

# *Fordham International Law Journal*

---

*Volume 13, Issue 3*

1989

*Article 4*

---

## The United Kingdom's Obligation to Balance Human Rights and Its Anti-Terrorism Legislation: The Case of Brogan and Others

Patricia M. Roche\*

\*

Copyright ©1989 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The United Kingdom's Obligation to Balance Human Rights and Its Anti-Terrorism Legislation: The Case of Brogan and Others

Patricia M. Roche

## **Abstract**

The Note argues that the UK must modify its extrajudicial detention legislation in order to comply with the prompt appearance requirement of Article 5(3) of the European Convention. It analyzes the history of the conflict between Northern Ireland and the UK leading to the implementation of the extrajudicial powers of arrest and detention and the Court's decision in the Case of Brogan and Others. The Note further argues that the eventual permanent derogation which the UK employs is untenable under the EC and recommends judicial reinterpretation.

THE UNITED KINGDOM'S OBLIGATION TO BALANCE  
HUMAN RIGHTS AND ITS ANTI-TERRORISM  
LEGISLATION: THE CASE OF BROGAN  
AND OTHERS

*[I]f the State is subject to no limitations in its pursuit of terrorists, then there is no place for human rights, for they are inevitably a limitation; if the pursuit of terrorism justifies no different restriction of human rights than the normal policing of society, then the problems of terrorism will pose no questions under the Convention which will not arise with respect to the ordinary criminal process.<sup>1</sup>*

INTRODUCTION

The United Kingdom is a signatory to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention").<sup>2</sup> Article 5(3) of the European Convention requires the prompt appearance of a detained individual before a judicial authority.<sup>3</sup> The European Convention also permits a contracting party to derogate from the prompt appearance requirement of article 5(3) in times of emergency.<sup>4</sup> The United Kingdom's anti-terrorism legislation, The Prevention of Terrorism (Temporary Provisions) Act 1989 (the "PTA" or the "Act"), permits extrajudicial arrest and detention of suspected terrorists for as long as seven days.<sup>5</sup> In the *Case of Brogan and Others*,<sup>6</sup> the European Court of Human Rights (the "Court") concluded that these extrajudicial powers of arrest and detention are incompatible with the prompt appearance requirement of article 5(3) of the European Convention.<sup>7</sup>

---

1. Warbrick, *The European Convention on Human Rights and The Prevention of Terrorism*, 32 INT'L COMP. L.Q. 82, 90 (1983) (citation omitted) [hereinafter *The ECHR and Terrorism*].

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

3. *Id.* art. 5(3), 213 U.N.T.S. at 226. For the text of article 5(3) of the European Convention, see *infra* note 26.

4. *European Convention*, *supra* note 2, art. 15, 213 U.N.T.S. at 232-34.

5. The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14(5), reprinted in 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989). For the text of section 14(5) of the Act, see *infra* note 134.

6. 145-B Eur. Ct. H.R. (ser. A) (1988).

7. *Id.* at 34.

This Note argues that the United Kingdom must modify its extrajudicial detention legislation in order to comply with the prompt appearance requirement of article 5(3) of the European Convention. Part I discusses the European Convention and highlights the sections applicable to this conflict. Part II analyzes the history of the conflict between the United Kingdom and Northern Ireland leading to the implementation of the extrajudicial powers of arrest and detention and the Court's decision in the *Case of Brogan and Others*. Part III argues that successive submissions of notices of derogation, which effectively result in a form of permanent derogation, is untenable under the European Convention and recommends the judicial reinterpretation of the prompt appearance requirement of article 5(3) of the European Convention and the amendment of the PTA. This Note concludes that these measures will permit the United Kingdom to comply with the prompt appearance requirement of article 5(3) of the European Convention.

## I. THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

### A. Obligations of Contracting Parties

The Member States of the Council of Europe<sup>8</sup> signed the Convention on November 4, 1950.<sup>9</sup> Its goal is universal observance and collective enforcement of the fundamental human rights embodied in the Universal Declaration of Human Rights<sup>10</sup> by the "like-minded" governments of the European countries that share a common heritage.<sup>11</sup> Through the European Convention, the Council of Europe affirmed its profound

---

8. The current Members of The Council of Europe are Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. J. FAWCETT, *APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 6 n.3 (2d ed. 1987).

9. European Convention, *supra* note 2, 213 U.N.T.S. at 222 n.1. The European Convention came into force on September 3, 1953. *Id.* The original signatories to the European Convention were Belgium, Denmark, Federal Republic of Germany, Greece, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Saar, Sweden, Turkey, and the United Kingdom. *Id.* at 222.

10. G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. 1/777 (1948).

11. European Convention, *supra* note 2, 213 U.N.T.S. at 222-24. The European Convention defined as "like-minded" those countries with common political traditions, ideals, freedoms, and rules of law. *Id.*

belief in the role of fundamental freedoms as the foundation of justice and peace in the world.<sup>12</sup>

The European Convention obligates the contracting parties to ensure the compatibility of their domestic law with the European Convention and to remedy any breach of the European Convention's provisions.<sup>13</sup> At the time of signing or ratification, a contracting party may, however, make a reservation from a European Convention provision if a domestic law in force at that time is not in conformity with that provision.<sup>14</sup> At present, fourteen signatories have incorporated the provisions of the European Convention into their domestic law and seven have not.<sup>15</sup>

The enforcement procedures of the European Convention enable the government of a contracting party to charge another contracting party with a breach of European Convention procedures before the Convention institutions.<sup>16</sup> Additionally, an individual may allege a violation of the European Convention by a contracting party<sup>17</sup> and may submit a petition to the

12. *Id.* at 222. The Council of Europe seeks greater unity among its members through the maintenance of human rights and fundamental freedoms by effective political democracy and a common understanding and observance of these rights. *Id.*

13. *Id.* arts. 1, 13, 213 U.N.T.S. at 224, 232; see J. FAWCETT, *supra* note 8, at 3.

14. European Convention, *supra* note 2, art. 64, 213 U.N.T.S. at 252. Article 64 of the Convention provides:

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

*Id.*

15. J. FAWCETT, *supra* note 8, at 6 n.3. The following contracting parties have incorporated the provisions of the European Convention into their domestic law, completely or substantially in part: Austria, Belgium, Cyprus, Federal Republic of Germany, France, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, and Turkey. *Id.*

The following contracting parties have not incorporated the provisions of the European Convention into their domestic law: Denmark, Iceland, Ireland, Malta, Norway, Sweden, and the United Kingdom. *Id.*

16. European Convention, *supra* note 2, art. 24, 213 U.N.T.S. at 236. Enforcement procedures available to contracting parties are found in article 24, which provides that "[a]ny High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party." *Id.*

17. *Id.* art. 25, 213 U.N.T.S. at 236-38. Enforcement procedures for individual

Convention institutions.<sup>18</sup> In order for the Convention institutions to have recourse against the accused contracting party, the violation must have occurred within the jurisdiction of the accused contracting party.<sup>19</sup> Additionally, all domestic remedies must be exhausted before the Convention institutions will accept a petition.<sup>20</sup> Finally, the accused contracting party must have expressly accepted an individual's right to petition as well as the jurisdiction of the Convention institutions.<sup>21</sup> A contracting party or individual complainant initially files a petition with the European Commission of Human Rights (the "Com-

---

plaints are contained in article 25 of the European Convention, which provides that

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

*Id.*

18. *Id.* art. 28, 213 U.N.T.S. at 238-40. A petition is initially filed with the European Commission of Human Rights. *Id.* Article 28 of the European Convention defines the Commission's role and provides that

[i]n the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

*Id.*

19. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS: THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND, 1977, Cmnd. No. 7009, at 36.

20. European Convention, *supra* note 2, art. 26, 213 U.N.T.S. at 238; *see* 504 PARL. DEB. H.L. (5th ser.) 970 (1989); *see also* J. FAWCETT, *supra* note 8, at 6.

21. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS: THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND, 1977, Cmnd. No. 7009, at 36.

mission") and the case may be referred to the Court within a three month period.<sup>22</sup>

Violations of the European Convention may also be enforced in a contracting party's national court system if the accused contracting party has incorporated the European Convention provisions into its domestic law.<sup>23</sup> In the absence of such incorporation, individuals cannot use a contracting party's legal system to enforce directly the European Convention provisions. In such situations, there is no domestic route open to test the compatibility of domestic laws with the European Convention provisions.<sup>24</sup> Furthermore, without incorporation of the European Convention provisions into a contracting party's domestic law, the courts of a contracting party cannot function as sieves to the Convention institutions; the Convention institutions are thus the only forum to address complaints.<sup>25</sup>

### B. *Article 5 of the European Convention*

Article 5 of the Convention protects the freedom and security of the individual against arbitrary detention or arrest.<sup>26</sup>

22. European Convention, *supra* note 2, arts. 31, 32(1), 47, 213 U.N.T.S. at 240, 246. Articles 31, 32(1), 47 outline the referral process to the Court. Article 31 provides that if a friendly settlement is not reached between the parties as prescribed by article 28, the Commission shall prepare a report of its opinion regarding the alleged breach. *Id.* art. 31, 213 U.N.T.S. at 240. This report is to be transmitted to the Committee of Ministers. *Id.* Article 32(1) requires that any referral to the Court be made within three months from the date of the transmission of the Commission's report to the Committee of Ministers. *Id.* art. 32(1), 213 U.N.T.S. at 240. Article 47 further requires that the Court may deal with a case only after the Commission has failed to effect a friendly settlement within the three month period provided in article 32. *Id.* art. 47, 213 U.N.T.S. at 246.

