

Human Rights, Terrorism and Police Custody: The Brogan Case*

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I.

Terrorism represents a creeping threat to western European societies. It aims at the very heart of democratic institutions. In most cases its immediate impact on the average individual is not considered sufficient, in Western Europe, to justify the adoption of exceptionally restrictive measures. Restrictive measures, generally called for in cases of war or full-fledged internal conflict, would be considered as imposing too heavy a limitation on individual rights and freedoms with the risk of playing the terrorists' game.¹

Under the European Convention of Human Rights (the Convention) states have the choice between suspending of certain rights and freedoms outright, pursuant to Article 15,² and placing a more elastic interpretation on some of its provisions in an attempt to keep within the Convention's boundaries. However, the reluctance of states to resort to Article 15 has sometimes led to interpretations whose compatibility with the Convention is doubtful.³

* European Court of Human Rights, case of *Brogan and others* (10/1987/133/184-187), Judgment, 29 November 1988. To be published in Publications of the Court, Series A, Vol. 145-B.

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¹ See in this sense *Klass v. Germany*, Eur.Ct.H.R. A/28, paras. 49-50. An excellent survey of the anti-terrorist legislation adopted in the main Western European states can be found in: 3 *Revue de Science Criminelle et Droit Penal Comparé* (1987) 499.

² The first paragraph of Article 15 reads as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 195. On Article 15, and equivalent clauses included in other Human Rights treaties, see R. Higgins, 'Derogations under Human Rights Treaties', *BYIL* (1976-77) 281-320.

³ See, e.g., the Commission's position in *McVeigh, O'Neill and Evans v. U.K.*, Nos. 8022/77, 8025/77, 8027/77, 25 *Decisions and Reports (DR)* 15, and the doubts raised by Trechsel in his dissenting opinion, 98. With respect to the Italian anti-terrorist legislation in force in the 1970s and the compatibility with the European Convention of the extended terms of pre-trial detention, see Benvenuti, 'La "ragionevolezza" della detenzione preventiva nell'art. 5.3 della Convenzione Europea dei Diritti dell'Uomo', 57 *Riv.Dir.Int.*(1974) at 508; Cassese, 'The In-

One of the main "targets" of state legislation in this field is Article 5, protecting personal freedom. The case I shall briefly consider focuses on the interpretation of this Article, which, as is well known, guarantees personal freedom in general terms and contains an exhaustive list of exceptions. It compels state authorities, when limiting personal freedom, to keep strictly within the boundaries of the listed exceptions.⁴

In 1974, the British parliament enacted the Prevention of Terrorism (Temporary Provisions) Act⁵ with the aim of countering terrorism more effectively. In September and October 1984, four individuals – suspected of being members of the Provisional IRA – were arrested under Section 12 of this Act and were taken to detention centres. There they were interrogated and then released without being charged, after 5 days and 11 hours, 6 days and 16.5 hours, 4 days and 6 hours, and 4 days and 11 hours respectively.⁶ Under Section 12, the police were entitled to arrest any person suspected of terrorist-related offences, detain him or her for a maximum of 48 hours, and, if desired, ask the competent Secretary of State for an extension of the 48-hour time limit; the Secretary empowered to grant a maximum of five additional days granted an extension in this case.⁷ The prolonged detention was therefore legal under British legislation.

The four persons who had been subjected to prolonged detention filed a complaint with the European Commission of Human Rights alleging that Britain had violated several paragraphs of Article 5 of the Convention, among these para.3, because, after their arrest, they had not been taken promptly before a judge (or released).⁸ The European

ternational Community, Terrorism and Human Rights', in *Studi in onore di Giuseppe Sperdui* (1984) 475; Tanca, 'Costituzione italiana, diritti inviolabili e carcerazione preventiva', 4 *Riv. Trim. Dir. Pubb.* (1984) 921.

⁴ See, e.g., *Winterwerp* case, Publ. Ct. A/33, para. 37.

