legal force of the scheme, but the then Labour government eventually abandoned it to introduce control orders instead, as discussed below.

Those who had been subjected to detention without trial then brought a claim to the Strasbourg Court in *A v UK* ((2009) 49 EHRR 29), one aspect of which concerned obtaining compensation for their detention, given that it had been found to be unlawful. As mentioned above, the first

test under Article 15 was found to be satisfied – it was accepted that an emergency had been in being. But the Strasbourg Court then went on to consider whether the Part 4 measures had been strictly required by the exigencies of the situation. The Court reiterated that when it comes to consider a derogation under Art 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were ‘strictly required’. On that point the government put forward a number of new arguments which were not put forward domestically in *A and others*. It defended the confining of the measures to non-nationals, on the basis that the government was seeking to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Court found that the Government had not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims. The government also argued that the state could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In that connection, again the Court found that it had not been provided with any evidence which could persuade it to depart from the conclusion of the House of Lords that the difference in treatment was unjustified. Thus the Court took the same stance as the House of Lords had taken - that the measures were not strictly required by the exigencies of the situation, despite the fact that there was evidence that the applicants had had some involvement in terrorism.

Thus the conclusion of both the House of Lords and the Strasbourg Court was that the choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. It is fairly clear that the Court was in effect guided towards that conclusion due to the stance on the issue of proportionality that had been taken in the national court.

The Court in *Mehmet Hasan Altan v Turkey* (application no. 13237/17) and *Sahin v Turkey* (application no. 16538/17) reaffirmed the approach to the margin of appreciation and the stance taken as to the question of whether the measures taken were ‘strictly required’ in *A and others v UK* (*Mehmet Hasan Altan v Turkey* [91]; *Sahin Alpay v Turkey* [75]). Mehmet and Sahin were both journalists critical of the government. Both applicants were subject to criminal proceedings on the basis of contravention of Article 309 of the Criminal Code – attempting to

overthrow the constitutional order – due to their alleged connections to and sympathies with the Gulenist movement, despite there being no evidence linking them to the coup attempt, nor to active participation in the Gulenist movement. Mehmet had been held in pre-trial detention for over a year prior to being sentenced to life imprisonment (subject to ongoing appeals) and Sahin had been held for a similar period, although his trial had yet to be heard at the time of the Court judgment (*Mehmet Hasan Altan* [25]; *Sahin Alpay* [12-13]). Both *Mehmet* and *Sahin* involved claims of compensation for a lengthy period of pre-trial detention. The Turkish Constitutional court, taking a stance similar to that of the House of Lords in the UK in *A and others*, had also accepted that there was a ‘public emergency’ within the terms of Article 15 (*Mehmet Hasan Altan* [93]; *Sahin Alpay* [77]), but had also gone on to find that that the measures were not strictly required by the exigencies of the situation. Since the derogation was found to be invalid domestically, a violation of the applicants’ Article 5(1) rights was found (*Mehmet Hasan Altan* [110]; *Sahin Alpay* [119]).

The Court of Human Rights had regard to these findings. Unlike *A and others*, however, in which the UK’s derogation referred to specific measures of pre-trial detention, in *Mehmet* and *Sahin* the derogation did not refer to such measures (*Mehmet Hasan Altan* [89]; *Sahin Alpay*, [73]). Another crucial distinction was that in *Mehmet* and in *Sahin* there was no or limited evidence that the two applicants had had any involvement in terrorist activity, and therefore the Court found that the pre-trial detention was not ‘lawful’, nor effected ‘in accordance with a procedure prescribed by law’ due to the lack of reasonable suspicion, and on that basis could not ‘be said to have been strictly required by the exigencies of the situation’ (*Mehmet Hasan Altan* [140]; *Sahin Alpay*, [119]). So the derogation was not found to justify the treatment of the applicants in *Sahin* or *Mehmet* on proportionality grounds. The Court thus found violations of Article 5 (deprivation of liberty). In this regard the European Court agreed with the Turkish Constitutional Court’s finding in relation to Article 5(1) that ‘if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless’ (*Mehmet Hasan Altan* [36]; *Sahin Alpay*, [32]).

In *Mehmet* and in *Sahin* the Court of Human Rights also considered the question of whether the interference with the applicants’ Article 10 (freedom of expression) rights was justified as a measure ‘strictly necessary’ due to the exigencies of the situation. This issue was raised because the imposition of pre-trial detention had been linked explicitly to both applicants’

critical statements about the government in relation to the events leading up to and in response to the coup (*Mehmet Hasan Altan* [25]; *Sahin Alpay*, [22]). The Court considered that:

...even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights... the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness (*Mehmet Hasan Altan* [210]; *Sahin Alpay*, [180]).