23. *See id.* art. 13, 213 U.N.T.S. at 232; *see also* J. FAWCETT, *supra* note 8, at 6.

24. *See generally* J. FAWCETT, *supra* note 8, at 6 (discussing impact of incorporation of Convention provisions on domestic enforcement procedures). If a state has accepted the right to individual petition pursuant to article 25, its domestic laws can be tested for compatibility in the European Court of Human Rights or the Commission. European Convention, *supra* note 2, art. 25, 213 U.N.T.S. at 236-38. For the text of article 25 of the European Convention, *see supra* note 17.

Furthermore, the remedy of *habeas corpus* is available to a detained individual in the United Kingdom. *Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A), at 25 (1988). *Habeas corpus* permits a detained individual to submit to a U.K. court an urgent application for his release on the basis that his detention is unlawful. *Id.*

25. *See* 504 PARL. DEB. H.L. (5th ser.) 970-71 (1989).

26. European Convention, *supra* note 2, art. 5, 213 U.N.T.S. at 226-28. Article 5 provides:

The important questions that arise in relation to article 5 concern the extent to which the powers of the contracting party to detain are enhanced and the concomitant procedural duties relaxed when an arrested individual is a suspected terrorist.<sup>27</sup> Article 5(1) enumerates permissible cases in which a state may deprive an individual's liberty.<sup>28</sup> The Court and the Commission have interpreted this provision narrowly when evaluating a contracting party's justification for interference with an individual's liberty.<sup>29</sup> Furthermore, article 5(3) requires the

---

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear to trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

*Id.*

27. *The ECHR and Terrorism*, *supra* note 1, at 110.

28. European Convention, *supra* note 2, art. 5(1), 213 U.N.T.S. at 226.

29. *See, e.g.*, *The Guzzardi Case*, 39 Eur. Ct. H.R. (ser. A) (1980) (concluding



prompt appearance of a detained individual before a judge or other judicial authority.<sup>30</sup> It is unclear, however, the extent to which the existence of a terrorist threat within the contracting party's jurisdiction will effect a relaxation of the article 5(3) requirement of a prompt appearance.<sup>31</sup>

Few cases have interpreted the boundaries of the prompt appearance requirement set forth in article 5(3) of the European Convention.<sup>32</sup> The European Convention does not expressly articulate what constitutes an acceptable length of time between arrest and appearance before a judicial authority when extraordinary circumstances exist.<sup>33</sup> The cases that interpret the prompt appearance requirement indicate that some delay is permitted under article 5(3).<sup>34</sup> However, they do not clearly establish what circumstances are exceptional and, thus, justify a delay in bringing the accused before a judicial authority.<sup>35</sup>

The enumerated justifications for the deprivation of an individual's liberty include arrest and detention effected for the purpose of bringing the arrestee before the appropriate judi-

that article 5(1) forbids deprivation of liberty of detainee in order to prevent him from committing a crime); see also *The ECHR and Terrorism*, *supra* note 1, at 111.

30. European Convention, *supra* note 2, art. 5(3), 213 U.N.T.S. at 226. For the text of article 5(3) of the Convention, see *supra* note 26.

31. *The ECHR and Terrorism*, *supra* note 1, at 110-11.

32. See, e.g., *Case of De Jong, Baljet and Van Den Brink*, 77 Eur. Ct. H.R. (ser. A) (1984). In this case, the Court concluded that six, seven, and eleven day detention periods without judicial intervention were incompatible with the prompt appearance requirement of article 5(3). *Id.* at 25. The Court explained that "[i]n the particular circumstances, even taking due account of the exigencies of military life and military justice . . . the Court considers that the intervals in question cannot be regarded as consistent with the required 'promptness.'" *Id.*; see *X v. Belgium*, 42 *Collections of Decisions of The European Commission of Human Rights* (Eur. Comm'n H.R.) 55 (1973), Application No. 4960/71 (concluding five day detention without judicial review compatible with prompt appearance requirement of article 5(3) under extraordinary circumstance of applicant's hospitalization during his detention); *X v. The Netherlands*, 1966 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 564, Application No. 2894/66 (concluding four days satisfied prompt appearance requirement of article 5(3)).

33. *The ECHR and Terrorism*, *supra* note 1, at 111. The need to establish reasonable suspicion against the detained individual is not an acceptable cause for delay; reasonable suspicion should exist prior to the arrest. *Id.*

34. See *supra* note 32 (discussing case law interpreting prompt appearance requirement); *The ECHR and Terrorism*, *supra* note 1, at 111. Any delay should relate to the practical problems of getting a detained person before the proper judicial authority. *Id.*

35. *The ECHR and Terrorism*, *supra* note 1, at 111.

cial authority.<sup>36</sup> Article 5(3), however, limits the duration of such detentions with the requirement that the detainee "promptly" appear before a judicial authority.<sup>37</sup> The Convention institutions have traditionally interpreted narrowly the provisions of article 5 in order to expand the protections of liberty guaranteed by the European Convention.<sup>38</sup> The Convention institutions, however, also recognize the need to interpret the European Convention in light of changing conditions in Europe,<sup>39</sup> including the significant increase in acts of terrorism.<sup>40</sup>

The Court has emphasized the need for the assessment of promptness in light of the purpose of article 5.<sup>41</sup> The Court has pursued a semantic analysis of the term "promptly" and concluded that only limited flexibility is permitted in its interpretation.<sup>42</sup> Furthermore, the special features of each case must be considered in the assessment of whether a release is prompt.<sup>43</sup> The significance attached to the special features of a case, however, cannot negate the state's obligation, pursuant to article 5(3), to ensure a prompt appearance.<sup>44</sup>

### *C. Derogation Under the European Convention*

The European Convention provides a solution to the dilemma encountered by a state when circumstances within its borders constitute a threat to its national security and compli-

36. European Convention, *supra* note 2, art. 5(1)(c), 213 U.N.T.S. at 226. For the text of article 5(1)(c) of the Convention, see *supra* note 26.

37. *Id.* art. 5(3), 213 U.N.T.S. at 226; see J. FAWCETT, *supra* note 8, at 101. For the text of article 5(3) of the Convention, see *supra* note 26.

38. See, e.g., *The Guzzardi Case*, 39 Eur. Ct. H.R. (ser. A) (1980) (concluding article 5(1) forbids deprivation of liberty of detainee in order to prevent him from committing crime); see Warbrick, *The Prevention of Terrorism (Temporary Provisions) Act 1976 and the European Convention on Human Rights: The McVeigh Case*, 32 INT'L & COMP. L.Q. 757, 759 (1983) [hereinafter *Prevention of Terrorism*].

39. *Marckx Case*, 31 Eur. Ct. H.R. (ser. A), at 19 (1979); *Tyrer Case*, 26 Eur. Ct. H.R. (ser. A), at 15 (1978); see *Prevention of Terrorism*, *supra* note 38, at 758.

40. See, e.g., *McVeigh, O'Neil and Evans v. The United Kingdom*, 5 E.H.R.R. 71 (1981) (widening discretion given to states to take measures deviating from ordinary process of law enforcement for purposes of combatting terrorism); see also *Prevention of Terrorism*, *supra* note 38, at 757.

41. *Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A), at 32 (1988).

42. *Id.*; see *infra* notes 123-26 and accompanying text (discussing *Brogan* court's semantic analysis of prompt).

43. *Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A), at 32 (1988).

44. *Id.* at 32-33.

ance with the obligations of the European Convention undermine its sovereign duty to protect its citizenry.<sup>45</sup> Article 15 of the European Convention, the derogation clause, permits partial or complete abrogation from the European Convention rights in times of emergency.<sup>46</sup> Accordingly, the Court has concluded that the derogation clause affirms the principle that a contracting party should be afforded additional deference to combat threats to the security of its population.<sup>47</sup> Derogation from the requirement to protect the guaranteed rights of individuals is necessary because such crisis situations often involve violence and the imminent breakdown of minimum order.<sup>48</sup>

---

45. See European Convention, *supra* note 2, art. 15, 213 U.N.T.S. at 232-34; Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORD. 113, 113-15 (1982).

46. European Convention, *supra* note 2, art. 15, 213 U.N.T.S. at 232-34. Article 15 of the European Convention provides that

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

*Id.*; see Boyle, *Human Rights and Political Resolution in Northern Ireland*, 9 YALE J. WORLD PUB. ORD. 156, 159 (1982). Boyle has identified the following characteristics as defining "emergency" for purposes of article 15:

- (i) the emergency must be actual or imminent;
- (ii) its effects must involve the whole nation;
- (iii) the continuance of the organized life of the community must be threatened; and
- (iv) 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.

*Id.* (citation omitted).

47. See, e.g., *Lawless Case*, 3 Eur. Ct. H.R. (ser. A) (1961) (concluding derogation from prompt appearance requirement during periods of terrorist violence acceptable under article 15); see also *infra* note 56 (discussing *Lawless*); J. FAWCETT, *supra* note 8, at 311; Schreuer, *supra* note 45, at 115.

48. See, e.g., *Lawless Case*, 3 Eur. Ct. H.R. (ser. A) (1961) (citing existence of secret army utilizing violence in Republic of Ireland and operating outside the Re-

Article 15 is limited in its endorsement of derogation.<sup>49</sup> It permits derogation only during a war or other public emergency that threatens the existence of the nation.<sup>50</sup> A contracting party that derogates must employ strategies narrowly tailored to remedy the peculiar emergency situation.<sup>51</sup> Furthermore, derogating states are never permitted to deviate from the European Convention guarantees prohibiting torture, slavery, and ex post facto laws.<sup>52</sup>

The European Convention also provides the contracting parties with a discretionary "margin of appreciation"<sup>53</sup> in determining the necessity of emergency measures and the extent of the derogation required by the particular situation.<sup>54</sup> Almost without exception, the Court has approved counter-terrorism measures enacted by states as consistent with a state's margin of appreciation.<sup>55</sup> The presence of terrorist activities

public of Ireland, alarming increase in terrorist activities, and terrorist activities jeopardizing Republic of Ireland's foreign relations as factors supporting derogation under article 15); *see also infra* note 56 (discussing *Lawless*); J. FAWCETT, *supra* note 8, at 308; Schreuer, *supra* note 45, at 113.

