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# PRE-TRIAL DETENTION OF SUSPECTS IN NORTHERN IRELAND: A VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

## I. INTRODUCTION

[T]he response to an emergency situation by a government is, essentially, a response in the nature of the legal excuse of self-defense. "It rests on the concept of necessity. On the one hand a democratic government is under the obligation to protect the integrity of the state, while on the other it is under an obligation to protect human rights. . . . [I]f the measures are not introduced at the right time the government could easily find itself in a situation where it has lost control. Equally, there exists the possibility that, if the measures they resort to are too severe or abused, the efforts to come to grips with the problem will exacerbate it. At the end of the day the concept of necessity involves a choice of the lesser evil . . . ."<sup>1</sup>

Nowhere in the world is the conflict between a government's struggle to maintain control during an emergency situation and its obligation to protect human rights more strained than in Northern Ireland.<sup>2</sup> Great Britain has waged in the past, and indeed continues to wage war against terrorism by implementing stringent policies to combat its spread.

One policy in particular calling for the detention of prisoners for up to seven days without formally charging them with a crime was recently struck down in the *Brogan Case*<sup>3</sup> by the European Court of Human Rights (the "European Court") as violating several provisions of the European

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1. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 2-3 (1984) (quoting O'Boyle, *Emergency Situations and the Protection of Human Rights: A Modern Derogation Provision For A Northern Ireland Bill of Rights*, 28 N. IR. LEGAL Q. HUM. RTS. 160 (1977)).

2. Over the last decade Amnesty International has investigated various potential abuses of human rights by the British government as a result of its efforts to combat terrorism. See, e.g., AMNESTY INT'L, 1979 ANNUAL REPORT 143-45 (1980) (denial of visitation rights and adequate exercise for prisoners); AMNESTY INT'L, 1981 ANNUAL REPORT 335-39 (1982) (lack of adequate treatment given to hunger-striking prisoners demanding political prisoner status); AMNESTY INT'L, 1982 ANNUAL REPORT 304-06 (1983) (detention of prisoners without charge for up to seven days; police interrogation practices; convictions based on questionable confessions); AMNESTY INT'L, 1986 ANNUAL REPORT 314-17 (1987) (ill-treatment of political suspects during interrogation; Diplock courts); AMNESTY INT'L, 1989 ANNUAL REPORT 241-43 (1990) (unlawful killing of unarmed IRA members in Gibraltar).

3. *Brogan & Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) (1988).

Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention").<sup>4</sup> The lengthy detention period was reminiscent of internment, a policy called into question by the Court in the early 1970s.<sup>5</sup> Rather than comply with the Court's ruling in the *Brogan Case* and dispel any fears that internment was going to be revived by the British government, the government instead decided to derogate from the relevant provisions of the European Convention in late 1988. During this same period, Great Britain introduced a "silence equals guilt" policy, whereby a detainee's silence during pre-trial questioning could be used against him as an admission of guilt.

This Note will explore internment briefly as a predecessor to the *Brogan Case*, the current Northern Ireland statutory instruments and international human rights instruments pertaining to the detention of prisoners, the *Brogan Case* and Great Britain's subsequent decision not to follow its mandate and the implications of the "silence equals guilt" policy. Specifically, this Note will explore whether the policies implemented in the aftermath of the *Brogan Case* will have the effect of depriving pre-trial detainees of fundamental human rights and of exacerbating rather than alleviating the problem of violence in Northern Ireland.

## II. A BRIEF OVERVIEW OF THE "TROUBLES" IN NORTHERN IRELAND<sup>6</sup>

Northern Ireland has for four centuries been a province filled with internal strife and conflict between rival Catholics and Protestants.<sup>7</sup> The differences between these two groups eventually erupted in 1969 into the "troubles" as they are commonly called today.<sup>8</sup> At that time, the Northern Ireland Civil Rights Association began a civil rights movement demanding equality for Northern Ireland's Catholic minority.<sup>9</sup> They were protesting for economic, political and social reform, and their non-violent marches were met with violent attacks by Protestant foes.<sup>10</sup> Terrorist groups on both sides of the divide, the Provisional Irish Republican Army

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4. *In force* Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter European Convention], reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW 320 (I. Brownlie ed. 1983).

5. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

6. For a detailed background on the history of the Northern Ireland conflict, see Myers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 9-30 (1990).

7. Hellerstein, McKay & Schlam, *Criminal Justice and Human Rights in Northern Ireland*, 43 REC. A. B. CITY N.Y. 110, 114 (1988).

8. K. KELLEY, *THE LONGEST WAR: NORTHERN IRELAND AND THE I.R.A.* 117 (1988).

9. See K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE* 6-26 (1975).

10. Hellerstein, McKay & Schlam, *supra* note 7, at 114-15.

(PIRA)<sup>11</sup> on the Catholic side and the Ulster Defense Association (UDA)<sup>12</sup> on the Protestant side, waged a battle of violence that resulted in many deaths, most of which were attributable to the PIRA.<sup>13</sup>

The police force in Northern Ireland, the Royal Ulster Constabulary (RUC),<sup>14</sup> was unable to contain the violence.<sup>15</sup> Subsequently in 1969, Great Britain decided to send British troops to Northern Ireland to deal with peacekeeping and security.<sup>16</sup> Despite the army's presence, the violence escalated. In 1971, in an attempt to curtail the violence, Great Britain instituted the policy of internment, which led to the arrest of 1,576 people, 442 of whom were still detained at the end of that year.<sup>17</sup> Internment, however, did not curb the violence, and the events of 1972 led to the greatest number of deaths in any one year.<sup>18</sup> The most widely publicized of these events was the "Bloody Sunday" protest during which thirteen Catholic demonstrators were killed by the British army.<sup>19</sup>

No year since 1972 has seen as many casualties, 468 total.<sup>20</sup> From 1972 to 1988, the number of fatalities recorded annually ranged between

11. The Provisional IRA (PIRA) is a militant faction which branched off from the Official IRA in 1969. The PIRA attracted more public support in the ghettos than the Official IRA. The Official IRA had little credibility in the violent summer of 1969. "Falls Road Catholics complained that it was unable to prevent the burning of Catholic homes. 'IRA—I Ran Away' was scrawled on some walls in W. Belfast." W.D. FLACKES & S. ELLIOTT, *NORTHERN IRELAND: A POLITICAL DIRECTORY, 1968-88*, at 227 (1989).

