A WEEK IS A LONG TIME IN DETENTION: *BROGAN AND OTHERS* v *UNITED KINGDOM*

The European Convention on Human Rights and its permanent institutions have been invoked by litigants from Northern Ireland on several occasions over the past twenty years. Unlike most of these applications that in *Brogan and Others* v *United Kingdom*[1] resulted in a finding that the United Kingdom was in violation of the Convention. This fact alone makes the case of some interest and this interest has been increased by the reactions to the decision—reactions which have included splits within the Government and the Labour party, a well publicised conflict between the executive and judiciary, and a decision by the United Kingdom to risk international criticism by again derogating from the Convention.

HOW *BROGAN* AROSE

While the four applications involved in the *Brogan* case were first entered in 1984 the antecedents of the case can be traced somewhat further back. These lie in the policy of "criminalisation" adopted as a response to paramilitary violence in the mid-1970's. While criminalisation is a complex phenomenon,[2] in outline it can be identified as a shift from a short term strategy to defeat terrorism—based on the primacy of the army, the use of clearly identifiable emergency powers (notably internment without trial) and according political status to prisoners—to a longer term strategy which emphasises police activity, reliance on the criminal process, if modified, and treating all prisoners as ordinary criminals.

Whatever its merits, criminalisation has always had its critics, and these have fallen into two broad camps. The first criticise the overall aim of the policy, arguing either that it is likely to hamper the security forces in dealing with an armed rebellion or, from a different perspective, that it attempts to disguise and deny legitimacy to that rebellion. The second are likely to be sympathetic to the aim of demilitarising Northern Ireland (without accepting the view that changes in the criminal law alone are likely to achieve this) but contend that often criminalisation has not achieved this, either because the laws adopted diverge too greatly from a model of "ordinary" criminal law or because their application is inconsistent with that aim.

1. *Brogan and Others* v *United Kingdom* Application Nos 11209/84, 11234/84, 11266/84 and 11386/85, Decision of the Commission 14 May 1987, decision of the Court 29 November 1988, now reported in (1989) 11 ECHR 117. Unsuccessful applications from Northern Ireland have included *Stewart* v *United Kingdom* (1985) 7 EHRR 453 (plastic bullets); *Elliott and Others* v *United Kingdom* (UDR widows); *McFeeley and Others* v *United Kingdom* (1981) 3 EHRR 161 (Maze prison conditions).
2. For a discussion of criminalisation see Boyle, Hadden and Hillyard, *Ten Years on in Northern Ireland* (1980), pp 31–2.

Arrest powers have been a frequent target of this second type of criticism. Studies in the early 1970s revealed that large numbers of those arrested by the police and army were being released without charge.[3] Arrest thus appeared to be fulfilling primarily a counter-insurgency purpose of facilitating intelligence gathering as regards a suspect community. With the ending of internment in 1975 and moves, especially in the 1987 Northern Ireland (Emergency Provisions) Act,[4] towards bringing emergency arrest powers into line with non-emergency arrest powers, it might be expected that arrest would move back to its normal function within a liberal criminal justice system. This is to facilitate the apprehension and detention of those against whom there exists significant evidence of their involvement in a particular crime. Yet for the past fifteen years, while the total number of arrests has significantly declined, the ratio of those charged to those arrested has remained relatively constant at 15–20%. This low arrest/charge ratio is increasingly true of even the most "normal" of the emergency arrest powers, that contained in section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) (now section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989).[5] This provision does require reasonable suspicion that a person has been involved in the "commission, preparation or instigation of acts of terrorism". However the low ratio of charges to arrests has led some critics to wonder whether most arrests are based on reasonable suspicion at all, or whether arrest powers continue to be used mainly for intelligence gathering rather than apprehending those involved in criminal activity.[6]

Arrest powers have also given rise to concern because they are the precursor to detention and interrogation. Throughout the current period of conflict in Northern Ireland there have been recurrent concerns regarding the conduct of interrogations, most notably following an Amnesty International mission to Northern Ireland in 1978, which concluded that there was substantial evidence that detainees had been physically ill-treated. Since reforms were

3. See Boyle, Hadden and Hillyard, *Law and State* (1975), pp 43–53.
4. The Northern Ireland (Emergency Provisions) Act 1987 introduced reasonableness requirements into a number of police and army search and arrest powers: see Jackson, "The Northern Ireland (Emergency Provisions) Act 1987" (1988) 39 *NILQ* 235.
5. The PTA arrest power was little used in Northern Ireland until the early 1980s. In 1978 only 155 of 1341 police arrests were made under this power; by 1986 it had risen to 1309 of 2208 arrests. However the ratio of those charged to those arrested under the PTA fell from 90% to 27% in the same period. See Northern Ireland Office Information Service, *Statistics on the Operation of Emergency Powers* (1989).
6. See especially Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (1983), pp 33–4; Hillyard, "The Political and Social Dimensions of Emergency Law in Northern Ireland" in Jennings (ed), *Justice Under Fire; The Abuse of Civil Liberties in Northern Ireland* (1988), pp 196–8.