The Court observed that detention of journalists in part for publication of articles and providing commentary created a ‘chilling effect’ on the press (*Mehmet Hasan Altan* [212]; *Sahin Alpay*, [182]). The Court of Human Rights therefore found a violation of Article 10 in both cases. In contrast to the determination of the House of Lords in *A and others*, the Constitutional Court had awarded compensation, albeit a limited sum, to the victims in both cases and had instructed the local Assize Court to approve the release of both claimants. This remedy was taken into account by the Court of Human Rights, particularly in relation to Article 5(4), but on the other hand the Assize Court had refused to accept the Constitutional Court’s judgment, thus depriving it of legal force. In striking contrast to *A and others* the Court of Human Rights in *Mehmet* and *Sahin* awarded a higher level of non-pecuniary compensation to the victims, despite its finding that an emergency situation existed, largely because of the lack of evidence that either applicant was associated with terrorism or otherwise with violent opposition to the state. The applicants in *Mehmet* and *Sahin* were granted €21,500 in non-pecuniary damages (*Mehmet Hasan Altan* [220]; *Sahin Alpay* [190]).

### 3.3 Conclusions as to Strasbourg’s stance under Art 15

It is argued in conclusion that the margin of appreciation conceded at Strasbourg on the ‘emergency’ point means that it is hard to challenge the state’s view as to the measures needed to combat the threat, and in most cases, until recently, once the emergency point was conceded, so was the point as to the measures needed to combat the emergency. However, in *Aksoy*, in *A v UK*, and in *Mehmet* and *Sahin* that was not the case; so it can tentatively be suggested that the Court is showing a greater determination to scrutinise the measures taken; it is subjecting them to a more intensive review, having reduced the margin conceded on this issue. A divide

between the width of the margin conceded as to making a determination as to an ‘emergency’ and the margin conceded regarding the proportionality analysis is becoming apparent. Nevertheless, the tests under Article 15 remain reasonably easy to satisfy where actual terrorist activity has occurred. So, for example, had Part 4 ACTSA targeted national and non-national suspects, and had been introduced in the wake of terrorist activity carried out partly by ‘home-grown’ terrorists, as occurred in the UK in 2017, it is probable that the Supreme Court (which has replaced the House of Lords) and Strasbourg would have reached a different conclusion as to the proportionality of the measures adopted. Given the ease with which the Article 15 tests would probably be satisfied in the current situation, it is therefore of interest to explore the reactions of the contracting states to the terrorist attacks over the last 4-5 years, which have in most instances *not* included reliance on a derogation.

### *3.4 The minimal role of derogations in the ‘war on terror’*

The reluctance of the contracting states to seek derogations from the ECHR post 9/11, and even in the face of the increase in terrorist activity in Europe in 2015-18, may have been influenced by the case of the UK. As discussed above, immediately post-9/11 reconciliation between reliance on a non-trial-based measure and human rights law was sought by use of a derogation from the ECHR in 2001. That reconciliation failed since detention without trial under Part 4 Anti-Terrorism Crime and Security Act 2001 (ACTSA) for non-national terrorist suspects was abandoned, after the House of Lords invalidated the derogation in *A and others (A and Others v Secretary of State for the Home Dept)* (2004) UKHL 56) on grounds of proportionality, and the Strasbourg Court later confirmed that finding. But, as discussed, terrorist activity in Europe has escalated since then, and therefore derogations would be more likely to be upheld. Nevertheless, despite the escalation in ISIS-inspired terrorism in Europe in the last few years, very few states have sought derogations, bar France and Turkey.

France instituted a number of emergency measures (*etat d'urgence*) in 2015 after the Paris attacks accompanied by a derogation from Article 15 ECHR. (The French Government decided, by Decree No. 2015-1475 of 14.11.15, to apply Law No. 55-385 of 3 April 1955 on the state of emergency. Decrees No. 2015-1475, No. 2015-1476, No. 2015-1478 14.11.15, No. 2015-1493, No. 2015-1494 18.11.15, and Law No. 2015-1501 20.11.15 defined a number of the measures that could be taken by the administrative authorities. See No. 2015-1476, No. 2015-1478 of 14 November 2015, No.2015-1493 and No. 2015-1494 of 18 November 2015,

and Law No. 2015-1501 of 20 November 2015. The state of emergency was extended to 26 May, and the government then extended it to the end of July 2016 to cover the Euro 2016 football championship and the Tour de France. The state of emergency was extended and renewed again on 15.12.16 for an additional seven months and finally extended for a further three months on 11.7.18. See note verbale from the Permanent Representation of France, 24 November 2015, registered at the Secretariat General on 24 November 2015.)

The Constitutional Reform Bill (to create changes to Article 16 and 36) came before the Senate in France on 10.2.16 and a clear majority of MPs in the lower House of Parliament approved the measures. They were intended to enshrine the state of emergency powers into the constitution, allowing a government to call on the powers in a time of crisis. The expanded emergency powers allowed the government to impose immediate house arrest without authorization from a judge, if persons were considered a risk; impose traffic restrictions, and prohibitions on public assembly; to order closure of public spaces; power to requisition property; prohibition of entry into or residence of certain persons; conduct searches without a judicial warrant and seize any computer files found, and to block websites deemed to glorify terrorism without prior judicial authorization. These powers created interferences with the rights to liberty, security, freedom of movement, privacy, and freedoms of association and expression and so required the derogation under Article 15. The length of the state of emergency was criticised by Amnesty International (Perolini 2017; Aoláin 2017) but France eventually abandoned the derogation on 1<sup>st</sup> November 2017 (Boring 2016).