12. The UDA is the largest Protestant paramilitary organization in Northern Ireland, founded in 1971. *Id.* at 272.

13. See Hellerstein, McKay & Schlam, *supra* note 7, at 118-19.

14. In 1979, the size and structure of the RUC was substantially changed. Under the Police Act (Northern Ireland) of 1970, a Police Authority was established to maintain an adequate and efficient police force. Operational control of the RUC was vested in the chief constable. The size of the RUC, which prior to 1970 consisted of 3,500 men and women, was expanded to deal with new security demands. The force was increased "to 4,940 in 1970, to 6,500 in 1974, to 7,500 in 1979, to 8,000 in 1982, and to 8,250 in 1984. At the end of 1987 the total strength of the regular force was 8,236 . . ." W.D. FLACKES & S. ELLIOTT, *supra* note 11, at 386.

15. See A.C. HEPBURN, *CONFLICT OF NATIONALITY IN MODERN IRELAND 185-86* (1980).

16. *Id.*

17. See Hellerstein, McKay & Schlam, *supra* note 7, at 121.

18. *Id.*

19. *Id.*

20. Information Service on N. Ir. Conflict & Anglo-Ir. Affairs, Ir. Information Partnership, Agenda: Summary Table 1 (Aug. 11, 1989) (extracts from forthcoming edition).

a low of fifty-four in 1985 to a high of 297 in 1976.<sup>21</sup> Two of the last five years, however, have seen a sharp increase in the number of fatalities, the total reaching ninety-three in both 1987 and 1988.<sup>22</sup> And the death toll for the province since 1969 has reached 2,750 individuals.<sup>23</sup> These fatalities have occurred despite the signing of the Anglo-Irish Agreement in 1985<sup>24</sup> and have prompted Great Britain to adopt stricter policies to combat the violence, particularly in the treatment of detained suspects.

### III. INTERNMENT OF PRISONERS IN NORTHERN IRELAND IN THE 1970S

Internment, a policy intended to curb violence, did no such thing. Instead, it may have exacerbated the problem, and certainly the public outcry it inspired caused a great deal of embarrassment for Great Britain. Although Great Britain has not resurrected this questionable policy, vestiges of internment remain in the Northern Ireland (Emergency Provisions) Act.<sup>25</sup> In addition, the recent policies implemented by Great Britain, namely its decision not to abide by the European Court's mandate in the *Brogan Case* and its introduction of a "silence equals guilt" policy, could be viewed as subtle attempts by the country to avoid internment and all the baggage associated with it. It remains to be seen, however, whether these recent policies will, years from now, be viewed as more draconian than their predecessor in internment.

#### A. A Brief History of Internment

Internment has been defined as "an extra-judicial deprivation of liberty by executive action."<sup>26</sup> It involves incarcerating an individual without

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21. *Id.*

22. *Id.*

23. *Id.*

24. This treaty is also known as the Hillsborough Agreement and was signed by Great Britain and the Republic of Ireland in November 1985. Treaty on Northern Ireland, Nov. 15, 1985, United Kingdom-Republic of Ireland, 1985 Gr. Brit. T.S. No. 62 (Cmnd. 9690). This agreement provides, *inter alia*, for joint consultation on such matters as security, discrimination and injustices in Northern Ireland. *Id.* arts. 2, 5. For a more detailed discussion of the terms of this treaty, see Greenspan, *Bridging the Irish Sea: The Anglo-Irish Treaty of 1985*, 12 SYRACUSE J. INT'L L. & COM. 585 (1986).

25. For a detailed discussion of these provisions, see *infra* notes 77-86 and accompanying text.

26. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RTS. 261, 261 (1976).

charging him with an offense or allowing him access to a trial.<sup>27</sup> In this way, it is distinguishable from pre-trial detention where a detainee will eventually be charged and tried in a court of law.<sup>28</sup>

Although the policy of internment was implemented on a large scale as recently as 1971 in Northern Ireland, it was not a new policy. The statutory basis for its implementation was present in the Civil Authority (Special Powers) Act of 1922 (the "SPA"),<sup>29</sup> passed by the now defunct Northern Ireland parliament. SPA regulation 12 authorized the home affairs minister to issue an internment order against anyone who was suspected of having acted, or about to act, in a manner prejudicial to preserving peace and maintaining order in Northern Ireland.<sup>30</sup> Under the SPA, the Northern Irish government interned 500 members of the Sinn Féin party in 1922.<sup>31</sup> For the next two years, the government interned members of the IRA.<sup>32</sup> It was not used again until 1938 when 827 men were interned for an alleged conspiracy against the government.<sup>33</sup> From that time until 1956, internment was implemented sporadically.<sup>34</sup> Shortly thereafter, it was resurrected and used to combat an IRA offensive, but internment remained little used until its widespread resurgence in 1971.<sup>35</sup>

#### B. Internment Between 1971-75

In August of 1971, the then minister of home affairs, Brian Faulkner, re-introduced the policy of internment under regulation 12 of the SPA in order to counter the guerilla campaign being waged by the PIRA.<sup>36</sup> Between August 1971 and February 1972, 2,447 people were arrested.<sup>37</sup> A large number of the individuals arrested early on in this period were not members of the IRA, but civil rights activists, socialists, intellectuals and students who had become politicized by the civil rights movement.<sup>38</sup>

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27. *Id.*

28. *Id.*

29. See Spjut, *Internment and Detention Without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice*, 49 MOD. L. REV. 712-13 (1986).

30. *Id.* at 713.