introduced following this report and that of Judge Bennett QC,[7] concern about interrogations has lessened, though it has periodically resurfaced.[8] On a more general level, civil libertarians in particular remained concerned that allowing seven day detentions (as permitted under the PTA) facilitated the development of undesirable interrogation practices and was inconsistent with due process ideals.[9]

For these critics neither the legislature nor the judiciary in the United Kingdom offered reassurance. Parliament received several reports favourable to the current arrest and detention powers[10] and in both 1976 and 1984 re-enacted the broader arrest power and seven day detention provisions contained in the PTA. The judiciary in Northern Ireland have shown little willingness to narrow—and have arguably broadened—the powers granted by Parliament. Thus while they have generally been unwilling to allow confessions to be admitted where suspects have been physically maltreated they have been reluctant to exercise their discretion to reject confessions where pressure has been exerted which falls short of this.[11] On the PTA arrest power Lord Lowry LCJ indicated in *Ex parte Lynch*[12] that the common law requirement to inform a suspect of the grounds of arrest[13] did not apply to PTA arrests; all the arresting officer need do was recite the words of the relevant section. In *Hanna* v *Chief Constable of the RUC*[14] Carswell J indicated that as regards reasonable suspicion only the views of the arresting officer were relevant as to whether on the facts "as known or reasonably understood to be true by him" the arresting officer had reasonable grounds for making the arrest. Carswell J indicated that the court would be reluctant to overturn this decision unless these were grounds that no reasonable officer would have acted upon. This decision leaves it unclear exactly what information is required to justify an arrest, especially where that arrest—as most are—is based on the instructions of a superior officer. Given the bureaucratised, hierarchical nature of a modern police force, these decisions appear to have rendered the use of the PTA arrest powers largely immune from judicial review and increased the concern of critics who fear they may be used to arrest more than those the police are seeking to prosecute.

7. See *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Cmnd 7947, 1978). The reforms introduced included an available medical examination for detainees every 24 hours and video monitoring (but not recording) of interrogations by another police officer.
8. See for example *In re Gillen's Application* [1988] 1 NIJB 47 (habeas corpus application for prisoner beaten while in custody). The *Amnesty International Report* (1988), p 222 refers to three cases of people who suffered injuries in police custody.
9. See generally Scorer and Hewitt, *The Prevention of Terrorism Act; the Case for Repeal* (1981).
10. See for example the Reviews of the Operation of the PTA by Lords Shackleton (Cmnd 7324, 1978), Jellicoe (Cmnd 8803, 1983) and Colville (Cm 264, 1987).
11. For discussion of this issue see Walsh, n 6 *supra* at pp 46–53 and Mauch, "Confession Evidence in the Diplock Courts" (paper prepared for the Committee on the Administration of Justice, 1988).
12. [1980] NI 126.
13. See *Christie* v *Leachinsky* [1947] AC 573.
14. [1986] 13 NIJB 71.

By the mid-1980s therefore there remained concern about the scope and use of the PTA arrest power, but few domestic avenues of challenge seemed open. There remained the possibility that this arrest power contravened Article 5 of the European Convention of Human Rights, which guarantees a right to liberty. However this avenue was also blocked by the fact that the United Kingdom had entered a derogation under Article 15(1) of the Convention from the applicability of Article 5 as regards Northern Ireland.[15] However on 22 August 1984 the United Kingdom Government withdrew the derogation—and almost exactly two months later the first of the four applications that eventually became *Brogan and Others* v *United Kingdom* was filed.

THE *BROGAN* CASE IN STRASBOURG

The four applicants in the case were all arrested and detained under section 12 of the PTA in the months shortly following the withdrawal of the derogation. Two applicants (Brogan and Coyle) were arrested in Tyrone and detained for five days eleven hours and six days sixteen hours respectively. The other applicants (McFadden and Tracey) were. arrested in Derry and detained for four days six hours and four days eleven hours respectively. All were released without charge. They sought to challenge their detention under Articles 5(1)(*c*), 5(3), 5(4) and 5(5) of the Convention.[16]

Article 5(1)(*c*) is among those provisions which indicate when a person may be deprived of his liberty in accordance with the Convention. Its relevant passage indicates that deprivation of liberty may be in accordance with the Convention when it results from "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". The applicants sought to invoke this article to challenge both the nature and use of the PTA arrest power. Their challenge rested on two limbs.

