The Decline of Dualism: The Relationship Between International Human Rights Treaties and the United Kingdom's Domestic Counter-terror Laws

by

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DECLARATION

I declare that ‘The Decline of Dualism: The Relationship Between International Human Rights Treaties and the United Kingdom's Domestic Counter-terror Laws’ is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.
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I dedicate this thesis in memory of my grandfather William Currin, who so enjoyed attending his grandchildren’s graduation ceremonies.

Craig Webber

Cape Town: November 2012
SUMMARY

In the first half of the 20th Century, the United Kingdom’s counter-terror laws were couched extremely broadly. Consequently, they bestowed upon the executive extraordinarily wide powers with which it could address perceived threats of terrorism. In that period of time, the internal affairs of any state were considered sacrosanct and beyond the reach of international law. Consequentially, international human rights law was not a feature of the first half of the 20th Century.

Following the war, however, international human rights law grew steadily, largely through the propagation of international treaties. As the 20th Century progressed, the United Kingdom became increasingly involved in international human rights law, particularly by way of the ratification of a number of treaties. Prior to the year 2000, none of these treaties had been directly incorporated into the United Kingdom’s municipal law. The traditional Dualist understanding of the relationship between international treaty law and municipal law in the United Kingdom, would hold that these unincorporated human rights treaties would form no part of that state’s domestic law.

This Dualist assumption is called into question, however, by a legislative trend which neatly coincides with the United Kingdom’s increased involvement with international human rights. This trend consists of two elements, firstly, the progressively plethoric and specific ways in which the United Kingdom began to define its anti-terror laws. The specificity in which this legislation was set out curtailed the executive’s powers. The second element is that, over time, the United Kingdom’s counter-terror laws increasingly began to include checks and balances on the executive. There is a clear correlation between these trends and the United Kingdom’s evolving relationship with international human rights law. That nation’s enmeshment with international human rights law from 1945 onwards is undeniably linked with the parallel evolution of its domestic counter-terror laws.
One of the grounds on which the status of international law is questioned is that it is ineffectual. This thesis calls such arguments into question, as it shows that international human rights treaties have meaningfully impacted on the United Kingdom’s evolving counter-terror laws and thereby successfully enforced the norms they advocate.

**KEY TERMS**

- International law
- International human rights law
- Monism
- Dualism
- United Kingdom
- Northern Ireland
- Terrorism
- September 11th
- Counter-terror laws
- Transnational legal process
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CHAPTER 1

INTRODUCTION

1. Theoretical Framework

1.1 Naturalism, Positivism and the Scope of International Law

Rudimentary international law can be traced back as far as the ancient civilisations of Rome, Greece, Egypt and India. Later, in Medieval Europe, international law was unknown, largely because states, in the modern sense of the word, did not exist. Various kingdoms existed, but the ruling kings were loyal to the Holy Roman Empire and the Pope. Even within their own realms, the kings of the day ruled in conjunction with the aristocracy. Developments such as the Reformation, the disintegration of the feudal system, the re-emergence of Roman Law, the growth of international trade and the Renaissance changed the political landscape in Europe, allowing the modern system of states to develop. This in turn allowed for the development of modern international law.

The seeds of modern international law were sown first by Gentilis, an Italian Professor of Civil Law at the University of Oxford and then later by Dutch Jurist Hugo de Groot, better known as Grotius. In De Jure Belli ac Pacis Libri Tres, Grotius, who is known as the founder of modern international law, attempted to demonstrate the existence of a law common to all nations and binding on all people, regardless of local custom. Grotius is considered a Naturalist, in that he argued that the existence of natural laws was the automatic result of men living together in communities and sharing a common understanding that rules are required to preserve

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1 Starke (1989) at 8; Akehurst (1984) at 13; Janis (2003) at 1.; Oppenheim (2009) 48-56. See, however, Elliot (1918) at 270 who argues that to believe that international law existed among the Ancient Greeks is to misunderstand their understanding of states as self-sufficient.
5 Starke (1989) at 10; Oppenheim (2009) at 58-60; Elliot (1918) at 270.
society\textsuperscript{9}. He argued that natural law was so immutable that it was bound to develop, even in the absence of God\textsuperscript{10}. For Grotius, the law of nature was the product of reason which could be accessed by any individual using his inherent logical abilities\textsuperscript{11}. Grotius sought to use the existence of this common law as a means of promoting peace amongst the newly emerged nation states\textsuperscript{12}. For Naturalists such as Grotius, international law is non-consensual and the treaties and custom which constitute it, are simply manifestations of a natural state of being\textsuperscript{13}. Interestingly, early Naturalists such as Grotius and Blackstone believed that international law was applicable to individuals as well as states\textsuperscript{14}. In 1765 Blackstone wrote that ‘the law of nations is a system of rules, deducible by natural reason, and established...in order to decide all disputes...between two or more independent states, and the individuals belonging to each.’\textsuperscript{15} In 1769 the Positivist thinker, Jeremy Bentham coined the term ‘international law’ in his *Introduction to the Principles of Morals and Legislation*\textsuperscript{16}. Bentham argued that the term ‘law of nations’ was misleading as it could be taken to denote internal or municipal law\textsuperscript{17}. He argued that the term ‘international law’ should replace ‘law of nations’\textsuperscript{18}. It has been said that in defining this alternative term, Bentham inadvertently omitted any reference to individuals, thus altering fundamentally Blackstone’s formulation\textsuperscript{19}.

Later, in the 18\textsuperscript{th} Century other Positivist thinkers such as Cornelius van Bynkershoek, Moser and von Martens advocated systems of interstate justice based on the principle of consent, rather than Natural Law\textsuperscript{20}. The Positivists were deeply influenced by thinkers such as Hegel and Bentham, who were focused on the importance of the nation state and argued that international law applied only to such states\textsuperscript{21}. These thinkers distilled the principles of international law primarily by

\textsuperscript{9} Akehurst (1984) at 13; Nys (1912) at 2.
\textsuperscript{10} Nys (1912) at 2; Elliot (1918) at 272.
\textsuperscript{11} Elliot (1912) at 272.
\textsuperscript{12} Dugard (2011) at 10; Weeramantry (1999) at 1516.
\textsuperscript{13} Janis (2003) at 5.
\textsuperscript{14} Id at 247.
\textsuperscript{15} Blackstone *et al* (1852) at 61.
\textsuperscript{16} Bentham (1961) at 326-328.
\textsuperscript{17} Bentham (1961) at 326-328; Janis (2003) at 249.
\textsuperscript{18} Ibid.
\textsuperscript{20} Dugard (2011) at 10; Akehurst (1997) at 14; Starke (1989) at 13.
\textsuperscript{21} Janis (2003) at 253; McClure (1960) at 60.
examining custom and treaties\textsuperscript{22}. The 18\textsuperscript{th} Century also saw an attempt by the Swiss writer Emerich de Vattel to reconcile the Positivist and Naturalist schools of thought\textsuperscript{23}. He argued that states enjoyed certain inherent rights, which flowed from Natural Law, but were not similarly bound to observe any duties\textsuperscript{24}. Instead, De Vattel said that inter-state duties could only arise where there had been express agreement and that these duties were therefore part of positive or man-made law\textsuperscript{25}.

International law grew rapidly in the 19\textsuperscript{th} Century, particularly in the area of the law of war and neutrality\textsuperscript{26}. Many thinkers of the time favoured Positivism, though in the absence of custom or treaty rules, were not opposed to relying upon Naturalist principles of justice and reason\textsuperscript{27}. International law developed at an even quicker rate in the 20\textsuperscript{th} Century\textsuperscript{28}. This was due to the increased interdependence of states, mediated by technological advances in the fields of transport and communication\textsuperscript{29}. The quickened pace of international affairs in the 20\textsuperscript{th} Century also resulted in a proliferation of international treaties\textsuperscript{30}. These treaties were better suited to the fast pace of the 20\textsuperscript{th} Century than custom\textsuperscript{31}.

The events of World War Two altered the scope of international law fundamentally\textsuperscript{32}. Prior to 1945 the internal affairs of any nation were considered sacrosanct and beyond the reach of international law\textsuperscript{33}. This approach contributed significantly to Europe’s laissez-faire attitude towards Nazi Germany in the lead up to the war\textsuperscript{34}. The atrocious treatment by Germany of her own citizens throughout the conflict convinced world leaders that a change in attitude was essential\textsuperscript{35}. The London Charter of the International Military Tribunal was a decree issued on August 8\textsuperscript{th} 1945, which

\begin{flushleft}
\textsuperscript{22} Starke (1989) at 13.
\textsuperscript{23} De Vattel (1797) at 1ff.
\textsuperscript{24} Id at 4-8.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\textsuperscript{28} Starke (1989) at 15.
\textsuperscript{29} Ibid.
\textsuperscript{31} Starke (1989) at 16.
\textsuperscript{32} Id at 308.
\textsuperscript{33} Ibid.
\textsuperscript{34} Id at 309.
\textsuperscript{35} Ibid.
\end{flushleft}
allowed for the trial of Nazi leaders for violations of international law. The Charter was a significant milestone in the development of international human rights law as it signalled the end of the unqualified supremacy of national law. For the first time, international law became concerned with protecting individuals’ rights against their own governments. The Nuremberg Tribunal held, *inter alia*, that ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals that commit such crimes can the provisions of international law be enforced.’ The development of international human rights law has thus brought into question the Positivist view that international law cannot be applied to individuals. As has already been pointed out, the principle that law should prevent governments from abusing the rights of individual citizens is one which has traditionally been associated with the Naturalists. Individuals were not the only subjects of international law to be introduced in the 20th Century. Groups of states rather than single nations began to deal with problems with international dimensions and this resulted in the establishment of many international organisations, which are also subject to international law.

### 1.2 Traditional Critiques of International Law as Real Law

There is a popularly held belief that international law is not law at all. It has often been observed that the proverbial “man on the street” has scant regard for international law as real law. Politicians have also often expressed scepticism that international law constitutes actual law as commonly understood. Speaking in the House of Lords in the late 19th Century, the Marquis of Salisbury stated that international law ‘has not any existence in the sense in which the term law is usually

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37 Ibid.
38 Ibid.
41 Ibid. Another example of such a Naturalist thinker is John Locke, who in his Two Treatises of Government posited that individual human rights predate governments in the natural order of things. See Locke (1821) at 48ff.
43 Ibid.
45 MacKenzie (1938) at 7-8; Wright (1956) at 3; Morgenthau (1940) at 260.
understood...It can be enforced by no tribunal, and therefore to apply to it the term *law* is to some extent misleading.\[^{46}\] Over time, this scepticism has also been exhibited by a number of academics from various disciplines\[^{47}\]. In fact even in the time of Grotius there were those who were sceptical about the existence at international law\[^{48}\]. Grotius observed that: ‘there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name.’ Grotius was also evidently aware of one of the primary reasons for people’s cynicism, commenting that ‘men rush to arms for slight causes, or no cause at all, and when arms have been taken up there is no longer any respect for law, divine or human.’ Later, in the 18\[^{th}\] Century, this scepticism towards international law was also evident, when Bentham\[^{49}\], who was the first English thinker to test law by way of logical standards, opined that:

‘A treaty between two nations is an obligation which cannot possess the same force as a contract between two individuals. The customs which constitute what is called the law of nations, can only be called laws by extending the meaning of the term, and by metaphor.’\[^{50}\]

A further example can be found in the writing of then Montague Burton Professor of International Relations at the University of Oxford, Sir Alfred Zimmern, who in 1936 commented that: ‘the term “International Law” embodies a conception which is, at its best, confusing and at its worst exasperating.’ Zimmern believed that the concept of international law as law was inescapably intertwined with Naturalism and the Christian tradition and therefore implausible and anachronistic\[^{51}\].

There are many reasons why it is commonly thought that international law is ineffective and often ignored\[^{52}\]. Writing only months prior to the end of hostilities in the First World War, Elliot pointed out that the fact that international law has been violated very frequently and often flagrantly, has led people to conclude that it is of

\[^{46}\] Nys (1912) at 5.
\[^{47}\] MacKenzie (1938) at 6; Zimmern (1936) at 94.
\[^{48}\] Wright (1956) at 3.
\[^{49}\] Bentham in fact coined the term ‘international law’.
\[^{50}\] Bentham (1993) at 402.
\[^{51}\] Zimmern (1938) at 3.
\[^{52}\] Ibid.
little consequence. Some writers concluded that the Great War had in fact destroyed international law, while others stated that the proponents of international law had been deluded in mistaking it for anything other than a purely normative project. It has been said that one of the reasons that people commonly believe that international law is ineffective is that they believe that its sole object is to maintain peace and law and order amongst states. In addition, breaches of international peace are always widely reported on by the media. Such reports lead the general public to conclude that international law is toothless. Municipal crimes also receive wide media coverage, but it is easier for individuals, constantly interacting with their local environments, to place into context the information they receive from the media concerning local criminal activities. The same cannot be said of crimes against international law as most people cannot relate to inter-state activities. People also mistakenly believe that the existence of an international dispute signifies a breach on international law. This is not always the case, just as a dispute between individuals does not always mean that a crime has been committed.

The belief that international law does not constitute law in the true sense of the word is also often based on the assertion that it does not police its boundaries and enforce its codes in the same manner as municipal law. In the 19th Century John Austin argued that:

‘the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns,'
of provoking general hostility, and incurring its general evils, in case they shall violate maxims generally received and respected.”

For Austin, laws were established by political superiors for their political inferiors and in order to qualify as actual law, had to command authority as well attract a penalty or sanction when broken. Oppenheim points out that these comments are invalid due to Austin’s use of a fallacious definition of law. Austin’s definition fails to account for those unwritten customary national laws, which by their very nature are not set by a sovereign, but rather evolve over time through common usage. Oppenheim believed that law is better understood as a community’s body of rules, enforceable through mutual consent by an external body. Oppenheim thus distinguished laws from mere rules of morality, pointing out that the latter are enforced through internal conscience alone, while the former require external enforcement. Importantly though, Oppenheim believed that the absence of a law making authority, or a system of Courts did not necessarily mean that rules are without a legal nature, pointing out that ‘primitive’ communities often enforce their own rules. It is only as communities grow in size and complexity that a need arises for legislative and executive enforcement bodies. Applying Oppenheim’s definition, it is possible to identify bodies of law which exist outside of any given nation state, such as the Canon Law of Roman Catholic Church. Making use of the same definition of law, it is also evident that the law of nations, or international law is indeed actual law.

Countless others have responded to international law’s critics, as Oppenheim did, by offering new or revised definitions of what constitutes law. These definitions invariably steer clear of Austin’s requirements that law, properly so called, be set and enforced by a sovereign over subordinates. For instance, MacKenzie argues that laws

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64 Austin (1832) at 208.
65 Austin (1832) at 208-211; Lys (1912) at 20; Elliot (1918) at 268; Goodhart (1948) at 685-686; Sucharitkul (2010) at 2.
67 Ibid. at 4.
69 Id at 4.
70 Id at 5.
71 Id at 6.
72 Id at 7.
73 Id at 9-12.
74 MacKenzie (1938) at 10.
consist of ‘rules of conduct which govern the conduct of individuals in their relations with one another.’ A further example is Bruch who argues that a multidimensional view of law is best, encompassing violence, force, bureaucracy, rationality, governance and reform\textsuperscript{75}. D’Amato argues that enforcement is not a defining characteristic of law\textsuperscript{76}. Instead, he suggests that law is in fact opposed to force and that a more appropriate defining characteristic is of law is ‘right reason’\textsuperscript{77}. Goodhart provides, what has been termed an ‘analytical’ definition for law\textsuperscript{78}. For Goodhart the law amounts to any body of rules recognised as binding in an organised society\textsuperscript{79}. Adopting these definitions it is easier to view international law as law in the proper sense of the word.

Another notable critic of Austin’s concept of law is H.L.A Hart\textsuperscript{80}. Hart points out that the reasons many educated, well-meaning people doubt the existence of international law as actual law, are threefold: international law i) lacks a legislature; ii) cannot be enforced by a Court, without states’ prior consent; and iii) has no effective system of sanctions\textsuperscript{81}. Nonetheless, Hart found Austin’s theory to be incomplete as it failed to cater for certain rules within national systems which undoubtedly constitute laws\textsuperscript{82}. Hart noted that i) not all municipal laws are designed to order people to do things; ii) not all laws are enacted by a sovereign or legislature; iii) legislation not only binds others, but obliges the law makers themselves to follow the law\textsuperscript{83}. For Hart, law makes certain conduct obligatory or compulsory\textsuperscript{84}. This conception of law allowed Hart to account for the fact that obligations do not necessarily arise out of threatened sanctions, but can also be prompted by social pressure, shame, remorse or guilt\textsuperscript{85}. For Hart, therefore, laws properly so called are not necessarily predicated on the credible threat of physical sanctions or force\textsuperscript{86}. It has been noted that Hart’s understanding of law encompasses many forms of international law that do not find a home in Austin’s

\textsuperscript{75} Bruch (2011) at 372.
\textsuperscript{76} D’Amato (1985) at 4.
\textsuperscript{77} Ibid.
\textsuperscript{78} Sucharitkul (2010) at 3.
\textsuperscript{79} Goodhart (1948) at 19.
\textsuperscript{80} Hart (1961) at 3.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{86} Ibid.
conception of law. These include the pressures experienced by states to act in a certain manner, as a result of demands from other states and non-governmental organisations. Although Hart recognised international law as real law, he believed that it was a weak and primitive law, lacking many of the so-called ‘secondary rules’ which allow for the creation, alteration or extinction of the primary rules.

Despite these attempts at confronting the challenges posed to international law by Austin, the status of that law remains contested. Writing in the 1960s, Kunz comments that the supposed absence of sanctions remains the primary argument of those who believe that international law does not constitute actual law. Recently, Bolton has questioned whether the designation of international law as real law really matters. Bolton rightly points out that the question is of critical importance, as the designation of international law as real law or something of less import, impacts on the conduct of the subjects of international law, principally nation states. For instance, Bolton argues, based on a conclusion that international law treaties cannot create interstate legal obligations, that the United States is not legally bound by those treaties that it has signed and that it would be acting legally to break the terms of such treaties should its government opt to do so.

Contemporary thinkers often posit that international law’s lack of effective sanctions means that it cannot be considered law in the true sense of the word. Until quite recently a breach of international law could only be remedied by way of self-help. In other words, states injured by other nations’ illegal activities could only address the wrongdoing by taking independent steps, such as cutting off economic aid or embarking on a proportionate reprisal. Nonetheless, the creation of the Permanent International Criminal Court by way of the Rome Statute demonstrates states’ enthusiasm for international justice and the rule of law. In any event, a number of

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87 Murphy (2009) at 167.
88 Ibid. at 167.
89 Hart (1961) at 222.
90 Kunz (1960) at 325.
92 Id at 9-14.
93 Akehurst (1997) at 5; Wallace (2002) at 3.
95 Ibid.
96 Wallace (2002) at 3.
different sanctions are now available for the enforcement of international law. Examples include the authorisation and imposition of sanctions by the United Nations Security Council, together with self-help mechanisms such as the freezing of state owned assets, or the termination or suspension of treaties. Public opinion can also act as an effective means of enforcing international law. This is especially true, as states appear to zealously guard their image as abiding by and respectful of international law, even in instances where they appear to have disregarded it. Oppenhein stated that:

‘Violations of this law certainly are frequent. But the offenders always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts.’

Ironically these comments, echoed later by H.L.A Hart, have been used by detractors in an attempt to strengthen their argument that international law does not exist. For example, Lundstedt argued that laws so commonly disregarded could not constitute actual laws. In defence of international law, Lacey has pointed out that if the same standards were applied to municipal law, we would often be required to conclude that states’ internal laws had ceased to exist. Nonetheless, Lacey rightly concedes that the sanctions available in the international arena are typically less effective than municipal sanctions. One reason for this is that there are comparatively few states and often a small number of them are so powerful that the remainder are too intimidated to take any action when a strong nation breaks the law. Sanctions, however, are not the only reasons why laws are respected. In fact, in the municipal sphere, adherence to laws is seldom simply a product of fear of

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97 Ibid.
98 Ibid.
100 Ibid.
101 MacKenzie (1938) at 22.
103 Lundstedt (1925) at 239.
104 Ibid.
105 Lacey (1926) at 110.
106 Id at 7.
107 Ibid.
108 Ibid.
reprisal by the state\textsuperscript{109}. Factors such as morality, conscience and habit are also important factors in explaining why individuals obey the law\textsuperscript{110}. In any event, sanctions do not guarantee compliance with the law\textsuperscript{111}. In municipal law, many people regularly break certain kinds of law, such as traffic regulations, despite the fact that sanctions are in place\textsuperscript{112}.