31. See Lowry, *supra* note 26, at 273.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 274.

36. See Spjut, *supra* note 29, at 715-16.

37. *Id.*

38. See Lowry, *supra* note 26, at 276.

Indeed, the Diplock Commission, in examining these early arrests, conceded that a number of them were based on inadequate and inaccurate information.<sup>39</sup> A large number of prisoners were released and only 809 were still being held at the end of 1975.<sup>40</sup>

When the Emergency Protection Act was enacted in 1972 to replace the SPA, it conferred upon the secretary of state of Northern Ireland the power to introduce the Detention of Terrorists Order to control internments in place of the provisions for internment in the SPA.<sup>41</sup> The order provided the following: that a detainee would be served with an interim custody order which allowed for detention of up to twenty-eight days, and that within that time period the chief constable could refer the case to a commissioner (a United Kingdom lawyer of ten years standing) to determine if (a) the suspect had been involved in the commission or attempted commission of a terrorist act; and if (b) the suspect's detention was necessary for the protection of the public.<sup>42</sup> Terrorism was defined as the use of violence for political ends, including the use of violence designed to put the public in fear.<sup>43</sup> Significantly, the order was silent as to the weight of evidence needed to determine that the public should be protected from the suspect.<sup>44</sup> Furthermore, the commissioner had the power to extend the twenty-eight day period indefinitely if he felt that the suspect was a threat to the public.<sup>45</sup>

Between 1972 and 1975, thousands of people were arrested, and approximately 1,200 were interned as suspected terrorists.<sup>46</sup> These prisoners were released sporadically after being detained for varying periods of time before the policy was eventually phased out in 1975.<sup>47</sup>

### C. *Ireland v. United Kingdom*

Great Britain's treatment of interned prisoners in the early 1970s was formally called into question before the European Commission on Human Rights (the "European Commission") by the Republic of Ireland and

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39. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, CMND. NO. 5185, para. 32, at 15 [hereinafter DIPLOCK REPORT].

40. See Spjut, *supra* note 29, at 740.

41. See Lowry, *supra* note 26, at 292-93.

42. *Id.* at 293.

43. *Id.*

44. *Id.*

45. *Id.*

46. See Spjut, *supra* note 29, at 740.

47. See Lowry, *supra* note 26, at 274-75.

subsequently was referred by the commission to the European Court.<sup>48</sup> Ireland filed an inter-state application in accordance with article 24 of the European Convention.<sup>49</sup> Ireland submitted that internment constituted a violation of articles 1, 3, 5, 6 and 14 of the convention.<sup>50</sup> Specifically, Ireland alleged that the British government acquiesced in the use of brutality and torture during the interrogation of detainees.<sup>51</sup> The detainees were apparently subjected to five "disorientation" or "sensory deprivation" techniques consisting of:

- (1) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
- (2) hooding: putting a black bag over the detainee's head and, at least initially, keeping it there all the time except during interrogation;
- (3) subjection to noise: holding the detainees in a room

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48. Although not as publicized as *Ireland v. United Kingdom*, several prisoners brought individual suits against the United Kingdom in English courts regarding internment. These cases point out the various problems detainees encountered and the types of damages they were able to recover on the domestic front. In *Moore v. Shillington*, the plaintiff internee succeeded in a civil action for damages for assault during the period of his detention and wrongful arrest. *Moore v. Shillington*; *Moore v. Ministry of Home Aff. for N. Ir.*, [1972] N. Ir. 190 (Q.B.D.). The trial judge awarded the maximum damages and was particularly critical of the oppressive circumstances in which internees were held. *Id.* In *In re McElduff*, the plaintiff had been told upon his arrest that he was being apprehended under the SPA without any explanation of the charges against him. [1972] N. Ir. 1 (Q.B.D.). He sued for false imprisonment and was awarded damages. *Id.* In *In re Mackey*, the plaintiff claimed that he was not allowed legal representation before the Advisory Committee to the Minister of Home Affairs, in accordance with regulation 12 of the SPA. [1971] N.I.J.B. 1 (Q.B.D.). The court held that a detainee has the prior right to relevant facts in order to be able to rebut the allegation of suspicion. *Id.*

49. Rauch, *The Compatibility of the Detention of Terrorists Order (Northern Ireland) with the European Convention for the Protection of Human Rights*, 6 N.Y.U. J. INT'L L. & POL. 1 (1973).

50. *Id.*

51. Quigley, *Humanitarian Intervention: A Possibility for Northern Ireland*, 12 DEN. J. INT'L L. & POL'Y 295, 301 (1983).



where there was a continuous loud and hissing tone, while awaiting interrogation;

- (4) deprivation of sleep: depriving the detainees of sleep pending their interrogation; and
- (5) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the prison and pending interrogation.<sup>52</sup>

In the proceedings in *Ireland v. United Kingdom* before the European Court,<sup>53</sup> Great Britain admitted that these techniques had been authorized at a high level, although no specific names were given.<sup>54</sup> In March 1972, the British prime minister announced a discontinuance of the five techniques, and damages were paid to the victims as a form of settlement.<sup>55</sup> None of them subsequently brought a suit in a British court of law.<sup>56</sup>

The European Court held that although the techniques amounted to inhuman and degrading treatment under article 3, they did not rise to the level of intensity and cruelty implicit in the word "torture."<sup>57</sup> In addition, the Court ruled that it had no power to institute criminal or disciplinary proceedings against the members of the security forces responsible for the breaches of article 3 or others who might have condoned the use of the five techniques.<sup>58</sup>

Presumably, Great Britain will never again allow such techniques to be used to elicit confessions from detainees. The longer a detainee is held, however, the greater the risk of pressure to obtain information exists.

#### IV. THE CURRENT STATUTORY FRAMEWORK FOR DETAINING SUSPECTS IN NORTHERN IRELAND

Great Britain is currently trying to combat the ongoing violence in Northern Ireland with stringent policies concerning the detention of

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52. *Id.* at n.35.

53. 25 Eur. Ct. H.R. (ser. A) (1978).

54. Lysaght, *The Scope of Protocol II and its Relation To Common Article 3 of the Geneva Convention of 1949 and Other Human Rights Instruments*, 33 AM. U.L. REV. 9, 17 (1983).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 18.

persons suspected of having engaged in terrorist activities in Northern Ireland. Two major statutory instruments provide Great Britain with the power to detain suspects before formal charges are brought against them: (1) the Northern Ireland (Emergency Provisions) Act of 1987 (the "EPA")<sup>59</sup>; and (2) the Prevention of Terrorism (Temporary Provisions) Act of 1989<sup>60</sup> (the "PTA").

Great Britain does not have a domestic "Bill of Rights" per se, designed to protect the fundamental rights of its citizens. Great Britain, however, is a signatory to several international human rights agreements which provide a check on the provisions of its domestic statutes and thereby protect the liberty interests of its citizens. These international agreements include the European Convention,<sup>61</sup> as well as the Universal Declaration of Human Rights (the "Universal Declaration")<sup>62</sup> and the International Covenant on Civil and Political Rights (the "International Covenant").<sup>63</sup>

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59. Northern Ireland (Emergency Provisions) Act, 1987 [hereinafter EPA of 1987]. This Act amended the Northern Ireland (Emergency Provisions) Act of 1978. The 1978 Act consolidated parts of the Northern Ireland (Emergency Provisions) Act of 1973 [hereinafter EPA of 1973] and the Northern Ireland (Emergency Provisions) (Amendment) Act of 1975 and the whole of the Northern Ireland (Young Persons) Act of 1974 and the Northern Ireland (Emergency Provisions) (Amendment) Act of 1977. The relevant provisions dealing with detention of suspects originated in schedule 1 of the EPA of 1973 and remain in effect today.