Turkey's recent reliance on a derogation contrasts strongly with that of France in a range of respects. A group of members of the Turkish armed forces attempting to seize power in Istanbul on 15<sup>th</sup> to 16<sup>th</sup> July 2016. The attempted coup involved soldiers in an attack on several key State buildings, including Parliament and the Presidential compound; the Chief of General Staff was captured and taken as a hostage (*Mehmet Hasan Altan v Turkey* (application no. 13237/17, [15]). It was reported that more than 300 people were killed during the coup and 2,500 people were injured. The Turkish government alleged that the coup attempt was linked to Fetullah Gülen (ibid, [16]) and allegedly master-minded by the Gulenist terrorist group. On 21 July 2016 the government declared a national state of emergency pursuant to Article 120 of the Turkish Constitution of 1982 to last for three months, which was subsequently extended (most recently on 18<sup>th</sup> April 2018) but abandoned – at least formally – on 19 July 2018. After introducing the state of emergency Turkey formally notified the Council of Europe that it

intended to derogate from the European Convention on Human Rights under Art 15. (It is a requirement under Article 15 that the Secretary-General of the Council of Europe must be notified as to the derogation.) There was also a notification to the United Nations in Aug 2016 concerning derogation from the International Covenant on Civil and Political Rights (ICCPR) under Article 4, regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27). But unusually, no specific domestic measure was identified in the notices as regards the ECHR or ICCPR, such as detention without trial, and no Article of the Convention, as opposed to the notification in respect of the ICCPR, was identified as having been derogated from (see *Mehmet Hasan Altan* [81]).

But the actions taken in Turkey, including arresting and imprisoning thousands of academics and journalists, could not be covered by a derogation from Articles 5 or 10, as the Strasbourg Court found in the 2018 cases considered above, because they were clearly disproportionate to the threat in question. So it appears that Turkey failed to adhere to the ECHR in a range of respects, and although it has openly declared that that is the case via the derogation, its engagement with the demands of Article 15, and of the ECHR in general may be viewed as a tokenistic one. The situation is precisely the one that Article 15 was designed to avoid. So while the vast majority of the ECHR-contracting states have not sought a derogation in the face of the ‘war on terror’, the most significant recent terrorism-related derogation in existence in a contracting state relates instead to an attempted internal coup, and shows little allegiance to ECHR values. The lessons to be drawn from this situation are considered below; this chapter now turns to considering measures contracting states have taken to counter terrorism which have to an extent evaded ECHR protections without an open declaration that that is the intention.

### **3. Recalibrating rights rather than seeking a derogation**

#### *3.1 Introduction*

The UN Security Council has called on member states to tackle the problem represented by terrorist groups operating in Iraq and Syria. It has said that member states should: ...prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities...’. It went on to stress:

‘the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, Al-Nusrah Front and other cells, affiliates, splinter groups or derivatives of Al-Qaida...’ (UNSCR 2014).

The threat from ISIS supporters and ISIS-supporting returnees, while far from the only form of terrorism threatening the contracting states (see the references to Northern Irish and extreme right-wing terrorism in David Anderson, 2014; Charles Anthony, 2016; the threat appears not to be as great as that from Islamic groups: David Anderson, 2016), has been partly responsible for the introduction and consideration of liberty-invading non-trial-based executive measures in European contracting states post 9/11, intensifying in the years 2015-present as the threat from ISIS-supporting nationals has increased (Amnesty International 2017; also note the suggestion by Schneier (2009) that some counter-terror measures may make people feel more secure without having any real function in increasing security). Clearly, such measures tend to be in tension with domestic and international human rights law. Thus, the post-9/11 years have seen an increasing struggle in the contracting states (see Ramraj et al 2011) to reconcile human rights norms with reliance on non-trial-based counter-terror measures. But while, as explored below, they are likely to create tensions with such norms, they have often been presented as reconcilable with them, via recalibrations of human rights, as was necessitated by control orders and similar measures which have spread from the UK to other contracting states (Amnesty International 2017). In the UK the early ‘heavy touch’ control orders (see *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642) appeared to demand a minimising reinterpretation of certain rights, in particular Article 5, in effect emptying the right of part of its content or implying new exceptions into it. In 2009 a Report on global terrorism *Assessing Damage, Urging Action* (International Commission of Jurists 2009) identified this trend in the UK and other countries in the face of terrorism (see further Fenwick 2011).

Thus, there have been a number of attempts in the contracting state to minimise the impact of ECHR safeguards for fundamental freedoms in respect of counter-terror measures *rather than* seeking a derogation. As mentioned above, to control the activities of suspects whom it may not be possible to deport (since they are often nationals) and also in answer to this resolution, a number of member states have introduced non-trial-based measures recently, but the majority of them have not sought a derogation. Thus, the measures have fallen short of the most repressive ones that could be introduced, including detention without trial, introduced in the UK as mentioned above, but accompanied by a derogation, in 2001.