⁵ The PTA came into force on 29 November 1974. It outlawed the Irish Republican Army (IRA) – already banned in Northern Ireland – in Great Britain and gave special powers to the police. The Act was renewed every six months until March 1976, when it was amended. The 1976 Act was renewed annually until 1984, when it was re-amended. The 1984 Act proscribed the Irish National Liberation Army as well as the IRA and was also subject to renewal every year until March 1989. On that date permanent legislation was introduced. For a survey (and comment) on the evolution of the anti-terrorism legislation in the United Kingdom, see C. Walker, *The Prevention of Terrorism in British Law* (1986).

⁶ For more details about the facts, see *Brogan*, *supra* note 1, paras. 11-24.

⁷ The relevant part of Section 12 of the PTA (1984) reads as follows:

"12(1) a constable may arrest without warrant a person whom he reasonably suspects to be:...

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

(3) The acts of terrorism to which this part of this act applies are – (a) acts of terrorism connected with the affairs of Northern Ireland...

(4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him.

(5) Any such further period or periods shall not exceed five days in all."

The Home office processes applications relating to detentions in England and Wales, the Scottish Home and Health Department those in Scotland, and the Northern Ireland Office those in Northern Ireland.

⁸ Article 5, para. 3, reads as follows: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." It goes without saying, however, that if the arrested person is *promptly* released instead of being brought before a judge para.3 is not violated, provided the arrest has been carried out

Brogan Case

Commission of Human Rights (the Commission), the first international body to review the case, maintained that only the two longest detentions contravened para.3. The European Court of Human Rights (the Court), however, held that all four cases involved a violation of Article 5 of the Convention.⁹

II.

This case raises at least three distinct but interrelated issues: the maximum permissible length of police custody (or, in Convention terms, the interpretation of the adverb "promptly" contained in Article 5.3), the proper role of judicial authority in this field, and the degree to which special circumstances such as the occurrence of terrorist acts, influences our answers to the first two questions.¹⁰ Two aspects of this last question are particularly interesting. First, does terrorism justify a state attempt to interpret Article 5 flexibly? Second, if Article 5 is indeed interpreted flexibly, what would be the consequences, for the European system of protection of Human Rights?

It is regarded as part of the settled case-law of the Court that the adverb "promptly" – which has a more elastic meaning than the corresponding French term "aussitôt" – does not mean "immediately"; rather it must be interpreted according to the circumstances of each case.¹¹ Moreover, while there have been cases where the Court held that the length of police custody was excessive,¹² the Court has never clearly specified the maximum limit acceptable under the Convention.¹³

In contrast, the Commission which has its own case-law on the matter has determined that a four day time limit (two days plus two), currently in force in most Member States, is compatible with the Convention. Moreover, on one occasion it deemed acceptable a

with a view to taking the arrestee before a judge, if the suspicions prove founded. This is confirmed by the Court in this very case, para. 53. The applicants had also alleged the violation of paras. 1(c), 4 and 5 of Article 5.

⁹ See Court Judgment, paras. 55-62; *Report of the European Commission* (14 May 1987), Appls. 11209/84, 11234/84, 11266/84 and 11386/85: *Terence Brogan, Dermot Coyle, William McFadden and Michael Tracey v. United Kingdom*, paras. 106-108.

¹⁰ In para. 48 of the Judgment the Court said:
"Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. In the context of Article 5, it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose."

¹¹ See *Ireland v. United Kingdom*, 18 January 1978 A/25, para. 199.

¹² See, e.g., the following cases: *De Jong, Baljet and Van den Brinck*, 22 May 1984, A/77, paras. 52-53; *Van der Sluijs, Zuiderveld and Klappe*, 22 May 1984, A/78, paras. 46 and 49; *Duinhof and Duijff*, 22 May 1984, A/79, paras. 36 and 41; *McGoff*, 26 October 1984, A/83, para. 27.