49. *See* European Convention, *supra* note 2, art. 18, 213 U.N.T.S. at 234; J. FAWCETT, *supra* note 8, at 311; Schreuer, *supra* note 45, at 116.

50. European Convention, *supra* note 2, art. 15, 213 U.N.T.S. at 232-34. Precisely, article 15(1) permits derogation only in the case of "a war or other public emergency threatening the life of the nation." *Id.* at 232.

51. *Id.* at 232-34; *see* Schreuer, *supra* note 45, at 116. Schreuer explains that "[d]erogations must be applied subject to strict proportionality. This means: [(a)] that the derogation should only apply to those rights which have to be limited to cope with the emergency; and (b) that the limitation should only apply to the extent absolutely required." *Id.*

52. European Convention, *supra* note 2, art. 15(2), 213 U.N.T.S. at 232-34; *see* Boyle, *supra* note 46, at 159. Boyle summarizes article 15(2) of the European Convention as follows: "article 3 (prohibition on torture), article 4 (forced labor), article 7 (retroactive penal law), article 14 (discrimination), and article 2 (the right to life except 'in respect of deaths resulting from lawful acts of war') may not be derogated from in any circumstances." *Id.*

53. *See* 1958-59 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 174, 176, Application No. 176/56 (introducing concept of margin of appreciation regarding contracting party's discretion to assess necessity and measures of derogation); *The ECHR and Terrorism*, *supra* note 1, at 99. The term "margin of appreciation" describes the discretion given to state parties under the European Convention to determine the necessity and extent of measures of derogation. *Id.*

54. *See The ECHR and Terrorism*, *supra* note 1, at 99.

55. *See, e.g.,* Case of Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) (holding derogations from article 5 during periods of terrorist violence acceptable under article 15); *Lawless Case*, 3 Eur. Ct. H.R. (ser. A) (1961) (concluding derogation from prompt appearance requirement during periods of terrorist violence acceptable under article 15); *see also The ECHR and Terrorism*, *supra* note 1, at 115. The

can amount to an emergency sufficient to justify an otherwise unlawful deviation from European Convention provisions.<sup>56</sup>

Governments assert a right to derogate from human rights obligations during times of national emergency in order to safeguard the community interest.<sup>57</sup> The right to derogate is a factor in the reconciliation of individual liberties with community interests during emergencies.<sup>58</sup> Detrimental effects on society would result if governments were forced to protect fully individual rights during violent public emergencies.<sup>59</sup> The proclamation of a public emergency, however, does not convey an absolute right to suspend European Convention obligations.<sup>60</sup> There must be a safeguard against manipulation of community interests as an excuse for human rights violations.<sup>61</sup> Accordingly, the Commission and the Court have jurisdictional power to review the entitlement of a state to derogate from European Convention provisions and, if justified, to determine whether the derogation is in conformity with the ex-

---

exception appears in the Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 41-43. For a discussion of the Greek Case, see *infra* note 65.

56. See, e.g., *Lawless Case*, 3 Eur. Ct. H.R. (ser. A) (1961) (citing existence of secret army utilizing violence in Republic of Ireland and operating outside the Republic of Ireland, alarming increase in terrorist activities, and terrorist activities jeopardizing Republic of Ireland's foreign relations as factors supporting derogation under article 15); see also *The ECHR and Terrorism*, *supra* note 1, at 115. Terrorist activities breach the human rights of their victims. *Id.* at 93. Therefore, the individuals who interfere with the human rights of others render themselves susceptible to the loss of their own human rights. *Id.* Consistent with this view is the *Lawless Case*. In *Lawless*, an Irish citizen accused the Republic of Ireland with, among other things, violations of article 5 of the European Convention. 3 Eur. Ct. H.R. (ser. A), at 30-31 (1961). The allegations in *Lawless* stemmed from a five-month detention, authorized by the Republic of Ireland and predicated upon the suspicion of involvement in terrorist activities. *Id.* The Court relied upon the exigencies of terrorism in the Republic of Ireland in its evaluation of the detention laws at issue and concluded that the terrorist threat was sufficient to justify derogation from article 5(3). *Id.* at 56. The Court concluded that the five-month detention period was compatible with the Republic of Ireland's derogation. *Id.* at 62. The Court dismissed the article 5 charges, thereby sanctioning extended detention periods for suspected terrorists in derogating countries. See *id.*

57. Schreuer, *supra* note 45, at 113.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* Schreuer notes that "[human rights violations] are typically made to facilitate the task of power elites in ruling a community or, worse, to further their special interests." *Id.*

agencies of the particular situation.<sup>62</sup> The United Kingdom,<sup>63</sup> Ireland,<sup>64</sup> Greece,<sup>65</sup> and Turkey<sup>66</sup> have invoked the derogation

---

62. *Lawless Case*, 3 Eur. Ct. H.R. (ser. A), at 55 (1961); see Boyle, *supra* note 46, at 159. In *Lawless*, the Court stated that

any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention . . . provided that such measures are strictly limited to what is required by the exigencies of the situation . . . [.] It is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case.

3 Eur. Ct. H.R. (ser. A), at 55 (1961).

63. See 1966 Y.B. EUR. CONV. ON HUM. RTS. 16-20; 1965 Y.B. EUR. CONV. ON HUM. RTS. 10-16; 1964 Y.B. EUR. CONV. ON HUM. RTS. 28-30; 1961 Y.B. EUR. CONV. ON HUM. RTS. 44-54; 1960 Y.B. EUR. CONV. ON HUM. RTS. 74-90; 1958-1959 Y.B. EUR. CONV. ON HUM. RTS. 84-86; 1955-1957 EUR. COMM'N HUM. RTS., DOCUMENTS & DECISIONS 48-51. These notices of derogation concern measures of administrative detention in the United Kingdom's overseas territories prior to 1966. Schreuer, *supra* note 45, at 117. These territories have subsequently gained their independence from the United Kingdom, and, accordingly, the European Convention no longer applies to them. *Id.*

The United Kingdom has also freely exercised its right to derogate from the European Convention as concerns special powers of arrest and detention in Northern Ireland. See 1978 Y.B. EUR. CONV. ON HUM. RTS. 22; 1975 Y.B. EUR. CONV. ON HUM. RTS. 18; 1973 Y.B. EUR. CONV. ON HUM. RTS. 24-8; 1971 Y.B. EUR. CONV. ON HUM. RTS. 32. The United Kingdom gave notice of derogation on August 20, 1971 on the basis of

acts of terrorism, including murders, attempted murders, maimings, bombings, fire-raising and acts of intimidation, and more recently violent civil disturbances. The Government of Northern Ireland has therefore found it necessary . . . for the protection of life and the security of property and to prevent outbreaks of public disorder, to exercise, to the extent strictly required by the exigencies of the situation, powers of detention and internment.

*Id.*

The United Kingdom Permanent Representative to the Council of Europe first submitted notice of derogation regarding Northern Ireland to the Secretary General of the Council in 1957. See 1955-1957 EUR. COMM'N HUM. RTS., DOCUMENTS & DECISIONS 50. The United Kingdom renewed this notice of derogation several times. See 1978 Y.B. EUR. CONV. ON HUM. RTS. 22; 1975 Y.B. EUR. CONV. ON HUM. RTS. 18; 1973 Y.B. EUR. CONV. ON HUM. RTS. 24-8; 1971 Y.B. EUR. CONV. ON HUM. RTS. 32; 1969 Y.B. EUR. CONV. ON HUM. RTS. 72-74. The United Kingdom completely withdrew all notices of derogation regarding Northern Ireland on August 22, 1984. 21 INFO. BULL. LEGAL ACTIVITIES WITHIN COUNCIL OF EUROPE & MEMBER STATES 2 (July 1985).

64. See 1977 Y.B. EUR. CONV. ON HUM. RTS. 28-30; 1976 Y.B. EUR. CONV. ON HUM. RTS. 20-24; 1955-1957 EUR. COMM'N HUM. RTS., DOCUMENTS & DECISIONS 47-48 (concerning measures of administrative detention).

65. See 1967 Y.B. EUR. CONV. ON HUM. RTS. 26-36. This document gave notice of the suspension of an extensive list of articles of the Greek Constitution in 1967. *Id.* Subsequent communications with the Commission detailed the necessity of the

clause of the European Convention during times of national crisis.

## II. THE NORTHERN IRELAND CONFLICT, THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1974, AND THE CASE OF BROGAN AND OTHERS

### A. *History of the Northern Ireland Conflict*

Protestant rule of Ireland by what is now the United Kingdom was confirmed in July 1690 when the Protestant Prince William of Orange defeated the army of the deposed Catholic monarch James II.<sup>67</sup> Fighting between Protestants and Catholics has dominated the subsequent centuries of Irish history.<sup>68</sup> The U.K. Parliament ultimately agreed to Irish home-

---

derogation. *Id.* at 38-44. The Commission found the notices incomplete and rejected the notices of derogation. *See* Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 41-43. In the Greek Case, the Commission concluded that

the respondent Government ha[d] not fully met the requirements of Article 15, paragraph (3), of the Convention, in that:

- (1) it did not communicate to the Secretary General of the Council of Europe the texts of a number of legislative measures and in particular that of the new Constitution of 1968;
- (2) it did not provide the Secretary General with full information of the administrative measures, in particular as regards the detention of persons without court order;
- (3) it did not communicate to the Secretary General the reasons for the measures of derogation until 19th September, 1967, that is to say more than four months after they were first taken.