Aside from Austin, more contemporary jurists such as Kelsen have defined law in a way which inescapably binds law and coercion\textsuperscript{113}. For Kelsen law at its core, is force and to deny the importance of a law’s efficacy merges law proper with indiscriminate, random human behaviour\textsuperscript{114}. Cowan has highlighted various problems with this Positivist definition of law\textsuperscript{115}. If law is good, then it must follow that force is good and that good citizens have an obligation to assist in the law’s enforcement. If citizens call for more law, this inevitably means that they want more force. This presents a significant problem however as those nations which employ high levels of internal force are often perceived as being totalitarian\textsuperscript{116}. Cowan also points out that despite the fact that people all over the world continuously press their leaders for more laws, wars still abound\textsuperscript{117}. These conflicts are not only fought between states, but within countries in the form of civil wars or internal conflicts\textsuperscript{118}. Cowan argues that the demand for more laws has directly impacted on the greater prevalence of conflict. Hobbes points out that the opposite of war is not peace, but rather law\textsuperscript{119}. If law is inexorably linked with force, however, this leads to the conclusion that we are faced with a stark choice: war with one another or war with ourselves\textsuperscript{120}. Cowan speculates that one way out of this conundrum is to hope that warfare evolves in such a way so as to become more civilised and tolerable. The only way in which a Positivist thinker could suggest that such a state of affairs be brought about, however, is by way of

\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} Kelsen (1967) at 266-267.
\textsuperscript{114} Ibid.
\textsuperscript{115} Cowan (1971) 685-686.
\textsuperscript{116} Id at 685.
\textsuperscript{117} Ibid.
\textsuperscript{118} Ibid.
\textsuperscript{119} Hobbes (1651) at 1-83.
\textsuperscript{120} Cowan (1971) at 686.
more laws and therefore more force\textsuperscript{121}. The results of such a suggestion would be untenable\textsuperscript{122}. Bacchus has correctly surmised that a world in which power or force is all that matters, is the very opposite of the world that Grotius envisaged when he described the international rule of law\textsuperscript{123}.

Others such as Nys, have pointed out that some sanctions are so poorly defined that they are barely perceptible and that very often laws are obeyed due to the weight of public opinion\textsuperscript{124}. Nys argues that law does not necessarily share the same meaning as constraint even where laws are broken, or even crushed, they still constitute actual law\textsuperscript{125}. Nys speculates that many people perform countless juridical acts without considering whether failure to carry out these obligations will result in punishment\textsuperscript{126}. He also points out that certain legal institutions, have existed for many years without any powers of enforcement\textsuperscript{127}. In addition, Nys argues that coercive force is often lacking in the field of constitutional law and that many countries lack institutions responsible for enforcing the terms of their constitutions.

Scott has argued that international law is enforced by sanctions, in the form of military interventions and that the form of the sanction is immaterial\textsuperscript{128}. He also argues that the nature of law as real law, cannot be dependent on the whim or ability of a sheriff or the success or failure of an army waging war\textsuperscript{129}. Scott also argues that where states acknowledge the existence of any given international law, that it is irrelevant whether their acquiescence has resulted from a threat of force which is moral, physical or ethical\textsuperscript{130}. Scott goes as far as to say that making the form of punishment the essence of law, properly so called us absurd\textsuperscript{131}, and that other kinds of sanctions are available in international law, including, embargos, reprisals and blockades\textsuperscript{132}. Other authors, such as D’Amato have argued that international law is

\textsuperscript{121} Id at 686.  
\textsuperscript{122} Ibid.  
\textsuperscript{123} Bacchus (2003) at 268.  
\textsuperscript{124} Nys (1912) at 3.  
\textsuperscript{125} Ibid at 3.  
\textsuperscript{126} Id at 20.  
\textsuperscript{127} Ibid at 20.  
\textsuperscript{128} Scott (1905) at 124.  
\textsuperscript{129} Ibid.  
\textsuperscript{130} Ibid.  
\textsuperscript{131} Id at 125.  
\textsuperscript{132} Ibid.
enforced by way of social disapproval or outcasting. Kleinfeld points out, however, that the core objection levelled at international law is not that it does not have any enforcement mechanisms, but rather that that it does not work. In other words, detractors argue that while international law may have certain instruments of acquiescence, it lacks the power to bring the norms and values which it advocates into existence. Kleinfeld uses this point to demonstrate why the mere existence of ‘outcasting’, a form of social pressure by which international law can be enforced, does not demonstrate that international law is actually enforced. It thus becomes clear that it would be useful to be able to gauge the extent to which international law is able to enforce the norms it espouses. One of the aims of this thesis is to attempt to measure the extent to which international human rights law has successfully enforced the norms its espouses in the context of the United Kingdom’s counter-terror laws.

Koh has posed an important question, related to the above discussion: what is meant when we say that any given law has been enforced? Koh points out that municipal laws are often imperfectly enforced, for instance parking regulations and the like may not be faultlessly implemented. Nonetheless, Koh argues, we still maintain that such laws are sufficiently enforced by the many well known aspects of the domestic legal process, such as the legislature, the administration and the executive. He points out that prosecutors, police officers, judges, penalties, statutes and the like all work in tandem to ensure the internalisation of the norms on which our societies are built. Koh points out further the fact that more often than not, people are far less willing to accept that a similar process is at play in relation to international law. He believes that international human rights laws are enforced, albeit poorly, through a little known ‘transnational legal process’. This process involves three steps, namely i) institutional interaction, which produces debates around human rights norms; ii) interpretation of these laws; and lastly iii) the internalisation of norms by municipal

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133 D’Amato (1985) at 5.
134 Kleinfeld (2011) at 305.
135 Ibid.
136 Ibid.
137 Koh (1999) at 1398.
138 Ibid at 1399.
139 Ibid.
140 Ibid.
141 Ibid.
legal systems. Koh concedes that this process is imperfect and only works sporadically, but that nonetheless it is the means by which international law norms are internalised by nation states. Koh also attempts to explain the relationship between laws and observed practice. Where laws appear to be complied with, there are in fact a number of reasons for this. The first, so the argument goes, is coincidence. Coincidence, however, cannot explain why so many people in any given state seem to obey various laws. The second potential reason is conformity, which involves an active decision to follow a rule when convenient, without any feelings of obligation. The third possible explanation is compliance, which involves the acceptance of a given rule for external reasons, such as avoiding penalties or fines. The last possibility is obedience, which occurs where people obey rules, because they have internalised the underlying norms of the rule. Koh points out that of all of these options, the last is the most effective form of law enforcement. He argues that true compliance is not really achieved through external sanctions, but rather the internalisation of norms. Koh argues that norms and rules are generated and thereafter internalised. This process of internalisation is said to happen when ‘transnational norm entrepreneurs’, together with governmental norm sponsors, such as the United Nations Human Rights Commissioner and others, seek the declaration and interpretation of human rights norms by approaching, *inter alia*, law declaring forums, such as regional and international Courts. These norms are then internalised by governments, via a process whereby, *inter alia*, legal advisers and other lawyers working in government departments seek to ensure that policies conform to international norms, and where this is not desirable, seek to justify non-compliance. In this way, municipal decision making structures become enmeshed with international legal norms, so that institutional arrangements for the maintenance of international commitments become part of domestic legal and political

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142 Ibid.
143 Ibid.
144 Id at 1400.
145 Ibid.
146 Koh (1999) at 1400.
147 Ibid.
148 Ibid.
149 Id at 1401.
150 Id at 1407.
151 An example provided by Koh is Lord William Wilberforce.
152 Id at 1410.
153 Ibid.
processes\textsuperscript{154}. Koh comments that when these default patterns of compliance are broken, frictions are created and that in order to avoid such problems, national leaders may in fact shift policies over time in order to bring them in line with internalised international norms\textsuperscript{155}.

A further argument has been made in defence of international law’s status as actual law. It has been pointed out that in practice, states accept that international law constitutes actual law\textsuperscript{156} and that on most occasions states interact with one another in a lawful manner\textsuperscript{157}. This was a point first made by Henry Wheaton in his treatise on international law. Wheaton argued that the states’ motives for observing international law were irrelevant and that international law was sufficiently ‘law like’ to qualify as actual law\textsuperscript{158}. Others, though, have pointed out that states’ motives for abiding by international law are important. Reeves points out that national policies are the driving force behind states’ actions and that when these do not coincide with international law, the illusion of international law as actual law is broken\textsuperscript{159}. Reeves therefore states that it is necessary that international interactions must rest on a shared regard for humanity and the law\textsuperscript{160}. Franck has observed that the motives behind states’ acquiescence to international law, is often not in line with their short term self-interest. This is particularly interesting in light of the fact that international law is largely voluntary in nature and not supported by much in the way of coercive force\textsuperscript{161}. Franck argues that in societies organised by rules, compliance is partly secured where those to whom the rules are directed find them to be legitimate. He states that this perceived legitimacy becomes a crucial factor in relation to compliance where, as in international law, there are few coercive forces\textsuperscript{162}.

\textit{1.3 Dualist and Monist Theories of International Law}

\textsuperscript{154} Koh (1999) at 1411; Koh (1997) at 2599.
\textsuperscript{155} Koh (1997) at 2655.
\textsuperscript{156} Akehurst (1997) at 2; Wallace (2002) at 2; Oppenheim (2009) at 12.
\textsuperscript{157} Franck (1988) at 705; Reeves (1915) at 81; Brown (1945) at 534.
\textsuperscript{158} Janis (2003) at 3.
\textsuperscript{159} Reeves (1915) at 81.
\textsuperscript{160} Id at 82.
\textsuperscript{161} Franck (1988) at 705 and 707.
\textsuperscript{162} Id at 706.
Starke states that ‘nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law.’\textsuperscript{163} Examining the relationship between international law and municipal law also aids in better understanding the law of treaties, which for the purposes of this thesis, is the most important branch of international law\textsuperscript{164}.

The two most important theories which deal with the relationship between international and municipal law are Monism and Dualism\textsuperscript{165}. Monism has both international and state law as part of one single legal system\textsuperscript{166}. Supporters of Monism believe that all law forms part of one unitary entity and therefore the most important question relating to international law is whether it constitutes actual law\textsuperscript{167}. For Monist thinkers, an acknowledgement of the legal nature of international law necessarily means that as a system of laws, it must form part of a single overarching legal structure\textsuperscript{168}. Other Monist thinkers have been less concerned with the status of international law and have adopted a more practical stance\textsuperscript{169}. They point out that states are composed of individuals and it is these individuals that are ultimately called upon to comply with international law\textsuperscript{170}. Since both international and state law govern individuals, so the argument goes, they must therefore form part of the same system\textsuperscript{171}.

Monists are divided on the question of which subsystem of law enjoys primacy\textsuperscript{172}. Kelsen focused on analysing and determining the hierarchy of international and municipal legal norms on which laws and regulations are based\textsuperscript{173}. He believed that the ultimate fundamental legal principle could be found in either state or international

\textsuperscript{163} Starke (1989) at 71.
\textsuperscript{164} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} Starke (1989) at 74.
\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid.
\textsuperscript{172} Starke (1989) at 74; Ludwikowski (2001) at 254.
\textsuperscript{173} Starke (1989) at 74; Kelsen (1967) 556-562.
law\textsuperscript{174}. He nonetheless stated that municipal law enjoyed primacy over international law but was careful to point out that this conclusion was unscientific and not necessarily rooted in fact, as the uncertain nature of the law did not allow for such an analysis\textsuperscript{175}. Various thinkers objected to Kelsen’s conclusions, pointing out that giving primacy to state law would mean that hundreds of state legal systems would all become supreme, introducing a kind of anarchy\textsuperscript{176}. It has also been pointed out that the primacy of state law is unable to account for the continued existence and stability of international law in the light of countless changes in state constitutions, revolutions and the like\textsuperscript{177}. Kelsen’s critics have also pointed out how new states are automatically assumed to be bound by international law and that such states are expected to align their national legislation with international legal principles\textsuperscript{178}. It has also been argued that although states enjoy a very wide degree of liberty and sovereignty, this amounts to a mere competency, no matter how wide, which exists within the broad bounds of international law\textsuperscript{179}.

Other writers such as Lauterpacht argue that both state and international law are primarily concerned with individuals and more specifically the protection of human rights\textsuperscript{180}. For Lauterpacht the very existence of state or municipal law is dependent on international law and that for this reason international law is supreme\textsuperscript{181}. Other writers such as Kunz, Verdross, Ginsburg and Starke also conclude that the only tenable hypothesis is that international law enjoys primacy over domestic law\textsuperscript{182}. In contrast, proponents of inverted Monism, including Bergbohm, believe that municipal law is superior to international law\textsuperscript{183}. While inverted Monists do acknowledge the existence of international law, they believe that it is simply a consensual creation of independent states and therefore inferior law\textsuperscript{184}.

\textsuperscript{174} Starke (1989) at 74; Kelsen (1967) at 562.
\textsuperscript{175} Starke (1989) at 75.
\textsuperscript{176} Ibid.
\textsuperscript{177} Starke (1989) at 74; Rudolf (1987) at 25; Starke (1937) at 77.
\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Lauterpacht (1950) at 61.
\textsuperscript{181} Ibid.
\textsuperscript{182} Starke (1936) at 77; Ginsburg (2006) at 7.
\textsuperscript{183} O’Connell (1965) at 42.
\textsuperscript{184} Ibid.
According to Dualism, international law and municipal law are two distinct legal systems with fundamentally different characteristics. Dualism emerged at the same time that the modern state began to emerge, when philosophers such as Hegel were emphasising the independence of states’ wills. The main proponents of Dualism were the Positivists whose consensual views around international law naturally led to their conceiving of municipal law as a distinct system. Dualists such as Triepel identified two main differences between international and municipal law. They viewed the sole subjects of international law as states and the only subjects of municipal law as individuals. Dualists also believe that state law has its source in the will of the state, while international law is sourced in the shared will of states. Other theorists such as Anzilotti, distinguished between international law and municipal law on a different basis. Anzilotti believed that the two systems of law had fundamentally distinct organising principles. It was argued that while international law was based on the principle that agreements between states should be respected, state law was based on the premise that legislation ought to be obeyed. Still other Dualists believe that what distinguishes the two systems of law is their different sources. They argue that while municipal law is sourced in legislation and court decisions, international law is based on treaties and custom. The question of primacy is not directly dealt with by Dualists, since they do not believe that the two systems, being utterly distinct, can be in conflict with one another.

In the 1950s Gerald Fitzmaurice suggested a theory synthesising Monism and Dualism. The ‘Fitzmaurice compromise’ acknowledged that for the most part, municipal and international law have separate fields of operation and that each law is

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186 Starke (1989) at 75.
187 Ibid.
188 Ibid.
189 Ibid.
190 Starke (1989) at 75; O’Connell (1965) at 41; Teson (1979) 108-116.
191 Ibid.
192 Ibid.
193 Ibid.
194 Starke (1989) at 73.
195 Ibid.
196 Wallace (2002) at 35.
197 Ibid.
supreme in its own realm. Fitzmaurice contended that in instances where fields of operation coincide and a conflict develops, this conflict is primarily concerned with obligations rather than legal systems. For example, Fitzmaurice believed that in instances where a state’s municipal laws prevented action being taken to bring the state in line with international law, Courts would not uphold the municipal law, but would rather concentrate on the state’s failure to meet its international obligations.

1.4 Theories of Co-ordination and Harmonisation

A number of theorists adopt a more pragmatic approach to the monist-dualist debate. These proponents of the so-called co-ordination theory argue that since international law and municipal law operate in different spheres, it is impossible for conflicts between the two to arise. They argue that apparent conflicts arising in a domestic setting should be resolved using domestic legal principles and vice versa. Neither legal system is supreme, since they operate in completely different arenas. While these attempts at resolving the monist-dualist debate seem to lean heavily towards Dualism, its proponents, including Harris, disagree, arguing that the traditional debate assumes a common field of operation. Harris points out that the monist-dualist debate rests on the assumption that the two legal systems simultaneously apply in any given factual circumstance. This assumption is rejected by Harris who argues that each system is in fact supreme in its own field and that accordingly conflicts cannot arise. It is alleged that theorists on either side of the monism-dualism discussion, have constructed an artificial, shared field of operation for the two legal systems, in order to sustain the debate. Harris opines that where a state is unable to act domestically in a manner which would bring it into line with international law, a conflict of legal systems does not arise and it is not necessary to decide which system

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198 Id at 36.
199 Ibid.
200 Ibid.
201 Harris (1979) at 60-62; Brownlie (2008) at 34-35; Fitzmaurice (1957) at 68-94.
202 Ibid.
203 Ibid.
204 Harris (1979) at 61; Kelsen (1967) at 404.
205 Harris (1979) at 61-62.
206 Ibid.
207 Ibid.
is superior\(^{(208)}\). Rather a conflict of obligations arises, where the state concerned will be in breach of its international responsibilities and will be dealt with accordingly, on the international plane\(^{(209)}\).

Another writer who adopts a more pragmatic approach to the monist-dualist debate is O’Connell, who argues that the two schools of thought attempt to answer different questions\(^{(210)}\). This approach is known as harmonisation theory. Monists attempt to find out whether international law is in fact law in the same sense as state law, while Dualists wish to establish which system should be applied in any given circumstance\(^{(211)}\). O’Connell points out that these questions are unrelated and that it is therefore a mistake to view the two schools of thought as diametrically opposed to one another\(^{(212)}\). He rejects the Monist idea that the one system is derived from the other, pointing out that this ignores physical, meta-physical and social realities\(^{(213)}\). At the same time, he rejects the Dualist perspective on the basis that all laws share the common purpose of regulating human behaviour\(^{(214)}\). O’Connell argues that in order to better to understand the relationship between state law and municipal law, it is useful to examine federal systems of government\(^{(215)}\). He points out that federal and state laws coexist within such systems, in much the same way that municipal and international legal systems do in the broader global context\(^{(216)}\). Each set of laws regulates a distinct and specific area of human conduct\(^{(217)}\). Nonetheless both sets of rules coexist harmoniously in that they share the common purpose of regulating human conflict\(^{(218)}\). O’Connell thus believes that neither system should be viewed as normatively superior and rejects the notion that international law cannot be applied in a municipal setting unless it has been incorporated into state law\(^{(219)}\). O’Connell rejects the theory of coordination and accepts that in rare instances international law and municipal law do

\(^{(208)}\) Ibid.
\(^{(209)}\) Brownlie (2008) at 35; Fitzmaurice (1957) at 68-76.
\(^{(210)}\) O’Connell (1965) at 41-42.
\(^{(211)}\) Ibid.
\(^{(212)}\) Ibid.
\(^{(213)}\) Ibid.
\(^{(214)}\) Ibid.
\(^{(215)}\) Id at 43.
\(^{(216)}\) Ibid.
\(^{(217)}\) Ibid.
\(^{(218)}\) Ibid.
\(^{(219)}\) Ibid.
overlap in operation. In such cases, it may be necessary for one system of law to be applied over the other.

1.5 Transformation and Delegation Theories

Over the years, a number of theories have been propounded concerning the application of international law in state settings. Positivists argue that international laws can only be applied in a municipal setting, following their incorporation into a state's law. As Positivists adopt a Dualist mindset, they conceive of the two legal systems as being utterly distinct and thus it is theoretically impossible for the one system to impact on the other, unless it actually becomes part of the other. In this way, international laws such as treaties can only impact on state laws when they are transformed into state law. Positivists argue that this transformation is not merely a formality but rather a substantive requirement. Transformation theory rests on the premise that state law and international law originate in very different ways. It is said that international law is consensual, whereas state law is non-consensual; that international law is based on promises and undertakings, while national or state law is built around commands or imperatives. Critics argue that this distinction is unimportant and that both systems of law set out certain conditions under which corresponding consequences will follow. It has also been pointed out that the two systems are substantively similar and that the consensual or non-consensual nature of any set of laws is connected with form and procedure rather than substance.

In terms of delegation theory, international law allows states to decide for themselves when and to what extent treaties and the like are imported into national law. In this

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220 Ibid.
221 Ibid.
222 Starke (1989) at 76.
223 Ibid.
224 Ibid.
225 Ibid.
226 Ibid.
227 Ibid.
228 Ibid.
229 Ibid.
231 Starke (1989) at 77.
way, there is no act of transformation. Instead the same process of law making which began with the signing of a treaty or convention, is simply prolonged to the point at which those laws become applicable to the individuals residing in a state. Any constitutional requirements for the inclusion of treaties or conventions into state laws are merely part of the same unitary law making mechanism.

### 1.6 Legal Pluralism

Bogdandy points out that the theories of Monism and Dualism evolved over one hundred years ago and that if one compares the context in which they arose with our contemporary situation, it becomes evident that almost every relevant element has changed. Factors such as globalisation, the growth and elaboration of international law, as well as the proliferation of national constitutions in which the role of international law in relation to domestic law is specified, mean that Monism and Dualism are today unsatisfactory theories. Indeed, Brownlie has commented that ‘an increasing number of jurists wish to escape from the dichotomy of Monism and Dualism.’ Bogdandy opines that Monism and Dualism ‘are intellectual zombies of another time and should be laid to rest.’ Brownlie has also commented that these theories have in fact ‘done much to obscure realities.’ Bogdandy believes that the theory best suited to replacing Monism and Dualism is Legal Pluralism. He explains the Legal Pluralism promotes the realisation that the various legal regimes interact and impact on one another. Ludwikowski echoes these sentiments, pointing out that national, supranational, regional and international legal structures all overlap and impact on one another. Under these conditions, so the argument goes, it is impossible to identify one single set of norms as being supreme over all others.

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232 Ibid.
233 Ibid.
234 Ibid.
238 Bogdandy (2008) at 400.
239 Brownlie (1998) at 55.
240 Bogdandy (2008) at 400.
241 Ibid.
243 Ibid.
Despite the theoretical shortcomings of Monism and Dualism and the attempts which have been made to provide alternative theories, these terms remain ubiquitous. Moreover, Dualism remains an important concept in any analysis of the relationship between the United Kingdom’s domestic laws and international law. This was evidenced in the recent case of Assange v The Swedish Prosecution Authority (Rev I) [2012] U.K.S.C. 22, where Lord Mance commented that:

‘if this means that there can now be seen to be a possible or likely discrepancy between the United Kingdom's international obligations and the domestic legal system...that is in no way impossible... It is the consequence of the United Kingdom's dualist system’.