The first claimed that the criterion for section 12 arrests, reasonable suspicion of involvement in the "commission, preparation or instigation of acts of terrorism", was broader than the "reasonable suspicion of having committed an offence" permitted by Article 5(1)(*c*). The second directly challenged the use of the arrest power, claiming that it was being employed for intelligence gathering rather than, as the Convention requires, to bring someone "before the competent legal authority". To support this limb the applicants cited statistics on the ratio of charges under section 12, and statements by

15. See (1978) 21 *Yearbook ECHR* 22.
16. The applicants did raise a challenge under Article 5(2) concerning the words of arrest in their original petition. However this was not pursued at the admissibility stage before the Commission and the Court refused an attempt to revive it at the Court hearing.

Lord Lowry LCJ in *ex parte Lynch*[17] and by the then Home Secretary Leon Brittan,[18] which threw doubt on the purposes to which section 12 was put.

A unanimous Commission, and the Court by 16–3, rejected both these arguments. On the first point they cited the Court's view in *Ireland* v *United Kingdom*[19] that suspicion of involvement in terrorism was "well within the notion of an offence" for the purposes of Article 5. As regards the second they stressed that they could not examine the use of section 12 in general and were limited to considering whether in this particular case the applicants had been arrested for the purposes of bringing them before the competent legal authority. This focus on concrete cases is in line with the Convention institutions' usual approach to claims of systemic abuses of powers and was also taken by the Commission in the *Stewart*[20] case involving the use of plastic bullets in Northern Ireland. As regards the concrete use of section 12 the Court accepted the Government's arguments that Article 5 did not require an intention to charge everyone arrested; once reasonable suspicion existed, someone could be arrested with a view to charging him if interrogation or further inquiries revealed sufficient additional evidence. The appropriate test was one of a good faith intention to charge if further evidence was obtained and there was nothing in this case to call that good faith into question.

The attempt to invoke Article 5 to narrow the scope and application of the PTA arrest power was therefore rejected. However some aspects of the decision indicate that this rejection may not be entirely unequivocal. First, the applicants had conceded, mainly to avoid problems with the argument that they had not exhausted domestic remedies, that in each case the police *did* have reasonable suspicion of their involvement in terrorism. Moreover it was established that they were questioned about their involvement in specific offences rather than about their involvement in terrorism in general. In such circumstances it would have been very difficult to find

17. In *Lynch* (*supra* n 12 at p 126) Lord Lowry LCJ commented that arrest under section 12 was not necessarily the first step in a criminal proceeding but was "usually the first step in the investigation of the suspected person's involvement in terrorism".
18. In a radio interview Mr Leon Brittan MP when Home Secretary stated in reply to an inquiry regarding the low charge/arrest ratio under the PTA: "I think that is a very misleading figure because that suggests the purpose of the legislation is simply to bring a charge. If that were so, then there might be almost no need for the legislation. What the figures do not tell is how much information was obtained not only about the people concerned but about others and how many threats were averted as a result of obtaining information from those who were detained."
19. See *Ireland* v *United Kingdom* (1978) 2 EHRR 1.
20. In *Stewart* v *United Kingdom* (1985) 7 EHRR 453 concerning whether a child's death as a result of being struck by a plastic bullet violated the right to life protected by Article 2 of the Convention, the Commission refused to consider the use of plastic bullets in the abstract. It confined itself to their use in the particular circumstances of the case.

a breach of Article 5(1)(*c*) as regards these particular cases; but other cases may be different. Secondly, those who dissented in the Commission (finding even five days' detention to violate Article 5(3)) indicated that they were prepared to tolerate broad arrest powers only if there was judicial supervision of their exercise. The dissenters' view on the length of detention was largely accepted by the majority on the Court. With that requirement for judicial supervision now largely removed by the derogation, a future Court might devote more attention to the nature of the PTA arrest power than did the *Brogan* Court.[21]

The applicants had greater success on their argument that the provisions of sections 12(4) .and 12(5) of the PTA, which allow detention for up to 48 hours on arrest, and for a further five days if the Secretary of State approves, violated Article 5(3) of the Convention. This requires that everyone arrested in accordance with Article 5(1)(*c*) be brought "promptly before a judge or other officer authorised by law to exercise judicial power".[22] Both the Commission and Court concluded that this requirement was not met in the case of PTA arrests. However, while a majority on the Commission were prepared to allow persons to be held for five days before appearing before a judge (and hence found for only two of the four applicants), the majority on the Court regarded detention for even four days six hours as too long.