60. Prevention of Terrorism (Temporary Provisions) Act, 1989 [hereinafter PTA of 1989]. This version of the PTA was brought forward in 1988. At that time, the British government determined that the legislation should no longer be limited to five years, but instead, should achieve greater permanence. The government, however, rejected the idea of dropping annual renewal of the PTA by Parliament. W.D. FLACKES & S. ELLIOTT, *supra* note 10, at 97. The PTA of 1989 amended the Prevention of Terrorism (Temporary Provisions) Act of 1984 [hereinafter PTA of 1984]. The relevant provisions dealing with detention of suspects, found in section 12 of the PTA of 1984, were not affected by the 1989 amendment and remain in force today.

61. European Convention, *supra* note 4.

62. Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration], reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 4, at 250. The Universal Declaration was adopted by the United Nations General Assembly in 1948. It is not an international treaty and does not create binding obligations on the countries that adhere to it. Z. NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION 36 (1978).

63. *In force* Mar. 23, 1976, 999 U.N.T.S. 3, reprinted in 6 I.L.M. 368 (1967) and in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 4, at 270 [hereinafter International Covenant]. The International Covenant was adopted by the General Assembly of the United Nations in 1966 and came into force in 1976. Z. NEDJATI, *supra* note 62, at 38. It allows for a state party to make an inter-state application to the United Nations Human Rights Committee alleging that another party is not fulfilling its obligations under the

The relevant provisions of Great Britain's domestic statutes pertaining to the pre-trial detention of suspects and the corresponding provisions of the foregoing international human rights agreements bearing on this issue are set forth below.

### A. Northern Ireland Statutory Instruments

Both the PTA and the EPA contain independent provisions for the detention of persons suspected of having engaged in terrorist activity: "detention upon arrest" under the PTA and "extra-judicial detention" under the EPA.<sup>64</sup> The PTA policy of "detention upon arrest" arises out of the police powers to arrest given to the RUC.<sup>65</sup> In contrast, the EPA policy of "extra-judicial detention" begins with the issuance of an interim custody order by the secretary of state of Northern Ireland.<sup>66</sup> After such an order has been issued, the constable of the RUC becomes involved in the adjudication process for a detainee.<sup>67</sup> The following discussion sets forth the principles embodied in these policies.

#### 1. Detention Upon Arrest Under the PTA

Section 12(1)(b) of the PTA provides that a constable may arrest *without warrant*, "a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism . . ."<sup>68</sup> Terrorism is defined in section 14(1) to be "the use of violence for political ends, and includes any use of violence for the purpose of putting the public . . . in fear."<sup>69</sup> Section 12(4) of the PTA provides, "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."<sup>70</sup> The maximum extension permissible is five days from the end of the initial forty-eight hours, seven days total.<sup>71</sup>

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covenant. *Id.* at 39. The covenant also allows for the submission of individual applications to the committee provided that the same matter is not, or never has been, under consideration by the European Commission. *Id.*

64. See PTA of 1984, *supra* note 60, § 12.

65. See Hellerstein, McKay & Schlam, *supra* note 7, at 132.

66. EPA of 1973, *supra* note 59, sched. 1.

67. *Id.*

68. PTA of 1984, *supra* note 60, § 12(b).

69. *Id.* § 14(1).

70. *Id.* § 12(4) (emphasis added).

71. *Id.* § 12(1)(a).

The PTA applies to the entire United Kingdom, however, section 12 is used to detain suspected terrorists in Northern Ireland more frequently than other countries in the United Kingdom.<sup>72</sup> In Northern Ireland in 1986, 1,309 persons were detained under the section, 483 extensions<sup>73</sup> were granted and 358 persons were eventually charged with offenses.<sup>74</sup> In the first six months of 1987, 659 persons were detained, 147 extensions were granted and 155 persons were eventually charged.<sup>75</sup>

In contrast, in Great Britain in 1986, 202 persons were detained under section 12, fifty-seven extensions were granted and thirty-six persons were eventually charged with offenses. In the first six months of 1987, 127 persons were detained, thirty-one extensions were granted and thirteen persons were eventually charged.<sup>76</sup>

## 2. Extra-judicial Detention Under the EPA

The provision for extra-judicial detention has existed in schedule 1 of the EPA since 1973.<sup>77</sup> It has not been implemented since 1975 when internment was disbanded.<sup>78</sup> Lord Diplock attempted to "distinguish" this form of detention from internment in the following way:

Deprivation of liberty [is] a result of an extra-judicial process we call "detention," following the nomenclature of The Detention of Terrorists (Northern Ireland) Order, 1972. It does not mean imprisonment at the arbitrary Diktat of the Executive Government, which to many people is a common connotation of the term "internment." We use it to describe depriving a man of his liberty as a result of an investigation of the facts which inculpate the detainee by an impartial person or tribunal . . . .<sup>79</sup>

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72. REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1984, 1987, CMND. NO. 264, at 14 [hereinafter COLVILLE REPORT].

73. The reasons for granting extensions include: the checking of fingerprints; forensic tests; checking the detainee's replies against intelligence; new lines of inquiry; interrogation to identify accomplices; correlating information obtained from one or more than one other detainee in the same case; finding and consulting another witness; identification parades; checking an alibi; translating documents; obtaining an interpreter and then carrying on the necessary interviews with his assistance; communications with foreign police forces, sometimes across time-zone and language difficulties; and evaluation of documents once translated and further investigated. *Id.* at 13-14.

74. *Id.*

75. *Id.*

76. *Id.* at 68.

77. See EPA of 1973, *supra* note 59, sched. 1.

78. See Lowry, *supra* note 26, at 274-75.

79. DIPLOCK REPORT, *supra* note 39, para. 28, at 14.

Lord Diplock's attempted distinction could be interpreted in the following manner: if extra-judicial detention were implemented today, an inquiry would be made into the allegations against a suspected terrorist within twenty-eight days after he is brought into custody, whereas when internment was implemented in the 1970s, hundreds of people were arrested and remained in custody without prompt inquiries (if any were made at all) as to the nature of the allegations against them. In addition, a number of the internees in the 1970s were subjected to inhumane treatment and even torture.