1.7 The Relationship Between the United Kingdom’s Municipal Law and International Law

In the United Kingdom the power to conclude treaties with other nations rests with the Queen\textsuperscript{244}. Parliament plays no role in treaty making\textsuperscript{245}. Consequently treaties do not automatically become part of the United Kingdom’s domestic law\textsuperscript{246}. If this were not the case, the supremacy of Parliament would, by implication, be undermined\textsuperscript{247}. Treaty provisions only become part of the United Kingdom’s municipal law if and when they are included in an Act of Parliament\textsuperscript{248}. This rule against the self-execution of treaties was reaffirmed in 1989 when the House of Lords stated in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 A.C. 418; [1989] 3 W.L.R. 969, \textit{inter alia}, that the Royal Prerogative, which includes the power to make treaties, did not extend to altering the law or conferring or depriving individuals of rights. The United Kingdom’s approach to international treaty law thus appears to be Dualist in nature\textsuperscript{249}. Where ratified treaties conflict with the United Kingdom’s municipal law this simply means that that state would be in breach of the treaty\textsuperscript{250}. In

\textsuperscript{244} Akehurst (1997) at 44; Starke (1989) at 82; Wallace (2002) at 41; O’Connell (1965) at 60.
\textsuperscript{245} Akehurst (1997) at 44; Wallace (2002) at 41.
\textsuperscript{247} Akehurst (1997) at 44; Wallace (2002) at 42.
\textsuperscript{250} Ibid.
these circumstances it is beyond the power of the United Kingdom’s Courts to give
effect to such a treaty, rather they are bound to follow Parliament’s law\textsuperscript{251}. Where
domestic laws conflict with any treaty signed by the United Kingdom, the local
legislation prevails\textsuperscript{252}. That being said, the United Kingdom’s municipal Courts
attempt to construe Acts to be in harmony with that country’s international
obligations\textsuperscript{253}. For instance, in \textit{Smith v East Elloe Rural District Council} [1956] A.C.
736; [1956] U.K.H.L. 2 Lord Reid commented that general wording found in statutes
should be given limited meaning so as to prevent conflicts with international law.
Later, in \textit{Salomon v Commissioners of Customs and Excise} [1967] 2 Q.B. 116,
Diplock L.J. stated that where any Act incorporating a treaty into national law suffers
from ambiguity, a presumption is triggered, namely that Parliament does not intend to
act in breach of international law. In the same case Lord Denning stated that ‘we
ought always to interpret our statutes so as to be in conformity with international law.’
The Court added that it was not necessary for enabling legislation to refer directly to
the Convention which it was intended to incorporate into municipal law. The treaty
presumption described by Diplock L.J. was repeated in the cases of \textit{Post Office v
Estuary Radio Ltd} [1968] 2 Q.B. 740 and \textit{Corocraft Ltd v Pan American Airways Inc.}
[1968] 3 W.L.R. 1273. Later, in the case of \textit{Garland v British Rail Engineering}
Diplock extended the scope of the treaty presumption that he had set out in
\textit{Salomon}\textsuperscript{254}. Lord Diplock stated:

‘it is a principle of construction of United Kingdom statutes…that the words
of a statute passed after the Treaty has been signed and dealing with the
subject matter of the international obligation of the United Kingdom, are to
be construed, if they are reasonably capable of bearing such a meaning, as
intended to carry out the obligation, and not to be inconsistent with it.’

Hunt points out that in \textit{Salomon}\textsuperscript{255} the treaty presumption rested on their being
ambiguity in the statutory language, but this was not the case in \textit{Garland}\textsuperscript{256}. Hunt also

\begin{itemize}
  \item \textsuperscript{251} Akehurst (1997) at 44; Starke (1989) at 83.
  \item \textsuperscript{252} Wallace (2002) at 44.
  \item \textsuperscript{253} Hunt (2002) at 14.
  \item \textsuperscript{254} [1967] 2 Q.B. 116.
  \item \textsuperscript{255} [1967] 2 Q.B. 116.
\end{itemize}
points out that the presumption, as stated in *Garland*\(^{257}\), now seems to apply to any legislation dealing with international obligations, rather than only Acts directly incorporating treaties\(^{258}\).

In many other countries, including the United States, the legislature participates in the treaty making process and upon ratification the treaty automatically becomes part of the municipal law\(^{259}\). In reality, enabling legislation giving effect to treaty terms is passed by the United Kingdom’s Parliament before the treaty is ratified\(^{260}\). The Ponsonby Rule states that following signature, all treaties are to be placed before Parliament for a period of 21 days to enable discussion and comment\(^{261}\). Since 1997 all international agreements brought before Parliament under the Ponsonby Rule have been accompanied by explanatory memoranda to enable members to better understand the substance of the treaty without having to refer to its text\(^{262}\).

Interestingly, it has recently been observed, that courts in a number of other common law jurisdictions\(^{263}\), appear to be abandoning their traditional Dualist orientation towards international law and actively making use of unincorporated human rights treaties\(^{264}\). Waters has described this trend as ‘creeping Monism’. Waters shows that judges in a number of traditionally Dualist jurisdictions are referencing international

\(^{256}\) Hunt (2002) at 18.
\(^{258}\) Ibid.
\(^{259}\) Akehurst (1997) at 45.
\(^{260}\) Wallace (2002) at 42.
\(^{261}\) Ibid.
\(^{262}\) On 1 April 1924, during the Second Reading Debate on the Treaty of Peace (Turkey) Bill, Mr. Arthur Ponsonby made the following statement: 'It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified and published and circulated in the Treaty Series. In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question.' Following an undertaking by Ministers on 16 December 1996, all treaties signed after 1 January 1997 and laid before Parliament under the Ponsonby Rule are now accompanied by an Explanatory Memorandum. It contains a description of the subject matter of the treaty and an account of the reasons why it is proposed that the United Kingdom should become a party to the treaty. It further highlights the benefits for the United Kingdom from participation in the treaty as well as any burdens which would result.
\(^{263}\) Australia, New Zealand, Canada, the United States and the British Privy Council in the Commonwealth of the Caribbean. See Waters (2007) at 652.
\(^{264}\) Waters (2007) at 635.
human rights treaties and thereby, in essence judicially incorporating them into municipal law.

Unlike international treaties, custom based international law has traditionally formed part of the United Kingdom’s municipal law. Sir William Blackstone summed up the early English view on the law of nations when he stated that:

‘The Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted by its full extent by the common law, and is held to be a part of the law of the land.’

This Monist-like arrangement, known as the doctrine of incorporation, is subject to two qualifications. First, any customary international law can only form part of the United Kingdom’s municipal law where it is not in conflict with any local legislation, regardless of when such legislation was passed. Secondly, where the scope or meaning of any customary international rule has been determined by the United Kingdom’s highest courts, this interpretation will be binding on that country’s lower courts, regardless of any developments or changes in the custom on the international stage. This statement of the law is somewhat narrower than that originally proclaimed in 1735 by Lord Chancellor Talbot who stated that ‘the law of nations…forms part of the law of England’. This sentiment has subsequently been restated many times including in the 19th Century by Lord Eldon in *Dolder v Huntingfield* (1805) 11 Ves 283 and by Lord Ellenborough in *Novello v Toogood* (1823) 6 M & S 92.

In the 20th Century the doctrine of incorporation received less enthusiastic treatment from Lord Atkin in *Chung Chi Cheung v R* [1939] A.C. 160. Lord Atkin held that customary international law did form part of the United Kingdom’s domestic law.

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265 Ibid.
268 Starke (1989) at 78.
269 *Buvot v Barbuiv* (1737) 25 E.R. 77.
insofar as it did not conflict with that nation’s legislation or case law\textsuperscript{271}. Lord Atkin also held that only those customary rules which were generally accepted by the international community could be incorporated into the United Kingdom’s municipal law\textsuperscript{272}. In contrast, however Lord Denning in \textit{Trendtex Trading Corporation v Central Bank of Nigeria} [1977] Q.B. 529 restated the original 19\textsuperscript{th} Century position\textsuperscript{273}. Other cases such as \textit{R v Keyn (The Franconia)} 2 Ex D 63 and \textit{Commercial and Estates Co of Egypt v Board of Trade} [1925] 1 K.B. 271 seem to support the notion that international law is not able to confer any rights or impose any duties insofar as these do not already form part of municipal legislation or case law. This stance is often referred to as the doctrine of transformation\textsuperscript{274}. Brownlie has argued that the doctrine of transformation is compatible with the doctrine of incorporation when it comes to proving rules of international law\textsuperscript{275}. He states that where evidence is inconclusive and the issue at hand impacts the liberty of a person or persons, the legislature’s assent is required to supplement the evidence\textsuperscript{276}. Such assent, however, need not be in the form of an Act of Parliament\textsuperscript{277}.

There are two important exceptions to the general rule that customary international law is applicable in the United Kingdom’s domestic Courts\textsuperscript{278}. The Courts may not question any act of the executive, even where such an act breaches international custom\textsuperscript{279}. In addition, any statement made or certificate issued by the Crown may not be disregarded by the Courts, even where such a statement or certificate is impossible to reconcile with international customary law\textsuperscript{280}.

Due to the heavy reliance by United Kingdom Courts on local case law and decisions from other common law jurisdictions, the reality is that the doctrine of transformation holds sway, since case law is an unreliable source of updated, modern customary

\begin{itemize}
  \item \textsuperscript{271} Starke (1989) at 78; Wallace (2002) at 39.
  \item \textsuperscript{272} Id at 79.
  \item \textsuperscript{273} Starke (1989) at 79; Wallace (2002) at 39.
  \item \textsuperscript{274} Starke (1989) at 79; Brownlie (2008) at 44.
  \item \textsuperscript{275} Brownlie (2008) at 45.
  \item \textsuperscript{276} Ibid.
  \item \textsuperscript{277} Ibid.
  \item \textsuperscript{278} Starke (1989) at 80.
  \item \textsuperscript{279} Ibid.
  \item \textsuperscript{280} Starke (1989) at 80; Wallace (2002) at 44.
\end{itemize}
international law\textsuperscript{281}. Despite this, the incorporation doctrine has impacted on two established rules recognised by British Courts\textsuperscript{282}. When interpreting statutes the United Kingdom’s Courts apply a presumption that Parliament would not intend to breach international law\textsuperscript{283}. In addition, Courts will always assume that legislation is in harmony with international law, unless a statute is clearly and unambiguously in conflict with it\textsuperscript{284}. In these instances no customary international law in conflict with legislation will be enforced by the Courts\textsuperscript{285}. In addition, British Courts will take judicial notice of rules of international law so that these do not have to be proved by producing evidence\textsuperscript{286}.

1.8 Defining Terrorism

Terrorism transcends national boundaries and is deeply imbedded in the history of mankind\textsuperscript{287}. It is therefore unsurprising that countless attempts have been made at finding a universal, coherent, comprehensive and objective way to define the term\textsuperscript{288}. In fact one study conducted in 1988 was able to identify 109 different definitions of terrorism\textsuperscript{289}. As a result of this, there is currently no comprehensive, universally accepted legal definition of terrorism\textsuperscript{290}. Moreover, attempts at defining terrorism have proved to be highly contested and controversial\textsuperscript{291}. Nonetheless, such attempts have shown that it is important to distinguish between acts which are purely criminal in nature and those which are criminal in nature and are motivated by political ideology\textsuperscript{292}. There is little consensus over which unlawful acts constitute terrorism\textsuperscript{293}. This is largely as a result of the relativist and subjective nature of political

\textsuperscript{281} Akehurst (1997) at 46.
\textsuperscript{282} Starke (1989) at 81.
\textsuperscript{283} Starke (1989) at 81; Wallace (2002) at 41.
\textsuperscript{284} Ibid.
\textsuperscript{285} Wallace (2002) at 40.
\textsuperscript{286} Starke (1989) at 81.
\textsuperscript{288} Schmid and Jongman (1988) at 5.
\textsuperscript{291} Walker (1986) at 4; Tiefenbrun (2003) at 358.
\textsuperscript{292} Walker (1986) at 4.
terrorism. This difficulty is best surmised by the well known axiom ‘one man’s terrorist is another man’s freedom fighter.’ At some point in time, the United States classified both Nobel Peace Prize recipients Yassir Arafat and Nelson Mandela as dangerous terrorists. Blakesley goes a step further and argues that in law, terrorism is defined in a manner which excludes states’ own acts of violence. Blakesley opines that:

‘Modern definitions of terrorism seek to put one’s own state terrorism or terrorism by our own or favoured freedom fighters under erasure, prolonging the problem of terrorism with our hypocrisy.’

Some writers, however, still insist that it is possible to produce an objective, universal definition for terrorism, by arguing that the ends can never justify the means and that it is indefensible for any person or group to engage in ‘terrorist’ behaviour, whatever the stated aim or objective is. This solution is unhelpful, however, as it begs the question.

It is easy for most to agree that acts of terrorism are wrong, however far more difficult to agree on what acts amount to terrorism. It is difficult to characterise terrorist acts narrowly. They can occur at times of war and conflict or during peace time; and are motivated by a broad, complex array of reasons and ideals. Another reason that terrorism is difficult to define, is that it is an emotionally evocative concept. Today, terms such as ‘terrorist’ have become insults and are often used pejoratively with no intention to communicate a specific meaning. The word ‘terrorism’ tends to refer to

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295 This phrase was originally coined by President Ronald Reagan and is quoted extensively in the literature. See for example, Conte (2010) at 4; Oehmichen (2009) at 6; Cooper (2001) at 882; Zeidan (2004) at 491; Tiefenbrun (2003) at 387.
296 Conte (2010) at 8.
298 Blakesley (2007) at 559-560.
300 Ibid.
301 Ibid.
302 Ibid.
actions which are wrong, evil, illegitimate and criminal\textsuperscript{305}. At the same time, words like ‘terrorism’, ‘terrorist’ and ‘terror’ are regularly referenced in legalisation\textsuperscript{306}. What makes pejorative epithets effective is the meanings and associations they are able to inspire, beyond the ordinary\textsuperscript{307}. Overly broad, vague terms are particularly undesirable in legislation aimed at curbing certain political activities and are often the hallmark of unconstitutional law making\textsuperscript{308}. The vagueness of the concept of political terrorism has led to a number of theorists devising various typologies which assist in better understanding the multiple facets of international terrorism\textsuperscript{309}.

Thomas Thornton, for example, distinguished between agitational terror and enforcement terror\textsuperscript{310}. The latter refers to those acts intended to perpetuate any given regime, while the former describes actions intended to allow for a political system to be replaced or changed\textsuperscript{311}. Sorel argues that refusing to distinguish between the various types of terrorist and terrorism, makes it far more difficult to settle on a definition of terrorism\textsuperscript{312}. Other writers such as Rodin have gone further by creating a set of typologies designed to assist in identifying and better understanding the different categories of definitions of terrorism\textsuperscript{313}. Tiefenbrun has approached the problem in a slightly different manner by attempting to describe the five basic elements which are present in all of the various definitions of terrorism\textsuperscript{314}. Schmid, on the other hand has suggested that in order to meaningfully move towards a definition of terrorism, it is necessary to acknowledge the various ‘arenas of discourse on terrorism’. These arenas of discourse are i) the Academy; ii) governments; iii) the public, as mediated by the media; and iv) those committing perceived acts of terror\textsuperscript{315}.

\begin{itemize}
\item \textsuperscript{305} Conte (2010) at 7; Blakesley (2007) at 557.
\item \textsuperscript{306} Ibid.
\item \textsuperscript{307} Id at 3.
\item \textsuperscript{308} Ibid.
\item \textsuperscript{309} Gross (2006) at 12.
\item \textsuperscript{310} Ibid.
\item \textsuperscript{311} Ibid.
\item \textsuperscript{312} Sorel (2003) at 367. Sorel distinguishes between those terrorists with well defined aims such as the gaining of independence; and those with less well defined religious, cultural or political aims; and those who more closely resemble private criminal groups.
\item \textsuperscript{313} Rodin (2004) at 753-755. Also see Golder and Williams (2004) at 286-288. These latter writers distinguish between general and specific definitions of terrorism.
\item \textsuperscript{314} Tiefenbrun (2003) at 360-363. The elements identified are i) the perpetration of violence by whatever means; ii) the targeting of innocent civilians; iii) with the intent to cause violence or with wanton disregard for its consequences; iv) for the purpose of causing fear, coercing or intimidating an enemy; v) in order to achieve some political, military, ethnic, ideological, or religious goal.
\item \textsuperscript{315} Schmid (1992) at 7-8.
\end{itemize}
Taylor attempted to find a suitable definition of terrorism, by focusing on what he believed were the three different perspectives that people adopt when giving certain acts the label of terrorism. Taylor argued that terrorism is understood primarily as either i) a legal issue; ii) a moral issue; or iii) a behavioural issue. These perspectives aid to explain why it is so difficult to settle on a universally acceptable definition of terrorism. These typologies, while aiding a better theoretical understanding of the complexities of terrorism, have not contributed to a clearer definition\(^{316}\).

Some writers have questioned the necessity of defining terrorism, arguing that terrorist activities can always be broken down into acts which constitute crimes in and of themselves\(^{317}\). Baxter has also questioned the utility of finding an accepted legal definition. Writing in 1974, Baxter stated that:

‘We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise, it is ambiguous; and, above all, it serves no operative legal purpose.’\(^{318}\)

Others have argued, however, that finding a definition for terrorism is wholly possible and of practical as well as theoretical importance\(^{319}\). Gross argues that terrorism offences should be treated separately from normal criminal offences due to the uniquely amoral nature of the terrorist’s motives\(^{320}\). For this reason, Gross suggests it is important to find an accurate definition of terrorism\(^{321}\). Cooper has argued that considering the political dimensions of terrorism, it is simply not possible to find a universally acceptable definition\(^{322}\). Others have argued that in light of the political nature of terrorism and the high level of threat that terrorism poses to the public, it is necessary to create a separate system of niche laws\(^{323}\). It has also been pointed out that certain acts, such as membership of terrorist groups or financing such groups,

\(^{316}\) Ibid.
\(^{317}\) Ibid.
\(^{318}\) Baxter (1974) at 380. Other authors agree that finding a definition for terrorism lacks utility, see for instance, Higgins (1997) at 13.
\(^{321}\) Ibid.
\(^{322}\) Cooper (2001) at 891-892.
\(^{323}\) Conte (2010) at 8.
would not be considered criminal under the extant criminal law\textsuperscript{324}. From a practical perspective it has also been argued that considering the transnational nature of contemporary terrorism, the creation of distinct counter-terror laws, with elements common across national boundaries, is helpful in combating terrorists\textsuperscript{325}. Still others have suggested that acts of terrorism are best treated as acts of war and dealt with accordingly\textsuperscript{326}. Some writers have argued that labelling terrorism as an ordinary crime creates practical difficulties as a need is created to gather evidence, make arrests and hold trials\textsuperscript{327}. It is said that these requirements are unrealistic in the realm of transnational terrorism perpetrated by organisations based in distant states\textsuperscript{328}. Others have disagreed, pointing out that terrorists are in fact criminals and that if terrorism-related crimes are treated differently to other crimes, this could result in municipal governments employing counter-terror legislation to gain unfair political advantages\textsuperscript{329}.

Conte argues that the two most important factors that distinguish terrorism from other criminal acts or conduct during armed conflicts, is the type of motivation behind the acts of terror as well as the manner in which such acts are measured or evaluated\textsuperscript{330}. While criminals are driven by personal motives, terrorism involves altruistic, external motives connected with a higher cause or ideology\textsuperscript{331}. In addition, terrorists do not evaluate their actions in terms of the laws of the state against whom they are acting\textsuperscript{332}. Terrorists killing civilians will not characterise their actions as murderous, but rather as justified and legitimate acts\textsuperscript{333}.

The controversy surrounding the meaning terrorism can be neatly demonstrated by referencing the International Criminal Court (ICC), established under the Rome Statute\textsuperscript{334}. It is interesting to note that not only did the states drafting the statute fail to agree on a definition for terrorism, they were also incapable of agreeing whether there

\textsuperscript{324} Ibid.
\textsuperscript{325} Id at 9.
\textsuperscript{326} Ibid.
\textsuperscript{327} Ibid.
\textsuperscript{328} Ibid.
\textsuperscript{329} Ibid.
\textsuperscript{330} Id at 10.
\textsuperscript{331} Ibid.
\textsuperscript{332} Id at 11.
\textsuperscript{333} Ibid.
was a need to include international terrorism under the ICC’s jurisdiction\textsuperscript{335}. Some of the reasons given by various states who opposed the inclusion of terrorism within the ICC’s jurisdiction, included the fact that the offence was not yet sufficiently defined\textsuperscript{336}.