The majority on the Commission took an essentially pragmatic approach to the Article 5(3) claim. They noted that in the past the Commission and Court had suggested that four days was the upper limit for which someone could be held before being brought before a judge. One case had in exceptional circumstances—the detainee became ill and had to be taken to hospital—allowed five days.[23] They concluded that four days remained the normally appropriate limit but 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".[24] The Commission also acknowledged the Government's arguments that bringing suspected terrorists quickly

21. How authoritative the *Ireland* v *United Kingdom* ruling is must be in doubt given that Ireland accepted the existence of an emergency situation in that case. Courts in the United Kingdom have differed over what suspicion of "involvement in terrorism" amounts to. In *McKee* v *Chief Constable of the RUC* [1984] NI 169 the Northern Irish Court of Appeal held that this required suspicion of involvement of offences of violence, while the House of Lords (*obiter*), without offering a precise formulation, indicated that it should be given a broad interpretation: [1984] NI 181.

22. As was affirmed in *Brogan*, appearance before the judicial officer as required by Article 5(3) is only to decide on the legality of continued detention. The issue of how long may elapse before a suspect is brought before a judge for trial is governed by the notions of a "reasonable time" contained in Articles 5(3) and 6(1).

23. Application No 4960/71, Decision of the Commission 19 July 1972; 42 *Collection*, p 49.

24. See Commission decision, para 106.

before judicial tribunals caused problems in that the evidence against such suspects was often based on information from informers who might thereby be put at risk. Thus they concluded in these special circumstances five but not seven day detentions might be upheld.

The four minority Commission members (Frowein, Thune, Treschel and Schermers) were less impressed by the context of terrorism.[25] Stressing the importance of judicial supervision as a safeguard against the risk of abuse of arrest and detention powers they argued: "It is precisely in situations where wider powers of arrest are conferred on the authorities to cope with an organised terrorist threat that the need for judicial control against the abuse of power is greatest." They concluded that all four arrests in this case were in violation of Article 5(3).

The majority on the Court sided with the Commission minority. While acknowledging that the growth of terrorism meant that it had to strike a balance "between the defence of the institutions of democracy in the common interest and the protection of individual rights",[26] it did not regard that balance as permitting detentions in excess of four days six hours. The Court stressed both the role of judicial supervision in protecting the "fundamental human right" of the absence of arbitrary interference with one's liberty by the state and the text of Article 5(3), which referred to "prompt" appearance before a judge or judicial officer.[27] Such a concept had to be distinguished from that of a "reasonable time" which appears elsewhere in the Convention and, although the Court was left some flexibility in its interpretation, this could not be "to the point of impairing the very essence of the right guaranteed by Article 5(3), that is to the point of effectively negativing the state's obligation to ensure a prompt appearance before a judicial authority".[28] The majority concluded that all four detentions violated Article 5(3), but did not specify what an acceptable period of detention was.

Seven judges (Vilhajlmsson, Bindschedler-Robert, Glocklu, Matscher, Valticos, Evans and Martens) dissented, regarding none of the detentions as violating Article 5(3). All basically indicated that they regarded the majority as paying insufficient attention to the context of terrorism. Most argued that the Court had in the past acknowledged that the four day limit could be exceeded in exceptional circumstances—terrorism in the Northern Irish context they regarded as an exceptional case. Judge Evans stressed the difficulties the Government had alluded to regarding judicial supervision of detention

25. Sir Basil Hall dissented on the grounds that in his view seven days' detention was permitted under Article 5(3).
26. See Court decision, para 48.
27. The Court stressed (at para 59) that the use of the word "*aussitot*" (literally "immediately") in the French text of Article 5(3) indicated there was little scope for flexibility.
28. See Court decision, para 59.

in terrorist cases. Judge Martens contended that the proper approach was to concede that governments had a "margin of appreciation" in dealing with terrorism and that the European institutions should only intervene if it found the state's arguments for a particular power "wholly unconvincing and incapable of being reasonably defended". This he did not think was the case in dealing with the PTA seven day detention power.[29]

Ultimately then the difference between the majority and minority on both the Commission and Court came down to the relative weight to be accorded to the context of an acknowledged terrorist threat. The majority on the Commission and, to an even greater extent, the dissenters on the Court, accepted the argument that when a significant level of terrorism exists measures taken to combat it should be subject to a lesser level of scrutiny as regards their compatibility with international human rights norms. The Commission minority and Court majority did not. In particular they took the view that independent judicial scrutiny of the operation of anti-terrorist powers was not lightly to be ousted. It seems to the writer that there is much to applaud in the latter approach. On the general level, the idea of a special status for anti-terrorist laws is a disturbing one. Given the existence of terrorist activity in several European states, it might lead these states significantly to water down human rights protections while being able to claim they continue to give effect to the Convention. Moreover the creation of one special regime could be a precedent for others. Drug-related offences or organised crime might become the next area where human rights are evaluated differently. A proliferation of special regimes would considerably undermine the Convention's claim to protect human rights as opposed to the rights of particular groups.