#### 4.2 Recalibration of Article 5

Non-trial-based executive control measures unaccompanied by a derogation are to an extent hard to reconcile with human rights law, meaning that a down-grading recalibration of rights may tend to occur. The UK was the first European state to introduce such measures, but recently, as pointed out by Amnesty in a Report on counter-terror measures in 14 European countries, a number of other member states have followed suit, or are about to do so (Amnesty International 2017). The Report found that the adoption of various pieces of legislation has resulted in a downgrading of safeguards for rights to privacy, expression and liberty across Europe, disproportionate to the terrorist threat (p 19). It also found that EU states in general had failed to uphold human rights' standards in the face of securitisation concerns (at pp 6, 19). Amnesty International further noted in its Report that 'In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law' contrary to the temporarily and operationally limited understanding of derogations in the context of the ECHR and other international human rights instruments (chap 1). The Report highlighted the specific issue of control-orders and related measures (pp 48-56), as well as the use of citizen-stripping measures, and measures that temporarily exclude suspected foreign fighters from the country, discussed in Section 4 below.

The phenomenon of recalibration of rights will therefore be considered using the example of the UK. As discussed, the UK introduced a derogation post 9/11 from Article 5 in order to introduce derogation without trial for non-national international terrorist suspects, under Part 4 Anti-Terrorism Crime and Security Act 2001. A further non-trial-based measure emerged *unaccompanied* by a derogation after detention without trial was abandoned in 2005 (as discussed, after the derogation was declared invalid by the House of Lords in *A and others* ([2004] UKHL 56; for comment on the case, see: Hickman 2005; Hiebert 2005). The replacement measure took the form of control orders applicable to suspect nationals and non-nationals alike under the Prevention of Terrorism Act 2005 (PTA). Section 1(1) PTA defined a 'control order' as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.' Under s 1(3) a control order could impose '*any* obligations that the Secretary of State or the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity' (see further Walker 2007).

Control orders, and the measure that replaced them in 2011 - Terrorism Prevention and Investigation Orders (TPIMs) under the Terrorism Prevention and Investigation Measures Act 2011, as amended by Counter Terrorism and Security Act 2015 Part 2 - are non-trial-based executive measures which have provided the model for the introduction of such measures in a number of the ECHR contracting states in Europe. (See Chap 00 in this volume for further discussion of TPIMs.) The 2017 Amnesty report criticised ‘the regional trend [in Europe] of using such measures instead of charging and prosecuting people in the criminal justice system’ (at p 48). As discussed further in Chap 00 (pp00), they are imposed by the Home Secretary, with court review, on a low standard of proof and enable individuals to be subjected to significant restrictions on liberty, including house detention, but not to imprisonment. Chap 00 (pp00) also discusses derogating control orders under the PTA, which would have allowed for imprisonment without trial, but they were never activated in the UK. Measures on the control orders model rely on targeting terrorist suspects to curtail their liberty without the need for a trial, by imposing specific restrictions on them, related to the particular types of activity it is thought that they might engage in (due to previous behavior), with the aim of preventing future terrorist activity before it occurs.

Control orders as non-trial-based counter-terror measures were designed to approach or possibly over-step the limits of human rights’ law, in particular of the substantive rights to liberty under Article 5 ECHR and to private life under Article 8. But in so doing they had to rely on interpretations allowing a minimising recalibration of such rights, since, as indicated, the choice was made *not* to accompany the measures with a derogation. Since control orders were declared to Parliament to be compatible with the ECHR under section 19 Human Rights Act 1998, the repressive nature of the early control orders indicated implicit reliance on a recalibrated, attenuated version of Article 5 ECHR, able to accommodate to the needs of the crisis. They imposed a range of restrictions including 18 hours house detention a day and forced relocation under so-called ‘heavy touch’ control orders (see Fenwick 2011). The courts were impliedly required to reinterpret Article 5 in a minimising fashion in relation to the content of control orders and to do the same in respect of Article 6 in respect of the process of reviewing them. Minimising human rights via reinterpretation, rather than openly departing from them via a derogation, implies that a re-balancing between societal needs and individual rights *should* occur, in effect emptying the right of part of its content via a derogation by stealth. Under that approach the executive argument tends to be that the *purpose* of counter-terrorism

measures should be taken into account in re-determining the ambit of the right in question or the standards demanded under it. In 2009 a Report on global terrorism of the International Commission of Jurists identified this trend in the UK and other countries in the face of terrorism (p 91).

Recalibration of rights includes exploiting gaps and ambiguities in domestic and international human rights law in order to rely on attenuated or minimised versions of the rights as necessitated by the nature of the non-trial-based measures in question. Control orders relied in particular on a minimised notion of the concept of ‘deprivation of liberty’ under Article 5 ECHR in presupposing that they did not create such a deprivation in imposing lengthy periods of house detention, combined with other restrictions. But in response the courts relied on Article 5 ECHR as scheduled in the Human Rights Act 1998 (HRA) to bring them into closer compatibility with the ECHR (see *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642). The modifications brought the control orders scheme into closer compliance with both Articles 5 and 6 ECHR, meaning that the scheme itself became in various respects, less repressive. In particular, it was found that 18 hours house detention a day, combined with other restrictions would breach Article 5 ECHR, so shorter periods had to be imposed deemed not to create a deprivation of liberty (see in particular the decisions in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 and *Secretary of State for the Home Department v B and C* [2010] 1 WLR 1542). It was also found under Article 6 (the fair trial right) that in reviewing the imposition of the control order, the gist of the case against the controlee had to be disclosed to him in the proceedings (that was determined in the context of the ACTSA in *A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber) and applied to domestic law in relation to control orders in *Secretary of State for the Home Department v AF (No 3)* [2007] 3 WLR 681).