*Id.* at 42-43.

66. 1979 Y.B. EUR. CONV. ON HUM. RTS. 26-30; 1978 Y.B. EUR. CONV. ON HUM. RTS. 20; 1975 Y.B. EUR. CONV. ON HUM. RTS. 8-16; 1974 Y.B. EUR. CONV. ON HUM. RTS. 24-28; 1973 Y.B. EUR. CONV. ON HUM. RTS. 16-24; 1972 Y.B. EUR. CONV. ON HUM. RTS. 16-22; 1971 Y.B. EUR. CONV. ON HUM. RTS. 24-32; 1970 Y.B. EUR. CONV. ON HUM. RTS. 18-22; 1964 Y.B. EUR. CONV. ON HUM. RTS. 22-26; 1961 Y.B. EUR. CONV. ON HUM. RTS. 54-62. These notices are the most extensive derogations submitted to the Commission and as such have been criticized as vague and incompatible with the notice requirements of article 15. Schreuer, *supra* note 45, at 118. Schreuer criticized the notices of derogation, stating, "[t]he reasons given for the steps are not compelling and, more important, the extent of the derogations is unspecified. The notices simply refer to states of emergency, siege, or martial law." *Id.*

67. Hellerstein, McKay, & Schlam, *Criminal Justice And Human Rights In Northern Ireland*, 43 REC. A.B. CITY N.Y. 110, 116 (1988) [hereinafter Hellerstein]; *see* T. BALDY, *BATTLE FOR ULSTER* 33-44 (1987) (presenting historical overview of English-Irish conflict dating to 1171); *see also* R. FOSTER, *MODERN IRELAND: 1600-1972* 494-511 (1988); T. INGRAM, *A CRITICAL EXAMINATION OF IRISH HISTORY* (1900).

68. Hellerstein, *supra* note 67, at 116-17.

rule in 1920.<sup>69</sup> The Ulster Protestants of the northern six counties, however, had insisted on special treatment in the home-rule legislation.<sup>70</sup> The southern twenty-six counties adhered to their goal of a unified Ireland and refused to accept the partition of Ireland and two separate home-rule parliaments.<sup>71</sup> In return for the acknowledgment by the U.K. Parliament of an Irish Free State, however, the southern twenty-six counties agreed to the partition of Ireland; thus the alignment of the six northern counties of Ireland with the United Kingdom was established.<sup>72</sup> The Treaty of 1921<sup>73</sup> and subsequent U.K. legislation created the Irish Free State, a self-governing political system.<sup>74</sup> The six northern counties retained an autonomous government, and the region is now known as Northern Ireland.<sup>75</sup> In 1937, the remaining twenty-six counties of the Irish Free State enacted a new constitution that proclaimed the independence and sovereignty of the Republic of Ireland.<sup>76</sup>

A deep and long-standing antagonism between the Protestant and Catholic communities divides Northern Ireland.<sup>77</sup> The Protestant sector, representing a two-to-one majority of

69. *Id.* at 117. Home-rule was the endorsement of self-governing status within the British Commonwealth by the U.K. Parliament. See *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 10 (1978).

70. Hellerstein, *supra* note 67, at 117.

71. *Id.*; see R. FOSTER, *supra* note 67, at 494-511.

72. Hellerstein, *supra* note 67, at 117; R. FOSTER, *supra* note 67, at 494-511.

73. Treaty Between Great Britain and Ireland, Dec. 6, 1921, Great Britain-Ireland, 114 B.S.P. 161 (Cmd. 1560), 26 L.N.T.S. 10.

74. See *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 10 (1978); see also T. BALDY, *supra* note 67, at 43. Baldy states that the Treaty of 1921 "established dominion status for the overwhelmingly Catholic southern twenty-six counties, while Protestants in the north vetoed a united Ireland, choosing to retain their link to Britain in a six-county partition that gave them a 2 to 1 majority over Catholics." *Id.*; see *id.* at 119 n.67; Hellerstein, *supra* note 67, at 117.

75. *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 10 (1978); see T. BALDY, *supra* note 67, at 43; Hellerstein, *supra* note 67, at 117. One commentator describes the Northern Ireland Parliament's rule as

sectarian and replete with anti-Catholic discrimination in employment, housing, education and the franchise. In the absence of a written Constitution or meaningful judicial review, the Northern Ireland Parliament enlarged already built-in Protestant electoral majorities with property qualifications and gerrymandering of election districts.

*Id.* at 117-18.

76. *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 10 (1978).

77. Hellerstein, *supra* note 67, at 114-15; Boyle, *supra* note 46, at 156.



the population in general, vehemently opposes a unified Ireland and supports continued allegiance to the United Kingdom.<sup>78</sup> Conversely, the Catholic minority, in the main, supports a complete break from U.K. rule.<sup>79</sup> The complex conflict of identities and nationalisms in Northern Ireland has caused political, social, and economic discrimination of the Catholic minority.<sup>80</sup>

The current conflict in Northern Ireland, which began in 1968, has led to the re-emergence of the Irish Republican Army (the "IRA"), the emergence of the Provisional IRA, and the intervention of the U.K. army in Northern Ireland.<sup>81</sup> The IRA, a clandestine and quasi-military organization, does not accept the alignment of Northern Ireland with the United Kingdom and actively seeks what it views as liberation of the Irish people from U.K. rule.<sup>82</sup> The IRA promotes a unified Ireland and seeks to drive the United Kingdom out of North-

78. *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 10-11 (1978); see T. BALDY, *supra* note 67, at 43.

79. *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 11 (1978).

80. Boyle, *supra* note 46, at 156; see T. BALDY, *supra* note 67, at 44-46 (discussing discrimination of Catholics in Northern Ireland).

81. See *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 11 (1978) (discussing formation of IRA in early twentieth century and inactivity of IRA between 1962 and 1969); Hellerstein, *supra* note 67, at 121; see also T. BALDY, *supra* note 67, at 49-53 (discussing IRA and emergence of Provisional IRA in 1970s). One commentator explains that

[t]he current bout of terrorist intimidation and violence dates from 1968, although it began more peacefully as a civil rights movement of the Catholic minority modeled on the American experience earlier in that decade. Beginning in October 1968, civil rights marchers encountered violent opposition from unionist mobs. Civil strife led to the intervention of the British Army. While some Catholic protestors originally welcomed the presence of the army as protection against the unionist attack, its presence soon stimulated support for the IRA and the subsequent formation of the violent faction, the Provisional IRA.

Hellerstein, *supra* note 67, at 120-21.

82. Connelly, *Political Violence and International Law: The Case of Northern Ireland*, 16 DEN. J. INT'L L. & POL. 79 (1987); Cullen, *Northern Ireland/20 Years Later*, Boston Globe, May 31, 1989, at 1; see *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 11 (1978); Hellerstein, *supra* note 67, at 118-19 (discussing Irish political parties formed during twentieth century). See generally J. BELL, *THE SECRET ARMY* (1970) (discussing Irish Republican Army). The Provisional IRA, which formed in December 1969, is the armed offshoot of the IRA. T. BALDY, *supra* note 67, at 50.

ern Ireland.<sup>83</sup> The IRA employs violence as a method of securing its goals and has periodically mounted terrorist campaigns both in Ireland and in the United Kingdom.<sup>84</sup> The Protestant loyalists have organized paramilitary groups that also use violence in order to preserve Northern Ireland's link with the United Kingdom.<sup>85</sup>

The early 1970s witnessed a dramatic increase in terrorist violence stemming from the Northern Ireland conflict.<sup>86</sup> The United Kingdom responded by utilizing legislation granting special powers of internment without trial in the cases of suspected terrorists.<sup>87</sup> The violence continued to escalate, and, in 1972, the U.K. Army killed thirteen Catholic demonstrators in Londonderry on the infamous "Bloody Sunday."<sup>88</sup> The unprecedented rise in terrorist-related deaths and civil unrest in Northern Ireland led the United Kingdom to resume direct rule of that region.<sup>89</sup> Additionally, the United Kingdom placed executive authority over Northern Ireland in the Secretary of State for Northern Ireland.<sup>90</sup>

#### B. *The Prevention of Terrorism (Temporary Provisions) Act*

In 1974, the U.K. Parliament passed The Prevention of Terrorism (Temporary Provisions) Act 1974.<sup>91</sup> The U.K. Par-

---

83. *Tension Heightened over Protestants' Parade; IRA Bombing Precedes Ulster March*, L.A. Times, Aug. 13, 1989, at 6, col. 1.

84. *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 11 (1978); Connelly, *supra* note 82, at 79 n.1.

85. Connelly, *supra* note 82, at 79 n.1. The Ulster Defence Association, Ulster Volunteer Force, and Ulster Freedom Force are the Protestant loyalist counterparts to the Catholic republican paramilitary groups. T. BALDY, *supra* note 67, at 49. The official Northern Ireland security forces, the Ulster Defense Regiment and the Royal Ulster Constabulary, are predominantly comprised of Protestants. K. BOYLE & T. HADDEN, *IRELAND: A POSITIVE PROPOSAL* 26 (1985).

86. See Hellerstein, *supra* note 67, at 121; see also *Case of Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A), at 11 (1978).

87. See Hellerstein, *supra* note 67, at 120-21 (citing Civil Authorities (Special Powers) Act (Northern Ireland), 1922).