¹³ See case of *Brogan*, *supra* note 1, para. 60: "There is no call to determine in the present judgment whether in an ordinary criminal case any given period, such as four days, in police or administrative custody would as a general rule be capable of being compatible with the first part of Article 5 para.3."

period of five days due to exceptional circumstances (the arrestee was hospitalized and thus could not be brought before the judge).¹⁴

In the *Brogan* case the Commission and the Court disagreed exactly on the maximum duration of the custody period. In accordance with its previous case-law, the Commission focused on the actual length of detention and on the special situation created by the terrorist threat, maintaining that *in normal circumstances* the police should not detain anyone for more than four days without judicial control. Nonetheless, in its *Brogan* opinion the Commission suggested that slightly longer periods could be accepted in situations justifying greater restrictions on individual rights and thus requiring greater sacrifice on the part of individuals.¹⁵ Hence, according to the Commission, the limit of four days applies only in *normal* cases; a different (possibly longer) limit applies to special cases. Moreover, the Commission seems to take it for granted that the existence of a danger to society and democratic institutions is in itself sufficient to justify a limitation on individual rights. It does not seem to require proof that the limitation proposed is indeed effective in countering the threat (or, to put it differently, on whether the same goal could not as efficiently be pursued by other means, while fully applying the Convention's provisions).

The Court did not adopt the Commission's line of reasoning. Instead, it said that the flexibility inherent in the concept of "promptness" is very limited since too broad an interpretation would undermine the very right protected. This was deemed particularly true in the instant case because the goals allegedly to be achieved by a longer detention could be attained just as well by imposing – with appropriate procedural precautions – judicial control over the detention.¹⁶

The Court thus clearly rejected the Commission's view. In essence, it asserted that even though the term "promptly" can be elastically construed, there is a maximum period of detention compatible with the Convention and that any extension beyond the maximum limit violates individuals' right to personal freedom. And while the Court declined to fix the maximum detention period, it unequivocally stated that it must be conceived of as an absolute, not as an average period applicable only in normal circumstances. This means that in normal cases the authorities should stay well below that limit; the limit should only be reached when strictly necessary.¹⁷

The Court did not offer a detailed explanation as to why it did not share the Commission's view. Some useful comments can, however, be made. The application of the concept of "special circumstances" to Article 5 clearly shows that the Commission regards it preferable to allow states a greater freedom in the choice of the measures they deem appropriate to counter terrorism, rather than have them resort to Article 15. By interpreting Article 5 flexibly, that is, by creating a distinction between normal and special cases, the

¹⁴ See Decision of the Commission, Appl. 2894/66, 6 October 1966, 9 Yb ECHR 564. A period of five days was deemed acceptable in Decision 19 July 1972, Appl. 4960/71, 42 Coll. Decision, 49. The Commission stated: "ceci n'est dû qu'à des circonstances indépendantes des autorités judiciaires ou de la police" (p. 55).

¹⁵ "The Commission has assessed these periods against the background of its case-law according to which a person should not be detained in normal cases for more than four days without being brought before a judicial authority. The Commission is aware, however, that it must strike a fair balance between the interests of the individual and the general interest of the community. ... In so doing, the Commission takes into account that the struggle against terrorism may require a particular measure of sacrifice by each citizen in order to protect the community as a whole against such crimes..." Rep. of the Comm., para. 106.

¹⁶ See case of *Brogan*, *supra* note 1, para. 61.

¹⁷ *Id.*

Brogan Case

Commission gives states this freedom. In so doing, the Commission seeks to ensure the integral application of the Convention wherever and whenever possible (including in states facing difficult situations), even if at the cost of a relative strain on some of its provisions. In other words, in the opinion of the Commission, in situations of terrorism or risks to institutional stability it is better to have all of the Convention's provisions in force, even if this means guaranteeing some rights (the right to personal freedom, in the present case) in a somewhat attenuated form, than for some of these rights to be suspended outright.

There are some difficulties, in my opinion, with this view: I will try to point them out, and to explain why, apart from the difficulties, it is not a desirable view and has rightly been rejected by the Court.

I have already mentioned that, in a previous case, the Commission had accepted a period of detention of five days because at some point during the detention period the arrestee had to be hospitalized. In the *Brogan* case this precedent enabled the Commission to assert that the limit of four days only applies to normal cases, whereas in the present case the existence of a special situation, which "requir[ed] a particular measure of sacrifice by each citizen in order to protect the Community as a whole," justified the application of a slightly longer limit. The natural extension of this line of reasoning is that, if each abnormal situation permits the application of a different maximum limit, every individual must expect, owing to some change of circumstances, either a limitation or an enlargement of his or her rights and freedoms under the Convention.