In reality, extra-judicial detention is no different from internment because no time period is specified for a prisoner's release. Under schedule I of the EPA, the secretary of state can make an interim custody order for the "temporary" detention of a person.<sup>80</sup> Within twenty-eight days, there must be a reference by the chief constable of the RUC to a commissioner for adjudication in private to determine whether the suspect had been engaged in acts of terrorism and whether his detention was necessary for the protection of the public.<sup>81</sup> If these requirements are met, the suspect may be detained (for an unlimited period of time);<sup>82</sup> otherwise, the suspect must be released.<sup>83</sup>

Although a detention order has not been issued since 1975, some proponents argue that extra-judicial detention should be retained in the EPA in case matters get worse in Northern Ireland, justifying its use.<sup>84</sup> Other commentators have termed extra-judicial detention to be a source of embarrassment for Great Britain<sup>85</sup> and call for it to be stricken from the EPA altogether.<sup>86</sup>

### B. *International Human Rights Agreements*

Unlike the Universal Declaration, the International Covenant and the European Convention create legally binding obligations on member states.<sup>87</sup> Although many of the provisions of the International Covenant and the European Convention are similar, this summary will focus on the

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80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See* Hellerstein, McKay & Schlam, *supra* note 7, at 134.

85. *Id.*

86. *Id.* at 194; *see* REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1975, CMND. 5847, at 55 [hereinafter GARDINER REPORT].

87. Z. NEDIJATI, *supra* note 62, at 1, 38.

European Convention, the instrument called upon for redress of human rights violations in the *Brogan Case*.<sup>88</sup>

The European Convention was drawn up by the Council of Europe in 1950 and came into force in 1953.<sup>89</sup> Some of the rights guaranteed by the convention which affect prisoners include, *inter alia*, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security of person, the right to a fair trial and the right to effective remedy before a national authority.<sup>90</sup>

The convention establishes three bodies that are responsible for protecting the rights guaranteed by it: the European Commission, the European Court and the Committee of Ministers of the Council of Europe.<sup>91</sup> The European Commission is vested with the authority to receive inter-state as well as individual applications alleging violations of the convention.<sup>92</sup> It has twenty members, one from each convention country, and it holds five sessions per year.<sup>93</sup>

The commission renders an opinion whether the facts alleged in a given application constitute a breach of the convention.<sup>94</sup> Within three months time, the commission may refer the case to the Committee of Ministers for a decision.<sup>95</sup> If the committee decides by a two-thirds majority that there has been a violation of the convention, it must prescribe a period during which the state in question must take remedial measures.<sup>96</sup>

The commission may also refer the case to the European Court for a decision.<sup>97</sup> The Court is composed of nineteen judges representing the member states of the Council of Europe.<sup>98</sup> The Court, by a majority, renders final judgments which are binding on the states concerned.<sup>99</sup> The execution of these judgments is supervised by the Committee of Ministers.<sup>100</sup> Hence, a complete framework is set up by the convention for

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88. See *infra* notes 124-58 and accompanying text.

89. Z. NEDJATI, *supra* note 62, at 1.

90. *Id.*

91. *Id.* at 6.

92. *Id.* at 2.

93. *Id.* at 6.

94. *Id.* at 8.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 9.

100. *Id.*

the redress of human rights violations.

One such human rights violation which was brought to the European Commission's and the European Court's attention was Great Britain's policy of detaining suspects for up to seven days, under section 12 of the PTA. As the following discussion of this case elucidates, the European Court did not feel that a government's effort, however legitimate to combat the threat of terrorism in itself, justifies abridging a detainee's fundamental rights, as guaranteed in the European Convention.

## V. THE *BROGAN CASE*

The *Brogan Case*<sup>101</sup> originated with four separate applications for relief by the European Commission filed in 1984 and 1985.<sup>102</sup> The commission subsequently joined the claims, and after hearing the case, it determined in May 1987<sup>103</sup> that there had been breaches of article 5(3) and article 5(5) regarding the treatment of two of the four prisoners; no breaches of article 5(4), article 5(5) and article 13 occurred.<sup>104</sup> In July 1987, the commission brought the case before the European Court, which subsequently rendered its opinion in November 1988.<sup>105</sup>

### A. *Factual Background*

All four prisoners (Dermot Coyle, Terence Brogan, William McFadden and Michael Tracey) were arrested in 1984 on different occasions in their homes.<sup>106</sup> In each case, the prisoners "were informed by the arresting officer that they were being arrested under section 12 of the PTA and that there were reasonable grounds for suspecting them to have been involved in the commission, preparation, or instigation of acts of terrorism connected with the affairs of Northern Ireland."<sup>107</sup> In each case, the decision to extend the period of detention for a further five days was made by the secretary of state for Northern Ireland in accordance with section 12 of the PTA.<sup>108</sup>

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101. *Brogan & Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) (1988).

102. *Id.* at 26.

103. The full text of the European Commission's decision is printed as an annex to the European Court's decision. *See id.* at 58-70.

104. *Id.* at 26.

105. *Id.* at 17.

106. *Id.* at 19-20.

107. *Id.* at 20-21.

108. *Id.* at 21.

Terence Brogan was arrested on September 17, 1984 under section 12 of the PTA.<sup>109</sup> He was questioned about his suspected involvement in a police attack, as a result of which a police sergeant was killed and another officer was seriously injured.<sup>110</sup> Brogan was also interrogated about his suspected involvement in the PIRA.<sup>111</sup> Brogan's detention lasted five days and eleven hours, during which time he remained silent and refused to answer any questions addressed to him.<sup>112</sup>

Dermot Coyle was arrested on October 1, 1984 under section 12 of the PTA.<sup>113</sup> Coyle was questioned about his suspected involvement in the planting of a land-mine aimed at killing members of the security forces and a blast incendiary bomb attack.<sup>114</sup> Coyle, too, was interrogated about his suspected membership in the PIRA; he too remained silent.<sup>115</sup> In all, Coyle's detention lasted six days and sixteen and a half hours.<sup>116</sup>