Despite all of the difficulties discussed above, quite a number of attempts have been made at ascribing a meaning to terrorism. The draft League of Nations Convention for the Prevention and Punishment of Terrorism defined terrorism as ‘All criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.’\textsuperscript{337} The draft Convention never came into force, primarily due to disagreements around the definition of terrorism\textsuperscript{338}. In 1994 the UN General Assembly resolved that:

‘criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological racial, ethnic, religious or any other nature that may be invoked to justify them.’\textsuperscript{339}

In October 2004, the UN Security Council adopted a resolution condemning terrorism as one of the greatest threats to world peace\textsuperscript{340}. The Security Council resolved that:

‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act, which constitute offences within the scope of and as defined in the international

\textsuperscript{\textit{335} Gross (2006) at 19; Conte (2010) at 20.}
\textsuperscript{\textit{336} Ibid.}
\textsuperscript{\textit{337} Ibid.}
\textsuperscript{\textit{338} Ibid.}
\textsuperscript{\textit{339} Gross (2006) at 13-14.}
\textsuperscript{\textit{340} Id at 14.}
Conventions and protocols relating to terrorism, are under no circumstances justifiable.\textsuperscript{341}

Over the years, the United Kingdom’s Parliament has also sought to define the term. Section 14(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 and Section 20 of the Prevention of Terrorism (Temporary Provisions) Act 1989 defined terrorism as ‘the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.’ Warbrick has asserted that this definition is altogether too wide.\textsuperscript{342} Walker and others have pointed out that the above definition suffers from a number of shortcomings.\textsuperscript{343} Firstly, a number of offenders, not traditionally viewed as terrorists, would fall under its ambit, including, for instance, a person taking part in a protest against government policy who becomes involved in a brawl.\textsuperscript{344} Walker also points out that the definition’s emphasis on political ends, creates difficulties as it strengthens the case for providing special treatment to terrorist prisoners and complicates extradition applications.\textsuperscript{345} The above definition was replaced by the far broader Section 1 of the Terrorism Act 2000 (TA 2000), which defines terrorism as i) the use or threat of action where a) the action falls within ii); b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. ii) Action falls within this Subsection if it a) involves serious violence against a person, b) involves serious damage to property, c) endangers a person’s life, other than that of the person committing the action, d) creates a serious risk to the health or safety of the public or a section of the public, or e) is designed seriously to interfere with or seriously to disrupt an electronic system. iii) The use or threat of action falling within ii) which involves the use of firearms or explosives is terrorism whether or not i) b) is satisfied.

There are a number of problems with these attempts at a definition.\textsuperscript{346} They do not provide any resolution on a number of key questions including i) whether acts of

\begin{itemize}
  \item \textsuperscript{341} Ibid.
  \item \textsuperscript{342} Warbrick (1983) at 82. Other writers agree that the Act defined terrorism too broadly. See, for instance, Young (2006) at 21.
  \item \textsuperscript{343} Walker (2006) at 6.
  \item \textsuperscript{344} Walker (2006) at 6; Setty (2011) at 32.
  \item \textsuperscript{345} Ibid.
  \item \textsuperscript{346} Gross (2006) at 16.
\end{itemize}
terrorism can only be committed against non-combatant members of a community; ii) whether any moral or legal considerations can ever justify acts which would otherwise be considered to be terrorism; iii) whether acts of terrorism should be limited to acts of traditional physical violence or whether cybercrimes could amount to terrorism. In addition, all of the above definitions, particularly Section 1 of the TA 2000, are couched in broad, sweeping terms, which creates the danger that violent acts committed by legitimate state security forces could be classified as acts of terrorism. Sir David Williams, commenting on the definition of terrorism contained in the TA 2000 which was carried over into the Anti-terrorism, Crime and Security Act 2001 (ATCSA 2001), has opined that the ‘vague contours’ of the definition necessitate a considerable amount of trust be placed in the hands of the executive to maintain a sense of balance and proportion when acts of terrorism are alleged. The broad definitions discussed above, also mean that legitimate protestors exercising their rights to association, assembly and demonstration, dignity and freedom could be labelled as terrorists.

Alex Schmidt’s complex definition of terrorism is cited by the United Nations Office on Drugs and Crime (UNODC) as representing academic consensus. Schmidt defines terrorism as:

‘An anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence-based communications processes between terrorist (organisation), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target if

347 Id at 17.
348 Gross (2006) at 17; Setty (2011) at 34.
349 Williams (2003) at 179.
351 Id at 21.
terror, a target of demands, or a target of attention, depending on what the intimidation, coercion, or propaganda is primarily sought.\textsuperscript{352}

Conte argues that this definition highlights further differences between normal criminal conduct and terrorism\textsuperscript{353}. The victims or targets of terrorists are not the primary targets of the act; the purpose of the perpetrators is to intimidate or create a situation of fear or terror, or to persuade or dissuade the ultimate target from doing something; and the act is done in the furtherance of a religious, ideological or political cause\textsuperscript{354}. The fact remains, however that even Schmidt’s comprehensive definition has failed to achieve the status of a universally accepted definition.

By way of illustration, the UN Special Rapporteur on counter-terrorism has recommended the use of the thirteen universal terrorist-related Conventions adopted since the 1970s, as a means of identifying what actions should be proscribed in the fight against terrorism\textsuperscript{355}. Another recommendation of the UN Special Rapporteur is that in order for conduct to be characterised as terrorism it should correspond to all elements of a serious crime defined by state law\textsuperscript{356}.

In light of the difficulties sketched above, no attempt will be made in this thesis to provide a universal definition of terrorism. Such an undertaking is in any event unnecessary in light of the purpose of this research and the methodology employed. The primary purpose of this thesis is to examine the relationship between international law and municipal law, and to test some of the assumptions and corresponding theories which have sought to explain this interaction. The state which I have chosen to examine is the United Kingdom and the area of municipal law I will focus on is counter-terror legislation. I wish to acknowledge the contested nature of the word ‘terrorism’ and further wish to make clear that references in this thesis to terms such as ‘terrorist’, ‘terrorism’ and ‘terror’ are not indicative of my support for any one definition of those terms. The laws I have examined here are those which the United Kingdom has used to counter actions which that state ascribed to ‘terrorists’.

\textsuperscript{352} Ibid.
\textsuperscript{353} Ibid.
\textsuperscript{354} Ibid.
\textsuperscript{355} Ibid.
\textsuperscript{356} Id at 32.
Therefore, the Acts I have examined are those which expressly reference ‘terrorism’ together with a number of earlier laws which can be identified as the legislative antecedents of the more indubitably counter-terror Acts.

1.9 Balancing Security and Liberty

The most common way in which counter-terror law is analysed is by examining how it impacts the ‘balance’ between security and liberty. Following the attacks of September 11th 2001, the Attorney General, Lord Peter Goldsmith, stated that rights ‘are qualified and require a balance to be struck against the rights of others or the rights of society as a whole. I would suggest that the greatest challenge which free and democratic states face today is how to balance the need to protect individual rights with the imperative of protecting the lives of the rest of the community.’

This ‘balancing’ imagery has been criticised as being unhelpful, as it suggests that when security is prioritised over liberty, the ensuing benefits are universally enjoyed. Critics have pointed out that the justifications which support a ‘rebalancing’ are in fact utilitarian in nature, and are more concerned with the majority’s security than they are with minorities’ liberties. They argue that rather than confront the difficulty of truly ‘rebalancing’ security and liberty, states simply make inroads into the liberties of select minority groups. In this way states infringe on peoples’ rights to equality and non-discrimination.

Critics have also pointed out that the ‘balancing’ imagery creates the false impression that security is a firm concept capable of being measured and that it is naturally

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358 Donohue (2008) at 4-5.


361 Id at 5.

362 Ibid.
opposed to liberty. It has also been argued that the balance metaphor is inherently prejudiced in favour of security. Security itself is in fact a highly contested concept and there is no universally accepted definition. Various theorists have pointed out that states are often both the providers and the beneficiaries of 'security'. In addition, states themselves often threaten the security of their own citizens.

Adopting a more individual or human centred understanding of security sets up a paradigm where liberty and human rights are not in a state of natural opposition to security. If it is accepted that the concepts of liberty and security are in fact closely linked, then this casts doubt on the notion that national security is aligned with a greater common good and therefore trumps individual freedoms. Critics have argued that the traditional concept of 'security' is almost exclusively concerned with the policing and protection of national state borders and that this understanding is anachronistic. This raises questions about whether contemporary counter-terror laws are rooted in this dated concept of security or whether they take into account the reality that threats to security may involve non-state internal actors.

There is another respect in which the ‘balancing’ imagery has been criticised. It has been pointed out that gains in ‘security’ are very difficult to quantify precisely. Security is to a large degree connected with peoples’ subjective state of mind and thus difficult to measure. In any event, Waldron has observed that even where additional security measures are put in place, people seldom feel as secure as they did prior to any given incident of terrorism. Counter-terror policies are aimed at reassuring the public and attempting to control possible future risks. This endeavour is quite distinct from one in which levels of security are simply increased, by ‘flicking the

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365 Moeckli (2008) at 7 and 10; MacDonald (2012) at 318.
366 Ibid.
367 Ibid.
368 Ibid.
369 Id at 8.
370 Ibid.
371 Ibid.
372 Id at 9.
switch’ of reduced human freedoms. Restricting individual freedoms does not automatically increase levels of security, but rather sets up potential protection against prospective, unquantifiable risks. Solove has observed that many security measures put in place following terrorist attacks are largely ineffective and fulfil a symbolic rather than pragmatic role.

It has also been argued that the security-liberty dichotomy makes it more difficult to appreciate the real impact of counter-terror laws on liberal democracies. Acts of terror are often partly attributed to weak uninformed states. As a result of this, executives very often seek to increase their powers following such acts. Legislatures are usually loathe to appear soft on terror and therefore enact these powers. Citizens are also more prone to accept infractions against their civil liberties. Waldron comments that:

‘the state is always looking to limit liberty, and a terrorist emergency provides a fine opportunity. People become more than usually deferential to the demands of their rulers in these circumstances.’

Although tough counter-terror laws are often initially temporary in nature, this seldom remains the case. This, despite the fact that, in general, factual justifications for human rights restrictions are seldom found in the years following a terrorist attack.

In addition, and despite assurances to the contrary, counter-terror provisions are often used against ordinary criminals. This type of legislation is often created in a hurry and is lacking in the way of provisions overseeing the new or expanded executive powers. When analysing counter-terror laws in terms of a trade-off between liberty

378 Ibid. It is interesting to note, however, that at least one study supports the notion that terrorism is less prevalent in states where the executive is subject to fewer constraints. See Li (2005) at 278-294.
380 Donohue (2008) at 3.
385 Ibid.
386 Ibid.
and security, these types of consequence are often overlooked\(^\text{390}\). This is because the liberty-security dichotomy assumes that a simple choice has to be made between liberty and security and that when states are threatened they may deprive individuals of certain rights\(^\text{391}\). Some rights, however, are fundamental to liberal democracies and cannot simply be abandoned in favour of increased levels of security\(^\text{392}\). In addition, counter-terror laws increase the reach of the executive branch of government in ways which alter the traditional separation of powers model which characterises democratic states\(^\text{393}\).

The dichotomy also ignores the complex way in which security and freedom interact\(^\text{394}\). For instance, laws which superficially appear to impact on one right only, may in fact affect peoples’ access to a whole host of rights\(^\text{395}\). For example, certain legislation may be intended to curtail freedom of speech but also indirectly impacts due process rights, because encroachments on due process are not reported on\(^\text{396}\). Yet another example are laws extending detention periods, which impact directly on the right to life and liberty but also indirectly on rights such as freedom of speech, religion and association\(^\text{397}\). It has also been pointed out that infringing certain freedoms may in the long term in fact jeopardise physical security, by, for example, alienating minority groups\(^\text{398}\). In this vein, evidence shows that in Northern Ireland the use of coercive questioning techniques increased support for paramilitary groups such as the IRA\(^\text{399}\). It has also been pointed out that many assumptions regarding the relationship between liberty and security are made without any supporting evidence being produced\(^\text{400}\). For instance, it is commonly assumed that limiting terrorists’ fair trial rights will automatically increase levels of security\(^\text{401}\). It has been argued that such broad generalisations should be avoided and replaced with detailed analyses of
counter-terror policies, in which their effectiveness and suitability are investigated\(^\text{402}\). It has also been pointed out that security measures can also enhance a person’s rights\(^\text{403}\). For example, identity cards and biometrics may assist the defence in a criminal trial\(^\text{404}\).

In light of the above discussion, and considering the purpose of this research, I do not intend to conduct a traditional human rights analysis of the United Kingdom’s counter-terror laws, i.e. whether and to what extent the security measures contained in the various Acts engage or impact on peoples’ liberties. Rather, my examination will be focused primarily on the nature and extent of the executive powers created by each Act together with the nature and extent of any restrictions or limits imposed on such powers. In doing this, I will be able to determine whether i) the United Kingdom’s post September 11\(^{\text{th}}\) counter-terror laws provided that state’s executive with unprecedentedly broad powers; and ii) the United Kingdom’s counter-terror laws have evolved in a way which creates a discernable pattern, i.e. whether the laws have become progressively more or less generous to the executive in terms of powers granted. I will then proceed to examine whether any identified pattern makes sense, in relation to the levels of terrorist threat experienced by the United Kingdom over time. This, in turn, will enable me to examine whether international human rights law has played a role in the evolution of the United Kingdom’s counter-terror laws and if so, whether this role challenges the traditional understanding of the relationship between international law and municipal law in that state.

2. Academic Context of the Research

Many writers have sought to analyse the United Kingdom’s counter-terror laws from a human rights perspective\(^\text{405}\). A number of these commentators have argued that the terrorist attacks of September 11\(^{\text{th}}\) 2001 resulted in a noticeable shift in the nature of that state’s counter-terror laws\(^\text{406}\). These writers posit that those attacks have resulted

\(^{402}\) Ibid.

\(^{403}\) Donohue (2008) at 31.

\(^{404}\) Ibid.

\(^{405}\) See, for instance, Oehmnichen (2009); Bonner (2007); de Londras (2011); Roach (2011); Hadden (2004); and Donohue (2008). Other authors such as Walker (1986) have analysed the legislation from other perspectives such as effectiveness and practical consequences.

in a raft of laws which are unprecedentedly generous in the extent to which they empower the executive. These suggestions have been countered by Bonner in his ‘Executive Measures, Terrorism and National Security’, which sets out the proposition that the ‘rules of the game’ have not changed and that insofar as counter-terror measures are concerned, it is a case of ‘more of the same medicine to treat a similar problem’. In this thesis I will argue that the ‘rules of the game’ have indeed changed, albeit in a counterintuitive manner. A chronological examination of the United Kingdom’s counter-terror legislation reveals an unexpected arc: earlier laws bestowed broader powers on the executive and with the passage of time, the powers which the various Acts bestowed, became narrower. Admittedly, over time, the United Kingdom’s laws have become more complex and lengthy and the number of specified powers available to the executive has grown. Nonetheless, an examination of the extent of power entrusted to the executive confirms that there has been a gradual narrowing of executive powers.

Many writers agree that since the introduction of the 1998 Human Right Act (HRA) the United Kingdom’s domestic courts have shown a greater interest in human rights and a willingness to challenge incompatible laws. Some commentators even point out that these developments have in many cases motivated legislators to change laws. My thesis goes further and argues that international human rights law has had an ongoing and discernable impact on the United Kingdom’s counter-terror laws, since its genesis after the Second World War.

An examination of the underlying threats facing the United Kingdom reveals that the identified trend, i.e. largely narrowing executive powers, cannot simply be tied to changing threat levels. In fact, the magnitude and severity of the September 11th attacks makes my observations all the more intriguing. Why did terrorist attacks, unprecedented in both scale and nature, not result in commensurate executive powers? In this thesis I will argue that the unexpected and counterintuitive arc followed by the United Kingdom’s counter-terror laws is largely due to the influence of international law. The development over time of international human rights law in

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407 Ibid.
408 Bonner (2007) at 3.
410 Oehmichen (2009) at 384.
the 20th Century reveals a trend which neatly coincides with the arc of the United Kingdom’s counter-terror laws over the same time. The rise and proliferation of international human rights law has gradually resulted in counter-terror laws bestowing narrower powers on the United Kingdom’s executive, even in the face of increased threat levels. This conclusion has significant consequences for the theoretical debates which surround international law. Firstly, it brings into question the traditional Dualist notion of how the United Kingdom’s municipal law interacts with international law, particularly in the area of treaties. Secondly, it challenges some of the traditional critiques of international law, which seek to undermine the status of that law.

3 Historical Context of the Research

The seeds of the union between Ireland and Great Britain at the beginning of the 19th Century can be traced back to the 12th Century invasions of Ireland by the Normans, who had settled in Britain some one hundred years earlier411. The invasions led to centuries of violence and discord in Ireland as successive English Kings sought both to conquer and plunder their neighbour412. In the 17th Century, large numbers of Protestant settlers from Scotland and England began to settle in Ireland, especially in the province of Ulster413. This system of colonisation is often referred to as the Irish Plantations414. After the Irish Rebellion of 1641, Irish Roman Catholics were barred from voting or attending the Irish Parliament, even though at the time the vast majority of those persons residing in Ireland were Catholic415. This ban formed part of a broader system disadvantaging the Catholic community and in 1798 a number of dissenting Protestant groups united with Catholics in a rebellion416. Despite assistance from France, the rebellion was put down by British forces417. In 1782 Ireland was granted a measure of legislative independence, though in many respects it was still subject to British domination418.
A further rebellion planned by Catholic leader Theobald Wolfe Tone and carried out with the support of France, convinced then British under Prime Minister William Pitt that Irish independence should be ended\textsuperscript{419}. The legislative union of Great Britain and Ireland was brought about by the Act of Union 1800, creating the United Kingdom of Great Britain and Ireland (the United Kingdom)\textsuperscript{420}. The Act was passed in both the Parliament of Great Britain and the Parliament of Ireland, which lacked representation from the country's Roman Catholic population\textsuperscript{421}. Under the terms of the merger, the separate Parliaments of Great Britain and Ireland were abolished, and replaced by a united Parliament of the United Kingdom\textsuperscript{422}.

4.

Research Methodology

In order to investigate the extent to which, if any, international human rights law has impacted on the United Kingdom’s counter-terror policies and procedures, it is necessary to undertake a number of preliminary enquiries. Chapter 2 examines the various counter-terror laws enacted in the United Kingdom in the 20\textsuperscript{th} Century, beginning with the Defence of the Realm Acts 1914-1915 and culminating in the Prevention of Terrorism (Temporary Provisions) Acts 1974 – 1989. The historical background of each successive Act is briefly examined in order to present a timeline of the varying levels of terrorist threat experienced in the 20\textsuperscript{th} Century. The provisions of each successive piece of counter-terror legislation are then examined to establish the nature and extent of the \textit{executive powers} created by each Act together with the nature and extent of any restrictions or limits imposed on such powers. In doing this, I will be able to determine whether the United Kingdom’s 20\textsuperscript{th} Century counter-terror laws have evolved in a way which creates a discernable pattern, i.e. whether the laws have become progressively more or less generous to the executive in terms of powers granted. In addition, Chapter 2 examines the cases heard by domestic courts in the United Kingdom dealing with the various 20\textsuperscript{th} Century counter-terror laws, with particular emphasis on human rights based challenges to counter-terror executive powers. This examination is undertaken in order to gain a richer appreciation of the

\textsuperscript{419} Id at 160.
\textsuperscript{420} Id at 162.
\textsuperscript{421} Id at 163.
\textsuperscript{422} Ibid.
way in which the United Kingdom’s counter-terror policies and procedures evolved during the 20th Century.

Chapter 3 investigates the United Kingdom’s 21st Century anti-terror laws, beginning with the Terrorism Act 2000 and culminating with the Protection of Freedoms Act 2012. Chapter 3 looks briefly at the historical context of each successive law in order to sketch a timeline of the varying levels of terrorist risk experienced by the United Kingdom in the first years of the 21st Century. Thereafter each consecutive Act is scrutinised in order to determine the character and extent of the executive powers created under each of the laws, as well as the content and scope of any limitations placed on such powers. This is done in order to shed light on the question of whether the United Kingdom’s 21st Century anti-terror laws have evolved in a way which generates a recognisable pattern, i.e. whether the laws have become increasingly more or less in favour of the executive in terms of available powers. Lastly, Chapter 3 looks at the municipal court cases in which executive counter-terror powers were subjected to human rights-based challenges. This is done in order to gain a better understanding of the way in which the United Kingdom’s counter-terror policies and procedures changed in the first years of the 21st Century. Chapter 3 also draws upon the observations made and conclusions reached in Chapter 2 in order to determine whether i) the United Kingdom’s post September 11th counter-terror laws provided that state’s executive with unprecedentedly broad powers; ii) the United Kingdom’s counter-terror laws have evolved in a way which creates a recognisable arc, i.e. whether the executive powers created under the laws have become more or less broad; and iii) there has been a discernable change in approach by the United Kingdom’s municipal courts in cases involving human rights challenges to counter-terror executive powers.

Chapter 4 briefly describes the origins and development of international human rights law midway through the 20th Century. The United Kingdom’s international human rights obligations are then set out in detail. Chapter 4 also discusses the bodies established under international law to monitor states' adherence to obligations imposed under international treaties. It continues to examine the various interactions which have occurred over time between these monitoring bodies and the United Kingdom around that nation's counter-terror laws and policies. Decisions of the
Strasbourg-based European Court of Human Rights (ECtHR), involving the United Kingdom’s counter-terror policies and practices are then examined. Referencing the trends identified in the preceding chapters regarding i) the level of terrorist threat faced by the United Kingdom; ii) the extent to which the counter-terror laws have become progressively more or less generous to the executive in terms of powers granted; and iii) the approach of the United Kingdom’s domestic courts in instances where executive counter-terror powers have been subjected to human rights challenges, Chapter 4 then

i) identifies the direct ways in which international human rights law has impacted on the United Kingdom’s counter-terror laws, and

ii) argues that international law has had a significant indirect impact on the United Kingdom’s terrorism related laws and policies.