I think it is unwarranted, on the basis of the hospitalization case, to distinguish, in the context of Article 5, between "normal" and "special" cases and to apply to the latter a looser deadline. It is one thing to note the exceptional character of one case, and to create an exception due to the specific features of that case, where the exception remains limited, its future application to other cases improbable. It is entirely another thing to make the exception depend upon the circumstances, such as the political climate, in which the case is situated. What makes this case exceptional is not its special features but its being situated in those circumstances (e.g. terrorism). Applying a longer limit to an entire category of cases, all falling under that exceptional situation, would amount in practice to a modification of the norm.¹⁸ Such an interpretation is incompatible with the structure of Article 5, which includes an exhaustive list of the admissible exceptions to the right to personal freedom and makes no distinction as regards special situations.

A differentiation between "normal" and "special" situations also strikes at the very *ratio* of the regulation concerning police custody in the Convention. The limited duration of police custody under the Convention embodies a compromise between the police's need to detain suspects in order to verify the well-foundedness of their suspicions, and individuals' right not to be unduly detained.¹⁹ Its factual premise is a "reasonable suspicion" which may nonetheless prove unfounded. A strict limitation on these powers enables the police to make the necessary checks while insuring that, where suspicions prove groundless, the arrestee is not taxed too heavily.²⁰ The increased gravity of the

18 See in this sense, *mutatis mutandis*, Soulier, 'Lutte contre le terrorisme et droits de l'homme - De la Convention à la Cour Européenne des Droits de l'Homme', 3 *Revue de Science Criminelle et Droit Penal Comparé* (1987) 663. He adopts the same reasoning to criticize the Commission's position in the *McVeigh* case.

19 See, with reference to English criminal procedure for ordinary cases, C.J. Hemmins, *A Practical Approach to Criminal Procedure* (3rd edition) (1985) 354.

20 The corollary of this point is that the police are obliged to release the arrestee if the arrest is not confirmed by the competent authorities (even when they are convinced of his guilt) but cannot be held responsible for the arrest in cases where the suspicions prove unfounded. See,

suspected offence does not increase the likelihood that the suspect has committed it. The right of persons to have their position speedily defined, or be released, should be the same regardless of the crime at issue since a factual uncertainty, being the crux of the matter, has no relation to the gravity of an offence. Admitting longer police custody for those suspected of terrorist offences would alter the balance in favour of the police authorities, conferring on them more sweeping powers and the authority to decide when to use them. In practice the police – this is to say one of the parties to the compromise – would have the power to decide, exclusively upon their own evaluation of the facts, whose freedom to restrict more and whose less before being subjected to an external check. This is precisely what the provision contained in para. 3 is meant to avoid.

In theory anyone could be arrested on the basis of a suspicion which later proves unfounded. This has led the Commission to say that the presence of a terrorist threat requires a greater sacrifice of everybody's freedom.²¹ According to the Commission, if an individual is arrested, he or she should accept being detained a little longer before being brought before a judge, even though innocent, for the sake of a more effective struggle against terrorism. But, it is precisely in these situations, when the police are likely to arrest more people purely on suspicion, that guarantees to personal freedom should be strengthened, rather than weakened. This would lower the risk of abuses, and reduce the stress for a greater number of innocent people who inevitably end up being arrested.²²

III.

It is now clear that the structure and purpose of Article 5 do not allow a more "elastic" interpretation, for this could lead to a *de facto* erosion of the right protected. The issue raised by this case, however, is not only the mere length of the police detention. This was very clearly pointed out in the partly dissenting opinion of four members of the Commission. Undoubtedly, an effective struggle against terrorism – a particularly serious class of organized crime – requires special powers and a certain prolongation of pre-trial detention for the purpose of gathering the necessary evidence. But is the absence of judicial control also necessary to achieve this goal? In other words, is it necessary to sac-

in this sense, Appl. 7033/75 – 12 October 1977 (unpublished) 'Digest of the Case-law' at 388: "Whereas, however, in determining what is a reasonable suspicion of having committed an offence permitting arrest or detention of a person under Article 5.1(c) regard must be had to the circumstances of the case as they appeared at the time of the arrest and detention and not as they may appear at some later date."