88. Hellerstein, *supra* note 67, at 121. The city of Londonderry has a Catholic majority that calls the city Derry. K. BOYLE & T. HADDEN, *supra* note 85, at 17.

89. *See id.*

90. *See id.*

91. The Prevention of Terrorism (Temporary Provisions) Act, 1974, PUBLIC GENERAL ACTS & MEASURES OF 1974 (pt. II), ch. 56.

liament subsequently amended the PTA in 1976,<sup>92</sup> 1984,<sup>93</sup> and 1989.<sup>94</sup> In enacting the PTA, the United Kingdom recognized and sought to curtail the IRA terrorist campaigns that peaked in 1974.<sup>95</sup>

The PTA is part of the United Kingdom's legislative response to the violence and havoc wrought on Northern Ireland by the escalating terrorist activities.<sup>96</sup> There are three significant sections of the PTA: part I prohibits membership in the IRA and the Irish National Liberation Army,<sup>97</sup> part II authorizes exclusion of suspected terrorists from the United Kingdom at the discretion of the Secretary of State,<sup>98</sup> and part IV rests extrajudicial powers to arrest and detain persons suspected of involvement in terrorist activities with the executive authorities.<sup>99</sup>

Section 12 of the 1984 version of the PTA, in force at the time of the *Brogan* violations, authorizes the detention of suspected terrorists for an initial period of forty-eight hours.<sup>100</sup>

92. The Prevention of Terrorism (Temporary Provisions) Act, 1976, PUBLIC GENERAL ACTS & MEASURES OF 1976 (pt. I), ch. 8.

93. The Prevention of Terrorism (Temporary Provisions) Act, 1984, PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8.

94. The Prevention of Terrorism (Temporary Provisions) Act, 1989, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279 (4th ed. 1989).

95. *See* 1 PARL. DEB. H.C. (6th ser.) 337 (1981); Hellerstein, *supra* note 67, at 131. Two crowded public houses in Birmingham, England were bombed on November 21, 1974. Toolis, *When British Justice Failed*, N.Y. Times, Feb. 25, 1990, § 6 (Magazine), at 36. One of the bombs exploded in the basement bar of an office building and killed twenty-one people and injured 162 people. *Id.* These bombings prompted the U.K. Parliament to introduce the Prevention of Terrorism (Temporary Provisions) Act 1974. 1 PARL. DEB. H.C. (6th ser.) 337 (1981); *see* Hellerstein, *supra* note 67, at 131.

96. *See* Hellerstein, *supra* note 67, at 131. The Northern Ireland (Emergency Provisions) Act 1978, which was amended in 1987, is another part of the U.K. anti-terrorism legislation that permits arrest upon reasonable suspicion of the commission of a scheduled offense. PUBLIC GENERAL ACTS & MEASURES OF 1987 (pt. II), ch. 30; *see* Hellerstein, *supra* note 67, at 129-30.

97. The Prevention of Terrorism (Temporary Provisions) Act, 1989, pt. I, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1280 (4th ed. 1989). The Irish National Liberation Army is a radical republican paramilitary organization with a Marxist ideology that formed in 1975 after a violent split from the IRA. T. BALDY, *supra* note 67, at 62.

98. The Prevention of Terrorism (Temporary Provisions) Act, 1989, pt. II, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1284 (4th ed. 1989).

99. *Id.* pt. IV, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989).

100. The Prevention of Terrorism (Temporary Provisions) Act, 1984, § 12, PUB-

In addition, it permits a full seven-day detention period with the approval of the Secretary of State.<sup>101</sup> Thus, the PTA confers tremendous power in the executive for the prevention of terrorism.<sup>102</sup> There is no requirement that charges be levied officially against the detained individual or that the detainee be brought before a judicial authority.<sup>103</sup>

The U.K. Parliament, in the 1984 version of the PTA,

---

LIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8, § 12, at 34-35. Section 12, Powers of Arrest and Detention, provides as follows:

- (1) Subject to subsection (2) below, a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be—
  - (a) a person guilty of an offence under section 1, 9 or 10 above;
  - (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;
  - (c) a person subject to an exclusion order.
- (2) The power of arrest conferred by subsection (1)(c) above is exercisable only—
  - (a) in Great Britain, if the exclusion order was made under section 4 above; and
  - (b) in Northern Ireland, if it was made under section 5 above.
- (3) The acts of terrorism to which this Part of this Act applies are—
  - (a) acts of terrorism connected with the affairs of Northern Ireland; and
  - (b) acts of terrorism of any description except acts connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland.
- (4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him.
- (5) Any such further period or periods shall not exceed five days in all.
- (6) The following provisions (requirement to bring accused person before the court after his arrest) shall not apply to a person detained in right of the arrest—
  - (a) section 43 of the Magistrates' Courts Act 1980;
  - (b) section 29 of the Children and Young Persons Act 1969;
  - (c) (*applies to Scotland only*);
  - (d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981; and
  - (e) section 50(3) of the Children and Young Persons Act (Northern Ireland) 1968.
- (7) (*Applies to Scotland only.*)
- (8) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section.

*Id.*

101. *Id.* § 12(4)-(5).

102. *See id.*

103. *See id.* § 12(4) (vesting power to extend detentions with Secretary of State).

mandated annual review of the PTA by independent investigators and gave the PTA a limited life-span of five years without the possibility of renewal.<sup>104</sup> Some government ministers had criticized the earlier reviews of the PTA as piecemeal and procedural.<sup>105</sup> They further suggested that the government more adequately justify the special legislation for renewal and warned against routine renewals.<sup>106</sup>

### C. *The Case of Brogan and Others*

The European Court of Human Rights in the *Case of Brogan and Others*<sup>107</sup> concluded that the extrajudicial powers of arrest and detention embodied in the PTA are incompatible with the European Convention.<sup>108</sup> In *Brogan*, police officers, pursuant to section 12 of the PTA, arrested the four applicants at their respective homes in Northern Ireland.<sup>109</sup> The police detained the four applicants for periods ranging from four days and six hours to six days and sixteen and one-half hours.<sup>110</sup> The applicants, as a result of these detentions, presented applications to the Commission between October 18, 1984 and February 8, 1985, each alleging that the detentions violated the prompt appearance requirement of article 5(3) of the European Convention.<sup>111</sup>

The Commission decision<sup>112</sup> stated that an article 5(3) violation had occurred with respect to Brogan's detention (five days and eleven hours) and Coyle's detention (six days and sixteen and one-half hours) but not with respect to the detention

104. The Prevention of Terrorism (Temporary Provisions) Act, 1984, § 17(3), General Note, PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8, § 17(3), at 38.

105. See, e.g., 1 PARL. DEB. H.C. (6th ser.) 349, 353 (1981) (discussing need for comprehensive inquiries into workings of PTA and inadequate reviews of PTA); see also *The ECHR and Terrorism*, supra note 1, at 100-01.

106. 1 PARL. DEB. H.C. (6th ser.) 349 (1981); see *The ECHR and Terrorism*, supra note 1, at 100-01.

107. 145-B Eur. Ct. H.R. (ser. A) (1988).

108. *Id.* at 34.

109. *Id.* at 19-21.

110. *Id.*

111. *Id.* at 26. The applicants also alleged violations of articles 5(1), (3)-(5), and 13. *Id.* Additionally, in the original petitions to the Commission, the applicants in the *Brogan* case had alleged violations of article 5(2). *Id.* The applicants subsequently withdrew this claim; neither the Commission nor the Court considered it. *Id.*

112. 145-B Eur. Ct. H.R. (ser. A), at 57 (1988) (Eur. Comm'n on Hum. Rts.).

of the other two men who were detained for shorter periods.<sup>113</sup> The Commission cited case law permitting detention periods of four days in ordinary criminal offenses and five days in exceptional cases as compatible with the prompt appearance requirement of article 5(3) of the European Convention.<sup>114</sup>

The Court overruled the Commission decision and held that all four detention periods violated the prompt appearance requirement of article 5(3) of the European Convention.<sup>115</sup> The Court reasoned that attaching sufficient importance to the special features of terrorism in order to justify so lengthy a period of detention without judicial review would be an unacceptably broad interpretation of the plain meaning of the word "promptly."<sup>116</sup> The Court feared that such an application would seriously weaken the procedural protections that article 5(3) guaranteed to an individual's liberty.<sup>117</sup>

In its review of the Commission decision, the Court noted that ordinary criminal law in Northern Ireland did not confer power to arrest and detain a person merely to make inquiries of him.<sup>118</sup> The Court explained, however, that it is permissible to arrest individuals to dispel or confirm a reasonable suspicion that they have committed an offense, provided that they

---

113. *Id.* at 63. The Commission stated that it ha[d] assessed these periods against the background of its case-law according to which a person should not be detained in normal cases for more than four days without being brought before a judicial authority. The Commission is aware, however, that it must strike a fair balance between the interests of the individual and the general interest of the community. In so doing, the Commission takes into account that the struggle against terrorism may require a particular measure of sacrifice by each citizen in order to protect the community as a whole against such crimes. Moreover, the Commission also bears in mind the context in which the applicants were arrested and the reality of problems presented by the arrest and detention of suspected terrorists which have been alluded to by the Government and which may not be present in ordinary criminal cases.

*Id.* (citations omitted).

114. *Id.* at 62. The Commission noted that "in a case concerning ordinary criminal offences it has found a period of four days to satisfy the requirement of promptness in Article 5 para. 3. In an exceptional case, where the applicant's state of health required him to be hospitalized, a period of five days was considered acceptable." *Id.* (citations omitted).

115. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 34 (1988).