In Chapter 5, I present my conclusions. I will contend that since the start of the 20th Century, the United Kingdom’s counter-terror laws have become progressively more lengthy and complex. Indeed, that nation’s more contemporary laws have bestowed upon its executive a dizzying number of counter-terror powers. All of this is to be expected, when one considers the high levels of terrorist threat which have become a reality for the United Kingdom since the 1970s. Along with this more prosaic observation, however, it is possible to discern a more unexpected trend. The counter-terror laws which have been enacted to meet these recent threats confer appreciably narrower powers on the executive, than their earlier counterparts. In addition, the more recent laws contain a large number of checks and balances which were wholly absent from earlier Acts. I contend that these counterintuitive developments are the result of international law’s impact on the United Kingdom. I further submit that the impact which international law has had on the United Kingdom’s counter-terror policies, has largely been the result of an indirect process, akin to Koh’s ‘transnational legal process’423 rather than by way of incorporating Acts. This observation casts doubt on the assumed Dualist nature of the United Kingdom’s relationship with international treaties. In turn, this conclusion has important ramifications for the question of whether international law constitutes actual law. This is because one of

423 Koh (1999) at 1399.
the criticisms often levelled at international law is that it is ineffective and therefore does not amount to law in the true sense of the word.
CHAPTER 2

THE UNITED KINGDOM’S 20TH CENTURY COUNTER-TERROR LAWS

1. The Defence of the Realm Acts 1914 – 1915

1.1 Background

In 1900 John Redmond was elected leader of the Irish Parliamentary Party (IPP)\(^{424}\). Redmond had strong links with the United Kingdom’s ruling Liberal Party and was actively involved in that organisation’s Irish social reform programmes\(^{425}\). The success of these reforms in uplifting the Irish peasantry meant that in the first years of the 20th Century, Irish Nationalism garnered scant public support\(^{426}\). Nonetheless, the fact that without the support of the IPP, the Liberal’s would not have narrowly won the 1909 general election, underscored the important role that the IPP played in British politics\(^{427}\). On this basis, Redmond was able to secure then Prime Minister Asquith’s agreement to introduce an Irish Home Rule Bill\(^{428}\).

In 1911 Asquith, by means of the Parliament Act, had successfully limited the Lords’ veto power over Commons legislation to a period of two years\(^{429}\). Irish supporters of the Union were therefore very concerned that the Liberal’s attempts to introduce Home Rule to Ireland would be successful\(^{430}\). The Unionists were particularly concerned that the bill made no provision for any of the northern, protestant counties to contract out of Home Rule\(^{431}\). Though the grumblings of the Unionists were for the most part ignored by the Liberal government, they were, in contrast vociferously supported by the then leader of the Conservative Party, Andrew Bonar Law\(^{432}\). The normally law abiding Conservatives were concerned that home rule for Ireland would

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\(^{424}\) Ranelagh (1994) at 160.
\(^{425}\) Ibid.
\(^{426}\) Kee (1995) at 142.
\(^{427}\) Ibid.
\(^{428}\) Ibid.
\(^{429}\) Ibid.
\(^{430}\) Ibid.
\(^{431}\) Longford and McHardy (1981) at 46.
\(^{432}\) Ranelagh (1994) at 164.
have disastrous consequences for the British Empire, believing that many colonies had better claims than Ireland to independence.\footnote{Ibid.}

Although the House of Lords rejected the Home Rule Bill on three occasions, the Parliament Act meant that it automatically became law in 1914, receiving royal assent on September 15.\footnote{Id at 163.} The Act established a Parliament in Dublin, which apart from foreign policy and defence, would be the lawmaking body for the whole of Ireland.\footnote{Ibid.}

In August 1914 the United Kingdom declared war on Germany and all parties agreed that the new Act should be suspended until the war was over.\footnote{Ibid.} Aside from delaying the implementation of the Home Rule Act, the Great War also precipitated the promulgation of the first Defence of the Realm Act in 1914.\footnote{Ibid.} Though these Acts were designed to deal with the European conflict, they were also used by Westminster to subdue the threat of Irish Nationalism.\footnote{Ewing and Gearty (2000) at 335.}

\subsection*{1.2 Legislation}

On 8 August 1914 the first Defence of the Realm Act (DORA) was published. The Act’s purpose was to assist in the defence of the United Kingdom against its enemies and to secure the public’s safety for the duration of the First World War.\footnote{Section1.} This remarkably concise Act bestowed extraordinarily broad powers on the United Kingdom’s executive. It circumvented the ordinary legislative processes, by allowing the Crown, in consultation with Parliament, to issue Regulations, empowering, inter alia, anyone acting on the Crown’s behalf, to take steps to achieve the ends listed above.\footnote{Ibid.} Few constraints or limits were placed on the powers created under the Act and many of its sanctions were severe.\footnote{One notable exception is the first Regulation made under the Act, which stated that, in implementing the Regulations, the ordinary avocations of life and the enjoyment of property should be interfered with as little as possible, taking into account the steps required to be taken for securing the public safety and the defence of the Realm.\footnote{Ibid.} Section 1(3) of the Defence of the Realm Consolidation Act 1914 specifically authorised the use of the death penalty in instances where it was shown that the accused had intended to assist the enemy.}
The Act empowered the executive to circumvent a number of criminal procedure norms and laws. The first DORA authorised trial by Court martial in instances where persons contravened any of the Act’s Regulations designed to i) prevent persons from communicating with the enemy; or ii) prevent persons from obtaining any information for the purpose of communicating with the enemy or for any other purpose calculated to jeopardise the United Kingdom’s war efforts; and iii) secure the safety of any means of communication, together with the railways, docks and harbours. Under the second DORA, published on 28 August 1914, persons could also be tried by Court martial if they contravened any of the Act’s Regulations designed to, *inter alia*, prevent the spread of alarm or hostility towards the Crown. The impact of these provisions was ameliorated to an extent by the Defence of the Realm Consolidation Act 1914, which provided for the use of courts of summary jurisdiction, in place of courts martial, for less serious offences against the Regulations. The Act also provided that where persons were tried by court martial for offences in contravention of the Regulations, trials could proceed as if the accused was a member of the armed forces and had committed the offence while on active duty.

The broad executive powers introduced by the first and second DORA were, in one respect, curtailed by the Defence of the Realm Amendment Act 1915 (DORA 1915), which introduced the possibility of non-military jury trials for persons, not subject to naval or military law, accused of having committed offences under the Regulations. Under the Act, such persons had to be informed of this option, as well as the nature of any charges against them, as soon as possible following their arrest. These civil courts could, nonetheless, upon a finding of guilt, impose the punishments that would have been applicable had the trial proceeded by way of court martial. In other respects, the DORA 1915 increased the powers available to the United Kingdom’s executive. The Act permitted trials to be held *in camera*, where this was thought to be

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443 Section 1.
444 Section 1(1). In these instances, the right of appeal was specifically protected by the Act - see Section 1(5).
445 Section 1(4).
446 Section 1(1).
447 Section 1(2).
448 Section 1(1).
in the interest of public safety\textsuperscript{449}. In addition, Section 2 of the Act, provided that any person charged with an offence under the Regulations, together with that person’s wife or husband, would not be competent to give evidence at the trial.

A number of the Regulations made under the various Defence of the Realm Acts empowered the United Kingdom’s executive to interfere in various ways with peoples’ private property and privacy. Regulation 2, for instance, allowed authorities to, \textit{inter alia}, i) take possession of any arms, ammunition, explosive substances, equipment, or warlike stores; and ii) do any other act interfering with private property in order to defend the realm and protect the public’s safety. Regulation 3 empowered the executive to enter or access any land, buildings or other property for the same purposes. Regulation 6 allowed for i) the removal of vehicles, boats, vessels, aircraft, livestock, food, fuel, tools, or implements of any description; or ii) the removal and destruction any military equipment. Regulation 30 allowed the executive to prohibit the manufacture or sale of firearms, ammunition, or explosive substances within any specified area, and Regulation 31 prohibited persons from importing any firearms, ammunition or explosive substance without a permit from the authorities. Regulation 31 also empowered the executive to i) search any ship or vessel; and ii) seize any arms, ammunition or explosive substance being brought into the United Kingdom without a permit.

Regulation 51 further empowered the United Kingdom’s executive to encroach on peoples’ private property and privacy, by empowering authorities, on the basis of the public’s safety and the defence of the realm, to i) enter, if need be by force, any house, building, land, vehicle, vessel, aircraft, or premises at any time of the day or night; ii) examine, search, and inspect the same or any part thereof; and iii) seize anything found therein; and iv) destroy or disposed of any seized items.

Many Regulations made under the DORA, empowered the authorities to take steps interfering with peoples’ liberty or freedom of movement. For example, Regulation 9 empowered the authorities to require the inhabitants of any area to leave that area for the purposes of the navy or military. The Regulation made it an offence for any

\textsuperscript{449} Section 1(3).
person to ignore such an order and empowered the authorities to take steps to enforce compliance. Regulation 13 stated that the authorities could require every person within any area to remain indoors between any specified hours and made it an offence for any person within that area to ignore a curfew without written permission.

Regulation 14 provided the executive with further means of restricting peoples’ freedom of movement by providing that where the authorities suspected that any person constituted a threat to public safety, they could prohibit that person from residing in or entering any area. Failure to comply with such an order was an offence against the Regulations. The authorities could also require any suspected person to i) submit for approval any proposed place of residence; ii) report his arrival at such a place to the police; and iii) not change his place of residence without permission. Failure to comply was made an offence against the Regulations. On 26 March 1915 Regulation 14 was amended, allowing the authorities to make an alternative arrangement whereby suspected persons could remain in situ by agreeing to, inter alia, report to the police and limit their movements. Failure to comply with such conditions was also made an offence against the Regulations.

Regulation 28, empowered the executive to make further inroads into peoples’ freedom of movement. It made it an offence for any person to trespass on any railway or loiter near, inter alia, any tunnel, bridge or road or other place to which access had been forbidden by the authorities. The Regulation also made it an offence for any person to damage any railway, or to be near, inter alia, any tunnel, bridge, or road with the intention of damaging such facilities. Regulation 33 made it an offence for any person, without the written permission of the authorities, in the vicinity of any harbour or specified area, to be in possession of any explosive substance or flammable liquid in quantities exceeding the requirements of his business, or firearms or ammunition, unrelated to sporting activities.

Regulation 43 made it an offence for any person to obstruct or interfere with any person carrying out military orders or acting in accordance with the DORA. The Regulation also made it an offence for any person to withhold any information which could reasonably be required by any person carrying out military orders or acting in accordance with the DORA.
Regulation 48 made it an offence for any person to i) in any way attempt to commit any act prohibited by the Regulations; or ii) harbour any person, known or reasonably suspected to have contravened the Regulations. Regulation 49 obliged any person, with knowledge that another person was acting in contravention of the Regulations, to inform the relevant authorities. The Regulation made it an offence to fail to do so. Regulation 50 made it an offence for any person to act in any way calculated to be prejudicial to the public’s safety or the defence of the Realm, not specifically provided for elsewhere in the Regulations, with the intention of assisting the enemy.

A number of Regulations made under the DORA, contained various stop, search and arrest powers. For instance, Regulation 52 stated that any authorised person, including any police officer, i) could stop any vehicle travelling along any public road; and ii) where there was reason to suspect the vehicle was being used in any way prejudicial to the public’s safety or the defence of the Realm, he could search and seize the vehicle or anything found therein.

Another example is Regulation 53, which obliged any person, if required by any authority, including a police constable, to stop and answer questions. The Regulation made failure to do so an offence. The authorities could also order any person or category of persons to i) furnish any specified information; and ii) to attend at any specified time and place in order to furnishing any given information. Failure to comply with such an order was made an offence against the Regulations.

Regulation 55 empowered any authority, including a police constable, to arrest without a warrant, any person whose behaviour gave reasonable grounds for suspecting that he had acted or was about to act i) in a manner prejudicial to the public’s safety or the defence of the realm; or ii) in violation of the Regulations. The authorities were also able to arrest without a warrant any persons found in possession of any item which gave rise to similar suspicions. The Regulation also made it an offence for any person to i) assist in the escape of any person in custody; or ii) knowingly harbour or assist any escaped person.
Some of the Regulations made under the DORA empowered the United Kingdom’s executive to limit peoples’ freedom of expression. Regulation 27 prohibited people from spreading false reports or statements likely to i) cause hostility towards the Crown; ii) interfere with the success of the armed forces; or iii) prejudice relations with foreign powers. Similarly, the Regulation forbade spreading reports or statements likely to prejudice the recruiting, training, discipline, or administration of the armed forces. Contravention of these provisions was made an offence against the Regulations. Regulation 42 made it an offence for any person to attempt to cause mutiny, sedition, or disaffection among the armed forces or the civilian population.

It is clear therefore, that while the various incarnations of the DORA were remarkably concise and simple pieces of legislation, the powers which they bestowed upon the United Kingdom’s executive were very broad. So broad, in fact, that while the Acts were ostensibly intended to assist the United Kingdom successfully prosecute a war, it is not difficult to see how these self same powers could also be used to counter terrorism in Ireland. Indeed, the lawmakers of the day seem to have formulated the various Defence of the Realm Acts as broadly as possible. Rather than listing a limited number of executive powers, Westminster chose to create a vast store of potential power, which the executive could dip into if and when the need arose. The Defence of the Realm Acts are also characterised by an absence of checks and balances on the powers granted to the executive.

1.3 Cases

One of the purposes of this thesis is to ascertain whether a chronological examination of the United Kingdom’s counter-terror laws reveals a discernable pattern. In other words, I wish to discover whether it can be shown that the executive powers created under that country’s counter-terror laws have become more or less extensive over time. In order to properly grapple with this question, it is necessary to examine the relevant case law to gain an understanding of the judiciary’s interpretation and treatment of the various Acts.

Another purpose of this thesis is to examine the impact, if any, that international law has had on the United Kingdom’s counter-terror laws, particularly with reference to
the extent of executive powers created under the various laws. With this in mind, it is important to note that the cases below were heard prior to the adoption and proclamation by the United Nations of the Universal Declaration of Human Rights\textsuperscript{450} and before the United Kingdom had signed or ratified any international covenants or treaties dealing with human rights. There are a large number of reported cases dealing with aspects of the various incarnations of DORA. In some of the cases\textsuperscript{451}, DORA Sections and Regulations were only referred to obliquely and received only scant judicial attention. In most of the remaining of cases\textsuperscript{452}, where DORA Sections and Regulations received appreciable judicial attention, a judicially conservative approach was taken, with the literal rule of statutory interpretation being applied almost without exception\textsuperscript{453}. It is also evident that human rights and freedoms were only very infrequently referenced by the Courts. It is thus fair to say that the judiciary did not play a particularly significant role in constraining the powers bestowed upon the United Kingdom’s executive by the various DORA.

One case which bucks the trend described above is \textit{The King v Governor of Wormwood Scrubs Prison} [1920] 2 K.B. 305. Though none of the judges presiding over the case refer to freedoms or human rights, the case dealt with the interesting question of whether the DORA could be applied to instances of internal rebellion. On January 5, 1920, the Chief Secretary for Ireland, acting under DORA Regulation 14B ordered the internment of Patrick Foy, based upon a suspicion that he was acting, had acted, or was about to act in a manner prejudicial to the public safety and the defence of the realm. The applicant, Foy had obtained a rule calling upon the Governor of Wormwood Scrubbs Prison to show cause why a writ of habeas corpus should not be issued for the purpose of ending his detention. It was argued that the internment was

\begin{footnotesize}
\begin{itemize}
  \item \textit{In The Penrith Castle} [1918] P. 142; \textit{In re Colnbrook Chemical and Explosives Company} [1923] 2 Ch. 289 the so-called golden rule of interpretation was used, where the literal rule of statutory interpretation would have led to an absurd result.
\end{itemize}
\end{footnotesize}

ill-founded as, *inter alia*, the power to make Regulations at all was limited to the purpose of securing the defence of the realm, or in other words, protecting the country against foreign enemies, and not against internal disorder.

The Earl of Reading CJ disagreed with this contention arguing that such a construction of DORA was too narrow. It was stated that acts of rebellion which amount to military operations against the government, weaken a country’s ability to counter an enemy, and are therefore acts endangering the public safety and the defence of the realm. These sentiments were echoed by Bray J and Avory J.

In *Cannon Brewery Company v Central Control Board (Liquor Traffic)* [1918] 2 Ch. 101, Cannon had been given notice by the Control Board that its licensed premises would be permanently acquired by them in terms of s1(2)(b) of the 1915 Defence of the Realm (Amendment)(No.3) Act 1915 as well as Regulation 6 and 7 of the same Act. Following the Board’s occupation of the premises in 1916, Cannon instituted an action for compensation. In the *Court a quo* Younger J held, *inter alia*, that Section 1(2)(b) and Regulations 6 and 7 did not have the effect of empowering those authorised by the statute to acquire property from others without the payment of compensation. Younger J’s decision was partly based on the principal of statutory interpretation first set out in *Commissioner of Public Works (Cape Colony) v Logan* [1903] A.C. 355, that it should never be assumed that the legislature intends to take away property without proper compensation being paid, unless such an intention has been expressed with the utmost clarity. The defendants appealed, however Younger J’s decision was upheld. On the question of whether the Board was entitled on the basis of the DORA to take property without paying compensation, Swinfen Eady M.R. found that despite the fact that the Act did not specifically deal with the payment of compensation, Parliament could not be taken to have intended for no compensation to be paid, unless the words of the legislation undeniably pointed to this. Swinfen Eady M.R. found that, on the contrary, the wording of Section 1(2)(b) and Regulations 6 and 7 of the Act suggested that the government had intended parties to be compensated when properties were acquired. Bankes L.J. found that even without recourse to the rule of interpretation referred to above, the wording of statute made it clear that compensation had always been envisaged by the drafters. On the question of whether the Section 1(2)(b) and Regulations 6 and 7 of the Act entitled
the Board to expropriate property without having to pay compensation, Eve J. agreed with Bankes L.J. and Swinfen Eady M.R. that such an interpretation was implausible. The Cannon decision is noteworthy in that it is an example of a case in which the judiciary interpreted the DORA in a manner which limited the powers of the executive granted under those laws.

The case of Minister of Munitions v Mackrill [1920] 3 K.B. 513 is similarly noteworthy. The Railway and Canal Commission had been tasked with deciding whether to consent, under Sections 12(4) and 13(5) of the Defence of the Realm (Acquisition of Land) Act 1916, to the Minister permanently acquiring Mackrill’s land against his will. The Minister had taken possession of Mackrill’s land during the war and had erected buildings on the land. The Minister no longer required the use of the land but had agreed to sell the land to a third party to offset the cost of the buildings. In his judgment, Lush J pointed out that although other Sections of the 1916 Act were directive as regards the principles on which Courts were expected to make decisions, Sections 12(4) and 13(5) were silent on how the Commission was to exercise its discretion. The Attorney General argued, inter alia, that the Commission’s consent should be granted where the Minister could show that he was in possession of any given land and that buildings had been erected on that land. Lush J rejected this argument, stating that the legislature’s use of the word ‘consent’ denotes an intention that the Commission properly weigh up the propriety of the Minister’s request in order to ensure that protection is afforded subjects against the Crown’s power permanently to deprive them of their property. This was one of the main reasons why Lush J decided not to consent to the Minister’s application and is interesting because it appears to be an instance where the interpretation of a statute is influenced by a regard for freedoms and rights.

A further instance in which the United Kingdom’s Courts curtailed the executive’s DORA powers is Chester v Bateson [1920] 1 K.B. 832. In Chester it fell to be decided whether Regulation 2A(2) was ultra vires Section 1(1) of the 1914 Defence of the Realm Consolidation Act. That Regulation provided that no person was entitled, without the consent of the Minister of Munitions, to proceed against a tenant to recover possession of his own house, or to eject a tenant from his own house, where that tenant was employed in the war material sector. Section 1(1) of the 1914
Act empowered the making of Regulations to ensure that the successful prosecution of the war was not endangered. Chester, the landlord, argued that Regulation 2A(2) violated the Magna Carta, in which subjects’ right of access to justice was protected. Though Darling J refused to decide the case on the basis of the Magna Carta, his judgment nonetheless is strewn with references to rights and liberties. Though admitting that it is within the bounds of possibility that Parliament could withhold the rights of subjects to access justice and the Courts, Darling J argues that such a draconian measure could only be implemented by way of direct legislation and that Parliament could not have intended such a dramatic invasion of peoples’ rights to be accomplished by way of a departmental order as was the case with Regulation 2A(2). Darling J also points out in his judgment that aside from barring persons from access to the Courts, the offending Regulation makes it a summary offence to approach the Courts without the consent of the Minister. In granting the appeal, he concedes that in times of war subjects’ liberties are inevitably intruded upon but argues that the basic/fundamental right of access to the Courts should not be a freedom surrendered too casually. It is interesting to take note of Avory J’s contrasting judgment, which though reaching the same conclusion as Darling J, was based wholly on a literal interpretation of the 1914 Consolidation Act.

Based upon the above reported cases it is evident that despite the fact that many provisions of the various DORA were regularly brought before the United Kingdom’s domestic Courts, the judiciary did not place significant checks on the very broad powers which these laws bestowed upon the executive. Only in a very few cases did the Courts intervene in a manner which limited the authorities. It is also apparent that rights and freedoms were given scant attention by the judiciary.