William McFadden was arrested on October 1, 1984 under section 12 of the PTA.<sup>117</sup> He was questioned about his suspected involvement in the murders of two soldiers and his suspected membership in the PIRA.<sup>118</sup> With the exception of answering a few general questions, McFadden remained silent.<sup>119</sup> He was detained for four days and six hours.<sup>120</sup>

Michael Tracey was arrested on October 1, 1984 under section 12 of the PTA. He was questioned about two armed robberies of post offices and a murder conspiracy.<sup>121</sup> Like McFadden, Tracey only answered questions of a general nature.<sup>122</sup> Tracey's detention lasted four days and eleven hours.<sup>123</sup>

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109. *Id.* at 19.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 20.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*



*B. The Alleged Violations of the European Convention*

Brogan, Coyle, Tracey and McFadden (collectively referred to as "the applicants") alleged that their arrests were contrary to various provisions of the European Convention, the most significant substantively being articles 5(1)(c), 5(3), 5(4) and 5(5). Each of these allegations, the British government's response and the European Court's ruling are discussed seriatim.

1. Alleged Violations of Article 5(1)(c)

Article 5(1)(c) of the European Convention provides:

Everyone has the right to liberty and security of persons. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure 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 . . . .<sup>124</sup>

The applicants did not dispute that each arrest and detention was "lawful" under Northern Ireland law.<sup>125</sup> Instead, they argued that their arrest and detention was grounded "not of having committed a specific offence, but rather of involvement in unspecified acts of terrorism . . . which did not constitute a breach of the criminal law in Northern Ireland and could not be regarded as an 'offence' under Article 5 § 1(c)."<sup>126</sup>

The British government argued that the applicants were not "suspected of involvement in terrorism in general, but of membership of a proscribed organisation and involvement in specific acts of terrorism, each of which constituted an offence under the law of Northern Ireland and each of which was expressly put to the applicants during the course of their interviews . . . ."<sup>127</sup>

The European Court pointed out that section 14 of the PTA defines terrorism as "the use of violence for the purpose of putting the public . . . in fear."<sup>128</sup> The Court added that this same definition appeared in

124. European Convention, *supra* note 4, art. 5, para. 1(c) (emphasis added).

125. *Brogan*, 145-B Eur. Ct. H.R. at 28.

126. *Id.*

127. *Id.* at 28-29.

128. *Id.* at 29 (quoting section 14 of the PTA, *supra* note 60).

the Detention of Terrorists (Northern Ireland) Order of 1972 and the EPA of 1973, which the Court previously held in *Ireland v. United Kingdom* to be "well in keeping with the idea of an offence."<sup>129</sup> Thus, the Court held, by a vote of sixteen to three,<sup>130</sup> that no violation occurred because the arrests and subsequent detentions of the applicants were based on a reasonable suspicion of commission of an offence in accordance with article 5(1)(c).<sup>131</sup>

The applicants also alleged a separate violation of another phrase in article 5(1)(c). Specifically, they argued that they were not arrested and detained *for the purpose of bringing them before a competent legal authority* in accordance with article 5(1)(c).<sup>132</sup>

The British government rebutted this contention by stating that the necessary intent was present and that if sufficient evidence had been obtained during the course of the police investigation following their arrest, all four suspects would have been charged with a crime and eventually brought to trial.<sup>133</sup> The applicants rejoined by referring to the fact that they were never charged or brought before a court during their detention.

The European Court held, by a vote of sixteen to three,<sup>134</sup> that no violation of article 5(1)(c) occurred because the fact that the prisoners "were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 § 1(c)."<sup>135</sup> Under the circumstances of the case, the Court found no reason to believe that the police investigations were not carried out in good faith or that the detention of the prisoners was not done in furtherance of the investigations.<sup>136</sup>

## 2. Alleged Violation of Article 5(3)

Article 5(3) of the European Convention provides:

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 po-

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129. *Id.* (quoting *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. 75 (ser. A) (1978)).

130. *Id.* at 37.

131. *Id.* at 29.

132. *Id.* (emphasis added).

133. *Id.*

134. *Id.* at 37.

135. *Id.* at 29.

136. *Id.* at 30.

wer and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guaranties to appear for trial.<sup>137</sup>

The applicants argued that a person arrested under the ordinary law of Northern Ireland must be brought before a Magistrate's Court within forty-eight hours, and under the ordinary law of England and Wales, the maximum detention period permissible without a formal charge is four days.<sup>138</sup>

The British government attempted to refute this argument by stressing that the seven-day maximum period of statutory detention under the PTA was an indispensable part of the government's efforts to combat terrorism and the resulting problems it creates in obtaining evidence sufficient to bring charges against suspects.<sup>139</sup>

The European Court identified the issue to be decided as whether each suspect's release could be considered "prompt" within the meaning of article 5(3).<sup>140</sup> The Court pointed out that this particular provision of the European Convention

enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty . . . . Judicial control of interferences by the executive with the individual's right to liberty is an essential of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society . . . which is expressly referred to in the Preamble to the Convention" . . . and "from which the whole Convention draws its inspiration."<sup>141</sup>

Given the importance of this provision, the Court determined that the notion of "promptness" should be interpreted in a very limited way.<sup>142</sup> The Court held, by twelve votes to seven,<sup>143</sup> that

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137. European Convention, *supra* note 4, art. 5, para. 3.

138. *Brogan*, 145-B Eur. Ct. H.R. at 30.

139. *Id.*

140. *Id.* at 33.

141. *Id.* at 32 (citations omitted).

142. *Id.* at 33.

143. *Id.* at 37.

even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr. McFadden . . . falls outside the strict constraints as to time permitted by the first part of Article 5 § 3 . . . The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3.<sup>144</sup>

### 3. Alleged Violation of Article 5(4)

Article 5(4) of the European Convention provides:

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.<sup>145</sup>

The applicants argued that because article 5 had not been incorporated into United Kingdom law, an effective review of the lawfulness of their detention as contemplated under article 5(4) was precluded in the United Kingdom.<sup>146</sup>

The British government took the position that because the remedy of habeas corpus' was available to the applicants under Northern Ireland law, although they did not avail themselves of it, the requirements of article 5(4) were met.<sup>147</sup>

The European Court held unanimously<sup>148</sup> that in accordance with article 5(4)

the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the [PTA] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

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144. *Id.* at 34.

145. European Convention, *supra* note 4, art. 5, para. 4.

146. *Brogan*, 145-B Eur. Ct. H.R. at 34.