On a more detailed level it is worth noting that, unlike rights to speech or privacy, the rights to liberty and a fair trial in Articles 5 and 6 of the Convention do not contain qualifying or "clawback" clauses.[30] This suggests that the balancing, context-related approach normally employed in interpreting the speech and privacy provisions is less appropriate as regards Articles 5 and 6. These provisions would appear to be designed to apply fully—excepting only the extreme circumstances when derogation from them in line with Article 15(1) is permissible.

29. Judge Martens stressed the "particular extent, vehemence and persistence of the terrorism that has raged in Northern Ireland since 1969", the fact that the United Kingdom was a democracy of long standing and as such was aware of the importance of individual liberty, and the fact that the PTA powers were granted for limited duration with regular independent review of their operation.

30. The phrase is that of Higgins, "Derogations Under Human Rights Treaties" (1978) 48 *BYBIL* 281. It refers to provisions such as those in Article 10(2) of the European Convention which states that the exercise of the right of freedom of expression "may be subject to such limitations as are prescribed by law and are necessary in a democratic society . . .".

The other issues raised in the litigation caused far fewer problems for either the Commission or the Court. The Commission concluded by 10–2 and the Court unanimously that there was no breach of Article 5(4).[31] Judicial review, whether by habeas corpus or false imprisonment proceedings, was available to test the lawfulness of the applicants' detention. These were not limited to testing procedural questions (*eg* whether the applicant was detained under the correct statute) but also substantive ones (*eg* whether there did exist reasonable grounds for his detention). This was all Article 5(4) was taken to require. Almost as little dispute existed over the finding of a breach of Article 5(5),[32] once a breach of Article 5(3) was acknowledged. It was conceded that compensation would not be available to the applicants in the Northern Irish courts for a breach of Article 5(3). However, perhaps somewhat surprisingly having sought comments from both sides, the Court subsequently ruled that the applicants were not entitled to any compensation under Article 50 for the time they spent in detention in violation of Article 5(3).[33]

THE AFTERMATH OF *BROGAN*

The decision of the Court in *Brogan* appeared to be something of a surprise for the Government. The decline in the number of those being held in excess of five days[34] suggested that the police might tolerate the Commission standard as a limit, even if they found it undesirable. The Court decision however left it unclear whether even four days' detention without judicial supervision would be permissible under the Convention.[35] There was no immediate Government response to the ruling and it quickly became clear that there were disputes among politicians, officials and security force chiefs as to what approach should be followed. Three alternatives appeared to exist.

The first was essentially to scrap the PTA. With a Police and Criminal Evidence Order for Northern Ireland already in draft, an

31. Article 5(4) requires that everyone deprived of their liberty be able to take proceedings to have the lawfulness of their detention "speedily" decided upon.
32. Article 5(5) requires that anyone arrested or detained in violation of Article 5 have an enforceable right to compensation.
33. On 30 May 1989 the Court ruled that as regards the applicants' claim for non-pecuniary damage the finding of a violation of Article 5 was "just satisfaction" for the purposes of Article 50, "having regard to the circumstances of the case and in particular the reasons leading to the decision [that there was no breach of Article 5(1)]". The Court would thus seem to put little value on deprivation of liberty in breach of the Convention *per se*.
34. Statistics contained in a Northern Ireland Office press release on the day of the *Brogan* decision indicated that 80% of those arrested under the PTA in 1988 had been released or charged within five days; this compares with 54% in 1981.
35. Treschel, "The Right to Liberty and Security of the Person—Article 5 of the European Convention on Human Rights in the Strasbourg Case Law" (1980) 1 *HRLJ* 88, 131 argues that "only exceptional circumstances could even justify a delay of three days, the normal maximum being 48 hours". Treschel was one of the dissenting members of the Commission in *Brogan*.

Order heavily modelled on the Police and Criminal Evidence Act 1984, it was clear that soon the police would be able to detain people under the "ordinary" criminal law for up to four days, with judicial supervision after 36 hours.[36] This provision appeared likely to comply with the European Court's ruling and many, in the civil libertarian lobby especially, argued it was adequate to the security forces needs.[37] It soon became evident, however, arguably from Mrs Thatcher's initial response that she would ensure the security forces would have all the powers they required,[38] that this approach was not being contemplated. A new Prevention of Terrorism Bill was already before Parliament by the time the European Court ruled and the Government made it clear that its intention was to press ahead with it. Instead attention switched to ways of retaining the seven day detention power while complying with the Court's ruling.