2. The Restoration of Order in Ireland Act 1920

2.1 Background

Two weeks after the end of the Great War a general election was held in Ireland\textsuperscript{454}. Sinn Fein won a landslide victory and its leaders met in Dublin to form the first Dail

\textsuperscript{454} Kee (1995) at 178.
Eireann or Irish Parliament\textsuperscript{455}. Tensions began to surface between revolutionaries and constitutionalists and although Sinn Fein had denounced the use of violence to achieve a Republic, a number of developments gave credence to that option. Firstly, Ireland’s request for support from the American government was largely ignored\textsuperscript{456}. Secondly, the Irish case for independence was not received with much enthusiasm at the peace conference at Versailles\textsuperscript{457}. Despite the fact that many Dail members felt disinclined to order attacks on British soldiers, local units began acting on their own initiative without authorisation\textsuperscript{458}. In the first six months of 1919 secessionist violence claimed the lives of seven people in forty-seven separate attacks\textsuperscript{459}.

In an attempt to suppress Irish Nationalism, the British introduced a number of new coercive measures\textsuperscript{460}. Amongst other actions, a system of internment was initiated with close to 2 000 people being arrested and detained in January 1920\textsuperscript{461}. One of those arrested and detained was Patrick Foy\textsuperscript{462}. On March 8th, Foy’s lawyers applied to the King’s Bench for his release, arguing that the validity of the DORA, under which he was being held, depended on the continuation of a state of war\textsuperscript{463}. A formal peace accord had been signed four days prior to Foy’s arrest\textsuperscript{464}. In response the Attorney General pointed out that the Termination of the Present War (Definition) Act 1918 had bestowed upon the Crown the power to declare when the war was officially over and that since no such declaration had been made, Foy’s prosecution was legitimate\textsuperscript{465}. The three presiding judges sided with the Crown, declaring that officially at least, the country was still in a state of war\textsuperscript{466}. The uncertainty highlighted by Foy’s case was one of the reasons behind the enactment of the Restoration of Order in Ireland Act 1920 (ROIA)\textsuperscript{467}. A more important reason, however, was the veritable collapse of the jury system in Ireland\textsuperscript{468}. The political climate prevailing at

\textsuperscript{455} Ibid.
\textsuperscript{456} Kee (1995) at 179.
\textsuperscript{457} O’Beirne Ranelagh (1994) at 191.
\textsuperscript{458} Ibid.
\textsuperscript{459} Ewing and Gearty (2000) at 352.
\textsuperscript{460} Id at 354.
\textsuperscript{461} Ibid.
\textsuperscript{462} Ewing and Gearty (2000) at 355.
\textsuperscript{463} Ibid.
\textsuperscript{464} Ibid.
\textsuperscript{465} Ibid.
\textsuperscript{466} Ibid.
\textsuperscript{467} Ewing and Gearty (2000) at 357.
\textsuperscript{468} Ibid.
the time had made it very difficult to secure convictions in instances of politically motivated crimes, regardless of the amount of incriminating evidence available\textsuperscript{469}. The establishment of the Irish Free State as a Dominion on 6 December 1922 signalled the demise of the ROIA, which was seen as having been repealed by implication, due to the coming into existence of that state\textsuperscript{470}.

### 2.2 Legislation

The ROIA empowered the Crown to issue Regulations, in consultation with Parliament, under the Defence of the Realm Consolidation Act 1914 (the Consolidation Act), despite World War One having come to an end\textsuperscript{471}. The purpose of this arrangement was to enable the United Kingdom’s executive to deal with the any disorder in Ireland, which the ordinary laws were deemed insufficient to counter. In essence, the extraordinarily broad, pseudo-legislative powers bestowed upon the executive under the various DORA were simply extended under the ROIA, despite the fact that that the United Kingdom was no longer at war. In addition, many of the existing DORA Regulations were simply recast and sustained beyond the end of the war\textsuperscript{472}.

The ROIA, and the Regulations made thereunder, were principally directed at streamlining the Criminal Justice System. Some of these provisions, rather than directly empowering the executive, made inroads into the normal criminal justice processes, thus disturbing the traditional balance which exists between the executive and the judiciary. This imbalance leaned in favour of the executive. For instance, under the ROIA, all trials in Ireland\textsuperscript{473} were made subject to the same rules which governed trials by Courts martial and Courts of summary jurisdiction under the

\textsuperscript{469} Ibid.

\textsuperscript{470} See \textit{The King v Secretary of State for Home Affairs Ex Parte Brian} [1922] 2 K.B. 361 discussed in 2.2.3 below.

\textsuperscript{471} Section 1(1).

\textsuperscript{472} Regulation 1(1). It is worth noting that the first schedule to the first set of Regulations published under the ROIA amended the Regulations promulgated under the DORA so as to replace wartime specific language with terminology suitable for the peacetime restoration and maintenance of order in Ireland. Regulation 13 which had empowered the authorities to arrest without a warrant any person suspected of, \textit{inter alia}, endangering the public, was not carried forward into the ROIA.

\textsuperscript{473} Except i) trials where the maximum penalty applicable was non-custodial; and ii) trials involving offences against the principal or supplemental Regulations. See Regulation 67.
In addition, the ROIA made it possible for trials in any Irish High Court or county Court to be held without a jury. A further example is Regulation 70, which allowed Courts martial to impose fines in place of or in addition to other punishment. In instances where fines were unpaid, Courts martial were empowered to issue warrants for distress and imprisonment. Another example is Regulation 72(1) which empowered officers charged with taking a summary of evidence to proceed in the absence of the accused where it could be shown that a summons had been properly served. Indeed, the Regulations even empowered Courts martial to proceed with trials in the absence of the accused, where it could be shown that the summons and summary of evidence had been properly served. The Regulations also allowed written statements, taken on oath, to be used as evidence at Court martial trials. Yet another example is Regulation 71, which empowered Courts martial to secure the good behaviour of persons brought before them, by ordering the provision of a recognisance or sureties, regardless of verdict. Refusal to enter into a recognisance or provide sureties could result in imprisonment.

Other ROIA provisions supplied the executive with more direct powers. An example is Regulation 73, which allowed witnesses at a Court martial trial to be arrested preemptively, where it appeared probable that such persons would not attend unless compelled. The Regulation also made it an offence for any witness to refuse to i) take an oath; ii) produce any documents under their control; or iii) refuse to answer any question. Persons guilty of such an offence could receive a sentence of up to 6 months imprisonment. On 11 February 1921 a new Regulation was published, which authorised the military to order any person suspected of jeopardising the restoration or

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474 Section 1(2). The Subsection provided, however, that i) any crime tried in this way would be punishable according to relevant statutes or the common law; and ii) in instances where a court martial was trying a case involving the death penalty, a person nominated by the Lord Lieutenant and certified by either the Lord Chancellor of Ireland or Lord Chief Justice of England to have legal knowledge or experience, had to serve as a member of the Court.

475 Section 1(3)(h).

476 Distress warrants are issued by courts following nonpayment of a debt. If payment is not made after receiving a distress warrant, then personal goods can be seized.

477 These warrants could be signed by the relevant military or naval authority.

478 Regulation 72(2).

479 Regulation 72A. This was only allowed in instances where i) such statements had been signed by the witness and taken in front of the accused; and ii) the witness had died, or been unable to attend due to sickness or having been forcibly and unlawfully carried away.

480 Regulation 71(2).
maintenance of order in Ireland, to enter into a recognisance with sureties to keep the peace\footnote{Regulation 79A.}. Failure to do so was made an offence against the Regulations.

Some of the powers available to the executive under the ROIA had not been available under the DORA. For instance, Regulation 79(1), created the offence of promoting the objects of an unlawful organisation as defined in the Criminal Law and Procedure (Ireland) Act 1887. Regulation 79(2) made it an offence to possess any documents which, \textit{inter alia}, i) related to the affairs of an unlawful organisation, ii) emanated from such an organisation, or iii) indicated personal membership of such an organisation. In terms of evidence, where a person was charged with having such a document in his possession it was sufficient to show that the document had been found in premises controlled or occupied by the accused.

From the above analysis of the ROIA, it is clear that the harsh powers which under the DORA had ostensibly been devised to aid the United Kingdom’s war efforts, were simply redirected so as to counter terrorism in Ireland. Like the DORA before it, the ROIA was a relatively simple law, though it bestowed very broad counter-terror powers on the United Kingdom’s executive. Again, as with the DORA, very few mechanisms were built into the ROIA to prevent abuse of power by the authorities.

\textbf{2.3 \quad Cases}

It has already been observed that both the DORA and the ROIA bestowed remarkably broad powers on the United Kingdom’s executive. It has also been noted that the judiciary’s treatment of the various DORA was, by and large, conservative in nature and failed to place any significant constraints on the authorities. Despite the broad and far-reaching provisions of the ROIA, these were not regularly tested in the United Kingdom’s Courts of law. This may well be due to the fact that the ROIA was as short-lived as it was. Nonetheless, there were a few instances in which the United Kingdom’s domestic Courts intervened so as to constrain the executive’s use of the
ROIA counter-terror measures. The scope of even these judicial interventions was, however, relatively modest\textsuperscript{482}.

As has already been pointed out, one of the aims of this thesis is to examine the impact, if any, that international law has had upon the United Kingdom’s counter-terror legislation, particularly with reference to the extent of executive powers created under the various laws. It is therefore to be kept in mind that the cases below were heard prior to the adoption and proclamation by the United Nations of the Universal Declaration of Human Rights\textsuperscript{483} and before the United Kingdom had signed or ratified any international covenants or treaties dealing with human rights.

The first reported case in which the Courts impacted on the scope of the executive’s counter-terror powers is Egan v Macready & Ors [1921] 1 I. R. 265. In Egan we see something up to that point unusual, namely that the provisions of the ROIA were themselves used to constrain the executive’s counter-terror powers. The provisions dealt with in this case\textsuperscript{484} had previously been examined by the Courts, but without any reference to human freedoms or rights\textsuperscript{485}. The applicant, Egan, had been arrested, imprisoned and charged with committing the offence of improperly being in possession of ammunition. On 26 May 1921 in County Clare, the applicant had been found in possession of ninety-seven rounds of revolver ammunition and five rounds of service ammunition. He was brought before an informally constituted military Court consisting of various military officers, rather than a Court-martial, was convicted, and sentenced to death.

Based on the fact that i) the military Court had no legal status, and ii) there was no basis in British law for the passing of a death sentence for the crime at hand, a conditional order for a writ of habeas corpus was granted. Despite this, however, the military were able to show cause against the conditional order by producing evidence that there was a state of active rebellion in Ireland and arguing that for this reason the

\textsuperscript{482} Especially, when compared with other cases heard by the United Kingdom’s domestic courts later in the 20\textsuperscript{th} Century and in the early part of the 21\textsuperscript{st} Century.
\textsuperscript{484} Section 1 of the 1920 Act.
\textsuperscript{485} The King (Childers) v Officer Commanding the Troops at Portobello Barracks & Ors [1923] 1 I. R. 5; Rex (Rodgers) v Campbell & the President and Members of District Court-martial, sitting at Belfast on 20th April 1921 55 I. L. T. R. 192; and Whelan v Rex [1921] 2 I. R. 310.
military Court and the sentence it has passed down had been lawful. An application was then brought in the Chancery Division requesting that the conditional order for habeas corpus be made absolute.

One of the central questions posed in the application was whether and to what extent the powers of the military in Ireland, derived from the Crown’s prerogative, were limited by the ROIA. Section 1(2) of the ROIA stated that the provisions of the DORA dealing with Court martial trials, Courts of summary jurisdiction, and the punishment of persons who had committed offences against the Defence of the Realm Regulations were applicable to the trial and punishment of any person who had committed a crime in Ireland. The Subsection also provided that in instances where a Court-marital was trying a case involving the death penalty, a person nominated by the Lord Lieutenant and certified by either the Lord Chancellor of Ireland or Lord Chief Justice of England to have legal knowledge or experience, should serve as a member of the Court. These provisions were disregarded when the applicant was tried by way of military Court. The military authority placed reliance on Marais’ case [1902] A.C. 109 where the Privy Council held that in times of war, acts of the military designed to protect the public could not be subjected to the judicial scrutiny of civil Courts.

O’Connor M.R., however, held that a state of war had been in existence at the date of the passing of the ROIA by Parliament and that consequentially the executive powers of the military authorities were limited by the express provisions of that Act. Of particular interest are the comments the judge made supporting the above decision. O’Connor M.R. argued that coming to a different decision would require ‘a development in British Constitutional Law’ and ‘a new Bill of Rights’. The Court thus upholding the doctrine of parliamentary supremacy, found that an offence punishable by death could not be tried by any military tribunal other than a Court martial. In the circumstances the Court ordered that the conditional order for issue of a writ of habeas corpus be made absolute.
The next noteworthy reported case is *The King v Secretary of State for Home Affairs Ex Parte Brian* [1922] 2 K.B. 361. The provisions dealt with in this case had not previously been examined by the Courts. Regulation 14B made under the ROIA empowered the Secretary of State to order the internment in any place within in the British Islands of any person suspected of acting, having acted, or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland. On December 5th 1922 the Irish Free State Constitution Act was passed, granting the Irish Free State executive, legislative and judicial independence. On March 7th 1923, the Home Secretary was given information that a dangerous group was operating in the United Kingdom under the leadership of, *inter alia*, Art O’Brien, the applicant. The Home Secretary was advised that this organisation aimed to overthrow the governments of Northern and Southern Ireland. On the same day, the Secretary of State ordered the internment of the applicant in the Irish Free State at any place determined by the government of that state. The applicant was arrested in London and then deported to the Irish Free State. He thereafter applied for a writ of *habeas corpus*.

It is interesting to take note of the opening sections of Scrutton L.J.’s judgment, in light of the fact that it was issued prior to the UDHR and other subsequent human rights instruments coming into existence. Scrutton L.J. comments that the case involves the liberty of a person and that this is a topic ‘carefully dealt with in English law’ and ‘zealously upheld by English judges’. Scrutton L.J. also points out that human rights need to be applied fairly, even in cases where the accused does not evoke any sympathetic feelings. The Court held that Regulation 14B was inconsistent with Irish Free State Constitution Act and was impliedly repealed by that Act. Scrutton L.J. supported this conclusion by pointing out that either i) based on the wording of Regulation 14B an internment order requiring any person to be detained in the Irish Free State would require the consent of the Irish Chief Secretary, which had not been done in this case; or ii) after the passing of the Irish Free State Constitution it could not be said that an English authority was in a position to exercise jurisdiction over the Irish Free State, that territory having obtained executive, legislative and

486 Regulation 14B made under the 1920 Act.
judicial independence. As a result Scrutton L.J. held that the internment order was invalid.

Atkin L.J. also found that the order made by the Home Secretary was invalid and that the imprisonment of the applicant was unlawful, but decided to give a separate judgment based on the fact that the case involved ‘questions of grave constitutional importance’. As with Scrutton L.J.’s judgment, it is interesting to note that despite the fact that the UDHR and other subsequent human rights instruments had not yet come into existence, Atkin L.J. makes a number of references to human rights and freedoms. Atkin L.J. noted that due to the passing of the Irish Free State’s constitution, once the applicant arrived in that country, the Home Secretary lost all legal control over the place of internment, the conditions of internment, the period of internment, or any power of release and that as a result any empowering Act would have to be very clearly worded for a Court to determine that such broad powers affecting the liberty of a subject had been bestowed upon any minister. Atkin L.J. also noted that, considering the very substantial powers ‘in derogation of personal liberty’ that the Regulations bestowed upon the Home Secretary, it was most unlikely that Parliament had intended that these powers could be entrusted to anyone other than that official.

Based upon the above reported cases\textsuperscript{487} it is evident that despite the fact that the UDHR and other subsequent human rights instruments had not yet come into existence, some judgments dealing with the ROIA nonetheless made reference in broad terms to human liberties, freedoms and the ‘constitutionality’ or otherwise of certain provisions. Nonetheless, it is evident that the United Kingdom’s domestic Courts only exerted very modest restraint on the very broad powers granted to the executive under the ROIA. It is also apparent that despite the broad and far-reaching provisions of the ROIA, these were not regularly tested in the United Kingdom’s Courts of law.

\textsuperscript{487} Together with the other reported cases, where Sections dealt with in this thesis were examined by the courts, but with no reference made to any human freedoms or rights - \textit{DPP of Northern Ireland v Maxwell} [1978] 1 W.L.R. 1350; \textit{The King v Joseph Murphy} [1921] 2 I.R. 190.
3.1 Background

The Government of Ireland Act 1920 (GOIA) divided Ireland into two distinct political entities, the North and South.\(^{488}\) This was rejected by the Irish Dail and the Irish Republican Army (IRA), who were determined to press for a united Irish Republic.\(^{489}\) As a result, Northern Ireland was in a state of crisis from the moment of its inception.\(^{490}\) The loyalties of many of its citizens were uncertain and sectarian violence was widespread.\(^{491}\) The violence was so widespread that a curfew was introduced in 1920 and remained in force for four years.\(^{492}\) Under these circumstances it is unsurprising that emergency legislation, in the form of the Civil Authorities (Special Powers) Act (Northern Ireland) (SPA), was introduced.\(^{493}\) The Act, the 5th to be passed by the Northern Ireland legislature, was designed to replace the Restoration of Order in Ireland Act 1920 (ROIA).\(^{494}\) Despite the fact that the SPA encountered strong, broad-based opposition during its passage through Parliament,\(^{495}\) it was re-enacted from year to year until 1933 when it became permanent law. The SPA then remained as the source of emergency legislation in Northern Ireland until the enactment of the Northern Ireland (Emergency Provisions) Act in 1973.

3.2 Legislation

As with the DORA and the ROIA before it, the broad purpose of the SPA was matched by the similarly wide range of executive powers it created. Northern Ireland’s civil authority was empowered to act in whatever way necessary for the preservation of peace and the maintenance of order.\(^{496}\) The SPA mirrored the DORA and the ROIA in a number of other important respects. Firstly, it authorised the civil authority, in consultation with Parliament, to make and amend Regulations, within a

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\(^{488}\) Longford and McHardy (1981) at 66.
\(^{489}\) O’Beirne & Ranelagh (1994) at 197.
\(^{490}\) Finn (1991) at 53.
\(^{491}\) Ibid.
\(^{492}\) Longford and McHardy (1981) at 78.
\(^{493}\) Finn (1991) at 53.
\(^{494}\) Ewing and Gearty (2000) at 372.
\(^{495}\) Longford & McHardy (1981) at 79.
\(^{496}\) Section 1(2) defined the civil authority as the Minister of Home Affairs for Northern Ireland, who in turn was given the right to delegate his authority to any police officer.
\(^{497}\) Section 1(1).
very broad framework set out in the Act’s main body. In addition, very few limits were placed on the powers created under the Act and many of its sanctions were harsh.

The majority of the SPA’s provisions were sourced from the DORA and the ROIA, including those which made it an offence to i) act in a manner calculated to interfere with the preservation of the peace or the maintenance of order; ii) attempt to commit, or encourage or assist others to commit acts prohibited by the SPA; iii) harbour any person reasonably suspected of having committed an offence under the Act; iv) defy an order given under Act; v) promote the aims of any unlawful organisation; vi) be in possession of a document indicating membership of, or connection with an unlawful organisation; vii) damage public transport infrastructure, or be in the vicinity of such infrastructure, with the intention of causing damage; viii) cause agitation and disaffection amongst the police or the general population; or ix) endanger any police officer by discharging a firearm. It further allowed for the imposition of curfews; empowered the authorities to interfere with private property in the interests of preserving the peace; assisted authorities in obtaining information from any person or group of persons; prohibited the publishing of statements, which were intended or likely to cause disaffection towards the Crown and disrupt the peace; allowed for the public to be excluded from Court hearings;

498 Section 1(2) and (3).
499 One notable exception is Section 1, which stipulated that the powers bestowed should only interfere with the country’s ordinary laws, way of life, and enjoyment of property to the extent necessary to achieve the SPA’s purposes.
500 Section 3(5) specifically authorised the use of corporal punishment for certain offences. Section 6 specifically authorised the use of the death penalty for other offences.
501 Section 2(4).
502 Section 2(2).
503 Ibid..
504 Section 2(1).
505 Regulation 24.
506 Regulation 13.
507 Regulation 16.
508 Regulation 15.
509 Regulation 1.
510 Regulations 6, 8, 18, and 21.
511 Regulation 22.
512 Regulation 25.
513 Regulation 32.
and allowed depositions to be read as evidence, where a witness was too ill to travel or where their attendance was barred due to the existence of a state of unrest.\textsuperscript{514}

In some respects, the SPA reduced the scope of the powers available to the United Kingdom’s executive. For instance, Section 11(1) allowed for compensation to be paid to persons whose private property had been taken, occupied, destroyed or interfered with under the SPA. In addition, a number of harsh counter-terror policies contained in the ROIA were not imported into the SPA, thus further constraining the executive. Many of these were provisions that had been included in the ROIA in an attempt to streamline the Criminal Justice System, and their omission from the SPA diminished the power of the executive (at least relatively speaking) in relation to the judicial process. As an example, under the SPA it was no longer possible for trials to be held in the absence of a jury. In addition, the SPA no longer allowed suspected criminals, or those suspected of having committed offences against the Regulations, to be tried by Courts martial or Courts of summary jurisdiction.\textsuperscript{515} A further example is that it was no longer possible for trials to be held in the absence of the accused. The SPA also narrowed the executive’s powers in more direct ways. For example, it made no provision for the pre-emptive arrest of witnesses in instances where it appeared probable that such persons would not attend Court unless compelled. In addition, under the SPA, it was no longer an offence for witnesses to refuse to take the oath, answer questions or produce documents.