147. *Id.*

148. *Id.* at 37.

As is shown by the relevant case-law . . . these conditions are met in the practice of Northern Ireland courts in relation to the remedy of habeas corpus.<sup>149</sup>

#### 4. Alleged Violation of Article 5(5)

Article 5(5) of the European Convention provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of [article 5] shall have an enforceable right to compensation."<sup>150</sup>

The applicants argued that a claim for compensation for unlawful deprivation of liberty may be lodged in the United Kingdom for a breach of the domestic law, such as false imprisonment;<sup>151</sup> however, because article 5 of the European Convention is not incorporated into the domestic law, no claim for compensation lies for a breach of article 5 which does not also constitute a breach of United Kingdom law.<sup>152</sup>

The British government responded that article 5(5) is aimed at ensuring that the victim of an "unlawful" arrest or detention is given just compensation; the applicants' detention was "lawful" in accordance with various paragraphs of article 5, therefore, no enforceable right to compensation exists.<sup>153</sup>

The European Court held, by thirteen votes to six,<sup>154</sup> that such a restrictive interpretation is incompatible with the terms of article 5(5) which applies to arrest or detention "in contravention of the provisions" of article 5.<sup>155</sup>

\* \* \*

The European Court's decision in the *Brogan Case* is significant in several respects. The Court adopted a narrower view of the concept of "prompt release" of a suspect under article 5(3) of the European Convention than the European Commission has taken in its opinion. The commission held that this standard was violated regarding only two of the four suspects, Brogan and Coyle, who were detained for five days and eleven hours and six days and sixteen and a half hours, respectively.<sup>156</sup>

149. *Id.* at 34-35.

150. European Convention, *supra* note 4, art. 5, para. 5.

151. *Brogan*, 145-B Eur. Ct. H.R. at 35.

152. *Id.*

153. *Id.*

154. *Id.* at 37.

155. *Id.* at 35.

156. *Id.* at 26.

The Court, on the other hand, held that all four prisoners were not released promptly, including McFadden and Tracey, who were detained for four days and six hours and four days and eleven hours, respectively.<sup>157</sup> In so doing, the Court tipped the scale of justice in favor of protecting individual rights when it held that the "fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3."<sup>158</sup>

However carefully the European Court endeavored to protect the fundamental rights of detained suspects, its efforts were soon thwarted by the policies implemented by Great Britain in late 1988 and thereafter.

## VI. THE AFTERMATH OF THE *BROGAN CASE*

### A. *Great Britain's Derogation from the European Convention*

Article 15(1) of the European Convention provides for derogation "in time of war or other public emergency threatening the life of the nation . . . 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."<sup>159</sup> Article 15(3) also requires that the party derogating keep the secretary-general of the Council of Europe fully informed of the measures it has taken and the reasons therefor, and when those measures have ceased to operate so as to place the convention in full force again.<sup>160</sup>

In *Ireland v. The United Kingdom*, the European Court stated:

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

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157. *Id.* at 33.

158. *Id.* at 34.

159. European Convention, *supra* note 4, art. 15, para. 1.

160. *Id.* art. 15, para. 3.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the State's engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies of the crisis. . . . The domestic margin of appreciation is thus accompanied by a European supervision."<sup>161</sup>

Great Britain was obliged to comply with the European Court's ruling in the *Brogan Case* within six months, in accordance with its obligations as a signatory to the European Convention.<sup>162</sup> Great Britain had violated the convention in twenty-one other cases and always complied with the Court's ruling.<sup>163</sup> Shortly after the Court issued its decision in *Brogan*, however, the British Parliament debated whether to comply with the Court's ruling and amend the PTA accordingly, or alternatively to obtain an article 15 derogation from the relevant portions of the European Convention in question.<sup>164</sup> On December 24, 1988, the British government publicly announced its decision not to comply with the Court's ruling.<sup>165</sup> The home secretary, Douglas Hurd, informed Parliament that Great Britain would derogate from the applicable sections of the convention in question until it decided what its final policy would be.<sup>166</sup> Hurd stated, "It remains our wish to find a judicial route through this problem if this can be achieved."<sup>167</sup> He added that because of the threat of terrorism in Northern Ireland, the police needed to detain suspects for up to seven days in some instances.<sup>168</sup>

One year later, the position of Great Britain did not change. In December 1989, the British government decided to affirm its 1988 decision to derogate from the European Convention.<sup>169</sup> Mr. Waddington, a member of Parliament, stated of this decision:

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161. 25 Eur. Ct. H.R. 78-79 (ser. A) (1978) (citations omitted).

162. *Id.*; see also *supra* notes 89-100.

163. Whitney, *British Detention Law is Ruled a Breach of Rights*, N.Y. Times, Nov. 30, 1988, at A19, col. 1.

164. 143 PARL. DEB., H.C. (6th ser.) 207, 232-236 (1988).

165. See Whitney, *Britain, Citing Terrorism, Keeps Detention*, N.Y. Times, Dec. 25, 1988, at A4, col. 1.

166. *Id.*

167. *Id.*

168. *Id.*

169. See 160 PARL. DEB., H.C. (6th ser.) 209-10 (1989) (statement of Mr. Waddington).

Since the [C]ourt delivered its judgment on 29 November 1988 the Government have been considering whether it would be possible to introduce a judicial element in the procedure for authorising extensions of detention in a way which would be compatible with the provisions of the [C]onvention and which would not weaken its effectiveness. The Government believe that in the context of the continued threat to the United Kingdom, on a scale unknown elsewhere in Europe, posed by terrorism connected with the affairs of Northern Ireland the power to hold terrorist suspects for a period of up to seven [days] is essential.<sup>170</sup>

The Council of Europe's decision to grant Great Britain's request for a derogation is incongruous given the specific holding by the European Court in the *Brogan Case*. The Court stressed that the threat of terrorism on the whole community by itself is not enough to support an abridgement of fundamental human rights.<sup>171</sup> Yet, the threat of terrorism alone seems to be the reason articulated by Mr. Waddington for Great Britain's need for a derogation. This threat was well known to the European Court when it rendered its decision in November 1988, yet one month later this same threat was deemed sufficient by the Council of Europe to justify Great Britain's derogation. The end result is that the *Brogan Case*, for all its impact on the fundamental rights of detained suspects in Northern Ireland, will remain an unenforced judgment, suspended temporarily in limbo, or perhaps even permanently.