The second alternative, therefore, was to introduce an element of judicial supervision of detentions after three or four days. Although the British Government had consistently argued throughout the *Brogan* litigation that this would be impossible if it took place in open court, and undesirable if it proceeded *in camera,* attempts were made in the wake of the decision to find a way to achieve this. The main problem appeared to revolve around who would provide the judicial input. Magistrates hear applications for extensions of detention under PACE, but there appeared to be some doubt as to whether they were the right people to be involved concerning suspected terrorists. High Court judges might be better suited to the task; but while this might work in Great Britain, where the number of applications was likely to be low, in Northern Ireland it risked an increase in workload which would swamp the bench.[39]

The third alternative was to enter a notice of derogation under Article 15(1) of the Convention. The main advantage of this was that it would allow the PTA arrest power to remain in place unaltered and would require no change in policing policy. Its main disadvantage was that it risked significant international criticism. Derogation would again put the United Kingdom in the same camp as countries with appalling human rights records, such as Chile, which derogate from

36. This was indicated in the Proposal for a draft Police and Criminal Evidence (Northern Ireland) Order 1988, arts 42–3.
37. This view was espoused for example by the Committee on the Administration of Justice: see *Irish News* 2 December 1988.
38. Such perhaps was indicated by Prime Minister Margaret Thatcher's initial reaction to the ruling: "We shall ensure that the police have the powers that they need to tackle terrorism vigorously" 142 HC Debs col 575 (29 November 1988).
39. The Standing Advisory Commission on Human Rights, which obtained leave of the President in accordance with Rule 37(2) of the Court Rules of Procedure, submitted a memorandum to the Court on 19 January 1988 arguing for this. They argued for a limitation on detention periods to five days in total and for detentions in excess of 48 hours to be subject to an *ex parte* hearing before a High Court judge. I am grateful to Mr Geoffrey Sonnenberg, secretary to the Commission, for supplying me with a copy of the memorandum.

international human rights treaties. Moreover there was always the possibility that, having withdrawn the derogation in 1984, suggesting an emergency no longer prevailed, the Government might have difficulty persuading the European institutions that one again existed.

In the end it appears that pressure of time was decisive. With the Government anxious to have the new PTA in place before the old one expired on 22 March 1989 and no resolution of the problems of judicial oversight in sight by late December, those pressing for derogation prevailed. On 23 December notices of derogation were entered to both Article 5 of the European Convention and Article 9 of the International Covenant on Civil and Political Rights. It was subsequently reported that Northern Ireland's judges were particularly hostile to any notion of their having a role in supervising detentions, feeling that this might compromise their independence if they later came to sit in a trial involving the same accused whose continued detention they had earlier authorised and evidence against whom they had already seen.[40] Though the Government's decision was met by significant criticism, dealing with the judgment caused problems for opponents as well as supporters of the Government. Two members of the Labour party front bench were to be sacked when they disobeyed party instructions and voted against the Prevention of Terrorism Bill because the Government had failed to reduce detention periods.[41]

Although the derogation has been described as temporary, the passing of what is now the Prevention of Terrorism (Temporary Provisions) Act 1989 unamended means that scarce parliamentary time will have to be found in the future to prevent it becoming permanent. An immediate question which arises is whether the derogation complies with the requirements of Article 15 of the European Convention. The European Court in *Lawless* v *Ireland*[42] indicated that it was for the Convention institutions rather than the national governments to determine this question; but the standards evolved since then in European jurisprudence to deal with this issue have been described by one commentator as "disappointingly vague and inconsistent".[43]

Article 15 requires that for a derogation to be valid, two requirements must be met. First, there must be a "war or public emergency threatening the life of the nation" and secondly, the measures of derogation must be "to the extent strictly required by the exigencies of the situation". On both of these questions, especially the second, the Commission and Court have recognised that states have a

40. The matter first surfaced in a number of articles in *The Independent*, 28 and 29 December 1988.
41. See *The Times*, 8 December 1988.
42. *Lawless* v *Ireland* [1961] *Yearbook ECHR* 438.
43. See Hartman, "Derogation from Human Rights Treaties in Public Emergencies" (1981) 22 *Harv ILJ* 1, 3. Higgins (*supra* n 30) shares this view.

"margin of appreciation".[44] This seems to require that a state must do more than act in good faith, but it is unclear whether it requires a great deal more than this.

To deal with the first requirement, Hartman suggests that to threaten the life of the nation "some fundamental element of statehood, such as the functioning of the judiciary or legislature or flow of crucial supplies, must be seriously endangered".[45] But it seems unclear whether the existing, rather limited,[46] jurisprudence requires even this. Rather, in common lawyers' parlance, providing a government's decision is not one that "no reasonable government" could have come to it seems unlikely that the Convention institutions will disagree with it. As the guardians of a Convention whose primary concern is with individual human rights rather than state sovereignty it is arguable that the Commission and Court should take a stronger line. They could, for example, insist on independently assessing whether emergency conditions exist and recognise these only where ordinary powers are clearly inadequate to ensure the adequate protection of citizens' lives. Currently, however, their approach shows the traditional deference of courts to governments on issues of emergency powers.[47] Given the continuing high level of political violence in Northern Ireland including attacks on the judiciary and politicians, it seems unlikely that the Commission or Court will refuse to accept the Government's invocation of an emergency.