116. *Id.* at 33-34.

117. *Id.* at 34.

118. *Id.* at 24.

are brought before a court as soon as practicable.<sup>119</sup>

The Court also noted the proliferation of terrorism in modern society.<sup>120</sup> The Court recognized the need for a balance between the defense of democracy and the protection of individual rights.<sup>121</sup> The Court did not consider, however, whether derogation by the United Kingdom under article 15 of the European Convention would be justified on the basis of terrorism in Northern Ireland.<sup>122</sup>

In resolving the time limits of a prompt release, the Court was confronted with two interpretations of the term prompt in the European Convention.<sup>123</sup> The English text of the European Convention uses the term "promptly," while the French text uses the more restrictive term "*aussitôt*," which literally means immediately.<sup>124</sup> Treaty interpretation mandates that the Court apply the two terms in a way that reconciles them as much as possible but still adheres to the objectives of the European Convention.<sup>125</sup> The Court found the French term controlling and, thus, concluded that only limited flexibility is permitted in the interpretation of the time limits of prompt.<sup>126</sup>

The Court noted that prolonged detention periods are ne-

119. *Id.*

120. *Id.* at 27.

121. *Id.* Furthermore, the applicants argued that there was no plausible reason why the seven-day detention period permitted under the PTA was necessary, marking as it did such a radical departure from ordinary law, and even from the three-day detention permitted under the Northern Ireland (Emergency Provisions) Act 1978. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 30 (1988). The U.K. government countered that the nature and extent of the terrorist threat, combined with the resulting problems in obtaining evidence sufficient to bring charges, necessitated the maximum statutory seven-day detention period. *Id.* This power of detention, the government argued, forms an indispensable part of the United Kingdom's effort to combat the terrorist threat in Northern Ireland. *Id.*

The government further argued that the Secretary of State was the most suitable official to authorize the extension of detention periods. *Id.* at 31. The Secretary of State's specialized knowledge of the anti-terrorist activities and his unique ability to maintain a consistent approach to extension procedures isolate him as the most viable authority to oversee the extension process. *See id.* Furthermore, the acute sensitivity of the information on which suspicion for arrest is based and the risks involved in revealing it in court support the government's submission that extensions of detention could not be judicially controlled. *See id.*

122. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 28 (1988).

123. *Id.* at 32.

124. *Id.*

125. *See id.*

126. *Id.*

cessitated by the terrorist activities in Northern Ireland and that these detentions do not violate the prompt appearance requirement of article 5(3) of the European Convention.<sup>127</sup> Although the difficulties of judicial control over decisions to arrest and detain suspects could alter the manner in which article 5(3) is implemented, the Court warned that these concomitant exigencies could not dispense altogether with the requirement of a prompt appearance before a judicial authority.<sup>128</sup>

The dissent objected to the majority's apparent departure from prior case law.<sup>129</sup> The dissent criticized the majority, noting that it had failed to respect the limited discretion traditionally left to the states and that it had ignored the maxim that the acceptable period of detention will vary with the peculiar facts of each case.<sup>130</sup> Furthermore, the dissent supported its position with case law stating that a limit for the maximum number of days of detention valid for all situations was impossible to determine.<sup>131</sup> The exceptional situation in Northern Ireland, the Court's case law, and the fact-based assessment of the promptness of each release supported the dissent's view that the detentions were consistent with article 5(3).<sup>132</sup>

#### D. *Post-Brogan Modifications of the PTA*

The U.K. Parliament amended the PTA in 1989.<sup>133</sup> The 1989 version of the PTA is substantially the same as the 1984,

127. *Id.* at 33. The Court stated that [t]he investigation of terrorist offences undoubtedly presents the authorities with special problems . . . . The Court takes full judicial notice of the factors adverted to by the Government in this connection . . . . The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 § 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

*Id.*

128. *See id.*

129. *Id.* at 39.

130. *Id.* The joint dissenting opinion of Judges Thór Vilhjálmsson, Bind-schedler-Robert, Gölcüklü, Matscher, and Valticos noted that "[t]he question is how much latitude is allowable." *Id.*

131. *Id.* (citing *Stögmüller v. Australia*, 9 Eur. Ct. H.R. (ser. A) (1969)).

132. *Id.* at 40.

133. The Prevention of Terrorism (Temporary Provisions) Act, 1989, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279 (4th ed. 1989).



1976, and 1974 versions of the Act.<sup>134</sup> The extrajudicial powers of detention embodied in the PTA have retained a "temporary" designation despite the requirement in the 1984 Act that the legislation be made permanent or repealed after five years.<sup>135</sup> The PTA also retained annual parliamentary renewal and annual commission investigations.<sup>136</sup>

---

134. *See id.*; The Prevention of Terrorism (Temporary Provisions) Act, 1984, PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8; The Prevention of Terrorism (Temporary Provisions) Act, 1976, PUBLIC GENERAL ACTS & MEASURES OF 1976 (pt. I), ch. 8; The Prevention of Terrorism (Temporary Provisions) Act, 1974, PUBLIC GENERAL ACTS & MEASURES OF 1974 (pt. II), ch. 56. The 1989 PTA contains the powers of arrest and detention in section 14, the section addressing the arrest and detention of suspected persons. This section provides that

(1) Subject to subsection (2) below, a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be—

(a) a person guilty of an offence under section 2, 8, 9, 10 or 11 above;

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this section applies; or

(c) a person subject to an exclusion order.

(2) The acts of terrorism to which this section applies are—

(a) acts of terrorism connected with the affairs of Northern Ireland; and

(b) acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom or any part other than Northern Ireland.

(3) The power of arrest conferred by subsection (1)(c) above is exercisable only—

(a) in Great Britain if the exclusion order was made under section 5 above; and

(b) in Northern Ireland if it was made under section 6 above.

(4) Subject to subsection (5) below, a person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest.

(5) The Secretary of State may, in any particular case, extend the period of forty-eight hours mentioned in subsection (4) above by a period or periods specified by him, but any such further period or periods shall not exceed five days in all and if an application for such an extension is made the person detained shall as soon as practicable be given written notice of that fact and of the time when the application was made.

(6) The exercise of the detention powers conferred by this section shall be subject to supervision in accordance with Schedule 3 to this Act.

(7) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section.

The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989).

135. The Prevention of Terrorism (Temporary Provisions) Act, 1984, § 17(3), PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8, § 17(3), at 38.

136. The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 27(5)-

The United Kingdom has made two noteworthy alterations to the 1989 version of the PTA.<sup>137</sup> First, the U.K. Parliament adopted a formal system of reviews and authorization applicable to the detention provisions of section 14 of the PTA.<sup>138</sup> Second, the U.K. Parliament amended section 14(5)

(6), reprinted in 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1303 (4th ed. 1989).

137. The two alterations appear in schedule 3 and section 14(5) respectively. The Prevention of Terrorism (Temporary Provisions) Act, 1989, sched. 3 & § 14(5), reprinted in 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1311 & 1294 (4th ed. 1989). For the text of schedule 3, see *infra* note 138. For the text of section 14(5), see *supra* note 134.

138. The Prevention of Terrorism (Temporary Provisions) Act, 1989, sched. 3, reprinted in 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1311 (4th ed. 1989). This review process is modeled after the process contained in the Police and Criminal Evidence Act 1984. 504 PARL. DEB. H.L. (5th ser.) 12-13 (1989). These processes are outlined in section 3 of schedule 3 of the PTA, titled "Supervision of Detention and Examination Powers":

*Detention for examination or detention of suspected persons:*

3.—(1) Where a person is detained under section 14 of this Act or under paragraph 6 of Schedule 5 to this Act his detention shall be periodically reviewed in accordance with this paragraph by a review officer and shall not continue unless—

- (a) that officer has authorised it to continue; or
- (b) an application has been made to the Secretary of State for an extension of the period of detention under subsection (5) of that section or sub-paragraph (3) of that paragraph.

(2) The reviews shall be carried out as follows—

(a) the first review shall be as soon as practicable after the beginning of the detention; and

(b) the subsequent reviews shall be at intervals of not more than twelve hours; and no review shall be carried out after such an application as is mentioned in sub-paragraph (1)(b) above has been made.

(3) Subject to sub-paragraph (4) below, on any such review the review officer shall authorise the continued detention of the person in question if, and only if, he is satisfied—

(a) that his continued detention is necessary in order to obtain (whether by questioning him or otherwise) or to preserve evidence which—

(i) relates to an offence under section 2, 8, 9, 10 or 11 of this Act (in the case of detention under section 14) or under section 8 (in the case of detention under paragraph 6 of Schedule 5);

(ii) indicates that he is or has been concerned in the commission, preparation or instigation of acts of terrorism to which section 14 of this Act applies; or

(iii) indicates that he is subject to an exclusion order; and

(b) that the investigation in connection with which that person is detained is being conducted diligently and expeditiously.

(4) The review officer may also authorise the continued detention of the person in question—

to require that written notice be given to detained individuals if an application is submitted to the Secretary of State for an extension of the original forty-eight hour detention period.<sup>139</sup> This provision requires arresting authorities to give prompt notification to the arrested individual of the reasons for arrest and any charges levied.<sup>140</sup>

### III. SEEKING A WORKABLE COMPROMISE TO THE PROMPT APPEARANCE REQUIREMENT: JUDICIAL REINTERPRETATION OF THE PROMPT APPEARANCE REQUIREMENT AND AN AMENDED PTA

The threat of terrorism and the unique demands it places on a government's duty to protect its nationals has created internal pressure in the United Kingdom.<sup>141</sup> The U.K. government's primary concern is to achieve effective processes for the detention of individuals who are perceived as risks to national security.<sup>142</sup> The U.K. government, however, may not ignore in this pursuit the fundamental human rights of its subjects or its obligations under the European Convention.<sup>143</sup>

The Court's *Brogan* decision prompted the U.K. govern-

---

(a) pending consideration of the question whether he is subject to an exclusion order;

(b) pending consideration by the Secretary of State whether to make an exclusion order against him or to serve him with notice of a decision to make a deportation order under the Immigration Act 1971

The Prevention of Terrorism (Temporary Provisions) Act, 1989, sched. 3, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1311 (4th ed. 1989).