Although the UK courts’ response to the control orders’ scheme meant that it had to be modified to achieve greater ECHR-compatibility, albeit this time without rejecting it wholesale (see in particular *Secretary of State for the Home Department v AP* [2010] 3 WLR 51), the courts also partially acquiesced in the notion of finding that the ECHR could accommodate the scheme by accepting a somewhat recalibrated version of Article 5. Since significant interferences with liberty without trial – although not as significant as originally imposed - had been accepted by the courts as compatible with Article 5, such interferences could then be viewed as having received judicial endorsement. That included some acceptance of up to 16 hours a day house detention (*Secretary of State for the Home Department v JJ* [2007] 3 WLR

642 [105]). That could be combined with forced relocation where no special features particularly ‘destructive of family life’ arose (*Secretary of State for the Home Department v AP* [2011] 3 WLR 53 [19]-[24]). The facts of *Guzzardi v Italy* ((1981) 3 EHRR 333) at Strasbourg (discussed below), in which a deprivation of liberty was found, quite strongly resemble those in *AF*, a control orders case (*SSHD v AF* [2009] UKHL 28): *AF*’s house detention was for 14 hours, so it was significantly longer than *Guzzardi*’s, but he was restricted to a geographical area of 9 square miles, significantly larger; he had to wear an electronic tag and was also subject to similar, perhaps more far-reaching, restrictions on association and communication. *AF* was also subject to repeated house detentions for a longer period than was *Guzzardi* – more than 16 months. But no deprivation of liberty was found.

A somewhat recalibrated version of Article 6 could also be said to have emerged, given the acceptance that modified proceedings to impose the orders was compatible with Article 6 (see *Secretary of State for the Home Department (Respondent) v MB* (2007) UKHL 46). So a scheme in 2005 compatible with the ECHR only on the basis of presupposing a narrow interpretation of Articles 5 and 6, was transmuted into a modified version of itself by 2011 that came closer to achieving such compatibility. Thus reconciliation with human rights law was achieved by relying on a degree of recalibration of the rights, although not of the extensive nature demanded by the initial iteration of the scheme.

While in the UK the control orders scheme was abolished in 2011, and replaced by a ‘light touch’ scheme under TPIMs as a much ‘softer’ version of control orders, in other states schemes on the control orders model are being introduced, without being covered by a derogation. So it is worth considering whether such schemes do necessitate a derogation, due to the damage done to certain Strasbourg concepts if they are introduced and operated without one. The acceptance by the UK courts and at Strasbourg (the Strasbourg decisions below (not taken in the context of a war on terror) indicate that a deprivation of liberty under Art 5 will not necessarily be found to arise due to certain constraints on a persons’ liberty - partial house arrest, other geographical restrictions) that a deprivation of liberty under Article 5 will not necessarily arise where measures controlling the movement of suspects, including partial house detention, are introduced, appears to have encouraged other contracting states to introduce similar measures, as detailed in the Amnesty International (2017) report, discussed above (chap 1). Those measures have spread and are spreading across Europe, but they have not been accompanied by derogations.

### 4.3 Strasbourg's stance as to the 'deprivation of liberty' concept

It is clear that the Strasbourg case-law supports the proposition that in the paradigm case of deprivation of liberty, most obviously imprisonment, no further enquiry is necessary: a deprivation of liberty has occurred; the question is whether it can be justified under the Article 5 exceptions, where liberty can be taken away. It is *also* reasonably clear that house arrest for 24 hours – complete confinement, albeit in the home, not in a state-run place of detention – is a deprivation of liberty (*Mancini v Italy* App no 52970/99 [17]; *Nikolova v Bulgaria (No 2)* App no 40896/98, 30 December 2004 [60]; see also *Vachev v Bulgaria* (App no 42987/98, 8 October 2004) [64]; *NC v Italy* (App no 24952/94, 11 January 2001 [33]), and this will be the case even where the house arrest is not directly being enforced via direct coercion and physical restraint: *Pekov v Bulgaria* (App no 50358/99, 30 June 2006).

It is in the non-paradigm cases of interference with liberty, where an issue as to the existence, brevity, or intensity of the confinement arises, that a focus on four factors identified in *Guzzardi* apply (they were confirmed in the decision in *Storck v Germany* (App no 61603/00, (2006) 43 EHRR 96 para 74; the context of *Storck* was very different – it concerned lack of consent to periods of time in a psychiatric institution). In *Guzzardi* it was found that the starting point is the 'concrete situation of the individual'. Then the four factors must be considered; they are: the type, duration, effects and manner of implementation of the measure in question. The control order cases, bearing in mind the varying restrictions imposed, clearly fall into the non-paradigm category since none of them concern – or could concern - complete imprisonment (such orders would necessitate a derogation from Article 5).