21 Rep. of the Comm., para. 106 *supra* note 15. In the *McVeigh* case, the Commission reasoned in the same way with reference to a general obligation of individuals to accept being detained for more than one day even in absence of suspicions against them, para. 188, *supra* note 3.

22 See, in this sense, the partly dissenting opinion to the Rep. of the Comm. by MM. J.A. Frowein, S. Trechsel, H.G. Schermers and Mrs. G.H. Thune: "In the opinion of the majority, the struggle against terrorism justifies that all citizens should accept the risk of being detained for some time beyond four days without being brought before a judge. We cannot accept this position. 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. It cannot be said that the need for judicial control is less than in respect of detention for ordinary criminal offences. The Government has alluded to special problems which exist when suspected terrorists are arrested and detained... We agree that account must be taken of these problems but it has not been shown that they exclude judicial control of detention." (pp. 24-5).

Brogan Case

riche the guarantees associated with judicial control of detention in order to fight terrorism more effectively?²³

If it is not disputed that a longer pre-trial detention may often be necessary in terrorist cases, attention must be drawn to the individuals who may authorize the extensions. This is a rather delicate question because it entails a judgment on the different procedural systems of Member States. The Convention clearly requires that the authority entitled to remand the arrestee in custody must have "judicial power." This provision was further clarified in the *Schiesser* case where the Court stated that the authority must "be independent of the executive and the parties."²⁴ The 1984 Prevention of Terrorism Act, however, provides that the authorization to extend detention beyond 48 hours be given by the Secretary of State,²⁵ a member of the executive.

In its pleadings the British government did not question the fact that the Convention requires detention extensions to be authorized by a "judicial power" but instead asserted that a modification of the legislation in this direction would be undesirable (though not impossible).²⁶ In rejecting the British Government's view, the Court applied the principle according to which a state may not plead "internal reasons" to justify its non-compliance with its international obligations.²⁷ It should not be forgotten, however, that the British procedural system (especially as amended by the Police and Criminal Evidence Act 1984 for England and Wales)²⁸ tallies extremely well with the requirements of the Convention so that, for instance, problems of unreasonable length of pre-trial detention (unlike in many other Member States) rarely surface in the U.K. This is due precisely to the "accusatorial" character of British procedure, which prevents the police from charging a suspect without sufficient evidence, but compels them to take him or her to trial as soon as a charge is made. It is therefore easy to understand why the British government is so reluctant to change its legislation. From Britain's viewpoint, it is preferable to extend

²³ See, partly dissenting opinion, *supra* note 22.

²⁴ In the *Schiesser* case, the Court asserted that the authority must be independent of the executive and of the parties, which does not mean, however, that he may not to some extent be subordinate to other officers who enjoy similar independence; also he must himself hear the individual who has been brought before him; finally he must be under the obligation to review the circumstances militating for or against detention and to decide, by reference to legal criteria, whether there are reasons to justify detention, or to order release if there are no such reasons. Publ. Ct. A/34 paras. 26-31.

²⁵ See, *supra* note 8.

²⁶ See pleadings before the Court by Sir N. Lyell, counsel for the United Kingdom government (French Version): *Compte rendu des audiences publiques tenues le 25 mai 1988 - Cour/Misc(88)162*, pp. 40-1. He gave the following reasons: the need to keep the greatest secrecy about the elements of information held by the police; the necessity not to put informants in danger; the contrast with the established principles of the British legal system, which prevents a member of the judiciary from having "inquisitorial" powers. The matter was also given consideration in the Jellicoe report: Rt.H.Earl Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* Cmnd. 8803, (February 1983) para. 70.

²⁷ See, in this sense, D. Anzilotti, *Corso di Diritto Internazionale* (Vol. I, 4th ed.) (1964) 389; *PCIJ*, Decision n.7, 25 May 1926, *AJ* at 19.