139. The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14(5), *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989). The relevant addition to section 14(5) states that "if an application for such an extension is made the person detained shall as soon as practicable be given written notice of that fact and of the time when the application was made." *Id.*

140. *Id.*

141. *See* 505 PARL. DEB. H.L. (5th ser.) 8 (1989).

142. *See* 504 PARL. DEB. H.L. (5th ser.) 973 (1989).

143. *See supra* notes 8-25 and accompanying text for contracting party obligations under the European Convention. The European Convention provisions represent the minimal human rights that must be protected by contracting states. *Prevention of Terrorism, supra* note 38, at 759. Because the United Kingdom has no written constitution, it should adopt the minimum panoply of human rights guarantees embodied in the European Convention. Whitney, *British Detention Law is Ruled a Breach of Rights*, N.Y. Times, Nov. 30, 1988, A19, col. 1. In order further to facilitate enforcement of the European Convention's prompt appearance requirement, the U.K. Par-

ment to submit again a notice of derogation applicable to Northern Ireland on December 23, 1988.<sup>144</sup> The U.K. government's successive submissions of notices of derogation, which effectively result in a form of permanent derogation, is untenable for two reasons. First, article 15 presents derogation as a temporary measure.<sup>145</sup> Accordingly, permanent derogation conflicts with the human rights goals of the European Convention, and it is, therefore, likely that the Commission and the Court will not accept a permanent notice of derogation.<sup>146</sup>

---

liament should incorporate the European Convention provisions into U.K. statutory domestic law.

The House of Lords discussed the impact of a lack of a written constitution in the United Kingdom:

Of all the signatory states to the convention which have ratified, the United Kingdom is the only state that has no written constitution and no administrative court in which misuse or abuse of power on the part of the Executive—the Secretary of State—may be reviewed.

As Members of the Committee will know, the Court of Human Rights will not entertain jurisdiction unless and until all the vested procedures have been exhausted. The reason this is part of a much bigger problem . . . and the reason there are so many cases before the European Court of Human Rights to which the United Kingdom Government are responding is that there is no administrative court to act as a sieve or a filter. Moreover, the particular case in point, which gives rise to the decision in the amendment, would have been caught in such a filter.

504 PARL. DEB. H.L. (5th ser.) 970-71 (1989).

As the House of Lords noted, incorporation of the European Convention provisions into the U.K. domestic law will also serve as a sieve to the Convention institutions. *Id.* at 971. U.K. subjects alleging human rights violations would no longer be constrained to appeal to the Convention institutions for protection of their most fundamental rights. *See id.*

144. 504 PARL. DEB. H.L. (5th ser.) 975 (1989); *see supra* note 63 (setting forth prior notices of derogation by United Kingdom).

145. *See* European Convention, *supra* note 2, art. 15, 213 U.N.T.S. at 232-34. Article 15 provides that "[i]n the 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 . . . . It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate. . . ." *Id.* (emphasis added). For the complete text of article 15 of the European Convention, *see supra* note 46. Furthermore, it is accepted that article 15 of the European Convention "allows only for partial, controlled, and temporary limitations." Schreuer, *supra* note 45, at 116.

146. *See* Finnie, *The Prevention of Terrorism Act and The European Convention on Human Rights*, 52 MOD. L.R. 703, 709 (1989); Livingstone, *A Week Is a Long Time in Detention: Brogan and Others v. United Kingdom*, 40 N. IRELAND LEGAL Q. 288, 298-301 (1989). Several factors support a rejection of derogation as the appropriate response to *Brogan* and suggest that the permanent nature of the Northern Ireland conflict requires a permanent legislative solution. Initially, the state of affairs in Northern Ireland is not temporary and normal conditions can never be restored. Boyle, *supra*

Second, derogation provides tremendous propaganda value to the terrorist organizations because it acknowledges the success achieved by terrorist groups in undermining government control.<sup>147</sup> The United Kingdom must eventually cease to derogate from the European Convention, because its current notice of derogation is not an adequate resolution to the issues presented by the *Brogan* decision.<sup>148</sup>

*A. Judicial Reinterpretation of the Prompt Appearance Requirement of Article 5(3) of the European Convention*

The *Brogan* Court concluded that an extrajudicial detention period of four days, six hours is incompatible with the prompt appearance requirement of article 5(3) of the European Convention.<sup>149</sup> This determination appears inconsistent

note 46, at 175. Moreover, the duration of the conflict and the impact of the violence have affected the whole of Northern Ireland to an extent that renders a return to normalcy impossible in the near future. *See id.* Moreover, terrorism has been incorporated into the social fabric of Northern Ireland. *Id.*

This reality, while disruptive, has not extinguished the very existence of organized life in the United Kingdom. Finnie, *supra*, at 709. Finnie suggests that "more than assertion is required to prove that either the incidence or the nature of terrorism in the United Kingdom is such as to create an emergency threatening the life of the nation of a kind which widespread 'non-political' violence does not." *Id.* Ultimately, the United Kingdom must accept the existence of terrorist activities in Northern Ireland and introduce permanent legislation that effectively combats terrorism while protecting the human rights of its subjects. *See Boyle, supra* note 46, at 175.

147. *See* 504 PARL. DEB. H.L. (5th ser.) 967 (1989). The prospect of extended derogation was debated in the U.K. Parliament and criticized as an untenable response to the *Brogan* decision. *See id.* Reliance on derogation was cited as having the acute disadvantage of providing tremendous propaganda value to the terrorist organizations. *See id.* at 971. Moreover, derogation may be interpreted as an announcement to the terrorist organizations that their operations have succeeded in undermining the democratic order of Great Britain. *See id.* at 967.

148. The U.K. Parliament had required that the 1984 PTA be replaced with permanent legislation in 1989. 504 PARL. DEB. H.L. (5th ser.) 16 (1989); The Prevention of Terrorism (Temporary Provisions) Act, 1984, § 17(3), General Note, PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8, § 17(3), at 38. The U.K. Parliament, however, declined to make the 1989 PTA permanent because "it would be wrong, in principle, to allow such exceptional powers to remain indefinitely on the statute book." 504 PARL. DEB. H.L. (5th ser.) 16 (1989). The argument in support of permanent legislation accepts that there is no prospect of the terrorist threat subsiding and, therefore, there is no point in regarding the extrajudicial detention powers as temporary. *Id.* The more realistic approach for the U.K. Parliament is to accept the existence of the terrorist threat in Northern Ireland and enact permanent legislation that comports with *Brogan*.

149. *Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A) (1988), at 34. The Court concluded that the four detention periods at issue in *Brogan* were incompatible

with the Court's prior case law and with its analysis of the effects of terrorism on U.K. detention processes.<sup>150</sup>

Prior to *Brogan*, European Convention case law interpreting the article 5(3) promptness requirement clearly permitted a four-day extrajudicial detention period in ordinary criminal offenses and a five-day extrajudicial detention period under extraordinary circumstances.<sup>151</sup> In fact, the *Brogan* Court emphasized the importance of background factors in assessing the promptness of a judicial appearance and expressly acknowledged that terrorism necessitates prolonged detention periods.<sup>152</sup> Under such circumstances, the Court noted that a prolonged detention period might not violate the prompt appearance requirement of article 5(3) of the European Convention.<sup>153</sup> In light of the protracted conflict in Northern Ireland involving terrorist activities, the Court should find that extraordinary conditions exist, permitting a five-day extrajudicial detention period in accordance with the prompt appearance requirement of the European Convention.<sup>154</sup>

---

with the prompt appearance requirement of article 5(3) of the European Convention.  
*Id.*

150. Finnie, *supra* note 146, at 707-08. One commentator notes that [the Court's decision] also introduces an undesirable element of uncertainty by way of the importance it attaches to background factors . . . . It is suggested that the Court's views are ambiguous in that it is not clear whether its discussion of the notion of promptness is in abstract terms, thus setting overall maximum limits to it, or whether it is discussing promptness only in the context of the established features of the case in hand. On balance, the former seems the more likely interpretation.

*Id.*

151. *See supra* note 32 (discussing case law interpreting prompt appearance requirement).

152. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 33 (1988). The Court took judicial notice of the terrorist-related difficulties of investigation in Northern Ireland. *Id.* It further noted that the boundaries of prompt must "be assessed in each case according to its special features." *Id.* at 32. The Court also accepted that terrorism caused the need for prolonged detention periods, stating that "the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 § 3, keep a person suspected of terrorist offenses in custody before bringing him before a judge or other judicial officer." *Id.* at 33.

153. *See id.*

154. *See Finnie, supra* note 146, at 708-09. Finnie notes that the United Kingdom press has seized upon four days as being the acceptable limit, but nothing in the Court's judgment hints at this, and indeed the logic of the decision suggests otherwise, although it does seem to suggest that the background for the Prevention of Terrorism Act would permit an extension of the normal criminal procedure limits.

B. *The PTA Must Be Amended to Satisfy the Prompt Appearance Requirement of Article 5(3) of the European Convention*

Were the Court to determine that a five-day detention period is consistent with the European Convention requirements, the United Kingdom must still alter its detention policies to conform with the prompt appearance requirement of article 5(3) of the European Convention.<sup>155</sup> Specifically, the U.K. government should shorten its maximum detention period to five days instead of seven and introduce judicial review at this point.