How has Strasbourg employed the *Guzzardi* approach in cases concerning measures reasonably analogous to control orders? An 11 hour curfew from 9pm to 7am was imposed in *Raimondo v Italy* ((1994) 18 EHRR 237) as a supervisory measure; the applicant could leave the house with permission if he had valid reasons for doing so. The restrictions were found not to prevent him living a normal life and so did not deprive him of his liberty. Similarly, in *Ciancimino v Italy* ((1991) 70 DR 103) the applicant was obliged not to leave the district without first obtaining authorisation, to report to the police daily, and was subject to a curfew from 8pm to 7am (11 hours). This was also not viewed as amounting to a deprivation of liberty under Article 5. In a further case, *Trijonis v Lithuania* (App no 2333/02, 17 March 2005) the applicant was

subject to a similar curfew and house detention of 23 hours per day for the whole weekend, meaning that he could spend time at work. Again no deprivation of liberty was found. One of the factors that may have affected the reasoning may have been that Italy and Lithuania at the time had ratified Protocol 2, Article 4, and therefore protection was available against restrictions on movement falling short of deprivation of liberty. There also appeared to be a stronger prospect than in the control order instances in all of those cases of successfully challenging the regime imposed, and so the element of potentially indefinite restriction was of lesser weight.

In *Guzzardi* itself, greater emphasis was placed on the *cumulative* impact of the range of restrictions in relation to the life the applicant otherwise would have been living (see also *Engel v The Netherlands* (1976) 1 EHRR 647). *Guzzardi* was confined on a small island for 16 months; he was ordered to remain in an area of 2.5 square kilometers; he had to remain in his home (which was dilapidated) for 9 hours; he had to seek permission to make phone calls or have visitors. The house detention was *not* the core issue in the finding of the Court that in some respects the treatment complained of resembled detention in an ‘open prison’, and amounted to a deprivation of liberty.

It should be noted that when *Guzzardi* was decided Italy had *not* ratified Protocol 2. *Ashingdane v UK* ((1985) 7 EHRR 528) re-emphasises the point that the core obligation of confinement should not be given overwhelming weight since the applicant was confined in a closed psychiatric hospital with high security (the restraints included barred windows and a high perimeter fence; he was only able to visit his family twice in 7 years), but then moved to an open hospital, was free to go home 4 days a week and free to leave the hospital, provided he returned at night. The Court found that he had undergone a deprivation of liberty during his stay in *both* institutions.

The *express* argument for creating a new balance between the individual right to liberty and societal concerns (recalibration of the concept of deprivation of liberty) has been rejected in the context of Article 5 at Strasbourg in relation to the first post-9/11 preventive strategy. In *A v UK* ((2009) 49 EHRR 29) – the case brought against the UK by the Belmarsh detainees detained without trial under Part 4 ACTSA, claiming compensation for their detention - the government sought to rely upon the recurring purposive argument already encountered, but in that instance, rather than seeking to rely on the proportionate nature of the measure in question

in order to argue that it lay outside the ambit of Article 5 (which would have been futile in the context of a paradigm case of deprivation of liberty), the government argued instead that the exceptions under Article 5 should be broadened due to the terrorist context, an argument that the Eminent Panel of Jurists (2009) found that a number of governments were seeking to use. The UK government argued that the principle of fair balance underlies the whole Convention, and reasoned therefore that Article 5(1)(f) - the arguably applicable exception, allowing for detention pending deportation - had to be interpreted so as to strike a balance between the interests of the individual and the interests of the state in protecting its population from malevolent aliens. Detention, it was argued, struck that balance by advancing the legitimate aim of the state to secure the protection of the population without sacrificing the predominant interest of the alien to avoid being returned to a place where he faced torture or death. The fair balance was further preserved, it was argued, by providing the alien with adequate safeguards against the arbitrary exercise of the detention powers in national security cases (*A v United Kingdom* (2009) 49 EHRR 29 [148]).

The Court said that it did not accept the Government's argument that Article 5(1) permits a balance to be struck between the individual's right to liberty and the state's interest in protecting its population from terrorist threat. It said that the argument was not consistent with the Court's jurisprudence under Article 5(f), or with the principle that paras (a) to (f) 'amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5'. The Court further said that 'if detention does not fit within the confines of the [exceptions] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the state against those of the detainee' (ibid, [171]).

It seems therefore clear that Strasbourg is unreceptive to the argument that broader exceptions can be read into Article 5 by reference to the notion of creating a new balance between the right to liberty and security interests in the terrorist context. Thus some measures on the control orders model introduced in contracting states appear to need a derogation to protect them. Instead, more covert means of evading ECHR safeguards for fundamental freedoms via recalibrations of rights have been explored, as discussed. This chapter turns now to a further possibility of effecting such evasion.