### B. The "Silence Equals Guilt" Policy

In his report on the operation of the PTA, Lord Colville stated that proper checks and procedures designed to protect the detainees and police alike from abuse "solve nothing if the detainee is trained to say nothing."<sup>172</sup> He added that

[t]errorist training manuals now contain detailed techniques whereby a person under interrogation may devote his mind to something which enables him to resist the temptation to answer even the most innocent sounding question . . . . It is not a demonstrable argument to support seven days [detention] as op-

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170. *Id.*

171. See *supra* note 158 and accompanying text.

172. COLVILLE REPORT, *supra* note 72, at 13.



posed to five days. There now seems to be no particular period which amounts to the threshold of resistance to questioning.<sup>173</sup>

On October 20, 1988, the British government announced its desire to introduce a "silence equals guilt" policy for Northern Ireland,<sup>174</sup> whereby a detained suspect's silence during an interrogation or a defendant's silence during a trial could be used against him as an admission of guilt.<sup>175</sup> It was touted as likely to pass a vote in Parliament due to Margaret Thatcher's support by the majority.<sup>176</sup> Shortly after its announcement, the proposal sparked a great deal of criticism. In fact, an editorial in the *New York Times* said the following of Margaret Thatcher:

When she is right, nobody is more fiercely impressive than Margaret Thatcher. And when Britain's Prime Minister is wrong, her zeal compounds the damage and embarrassment. Now she is spectacularly wrong with . . . a proposal allowing a criminal defendant's silence to weigh as evidence against him. . . . Britain's good name as mother of parliaments and seedbed of political freedom is an asset more precious than the crown jewels. How bizarre for it to be tarnished by a Conservative Government.<sup>177</sup>

The "silence equals guilt" policy, despite its criticism from the world at large, did pass a vote by Parliament and became the Criminal Evidence (Northern Ireland) Order of 1988 (the "1988 Order").<sup>178</sup> With regard to the detention of suspects, before formal charges are filed, article 3 of the 1988 Order provides:

- (1) Where in any proceedings against a person for an offence, evidence is given that the accused—
  - (a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings;

173. *Id.*

174. See Whitney, *Britain Moves to Limit Right of Silence For Ulster Terrorist Suspects*, *N.Y. Times*, Oct. 21, 1988, at A20, col. 3.

175. *Id.*; see *Britain Seeks To Deny 'Right Of Silence' in N.I.*, *Ir. Echo* (New York City), Oct. 29, 1988, at 1, col. 1.

176. *Britain Seeks To Deny 'Right Of Silence' in N.I.*, *supra* note 175, at 11.

177. *Mrs. Thatcher's Muzzle*, *N.Y. Times*, Nov. 1, 1988, at A30, col. 1 (editorial).

178. Criminal Evidence (N. Ir.) Order, 1988.

...  
 [such fact] being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph 2 applies.

(2) Where this paragraph applies—

(a) the court in determining whether to commit the accused for trial or whether there is a case to answer;

may—

(i) draw such inferences from the failure as appear proper;

(ii) on the basis of such inferences treat the failure as, or as capable of amounting to corroboration of any evidence given against the accused in relation to which the failure is material.<sup>179</sup>

The “silence equals guilt” order is extremely problematic and, if challenged in an international court, may prove to be a more egregious violation of fundamental rights than the prolonged detention period called into question in the *Brogan Case*. Three international agreements, the Universal Declaration, the European Convention and the International Covenant, contain clauses which provide for the presumption of innocence of the accused until proven guilty in a court of law.<sup>180</sup> Furthermore, the International Covenant specifically provides that the accused shall “[n]ot be compelled to testify against himself or to confess guilt.”<sup>181</sup>

Until it is called into question under these agreements and eventually struck down, the “silence equals guilt” policy could ostensibly solve the problem that Lord Colville saw with the current debate over the proper

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179. *Id.* art. 3.

180. *See* Universal Declaration, *supra* note 62, art. 11, para. 1 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all the guarantees necessary for his defence.”); European Convention, *supra* note 4, art. 6, para. 2 (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”); International Covenant, *supra* note 63, art. 14, para. 2 (“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”).

181. International Covenant, *supra* note 63, art. 14, para. 3(g).

length of time to detain a suspect under the PTA before formally charging him with a crime or releasing him. When a confession is not forthcoming, a prisoner's silence will automatically serve as an inference of guilt; the pre-trial detention period ceases at the moment of silence. Given the arbitrary nature of the 1988 Order, a constable could ostensibly rely on silence as sufficient evidence to charge a suspect with a crime.

Furthermore, the 1988 Order greatly reduces the chances of Great Britain calling upon the policy of internment or "extra-judicial detention" under the EPA to combat the threat of terrorism. Extended periods of detention and interrogation where inhuman treatment could take place would not occur. As soon as a prisoner remains silent, his new status as a charged prisoner could ostensibly begin.

## VII. CONCLUSION

Great Britain has, in the past, responded to the volatile situation in Northern Ireland through the added use of force and restrictive policies in an effort to combat terrorism. International tribunals in dealing with these policies have attempted to strike a balance between the rights of the individual and a community under siege and have sometimes found that Great Britain's policies were too severe. Despite these policies, Great Britain's effort to squelch terrorism did not succeed.

The current wave of terrorist violence has prompted Great Britain to respond exactly as it did in the past. It is introducing new and even more questionable policies aimed at combating terrorism. It remains to be seen, however, how the scales of justice will tip regarding these policies. In all likelihood, the European Court will not allow Great Britain to remain unchecked in abridging fundamental human rights during the current "emergency" situation of increased violence.

The greater question remains whether these policies will backfire. Great Britain is enacting "temporary" policies for Northern Ireland to deal with the "emergency" situation. Most people lose sight of the fact that the "emergency" has lasted for over twenty years. The "temporary" policies Great Britain has continued to enact, some of which violate fundamental human rights, have really become the permanent law of the land in Northern Ireland. As a result, this permanent law is being matched by a permanent and growing resistance from terrorist organizations. Consequently, all eyes will be fixed on Great Britain to see if the British government's latest endeavors to combat terrorism will have the effect of exacerbating, rather than alleviating the violence in Northern Ireland. After a twenty-one year pattern with little success, perhaps the time has come to find new ways of curing Northern Ireland's "troubles."

*Kerry S. Sullivan*