²⁸ The Police and Criminal Evidence Act (1984 c60) received the Royal Assent on 31 October 1984 and has been in force since January 1986. It "makes changes in the law relating to the powers of the police in the investigation of crime and to evidence in criminal proceedings; creates the Police Complaints Authority and makes other changes to the police complaints and discipline system; introduces statutory arrangements for obtaining the views of the community on policing; and makes miscellaneous amendments to the Police Act 1964" (Preliminary Note to the Act).

a little the length of detention without charge – knowing however that the situation of the detainee is going to be speedily defined once the charge is made – and provide a form of “imperfect” control on the detention, rather than change a fundamental of its criminal procedure: the lack of inquisitorial powers of the judiciary.

But if it had accepted Britain's argument, the Court would have set a very dangerous precedent, enabling states (including those without an “accusatorial” system of criminal procedure) to extend the police powers of detention without judicial control much beyond the limits now generally considered acceptable. The question is then whether the internal coherence of the British system is worth weakening in the whole of Europe of the entire body of legal regulations on personal freedom. The Court rightly said it is not.

IV.

As I said before, apart from the difficulties stemming from the structure of Article 5, which, as I have discussed, does not permit flexible interpretations, I also have some doubts about whether the Commission's tendency to give states a wider discretionary power in order to ensure the full application of the Convention whenever possible is desirable altogether.

In *Klass*, both the Commission and the Court took full account of the state's pressing need to combat terrorism effectively and were therefore willing to interpret some Convention provisions more flexibly (Article 8 in that case).²⁹ In *Brogan*, the Commission seemed willing to extend this practice to norms, like Article 5, which – in contrast to articles of the Convention containing concepts such as public order or national security – do not permit the elastic interpretation these “clawback clauses” render possible. The Court has blocked this, confirming the higher degree of rigidity of certain provisions compared to others, due to the greater importance of the right protected. This rigidity implies that the rules may not be stretched in such a way as to adapt to the situation of each Member State. Rather, they represent a yardstick to which all Members must adjust, even in the presence of scourges such as terrorism. Consequently, if the threat becomes so strong as to require a limitation of that right, states must resort to Article 15.

It is certainly true that, in the short term, the remedy may appear worse than the evil, insofar as it entails the outright suspension (rather than the mere limitation) of a fundamental right in that country. Nonetheless, a limited suspension of that right, by definition temporary, has the advantage of enabling a state to take the measures it deems necessary and, at the same time, of insuring that the same right is fully protected in the other Member States; resort to Article 15 thus protects a fundamental right from erosion by “elastic” interpretations and from potential Member State abuses of any increased degree of discretion. The integrity and full application of a fundamental right such as the right to personal freedom is thereby preserved for the present and for the future to the greater advantage of individuals in the whole of Western Europe.

Thus, shortly after the *Brogan* judgment, the government of the United Kingdom made a declaration by which it availed itself of the right of derogation conferred by Arti-

²⁹ *Klass* at para.59. On this case, see the comment by G. Cohen Jonathan, in ‘Chronique de la jurisprudence de la Cour Européenne des Droits de l’Homme, année 1978’, *Cahiers de Droit Européen* (1979) 478. See also, more in general on the compatibility between the European Convention and anti-terrorist measures, C. Warbrick, ‘The European Convention on Human Rights and the Prevention of Terrorism’, *32 Int'l Comp. Law Quarterly* (1983) 82.

Brogan Case

cle 15.1 of the Convention.³⁰ The 1984 Prevention of Terrorism (Temporary Provisions) Act expired in March 1989. It has since been replaced by new, permanent legislation, which reconfirms the same rules contained in Section 12 of the old Act.

³⁰ The United Kingdom notified the Secretary General of the Council of Europe of its declaration on 23 December 1988. The relevant part of this declaration reads as follows:
"Following this judgment (*Brogan* n.d.a.), the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view.
... Since the judgment of 29 November 1988 as well as previously, the Government has found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods up to five days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government has availed itself of the right of derogation conferred by Article 15.1 of the Convention and will continue to do so until further notice." European Commission of Human Rights, Minutes of the plenary session held in Strasbourg from 16 to 20 January 1989, DH (89)1 (Déf.), Appendix VI at 10.