#### 4. Citizenship-stripping

In introducing counter-terror measures, the member states owe international law obligations to other States, and are subject to positive obligations imposed on States by UN Security Council resolutions in relation to terrorism. (See also Joint Committee on Human Rights 2015; Professor Goodwin-Gill said, ‘a State which excludes its own nationals is resorting to a unilateralism which is at odds with the collective endeavour of international rights protection as well as internationally agreed efforts to counter terrorism’ (ibid, paras 3.4, 3.5). See further UN Security Council Resolution 688 (S/2014/688).) If a terrorist suspect is stripped of citizenship and then deported to a non-ECHR state (or is already in that state when the citizenship-deprivation occurs) he/she cannot – or is less able to – rely on the ECHR against the sending state. The UK Bureau of Investigative Journalism (2013) reported a significant increase in the use of deprivation powers, in part due to British citizens travelling to fight in Syria, finding that in most cases, the deprivation orders had been issued whilst the individual was overseas. Use of citizenship-stripping has become much more prevalent in Europe (and globally) recently as an aspect of the escalating war on terror, and offers another means of evading ECHR safeguards for fundamental freedoms without seeking a derogation. Amnesty International has instanced Temporary Exclusion Orders and citizenship-stripping in the UK as examples of disproportionate measures (2017, pp 53, 62-63).

Reliance on citizenship deprivation to protect security is currently being introduced and explored in a range of democracies, including the ECHR-contracting states (Zedner 2016). But states have not sought to issue citizen deprivation orders against mono-nationals who are suspected terrorists even when facing an influx of FTF returnees, and even in the face of the terrorist attacks in Europe in 2015-17. In the UK, citizenship can be stripped from a national if their actions are ‘seriously prejudicial to the vital interests of the UK’, and they are a dual national *or* if ‘the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory’ under the British Nationality Act 1981 s40(4A), (s4A(c)). (The Immigration Act 2014 s66 had inserted s4A.) Under the latter provision, in other words, the person must have a reasonable prospect of attaining another nationality. Therefore persons covered by those provisions can be stripped of citizenship and have their passports withdrawn while inside or outside the UK. The conduct of nationals who have fought with or supported ISIS or similar groups would clearly fall within the ‘seriously prejudicial’ provision, but they



would retain citizenship unless one of the conditions as to nationality applied. Under s66(2) ‘in reaching a decision to deprive on those grounds, the Home Secretary can take into account conduct which took place prior to the section coming into force’. The provision as to a ‘reasonable prospect of attaining another nationality’ over-turned the principle from *Al-Jedda v SSHD* ([2013] UKSC 62, [2013] WLR(D) 371 [34]) to the effect that an individual with only a hypothetical past or future claim to a nationality may not be stripped of citizenship.

In France, the Constitutional Reform Bill 2016 considered measures for removing citizenship from French mono-nationals who were convicted as terrorists in the wake of the 2015 Paris attacks; while a clear majority of MPs in the lower House of Parliament approved the measures, they were ultimately abandoned. The Constitutional Reform Bill came before the French Senate on 10 February 2016 and included the removal of citizenship from French national convicted terrorists, but they were abandoned on 30 March 2016 after criticism from the President’s own party. Australia introduced powers to deprive dual nationals of citizenship on security grounds under the Australian Citizenship Amendment (Allegiance to Australia) Act 2015. Canada has also passed legislation allowing the government to deprive dual nationals of citizenship for security reasons under the Strengthening Canadian Citizenship Act 2014. Dual nationals convicted on terror charges in Belgium face losing their Belgian citizenship, while Bulgaria, Denmark, Macedonia, the Netherlands, Romania and Spain have similar laws.

The provisions governing citizenship deprivation are designed to create at least face-value compatibility with the Universal Declaration of Human Rights Article 15(1), providing that everyone has the right to a nationality. Article 15(2) provides: ‘No one shall be arbitrarily deprived of his nationality’ (see Adjami and Harrington 2008). Compatibility with the 1961 Convention on the Reduction of Statelessness, which provides measures to prevent the creation of new cases of statelessness, has – it appears – been achieved by the UK provisions since the UK has entered a reservation to Article 8 allowing for the deprivation of the nationality of a naturalised person, now covering the deprivations mentioned above, where the national has a reasonable prospect of acquiring another nationality. (See Immigration Act 2014 Explanatory Notes: commentary on s66.) Article 8(1) in particular provides: ‘A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless’. The reservation to Art 8(1) was made under Article 8(3). Article 7 is intended to prevent citizens renouncing citizenship except in certain circumstances (see Gibney 2014). Thus, while democracies have so far stopped short of introducing schemes capable of excluding their own terrorist

suspect mono-nationals from the country, the use of citizenship-stripping against dual nationals is proliferating globally, and provides a means in the contracting states of avoiding the ECHR protections without relying on derogations.