One point that has not so far been explored in the derogation cases is the requirement that the emergency "threaten the life of the nation". This is relevant to any challenge to the derogation arising out of the *Brogan* case in that its text covers the operation of section 12 of the PTA throughout the United Kingdom. It might be credibly argued that an emergency exists in Belfast and Derry—but what of Bristol or Dundee? In other words, since the level of terrorist activity in Great Britain over the last ten years is not that much higher than in France or Germany over the same period can it be argued that the emergency threatens the life of the nation as opposed to merely that part of it which is Northern Ireland? If this is so, can the derogation be valid?

44. Hartman (*supra* n 43 at pp 24–9) notes that the "margin of appreciation" first appeared in *Lawless*, was little heard of in the *Greek* case and was then revived with a vengeance in *Ireland* v *United Kingdom*. In general see Morrison, "Margin of Appreciation in European Human Rights Law" (1973) 6 *Human Rights J* 263.
45. See Hartman n 43 *supra* at p 16.
46. So far only three cases have considered derogation provisions. In *Lawless* the Court recognised an emergency in the existence of the IRA and its involvement in terrorist activities in the Irish Republic in the 1950's. In the *Greek* case [1969] *Yearbook ECHR* a rather stricter approach was taken and the Commission refused to find an emergency in the combination of strikes and the Greek Government's fear of a communist uprising. In *Ireland* v *United Kingdom* the Irish Government did not contest the existence of emergency conditions in Northern Ireland in 1971, only the necessity of the measures taken to deal with it.
47. See Alexander, "The Illusory Protection of Human Rights By National Courts During Periods of Emergency" (1984) 5 *HRLJ* 1.

Taking the *Lawless* approach to the conditions necessary for the existence of an emergency (where one was found to exist by reason of the existence of the IRA and its involvement in terrorist activity in the Irish Republic), one might well argue that *any* paramilitary activity in Great Britain might be enough to indicate the presence of an emergency throughout the United Kingdom. This however would be to set the degree of scrutiny of declarations of emergency at a very low level. It might be better to acknowledge that it is unlikely that "the life of the nation" concept requires that the threat be of equal intensity in all parts of the national territory. Most European states are federations and most European conflicts are localised (*eg* the Basque country in Spain, northern Italy at the height of Red Brigades activity). It is unlikely that the Convention was drafted with the intention of preventing states taking emergency action in respect of localised problems. However the regional character of emergency conditions might well be relevant to the second part of Article 15. It might be argued that measures which are "strictly required by the exigencies of the situation" in one part of the territory are inappropriate in the another where the threat is less.

A further interesting point arises from the fact that, while the United Kingdom Government withdrew its derogation in 1984, the new notice of derogation, entered on 23 December 1988, states that "Since the judgment of 29 November 1988 *as well as previously* the Government have found it necessary to exercise, in relation to terrorism connected with the affairs of Northern Ireland [the PTA seven day arrest power]". The derogation thus appears to aspire to be retrospective. This raises several questions. First whether withdrawing the derogation estops the Government from claiming that an emergency existed from 1984 to 1988. While estoppel is a clearly recognised concept of international law, its application seems to arise mainly in territorial disputes, to operate *in personam* and to require an element of reliance.[48] Inter-state treaties conferring rights on individuals create new problems especially with regard to whom the representation can be said to be made. Apart from estoppel, however, a second issue arises as to whether a tribunal can be expected to believe the Government's argument that emergency conditions prevailed when the derogation was withdrawn and that the security situation has deteriorated markedly since 1984. This could create some tricky problems for the United Kingdom, though the Government is likely to claim that the withdrawal of the derogation in 1984 arose less through a conviction that there was no longer a threat to the life of the nation than a decision that the existing law was in line with the Convention. A final issue arising through this apparent retrospective derogation is whether there is a breach of Article 15(3) of the Convention. This requires derogating states to inform the Council of Europe of their decision. Although (unlike Article 4(3) of the Civil and Political Rights

48. McNair, *Law of Treaties* (1961), pp 485–7 indicates that there is a need for one party to rely on the representation of another, but unlike some versions of the domestic law on estoppel there is no need for this reliance to be detrimental.

Covenant) there is no requirement for immediate notification of derogation, some commentators have suggested that even under the European Convention delay in notifying may render a derogation invalid.[49] A delay of four years may well come within this category.