Despite this, in many other respects the SPA increased the scope of the executive’s powers by, for instance, introducing a number of novel measures not previously seen in the DORA or ROIA. One of these ran contrary to the Criminal Procedure reforms described above. Section 2(6) created a reverse onus in instances where the SPA’s Regulations had been breached, by placing the burden of proof on the person alleged to have committed the offence. This development strengthened the power of the executive, at least in relation to the judiciary. Other novel provisions created under the SPA empowered the executive to prohibit or restrict i) the holding of meetings, assemblies or processions in public places; ii) the use or wearing of uniforms or badges; iii) the carrying of weapons or explosives; iv) the unauthorised use or

\textsuperscript{514} Section 9.
\textsuperscript{515} Section 3.
possession of a bicycle, motorcycle or motor vehicle\textsuperscript{516}; v) persons taking part in, organising or promoting military exercises\textsuperscript{517}; vi) the erection of monuments or memorials deemed to be sympathetic to the aims of any unlawful organisation\textsuperscript{518}; vii) the circulation of any newspaper for any specified period\textsuperscript{519}. The SPA also empowered the executive to i) dictate the use any given building; and ii) close a building altogether if evidence was presented showing that the premises were being used in ways which interrupted the peace\textsuperscript{520}.

One of the most significant provisions included in the SPA is Regulation 23. It empowered the authorities to arrest without a warrant any person, i) whose behaviour provided reasonable grounds for suspecting that they had acted, were acting or would act in a manner prejudicial to the preservation of peace and maintenance of order; ii) who had had in their possession items which provided grounds for such a suspicion; iii) who was suspected of having committed an offence against the SPA’s Regulations; iv) who was suspected of being in possession of any item which was being, or could be used to threaten the preservation of peace or the maintenance of order. These powers had not been available under the ROIA. The SPA also empowered authorities to seize any property, which there was reason to suspect was being, or could be used to threaten the peace. The SPA also authorised the detention of any arrested person until they could be brought before a magistrate.

The SPA also made it an offence, for the first time, to i) become or remain a member of an unlawful association or to promote the objects of such an association\textsuperscript{521}; ii) declare membership of an unlawful association in a Court of law; and ii) refuse to recognise a Court when charged with belonging to such an association. Another novel provision contained in the SPA made it an offence for any person to possess, display or assist in displaying in a public place any flag, emblem or symbol consisting of green, white and yellow horizontal stripes purporting to be the emblem, symbol or flag of the IRA, an Irish Republic, or any unlawful association\textsuperscript{522}.

\textsuperscript{516} Regulations 3 and 4. 
\textsuperscript{517} Regulation 6. 
\textsuperscript{518} Regulation 8A. 
\textsuperscript{519} Regulation 26. 
\textsuperscript{520} Regulation 20. 
\textsuperscript{521} Regulation 24A. 
\textsuperscript{522} Regulation 24C.
The above analysis highlights the fact that there is a common thread running through the DORA, ROIA and SPA: each successive law bestowed particularly broad powers on the United Kingdom’s executive. In essence, Parliament authorised the executive to legislate, by issuing Regulations, to in order to achieve similar, broad purposes. In the case of the SPA, the purpose was the preservation of peace and the maintenance of order. The SPA also mirrors the DORA and ROIA, in that it contains very few mechanisms to prevent abuse of power by the authorities. Many specific measures adopted by the United Kingdom under the DORA, during the First World War, and then later under the ROIA, found their way into the SPA. This is especially noteworthy considering the fact that the SPA was in force until 1973, when it was repealed by the Northern Ireland (Emergency Provisions) Act. A number of significant reforms were introduced by the SPA, though at the same time a host of new specific executive powers became available to authorities to counteract terrorist threats. Significantly, the Act reintroduced the power to arrest without a warrant and to detain persons suspected of committing offences under the Act.

3.3 Cases

It has already become evident that a number of the United Kingdom’s early 20th Century counter-terror laws, including the DORA, ROIA and SPA, bestowed remarkably broad powers on the United Kingdom’s executive. It has also become clear that the United Kingdom’s domestic courts failed, to any significant extent, to curb those powers. An examination of all reported cases from 1922 onwards reveals that a similarly conservative approach was adopted by the judiciary in cases dealing with the SPA. It is likewise interesting to note that despite the fact that many of the Regulations made under the SPA were in force for up to fifty years, there is a veritable dearth of reported cases dealing with the Act. Of further interest, is that there are no cases dealing with provisions of the SPA in which mention is made of any of the international law treaties dealing with human rights that were signed by the

United Kingdom in the course of the 20th Century. In this regard, it is important to note that, in 1973, at the time that the SPA was repealed, the United Kingdom had signed and ratified the European Convention on Human Rights (ECHR)\(^\text{524}\); and had signed but not yet ratified the International Covenant on Civil and Political Rights (ICCPR)\(^\text{525}\).

In *Forde v McEldowney* [1970] N.I. 11 however, Lord Pearson made a passing reference to human rights, although ultimately this had no impact on Lord Pearson’s decision. Nonetheless, an examination of *Forde v McEldowney* [1970] N.I. 11 is a worthwhile exercise in that it is a case i) dealing with one of the Regulations made under the SPA; ii) where an appeal was made to the House of Lords; iii) where passing reference was made to human rights; iv) where the decision of the House of Lords was not unanimous; and v) where the ‘literal’ method of interpreting statutes, so in evidence in many of the other cases dealing with the SPA, is used.

The appellant had been charged with being a member of a republican club contrary to Regulation 24A made under the SPA. At the first hearing of the matter, the magistrates found that at the relevant time the appellant had been a member of the prohibited organisation but that there was no evidence that he or the organisation posed a threat to law and order. The magistrates also found that at the time the police had no reason to believe that the club's pursuits were subversive of the government. On this basis the magistrates dismissed the charges brought against the appellant.

When the matter was appealed to the Court of Appeal in Northern Ireland it was held (Lord MacDermott L.C.J. dissenting) that since i) Regulation 24A was *intra vires* the SPA; and ii) the decision as to whether an organisation was a threat to law and order was within the Minister of Home Affairs’ discretion, the magistrates had erred in dismissing the charges. It was further held that without evidence of *mala fides*, it was not open to the Court to question the Minister of Home Affairs’ determination. As a result the case was referred back to the magistrates.

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\(^{524}\) 4 November 1950. ETS 5.

A further appeal was made to the House of Lords where it was held by the majority consisting of Lords Hodson, Guest and Pearson, that on the true construction of Section 1 of the SPA, the making of Regulations was a legislative act falling within the provisions of Subsection (3) and not an executive act as dealt with in Subsection (1). It was thus held that the Minister of Home Affairs’ power to make Regulations was not subject to the proviso that the ordinary course of the law and the enjoyment of property should be interfered with as little as possible considering the purpose of the SPA. Based on this reasoning, the majority held that the Minister had not acted outside of the bounds of the powers conferred by the Act and had been entitled to determine whether a particular type of organisation was subversive. The majority thus held that the Minister of Home Affairs’ decision to proscribe all ‘republican clubs’ had not been ultra vires the SPA. It was also held that the use of the words ‘any like organisations howsoever described’ did not render Regulation 24A too vague and uncertain to be acceptable. In the circumstances the appeal was dismissed.

It is interesting to note that in Lord Pearson’s speech a passing reference was made to human rights. Lord Pearson commented that since the provisions of the SPA under consideration by the Court authorised drastic incursions into freedoms of association, speech and liberty, a narrow interpretation should be used. Despite this comment, however, Lord Pearson concurred with Lords Hodson and Guest in dismissing the appeal and his reference to human rights does not seem to have impacted on his decision. It is also interesting to note that the minority decisions of Lords Didcott and Pearce were based on a purposive interpretive approach with no references made to human rights. They argued that holding that the limitations contained in Section 1(1) did not apply to the Minister’s legislative functions would be going against the intentions of Parliament.

Based upon the above discussion it is manifest that the United Kingdom’s domestic Courts failed to curtail, to any appreciable extent, the broad powers bestowed upon that state’s executive by the SPA. This continues the trend earlier observed, concerning the Courts’ treatment of the DORA and the ROIA. It is also clear that, despite the fact that the United Kingdom had signed a number of human rights treaties by the time that the SPA was repealed, the Courts did not scrutinise the SPA in light of the rights and freedoms contained within those treaties. One final observation is
that the provisions of the SPA, often characterised as harsh and draconian, were not regularly tested in the United Kingdom’s Courts of law. This last observation is particularly startling considering the length of time that the SPA remained in force.


4.1 **Background**

Following the sectarian violence of the early 1920s, Northern Ireland enjoyed a brief period of relative peace and stability. This came to an end in the mid 1930s when the military minded Seán Russell and his supporters emerged as the controlling force within the IRA Army Council. Once in power Russell began preparing a campaign of attacks on the British mainland. On 12 January 1939, the Army Council sent a formal ultimatum to British Foreign Secretary Lord Halifax, informing the British government of their intention to wage war against Britain. A bombing campaign targeting English public utilities and public spaces was launched in January 1939. Some of the more notable amenities to be attacked were Madame Tussaud’s Wax Works and the Piccadilly Circus branch of Lloyds Bank.

In response, then Home Secretary Sir Samuel Hoare, introduced the Prevention of Violence Bill (Temporary Provisions). The bill provided the government with comprehensive powers to i) prevent the immigration of foreigners, including the Irish to the British Mainland; ii) facilitate the deportation of foreigners from the British Mainland; and iii) facilitate the Irish residents in Mainland Britain registering with the police. When presenting the bill to the Parliament, Hoare referred to the IRA’s bombing campaign and pointed out that a total of 127 terrorist outrages had been perpetrated since January 1939, 57 in London and 70 in other outlying locations.

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526 Stephan (1965) at 35.
527 Ibid.
528 Ibid.
529 Ibid.
530 Ibid.
531 Ibid.
532 Id at 160.
533 Ibid.
534 Id at 161.
535 Ibid.
the course of these attacks one person had been killed and 55 injured; while 66 persons had been convicted of terrorist activity. The bill was successfully passed into law and remained in force until 1953, at which point the legislation was allowed to expire.

4.2 Legislation

The Prevention of Violence (Temporary Provisions) Act 1939 (PVA) differed, in important respects from the 20th Century counter-terror laws which preceded it. Firstly, the scope of the executive powers created by the Act was far narrower. While the preceding DORA, ROIA and SPA allowed authorities to govern by Regulation, in contrast, the only powers which the United Kingdom’s executive could access under the PVA, were those initially included in the Act. The PVA empowered the Secretary of State to i) expel certain persons from the United Kingdom; ii) compel certain persons to register with the police; and iii) prohibit certain persons from entering the United Kingdom. These powers could only be exercised in respect of persons i) reasonably believed to be involved in preparing or instigating acts of violence or harbouring any such person; or ii) reasonably believed to be attempting to enter the United Kingdom with a view to being involved in the preparation or instigation of acts of violence.

The PVA also differed from the preceding 20th Century counter-terror laws, in that it contained a number of mechanisms designed to circumscribe the powers granted to the executive. For example, persons made subject to expulsion, prohibition or registration orders were entitled to oppose such orders and make representations to the Secretary of State in support of their objections. The PVA obliged the Secretary of State to obtain advice on each objection received, unless he considered an objection to be frivolous. The advice was provided by a person nominated by the Secretary of State, who would, inter alia, interview the affected person and examine

536 Ibid.
537 Section 1(2).
538 Section 1(3). Persons who registered with the police had to provide their name and address. They also had to submit to having their height measured and their photograph taken.
539 Section 1(4).
540 Section 1(6).
541 Section 2(1).
the nature of the objection\textsuperscript{542}. The PVA obliged the Secretary of State to consider the advice and either revoke the order or notify the affected party of his refusal to do so\textsuperscript{543}. The Act also required the Secretary of State to keep Parliament appraised of the number of expulsion, prohibition and registration orders made\textsuperscript{544}.

The other executive powers created by the PVA were similarly subject to restrictions. The PVA empowered the authorities to arrest, without a warrant, and detain, any person subject to a prohibition or expulsion order, with a view to their being deported\textsuperscript{545}. Deportation, however, could not take place where an objection had been noted under Section 2(1), before the Secretary of State’s decision had been communicated.

The PVA also enabled the authorities to arrest, without a warrant, and detain any person reasonably suspected of i) having committed an offence under the Act; ii) being subject to an expulsion or prohibition order; or iii) being concerned in the preparation of acts of violence\textsuperscript{546}. However, no person could be detained for a period exceeding 48 hours or, in instances where the Secretary of State gave an express direction, 5 days\textsuperscript{547}.

Under the PVA, police officers were able to apply to any justice of the peace for a search warrant\textsuperscript{548}. Search warrants could only be granted where the justice of the peace was satisfied by information provided on oath, that there were reasonable grounds for suspecting that a person i) was involved in the preparation and instigation of acts of violence; ii) was knowingly harbouring any other person concerned in the preparation and instigation of acts of violence; iii) had committed an offence under the PVA; and that evidence supporting such suspicions could be found at the specified premises. Search warrants authorised under the PVA allowed the authorities to i) enter the named premises, if necessary by force; ii) search such premises and any persons found therein; and iii) seize anything found which the officer named in the

\begin{footnotesize}542\textsuperscript{ }\textit{Ibid.}\textsuperscript{.} 543\textsuperscript{ }\textit{Ibid.}\textsuperscript{.} 544\textsuperscript{ }Section 1(8). 545\textsuperscript{ }Section 2(2). 546\textsuperscript{ }Section 4(1). 547\textsuperscript{ }Section 4(1). 548\textsuperscript{ }Section 4(3).\end{footnotesize}
warrant had reasonable grounds for suspecting was the evidence being sought. In cases where police officers of at least the rank of superintendent had reasonable grounds for suspecting that a case constituted a great emergency and that immediate action was necessary in the interests of the state, that officer could fulfil the functions of the justice of the peace set out above\textsuperscript{549}.

It is thus apparent that in a number of important respects the PVA differed quite dramatically from its antecedents. Unlike the preceding DORA, ROIA and SPA, the PVA bestowed a limited number of relatively narrowly defined (albeit harsh) counter-terror powers on the United Kingdom’s executive. This constituted a break from the past, in which counter-terror laws had granted far broader powers to the executive. The PVA also differed from its predecessors, in that it contained a fair number of mechanisms designed to prevent abuse of power by the authorities.

### 4.3 Cases

Interestingly, an examination of all reported cases from 1939 onwards reveals that there are no reported cases dealing with provisions of the PVA whatsoever\textsuperscript{550}. The likely reasons for this are i) the fact that within 3 months of Sir Samuel Hoare introducing the Prevention of Violence Bill (Temporary Provisions) to the British Parliament, Germany had invaded Poland, thus signalling the beginning of the Second World War\textsuperscript{551}; and ii) the fact that the legislation was allowed to expire in 1954 only 9 years after fighting in the Second World War had ended\textsuperscript{552}.


#### 5.1 Background

In 1967 the Northern Ireland Civil Rights Association (NICRA) was formed in an attempt to counter the perceived discriminatory nature of the Northern Ireland state

\textsuperscript{549} Section 4(4).
\textsuperscript{550} The following case law resources were examined: The Weekly Law Reports; Daily Cases; English Reports; State Trials; The Law Reports; The Times Law Reports; Criminal Appeal Reports; Irish Reports and Digests; and First Law.
\textsuperscript{551} Sulzberger (1985) at 26.
\textsuperscript{552} Id at 284.
through, *inter alia*, the peaceful repeal of the Civil Authorities (Special Powers) Act 1922 (the Special Powers Act)\(^{553}\). Although successive Northern Ireland Prime Ministers adopted various programmes designed to address the political concerns of the Catholic minority, Nationalists were dissatisfied with the extent of the reforms, while Unionists believed that the government had gone too far in their attempts at appeasement\(^{554}\). The seeming failure of the civil rights movement’s peaceful approach to constitutional reform, combined with Unionist fears of loss of political power, led to an outbreak of violence in Belfast and Derry\(^{555}\). In response, Stormont invoked the internment provisions of the 1922 Act\(^ {556}\). Between August 9\(^{th}\) and December 14\(^{th}\) 1971, 1 576 people were interned with 934 being released without charge\(^ {557}\). Reports began to emerge from released internees that the army and Royal Ulster Constabulary (RUC) were torturing prisoners\(^ {558}\). Not long after the disastrous events of ‘Bloody Sunday’, the Northern Ireland (Temporary Provisions) Act 1972 was passed, which placed the Northern Ireland legislature into recess and vested its functions in the Secretary of State for Northern Ireland, who was directly accountable to Westminster\(^ {559}\).

In October 1972 a review Committee, headed by Lord Diplock\(^ {560}\), was appointed to consider what arrangements could be made in Northern Ireland to deal with the threat of terrorism without resorting to internment. Lord Diplock’s recommendations were, *inter alia*, that i) trials of scheduled offences should be held without a jury; and ii) confessions should be admissible in evidence unless obtained through torture or inhuman or degrading treatment\(^ {561}\). These recommendations and others were reflected in the Northern Ireland (Emergency Provisions) Act 1973 (the EPA 1973), which was published on the 6\(^{th}\) of June.

\(^{553}\) Von Tangen (1998) at 50.

\(^{554}\) Id at 56ff.

\(^{555}\) For a full discussion of the 1960s sectarian violence in Northern Ireland, which culminated in ‘Bloody Sunday’, see Finn (1991) 58ff.

\(^{556}\) Regulation 23.

\(^{557}\) Finn (1991) at 69.

\(^{558}\) Id at 70. For a discussion on the United Kingdom’s response to these allegations see Finn (1991) at 70ff.

\(^{559}\) Hogan and Walker (1989) at 27.


\(^{561}\) The phrase, ‘torture or inhuman or degrading treatment’ echoes the wording of various international human rights treaties. These treaties are fully discussed in Chapter 4.
In June 1974 the Gardiner Committee was mandated to review of the workings of the EPA 1973\textsuperscript{562}. It is noteworthy that in its report, the Committee made specific reference to the obligations of the United Kingdom in relation to the rights contained in the ECHR, as well as to that country’s more general international obligations\textsuperscript{563}. Many of the recommendations contained in the report\textsuperscript{564} were carried forward into the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 (the EPA 1975), which went unchanged until a 1977 internal government review of security legislation, which called for increased penalties for various offences, resulted in the passing of the Northern Ireland (Emergency Provisions) Act 1978 (the EPA 1978).

In 1982 Sir George Baker was appointed to investigate\textsuperscript{565} the state of the United Kingdom’s security legislation and two years later a comprehensive report was published. Despite the appearance of the Baker Report, the 1987 re-enactment\textsuperscript{566} of the EPA included only a number of minor amendments. In 1990 a review of the 1978 and 1987 Acts was undertaken under the chairmanship of the Viscount Colville of Culross, Q.C.\textsuperscript{567}. Some of the most important recommendations of that Committee including i) the establishment of effective complaints procedures; and ii) the establishment of a codes of practice, were included in a re-enactment published on 22 March 1991\textsuperscript{568}. The final incarnation of the Act was published on 15 March 1996\textsuperscript{569} and remained in force until it was repealed by the Terrorism Act 2000.

5.2 Legislation

Many of the counter-terror policies contained in the EPA 1973 were adaptations of similar practices established under earlier emergency legislation, such as the SPA.

\textsuperscript{562} Id at 28.
\textsuperscript{563} The Committee maintained that the 1973 Act was not in breach of international law, as Article 15 of the ECHR gave any contracting state party the right to derogate from its obligations under the Convention in times of war or public emergency. The report suggested though that as a result of the United Kingdom’s membership of the then European Community and North Atlantic Alliance it would be required to intervene in any civil war or violence, which spilled over into the Irish Republic.
\textsuperscript{566} Northern Ireland (Emergency Provisions) Act 1987 (the 1987 Act).
\textsuperscript{569} Northern Ireland (Emergency Provisions) Act 1996 (the EPA 1996).
Very often, however, the updated executive powers were more extensive than their predecessors had been. For example, under the EPA 1973, it became easier for the authorities to execute arrests without a warrant. Under the SPA it had only been possible to make such arrests on the basis of a reasonable suspicion, while the EPA 1973 required only a mere suspicion. For the same reasons, it also became easier under the EPA 1973 for the executive to i) enter and search dwellings for the purposes of effecting arrests; and ii) seize anything suspected of being connected with the commission of a scheduled offence or any other offence under the Act. The EPA 1973 also made it easier for the authorities to i) search non-dwellings for unlawful munitions; and ii) stop and search persons in public places for unlawful munitions. Non-dwellings could be entered and searched without the existence of any suspicion whatsoever, whereas under the SPA a suspicion was required. Under the EPA 1973, persons in a public places could be stopped and searched for unlawful munitions without the existence of any suspicion, whereas under the SPA, suspicion was required. That Act also made it easier for the authorities to enter any premises. Under the EPA the authorities could enter any premises if it was considered necessary for the preservation of the peace, whereas under the SPA, the authorities had to have a suspicion that the purpose of the premises was prejudicial to the preservation of the peace. Yet another example is Section 21 of the EPA 1973, which empowered members of the executive to order any assembly to disperse where any commissioned officer of the armed forces or officer of the RUC not below the rank of chief inspector, was of the opinion that it could lead to a breach of the peace or make undue demands on the police or armed forces. Under the SPA, the power to disperse had to be based on a reasonable apprehension, rather than a mere opinion.