## **Conclusions**

It is concluded that the role of Article 15 ECHR is diminishing despite the recent steep rise in terrorist activity in many of the ECHR-contracting states. Therefore it is argued that current counter-terrorism debate needs to consider more openly the impact of non-trial-based liberty-invading measures within the solution to the current terrorist threat in order to question whether there is a case for openly seeking a derogation to protect such measures. It should be asked whether, given the principles underlying the current conception of international human rights law, the cost of relying on such measures without a derogation from Article 5 is out of proportion to their value since they tend to lead to recalibration of the concept of ‘deprivation of liberty’. Such debate should consider whether, in the face of a range of terrorist threats, including that from ISIS-inspired home-grown terrorism, it is necessary to reconsider relying on a range of iterations of non-trial-based measures as an alternative, in some instances, to reliance on the criminal justice system. (Enhanced TPIMs could represent one such possibility; they are already available to be introduced in the ETPIMs Bill 2012 but unaccompanied by a derogation, but have not yet been introduced. Since they largely replicate ‘heavy touch’ control orders they arguably require a derogation for the reasons given: see also Chap 00, pp00.) If so, it is necessary to accept openly that there is a case for contending that they should be covered by a derogation, which also requires that they should be non-discriminatory and proportionate to the specific threat emanating from members and supporters of ISIS and similar groups, as well as far-right secular groups. Use of a derogation would be more transparent than relying on the other methods considered here of reconciling such measures with human rights law, and less likely to lead to normalisation of such measures (see eg Nugraha 2018). A derogation must be openly declared and therefore is less insidious in eroding rights-adherence than the stealthy avoidance of human rights laws via recalibrations of rights or by seeking to place suspects outside the area of a state’s jurisdictional responsibility.

Use of a derogation would also show respect for the mechanisms international human rights law has provided for crisis situations, to allow for use of restraining measures even against a

state's own citizens. Availability of derogations under the ECHR (and other international human rights' instruments) means that states are encouraged, even when facing crisis situations, to remain within the ECHR system rather than considering withdrawal from the Convention by denouncing it. But the derogation is still policed by the Court, and as seen in *Aksoy, A v UK, Mehmet and Sahin*, is not always accepted (although the Court was to an extent guided by the higher domestic courts in reaching its conclusions in three of those instances). It is arguably preferable for states to derogate rather than repudiate the ECHR or to water down rights covertly; derogations represent a transparent, non-permanent departure from rights within limits. Use of a derogation in the face of terrorist activity and a continuing severe terrorist threat avoids creating an appearance of adhering to rights while in practice attempting to dilute them via their recalibration. It may be preferable to declare openly that a departure from rights is occurring due to the emergency for a limited period, as occurred in France, as discussed, for a fairly short period of time, following a number of terrorist attacks.

Reliance on derogations when a state is or perceives itself to be in a state of emergency means that it remains within the ECHR system, and that the actions of the state still retain legitimacy (including satisfying the needs of transparency) since it can only derogate to the extent, and for the period of time, that will satisfy the demands of proportionality under Article 15, and that judgment may ultimately to be made by the Strasbourg Court. If a derogation was continued after the point when the state of emergency had diminished those demands would not continue to be satisfied. But reliance on derogations means following the system of derogations set out in Article 15 – the converse of the current position Turkey appears to be in in relation to Article 15 and the ECHR in general. Turkey has purported to remain within the Convention system by relying for a period on a derogation, but the connection between the emergency caused by the attempted military coup, and the widespread arrest and detention of journalists, academics and others apparently linked to Gulenism, is not apparent. Even if it was apparent, such arrests would not be viewed as a proportionate response to the emergency.

Despite these advantages of the reliance on derogations, this chapter has explored the question why, in the face of the current and increasing terrorist threat in Europe, derogations have not on the whole been sought, so derogations have not played a pivotal role in the 'war on terror' in Europe. Had derogations been sought in many ECHR-contracting states in the last 4-5 years to protect detention without trial for suspect terrorists, they would probably have been upheld at Strasbourg on the basis that a state of emergency in Article 15 terms was in being in those

states. That would have been found to be the case in a number of such states in the sense that terrorists attacks had already occurred and also a number of plots were foiled during 2013-18. (Over the past 5 years, the law enforcement and intelligence agencies in the UK have foiled as many as 25 Islamist-linked plots: see Intelligence and Security Committee 2017; Home Office 2018a) As argued, there has been over the last 10 years a reluctance to rely on the most repressive measures necessitating use of derogations against a state's own citizens, but it is *home grown* Salafi-jihadist inspired terrorism that is a key current concern. The tension between such reluctance, and the need to address the threat emanating from a state's own nationals explains, it is argued, the nature of the devices discussed, intended to allow for evasion of the full rigor of international human rights law, in particular the ECHR, but without openly derogating from it. But, as discussed, reliance on such evasion may lead to under-use of the measure, and protracted court action, continued tension with human rights law and an insidious undermining of respect for such law in the UK and elsewhere.

It is fair to say that although the risk of terror attacks may be over-stated by governments and the media (see Ramraj 2005), and the human rights of suspects can be portrayed as 'a gamble with people's safety' (Loader 2007), that has *not* led in the last five years to a rush in most of the contracting states to deploy derogations to introduce the most draconian measures. This chapter has considered the argument for the open use of derogations as opposed to the use of more covert methods of evading the impact of the ECHR and ICCPR, and concludes that Article 15 is not fulfilling the role it was originally intended to have since it is either largely being side-lined in the 'war on terror' or misused as in Turkey in the last few years.

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