At present, the 1989 version of the PTA authorizes extra-judicial detention periods of seven days, as did previous versions of the PTA.<sup>156</sup> While the *Brogan* Court expressly rejected

*Id.*; see 145-B Eur. Ct. H.R. (ser. A), at 57 (1988) (Eur. Comm'n on Hum. Rts.). The Commission Report of May 14, 1987 provides persuasive support for an interpretation of the promptness requirement of article 5(3) that permits a five-day detention in the case of extraordinary circumstances. *Id.* at 62-63. The Commission interpreted the Court's prior case law to permit, in ordinary criminal offenses, a four-day detention period under article 5(3). *Id.* at 62. The Commission also accepted a five-day detention period under article 5(3) in cases with exceptional circumstances. *Id.* The Commission, however, refused to accept detentions beyond five days under any circumstances. *Id.* at 63. Furthermore, the Court's case law clearly rejects both six and seven day detention periods under article 5(3). See *supra* note 32 (discussing prior case law interpreting prompt appearance requirement of European Convention).

155. See *supra* notes 149-54 and accompanying text (discussing judicial reinterpretation of prompt appearance requirement of article 5(3) after *Brogan* decision).

156. Compare The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14(4)-(5), reprinted in 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989) with The Prevention of Terrorism (Temporary Provisions) Act, 1984, § 12(4)-(5), PUBLIC GENERAL ACTS & MEASURES OF 1984 (pt. I), ch. 8, § 12(4)-(5), at 34-35. For the text of section 14(4)-(5) of the 1989 Act, see *supra* note 134. For the text of section 12(4)-(5) of the 1989 Act, see *supra* note 100.

The U.K. government considers the ability to detain for up to seven days integral to its defense against terrorism. See *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 30 (1988). The U.K. government argued in *Brogan* that

[i]n view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation ha[ve] confirmed.

*Id.* (citations omitted).

Furthermore, the House of Lords rejected an amendment reducing the statutory maximum detention period to four days. 504 PARL. DEB. H.L. (5th ser.) 12 (1988). One speaker noted that "we have considered and rejected one option—the possible reduction of the maximum period of detention from seven days to four . . . . Lord Colville sets out in great detail in his report the various reasons why seven days may be needed in a small number of cases." *Id.* The government maintains that the

a seven-day detention period as incompatible with the prompt appearance requirement of the European Convention, that Court and earlier cases indicate that five days might be acceptable.<sup>157</sup> Accordingly, the United Kingdom should amend the PTA to provide for a five-day maximum extrajudicial detention period.

The United Kingdom should not only shorten the detention period, it should also introduce judicial review. Section 14 of the 1989 PTA introduced certain internal checks on the detention process but did not introduce judicial review.<sup>158</sup> Furthermore, the requirement that written notice be given to detained individuals if an application is submitted to the Secretary of State for an extension of the original forty-eight hour detention period does not conform with the prompt appearance requirement of article 5(3) of the European Convention.<sup>159</sup>

The United Kingdom advances several arguments against judicial intervention. Initially, the United Kingdom argues that the production of the sensitive evidence underlying the government's application for extended detention would jeop-

seven day maximum period is needed to allow for the follow-up leads of the investigation and the completion of forensic tests. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 31 (1988). These forensic tests are extensive, time consuming, and increasingly important to successful prosecution of terrorists. *See id.* at 30-31; *see also* 504 PARL. DEB. H.L. (5th ser.) 12 (1989). The government insists that four days is not sufficient time for their completion. *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 31 (1988).

The U.K. Parliament also considered an amendment whereby the police constable would petition a justice of the peace, *ex parte*, for an extension of the detention period. 504 PARL. DEB. H.L. (5th ser.) 1367 (1989). The Parliament suspected that the *ex parte* petition would not conform with the *Brogan* dictate and was, therefore, critically viewed as a half-hearted attempt that had to be rejected. *Id.* at 968.

157. *See supra* note 32 (discussing Convention case law interpreting prompt appearance requirement of article 5(3)).

158. Dickson, *The Prevention of Terrorism (Temporary Provisions) Act 1989*, 40 N. IRELAND LEGAL Q. 250, 257 (1989); *see* Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14, sched. 3, *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1311 (4th ed. 1989); *supra* notes 133-40 and accompanying text (discussing modifications made to 1989 PTA).

159. The Prevention of Terrorism (Temporary Provisions) Act, 1989, § 14(5), *reprinted in* 12 HALSBURY'S STATUTES OF ENGLAND & WALES 1279, 1294 (4th ed. 1989). The new notification requirement in section 14(5) is apparently designed to conform with the notification requirement of article 5(2) of the European Convention. *See* European Convention, *supra* note 2, art. 5, 213 U.N.T.S. at 226-28. For the text of article 5(2) of the European Convention, *see supra* note 26.



ardize the investigation's success.<sup>160</sup> Moreover, the United Kingdom notes that judges would be brought into the political controversy in Northern Ireland, thus undermining public confidence of the impartiality of the Northern Ireland judiciary.<sup>161</sup> Additionally, the introduction of judicial review would disrupt the anti-terrorist procedures used in Northern Ireland.<sup>162</sup> Finally, the United Kingdom asserts that judges lack specialized knowledge concerning terrorist strategies and activities.<sup>163</sup> As a result of the present structure, the executive branch has developed a particular expertise in terrorist cases; the extension decisions made by the Secretary of State are, therefore, consistent and well informed.<sup>164</sup>

The statutory reduction of the maximum detention period from seven to five days would not significantly increase the likelihood that these risks will occur, because only those detentions that require a period over five days will require judicial authorization. The United Kingdom could further minimize the effects of these risks by selecting one judge to preside over

---

160. See *Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A), at 31 (1988); see also *Memorial of the Government of the United Kingdom, the Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A) (1988) (Nos. 10/1987/133/184-187), at 49-50 (1987).

161. *Verbatim Record of the Public Hearings Held on May 25, 1988 (morning), Case of Brogan and Others*, 145-B Eur. Ct. H.R. (ser. A) (1988) (Nos. 10/1987/133/184-187), at 41.

162. See 504 PARL. DEB. H.L. (5th ser.) 974 (1989). A member of the House of Lords summarized the problem:

[O]ur system of criminal justice is different from those in other European countries which are parties to the convention. There is much talk about an examining magistrate, but that is not a concept which we can import simply into our system. In those countries where there is an examining magistrate, he or she is part of the investigative system and operates in a way which is radically different from the way in which our magistrates work.

*Id.*

163. *Id.* at 968, 972 (1989).

164. *Id.* at 973 (1989); see *Brogan*, 145-B Eur. Ct. H.R. (ser. A), at 31 (1988). The Government argued that

[i]f entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach.

*Id.*

these hearings, who would then develop the needed expertise this area requires.

Although the U.K. government has consistently argued that a seven-day detention period is required in its anti-terrorism measures, it is arguable that in cases such as *Brogan* a more organized and timely arrest could alleviate the need for a full seven-day detention.<sup>165</sup> The U.K. government must devise a method of more expedient evidence gathering in order to conform with a five-day maximum detention period. In those cases where more than five days are required, the judiciary must intervene to authorize the continued detention. Because the government concedes that the full seven days is rarely utilized, it is only these rare cases that will require judicial intervention.<sup>166</sup>

### CONCLUSION

The importance of safeguarding human rights necessitates

---

165. See 145-B Eur. Ct. H.R. (ser. A), at 68 (1988) (Eur. Comm'n on Hum. Rts.). The partly dissenting opinion of Messrs. Frowein, Trechsel, Schermers, and Mrs. Thune in the *Brogan* Commission decision suggested that the United Kingdom could shorten the required detention period with more organized arrests. *Id.* This partly dissenting opinion commented that

the following elements should also be taken into account, which indicate that shorter periods [of detention] would have been sufficient in the present cases: the applicants were not arrested during any kind of disturbance or riot. The hour at which they were arrested and the fact that they were arrested at their homes suggests that the arrests were planned in advance.

*Id.*

The U.K. government countered this argument, stressing that the problem of completion of forensic tests and the follow-up of leads would still be present in a planned arrest. Verbatim Record of the Public Hearings Held on May 2, 1988 (morning), Case of Brogan and Others, 145-B Eur. Ct. H.R. (ser. A) (1988) (Nos. 10/1987/133/184-187), at 42. Typically, forensic tests take three days to perform. See 504 PARL. DEB. H.L. (5th ser.) 12 (1989). A planned arrest and expedient forensic testing, therefore, appears viable within five days. A speaker in the House of Lords commented that

the opportunity to continue interrogations is not by itself the crucial factor. The terrorist who remains silent for four days normally holds out for seven. The main value of the extra time is rather that it allows for the following-up of other leads and, in particular, for the completion of forensic tests. These can be very extensive in terrorist cases and the test itself frequently takes at least three days to do.

*Id.*

166. 504 PARL. DEB. H.L. (5th ser.) 12 (1989) (discussing Lord Colville's report and need for seven day detentions in only a small number of cases); Livingstone, *supra* note 146, at 296 n.34.

a compromise in the United Kingdom's anti-terrorism strategies. As with most compromises, no concerned party will be completely satisfied. The United Kingdom cannot permit human rights violations to continue unabated. The United Kingdom has been cited twenty-one times for violation of the European Convention and has responded with compatible reforms. It must conform again in order to preserve the integrity of its status as a defender of human rights.

*Patricia M. Roche\**

---

\* J.D. candidate, 1991, Fordham University.