To turn directly to the second half of Article 15, will the Government be able to claim that the seven day detention power is "strictly required"? The language of this part of the Article suggests a high level of scrutiny, indeed that the Government must show both that if the impugned measure is not taken the legal order will collapse and that there are no less restrictive alternatives available. If this approach were taken the Government could well be put on the spot to explain why, for example, *in camera* hearings by judges or magistrates could not be introduced to provide judicial supervision of detention. The Government is however likely to raise the argument that High Court judges are unsuited to such a job, because it involves them excessively in pretrial matters, while magistrates are unlikely to welcome the task as it may expose them to greater personal danger. These arguments may not be entirely convincing. High Court judges already deal with bail applications in Northern Irish anti-terrorist cases and preside over voir dire proceedings in Diplock courts when they hear evidence they may later have to disregard. As for magistrates, they have already been regarded as targets by paramilitary groups in Northern Ireland and have been given police protection. A stronger argument may be that such supervision would lead to the compromising of vital police intelligence sources if heard in open court or to allegations of secret justice and of the judiciary performing an executive role if the suspect could not appear or be represented. The Government may argue that such supervision is feasible in the civil law inquisitorial system of criminal procedure, where the magistrate combines the functions of carrying out the investigation and protecting the suspects' rights, but not in the adversary system where these functions are split between the police and defence lawyers.

So far, however, the Court has not taken such an approach. In *Ireland* v *United Kingdom* it gave the Government a "margin of appreciation", with the result that no explanation was required as to whether measures short of internment could have been taken.[50] Following this line it would again be likely to accord deference to the measures taken—though in view of the improvement in the security situation in Northern Ireland since 1971–2[51] and the proven survival of the normal court system the Commission or Court might be more wary

49. See Hartman n 43 *supra* at p 19 (discussing *Lawless*).
50. Green, "Derogation of Human Rights in Emergency Situations" [1978] *Canadian YBIL* 92,100 comments on the *Ireland* v *United Kingdom* decision that "a critical onlooker would be justified in concluding that the chances of a state being found guilty of wrongly declaring an emergency are somewhat remote".
51. For example the number of recorded shootings in Northern Ireland fell from 1756 in 1971 to 392 in 1986.

of upholding more extensive derogations from Article 5, such as selective or general internment.[52]

CONCLUSION

With the derogation entered and the old section 12 power re-enacted in a new PTA,[53] it might be argued that little has changed and that the litigation begun by Brogan and the three other detainees has achieved nothing. However clearly some things *have* changed. For one thing, the suspicion that litigation can achieve little has been reinforced. As discussed earlier in this paper, one of the reasons the *Brogan* litigation occurred was the feeling that domestic law was largely powerless to deal with significant abuses of emergency provisions. By derogating, rather than complying with Article 5, the Government risks giving the impression that even European action will have the same effect.

Deciding to derogate also commits the Government to a policy trend which may be difficult to reverse. If other elements of the anti-terrorist policy, most notably the ban on radio and television interviews with members or supporters of particular groups,[54] are successfully challenged in Europe will further derogations be entered? With each successive derogation the claim that Northern Ireland is merely a problem of large scale criminality to be dealt with by the ordinary criminal law becomes increasingly threadbare. In international law derogation is clearly conceived to be a temporary rather than a permanent situation. Domestic and in particular international pressure for a political resolution of the conflict is likely correspondingly to increase.

The case also has significant implications for the European human rights system. Had the Commission and Court shown greater favour to the United Kingdom's arguments that the presence of terrorism merited a lesser level of human rights scrutiny, the Convention system might have been considerably diluted. Increasingly, lawyers in other countries which have significant anti-terrorist provisions are turning to the Convention, perhaps because national courts are sensitive about crossing their own governments on these questions.[55] As a result of

52. Hartman (*supra* n 43 at p 51) argues that where the regular criminal courts remain open the presumption should be against the legitimacy of detention without trial.
53. The provision is now contained in section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989: see generally Dickson, *supra*, pp 250–267.
54. The direction covers interviews with representatives of the IRA, INLA, UVF, UFF, Sinn Fein and the UDA or those who express views which "solicit, support, or invite support for such organisations". It may be in violation of Article 10 of the European Convention and is currently being challenged in the domestic courts.
55. Cases concerning the anti-terrorist law of other European states include *Barbera, Messeque and Jabardo* v *Spain* (1989) 11 EHRR 360; *Ensslin, Baader and Raspe* v *Federal Republic of Germany* 14 DR 64; *Ventura* v *Italy* 23 DR 5.

Brogan they too can expect thorough scrutiny of the human rights implications of these laws. Yet by refusing to be more flexible, did not the Court push the United Kingdom Government into derogating, a position largely beyond regulation by the Convention? Are not other states likely to do the same if their anti-terrorist laws are struck down, with the result that the Convention is rendered irrelevant to a significant part of Europe's criminal justice system? This is clearly a significant risk. To prevent derogation becoming an easy way of evading the human rights guaranteed by the Convention, the Commission and Court will clearly have to establish that derogation is permissible only in the gravest circumstances, and provide more precise guidance on the tests appropriate to derogation than has hitherto been the case. If this occurs then *Brogan* will clearly not have been without importance.

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