Another provision sourced from the SPA provided that in criminal proceedings for a scheduled offence, a written statement made and signed by any person in the presence of a constable would be admissible as evidence if it was shown that the maker of the

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570 Sections 10, 11 and 12.
571 Regulation 23.
572 Sections 10(2), 11(2) and 12(3).
573 Section 11(3).
574 Section 13(1).
575 Section 13(3).
576 Regulation 3(4)(a).
577 Regulation 3(4)(b).
578 Regulation 18.
statement was i) dead, or unfit to attend as a witness; ii) outside Northern Ireland and it was impractical to secure his attendance; or iii) missing and that all reasonable steps had been taken to find him. In addition, the EPA continued to allow the written statements of accused persons to be used as evidence in trials for scheduled offences. As was the case under the SPA, such statements could not be used where i) prima facie evidence was adduced showing the accused had been subjected to torture or to inhuman or degrading treatment; and ii) the prosecution failed to show otherwise. It also remained unlawful under the EPA 1973 for persons to i) collect, record, publish, communicate or attempt to elicit, any information with respect to the police or the armed forces which was likely to be useful to terrorists, or ii) possess any record or document containing such information.

However, it is also worth noting that the executive powers created by the EPA 1973 were set out in greatly more explicit detail than any of the counter-terror policies made under the SPA. In this respect, the executive powers created by the EPA 1973 were narrower and more bureaucratically constrained than those bestowed by its predecessor. For example, under the EPA 1973 the specific offences which could trigger arrests without a warrant were contained in a lengthy list in Schedule IV to that Act. In contrast, the SPA countenanced similar arrests regarding a far broader category of acts, namely those which were prejudicial to the preservation of the peace and maintenance of order. Another example is the EPA 1973’s provisions regarding unlawful or proscribed organisations. Under that Act it was an offence for any person to i) belong or profess to belong to a proscribed organisation; ii) solicit or invite financial or other support for a such an organisation; and iii) knowingly make or receive any contribution to such an organisation; whereas the SPA cast the net far wider by making it an offence to, inter alia, act in any manner with a view to promoting or the objects of an unlawful organisation.

579 Section 5. Following the passing of the 1975 Act this Section ceased to have effect.
580 Section 6(1).
581 Section 6(2).
582 Section 20.
583 Regulation 23. It should be noted though that under the EPA 1973, it was also possible for the authorities to arrest without a warrant, any person suspected of being a terrorist. In this respect therefore, the Act was both harsh and broad.
584 Section 24.
There were, however, certain respects in which the executive powers available under EPA 1973 exceeded those created under the SPA. For example, Section 2(1) provided that any trial on indictment for a scheduled offence should be conducted by a Court without a jury. In addition, the Act attempted to better arm the state against the terrorist threat by limiting the Courts’ bail granting powers\textsuperscript{585}. Any person charged with a scheduled offence i) could not be admitted to bail except by a judge of the High Court; and ii) could not be admitted to bail pending an appeal. The EPA 1973 also allowed the authorities to i) search any premises where it was believed that any person was being unlawfully detained\textsuperscript{586}; and ii) stop and question any person about their identity, or knowledge of any recent explosion or life threatening incident\textsuperscript{587}. The EPA 1973 also forbade persons in a public place from dressing or behaving in way so as to arouse reasonable suspicion that they belonged to a proscribed organisation\textsuperscript{588}.

Nonetheless, the EPA 1973 did introduce a number of reforms that limited the extent of the powers available to the United Kingdom’s executive to counter terrorism. For instance, Section 1(1) of that Act prohibited any person found guilty of murder from being sentenced to death and stated that in such instances a sentence of life imprisonment should be imposed. A further example is Section 10(3) which provided that any person arrested without a warrant under Section 10 could not be detained for more than seventy-two hours, while Section 12(1), \textit{inter alia}, limited the length of time that a person arrested by the armed forces could be detained to four hours. Another instance is Section 18(7), which required members of the armed forces to produce evidence of their membership upon request, when exercising their powers while dressed in civilian attire. Although it was still possible to detain persons indefinitely under the EPA 1973\textsuperscript{589}, this could only be sanctioned by a Commissioner\textsuperscript{590} where cases had been referred by the Chief constable. In all other instances, persons could only be detained for up to twenty-eight days\textsuperscript{591}. Where cases

\textsuperscript{585} Section 3.
\textsuperscript{586} Section 15.
\textsuperscript{587} Section 16.
\textsuperscript{588} Section 23.
\textsuperscript{589} Paragraph 11(1) of Schedule I to the EPA1973. It had also been possible to detain persons indefinitely under the SPA. See, Regulation 23.
\textsuperscript{590} Established by Part I of Schedule I to the EPA 1973.
\textsuperscript{591} Paragraph 11(3) of Schedule I to the EPA 1973.
were referred to a Commissioner, the EPA 1973 entitled detainees to receive details of their alleged terrorist activities in writing. Under the EPA 1973, where a final detention order had been made, the Secretary of State was obliged to have the order reviewed by a Commissioner at least every six months.

Moreover, it is interesting to note that, with the passage of time, the various incarnations of the EPA progressively introduced a number of important reforms and concessions. For example, the EPA 1975 extended the power to grant bail to trial Court judges and removed the prohibition on bail pending appeal. The same Act also introduced legal aid for bail applicants. The EPA 1975 also reduced the number of days that a person could be detained without the case being referred to an Adviser. The same Act also entitled detained persons to submit written representations to the Secretary of State and to request an audience with the relevant Adviser. Under the EPA 1975 it was no longer permissible for hearings related to a person’s detention to be held in that person’s absence. Where a final detention order had been made, the EPA 1975 allowed detainees to make written requests to the Secretary of State for their detention to be reviewed.

The EPA 1987 limited to 28 days the period that any person charged with a scheduled offence could be held in custody by a magistrates’ Court. A further example is Section 8 of the 1987 Act which made it more difficult for the prosecution to have a confession admitted into evidence. Subsection 2 allowed such statements to be excluded, disregarded, or a fresh trial ordered, where prima facie evidence was adduced showing that the accused had been induced to make the statement by violence or the threat of violence, whether or not it amounted to torture. Subsection 3 allowed Courts to exclude a statement or order a fresh trial where this would avoid

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593 Paragraph 35(1) of Schedule I to the EPA 1973.
594 Section 4(1).
595 Section 5(1).
596 Established under Part I of Schedule I to that Act. In the 1973 Act persons could be detained for up to 28 days without their cases being referred to a Commissioner.
597 Paragraph 6(2) of Schedule I to the EPA 1975.
598 See Paragraphs 14 and 17 of the preceding Act, which had allowed hearings to be conducted in the absence of the detainee.
599 The Secretary of State was obliged to deal with such requests within 14 days of receiving them. Under the EPA 1973 detained persons had not been able to exercise this right. See Paragraph 35 of Schedule I to that Act.
600 Section 2.
unfairness to the accused; or ii) injustice. Part II of the 1987 Act guaranteed various rights of persons detained under Sections 12 or 13 of the Prevention of Terrorism (Temporary Provisions) Act 1984, including the right of any persons detained under those provisions to i) have one person informed of their detention and location; ii) consult with a solicitor; and iii) be informed of the latter right as soon as practicable, after being detained.

In terms of the EPA 1991, the authorities could only arrest persons suspected of involvement in scheduled offences, or other offences based on a reasonable suspicion. That Act similarly limited the power of the authorities to i) enter and search properties for the purposes of arresting persons suspected of involvement in scheduled offences; and ii) seize anything, suspected of being connected with the commission of a scheduled offence or any other offence under the Act. The EPA 1991, by the same mechanism, also reduced the authorities’ scope to i) enter search any dwelling or non-dwelling for unlawful munitions; ii) stop and search any person located in a non-public place. It further obliged the authorities, when carrying out searches for munitions, scanning devices or radio transmitters, to make a written record of the search specifying, inter alia, the address of the premises; damage caused during the search; and anything seized in the search. The same Act also obliged the authorities, when examining any document found in a search, to make a written record of the examination setting out, inter alia, i) a description of the document or record; and ii) the purpose of the examination. The dispersal powers which the authorities had enjoyed under previous Acts was not carried forward into the EPA 1991. That Act also created an independent Assessor of Military Complaints and Procedures in Northern Ireland, tasked with, inter alia, i) reviewing the procedures for receiving, investigating and responding to relevant complaints; ii) receiving and investigating any representations concerning those procedures; iii) investigating the operation of those procedures in relation to any particular complaint; and iv) making

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601 Section 14(1).
602 Section 15(1).
603 Section 15(2).
604 Section 17(1).
605 Section 18(1).
606 Section 19.
607 Section 19(8).
608 See, for example, Section 21 of the EPA 1973.
recommendations concerning any inadequacies in those procedures. Section 61(1) of the 1991 Act obliged the Secretary of State to draw up codes of practice in connection with the detention, treatment, questioning and identification of persons detained under the 1989 Prevention of Terrorism (Temporary Provisions) Act (PTA 1989), and also allowed for the issuing of codes of practice in connection with i) the exercise by police officers of any power conferred by Part II of the EPA 1991 Act or by the PTA 1989 Act; and ii) the seizure and retention of property found by police officers when exercising powers of search conferred by any provision of the Acts mentioned above. Section 62 of the EPA 1991 allowed the Secretary of State to issue similar codes of practice governing the exercise the powers bestowed on the armed forces under Part II of that Act.

Further reforms were introduced in the 1996 EPA, including Section 53, which obliged the Secretary of State i) to issue a code of practice in connection with the video recording of police interviews; and ii) to make an order requiring that all such video recording comply with that code. The EPA 1998, introduced a similar reform, which obliged the Secretary of State to i) to issue a code of practice in connection with the audio recording of police interviews; and ii) make an order requiring that all such audio recording comply with the code.

Despite this, the EPAs which followed the EPA 1973 added to the number of counter-terror powers available to the authorities in some regards. For instance, the EPA 1975 introduced powers designed to enable to authorities to search for and seize unlawful radio transmitters. The EPA 1973 expanded the range of activities relating to proscribed organisations, constituting offences, to include arranging, managing or addressing any meeting of three or more persons knowing that the meeting was i) to support; ii) further the activities of; or iii) to be addressed by a person belonging or professing to belong to, such an organisation. The 1975 Act introduced a new provision, which made it an offence for any person in a public place, without a reasonable excuse, to wear any hood or mask designed to conceal their identity.

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609 Section 60(1).
610 Section 5.
611 Section 11.
612 Section 21.
613 Section 16.
The EPA 1991 empowered authorities conducting searches of any premises for munitions, scanning devices and radio transmitters, to control the movement of persons in and out of those premises for the duration of the search\textsuperscript{614}. The EPA 1991 also empowered the authorities, when searching any premises, place or person, to examine any document or record found, so far as was reasonably required to ascertain the nature of the information contained therein\textsuperscript{615}. The EPA 1991 also created the offence of possessing any article, reasonably suspected of being intended for Northern Ireland-related terrorist purposes\textsuperscript{616}. Part VII of the EPA 1991 also introduced for the first time, various provisions enabling the identification and confiscation of the proceeds of terrorist-related activities.

In summation, although many of the counter-terror executive powers contained in the various EPA were adaptations of similar practices established under previous emergency legislation, such as the SPA, very often these updated powers were harsher than their antecedents had been. It is also evident that the specific executive powers created by the numerous EPAs, were set out in far more detail than any of those made under the SPA. Importantly, however, the specificity of the various EPAs resulted in a narrowing of the powers available to the executive to counter terrorism. It is also noteworthy that the EPA 1973 introduced a limited number of reforms, some of which made appreciable inroads into the powers available to the United Kingdom’s executive to deal with terrorist threats. Furthermore, the EPA 1973’s successors and in particular the EPAs of 1987 and 1991, introduced a number of relevant reforms and concessions, which further constrained the authorities in their counter-terror activities\textsuperscript{617}.

5.3 Cases

Thus far it has been shown that the United Kingdom’s early 20\textsuperscript{th} Century counter-terror laws, in the form of the DORA, ROIA and SPA, bestowed remarkably broad powers on the United Kingdom’s executive. In contrast, the numerous powers created

\textsuperscript{614} Section 19.
\textsuperscript{615} Section 22.
\textsuperscript{616} Section 30.
\textsuperscript{617} This, despite the fact that the EPAs which followed the EPA 1973 did, at least to an extent, add to the number of counter-terror powers available to the authorities.
by the EPA were narrower. It has also been demonstrated that the United Kingdom’s domestic Courts failed, in their interpretation of the law, to limit in any significant way the executive powers granted under the DORA, ROIA or SPA. In point of fact, aside from the ROIA, the provisions of the ROIA and SPA were seldom tested in the United Kingdom’s domestic Courts of law. This despite the far reaching and broad executive powers created under those laws. The following analysis of the United Kingdom’s domestic courts’ treatment of the various EPAs will show that these trends began to shift in the mid to late 1990s.

It is interesting to note that at the time that the last incarnation of the EPA was repealed618, the United Kingdom had signed and ratified a number of international human rights treaties including the European Convention on Human Rights (ECHR)619, the International Covenant on Civil and Political Rights (ICCPR)620, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)621, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPTP)622.

The first germane reported case to be brought before the Courts was In re Russell [1996] N.I. 310. The Sections dealt with in this case623, and the predecessors of those Sections624, had been examined by the Courts on previous occasions, but with no reference to any of the international law instruments dealing with human rights625. The applicants had been arrested under Section 14(1)(b) of the 1989 Prevention of Terrorism (Temporary Provisions) Act (The 1989 Act)626. Following the arrests, they had been taken to Castlereagh Police Office, where they were permitted to consult privately with their solicitors, and thereafter were interviewed by the police without

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618 In 2000.
619 4 November 1950. ETS 5.
622 1 February 1989. ETS 126.
624 Section 5 and 15 of the 1987 Act; Section 8 of the 1978 Act; and Section 6 of the 1973 Act.
626 Under this Subsection constables were empowered to arrest without a warrant persons suspected of being involved in acts of terrorism. This Section is more fully discussed in chapter 2.8.
their solicitors being present. Ultimately, one of the applicants was released without charge and the others charged with various offences.

The applicants approached the Court for relief including a declaration that the Chief constable of the RUC’s policy of not permitting solicitors to be present during interviews of persons arrested under the 1989 Act was unlawful, and an order of mandamus requiring the Chief constable to re-evaluate each applicant's request to have his solicitor present during interviews.

One of the arguments put forward by the applicants’ representatives was that the United Kingdom’s Courts should give effect to the principle found in the ECHR\textsuperscript{627} that a solicitor should be present at the interview of a suspect. The applicants argued that this should be an important consideration for any Court when exercising the discretion granted by Section 11(3) of the 1991 Act, to exclude a statement if it appeared that it was appropriate to do so to avoid unfairness to the accused or otherwise in the interests of justice. In response, the Chief constable’s representatives argued, \textit{inter alia}, that Article 6 of the ECHR only gave an arrested person the right to a fair hearing and to defend himself though legal assistance of his own choosing, and could not be interpreted as barring suspects from being interviewed in the absence of their solicitor.

The Court held, \textit{inter alia}, that the United Kingdom’s Courts were bound to give effect to statutes which were free from ambiguity, in accordance with their terms even if they conflicted with the ECHR. The Court argued further that Parliament had, by enacting Section 11 of the 1991 Act, intended statements to be admissible even where they had been obtained as a result of the creation of an atmosphere in which a suspect’s initial desire to remain silent was overcome. The Court stated that the presence of a solicitor at an interview would be inconsistent with that expressed intention. It was further held that construing Section 11 as allowing for the exclusion of a statement made at an interview solely because the arrested person's solicitor had not been allowed to be present, would be tantamount to defeating the will of Parliament. The Court agreed with the Chief constable’s submissions in holding that

\textsuperscript{627} Article 6.
Article 6 only gave an arrested person the right to a fair hearing and to defend himself through legal assistance of his own choosing. The Court also pointed out that the ECtHR had recognised that access to legal representation could be subject to restrictions, and that Court had not held that a terrorist suspect was entitled to have a solicitor present at an interview. For these and other reasons unrelated to the question of the ECHR’s applicability to the United Kingdom’s domestic law, the applications were dismissed.

*R v McWilliams* [1996] N.I. 545 was the next reported case which both dealt with the workings of one of the provisions of the Northern Ireland (Emergency Provisions) Acts, and in which mention was made of the international law documents dealing with human rights. The case dealt with Section 45 of the 1991 Act, which as stated above, had previously been examined by the Courts, but without any reference to an international law document dealing with human rights. In response to a shooting on March 10th 1993, authorisations were granted for i) the arrest of six suspects, including the appellant; and ii) the search of the suspects’ homes. The appellant was arrested and taken to a police station for questioning, where he requested to consult with a solicitor. Pursuant to Section 45(8) of the 1991 Act, the detective superintendent directed that the exercise of the appellant's right of access to a solicitor should be delayed for 24 hours. The directive was specifically based on Subsections (8)(b), (d) and (e) which required the superintendent to have reasonable grounds for believing that the exercise of the right of access i) would alert persons suspected of having committed a scheduled offence but not yet arrested for it; or (ii) would interfere with the gathering of information about acts of terrorism; or iii) by alerting any person, would make it more difficult to prevent an act of terrorism or to secure the apprehension, prosecution or conviction of any person in connection with an act of terrorism.

Based on the same grounds, the superintendent authorised a further 24 hour delay. During the period that the appellant was denied access to a solicitor, he provided the police with a statement including an account of the shooting. In addition, the appellant admitted, *inter alia*, belonging to the Irish Republican Army and being involved in the shooting. Ultimately the appellant was charged and later convicted of murder.
An appeal was launched based on, *inter alia*, the contention that the trial judge should have exercised his discretion under Section 11(3) of the 1991 Act and excluded his confessions on the grounds i) that Article 6 of the ECHR conferred upon suspects in police custody an absolute right to consult with a solicitor without delay and to have a solicitor present during interviews with the police; and ii) that such a right formed part of the common law standard of fairness so that a trial could not be regarded as fair if that right was infringed upon.

The Court held that there was no common law right for a suspect to have his solicitor present during interviews. The Court also held that since the provisions of the applicable domestic law were clear and unambiguous, there was no need to resort to the ECHR to resolve any uncertainty as to the construction of those provisions. As a result, the Court concluded that it was not bound to have regard to the question whether there had been an infringement of the terms of the ECHR. For these and other reasons unrelated to the question of the ECHR’s applicability to domestic law, the appeal was not allowed.

The last reported case dealing with one of the Acts in which reference was made to one of the international law instruments dealing with human rights was *Cullen v Chief Constable of the Royal Ulster Constabulary* [1999] N.I. 237. The case dealt with Section 15 of the 1987 Act, which as stated above, had previously been examined by the Courts, but without any reference to an international law document dealing with human rights. On October 17 1989 the appellant was arrested on suspicion of involvement in acts of terrorism. He was taken to a police station and held in custody until 23 October. During the appellant’s detention he received one unsupervised visit from his solicitor, the police thereafter delaying access or allowing only short supervised visits. Although Section 15(8) of the 1987 Act empowered police officers to authorise delays in complying with a suspect’s request to see his solicitor, in the instant case the police exceeded the authority granted by the Section by authorising delays in anticipation of the suspects’ requests.

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628 It should be noted that although the case of *Murray v Minister of Defence* [1988] 1 W.L.R. 692 was the precursor for *Murray v United Kingdom* (1996) 22 E.H.R.R. 29 which was heard by the European Court, the decision of the House of Lords did not include an examination of the applicability of the ECHR to the facts and will thus not be examined here. For a full discussion of *Murray v United Kingdom* (1996) 22 E.H.R.R. 29 see Chapter 4.
The appellant was interviewed a number of times by the police, eventually making a written statement of admissions. He was then charged with and pleaded guilty to the offence of withholding information in respect of a murder. In 1990, the appellant commenced an action for damages based on, *inter alia*, wrongful detention, false imprisonment, trespass to the person, and infringement of his right of access to a solicitor under Section 15 of the 1987 Act. The appellant’s action was unsuccessful in the Court *a quo* which held that the procedural flaws that he had been subjected to did not give rise to a claim for damages.

The Court held that in considering whether a breach of a duty imposed by a statute would give rise to a cause of action for damages, it was necessary to establish whether Parliament had intended to confer such a right. The Court stated that it was not sufficient to assume that breach of a statutory duty, which also constituted an infringement of a right conferred by the ECHR, would automatically confer a right to damages. It held that there was no evidence that Parliament had intended to confer such a right in the context of Section 15 of the 1987 Act. The Court argued that although it was clear that a delay in granting access to legal advice constituted a breach of Article 6 of the ECHR, i) such jurisprudence had been in its infancy when the 1987 Act was passed; and ii) Section 15 had imposed domestic law restrictions on that right. The Court stated further that since it was not possible to interpret Section 15 so that its provisions were in harmony with the ECHR, the appellant’s argument insofar as it rested on the assertion of one of the Convention’s rights could not succeed. For these and other reasons unrelated to the question of the ECHR’s applicability to domestic law, the appeal was not allowed.

A further appeal was then filed with the House of Lords. The minority speeches of Lord Bingham of Cornhill and Lord Steyn, which argued that an infringement of a Section 15 right was actionable without proof of loss, did not contain any references to the ECHR. Lord Hutton’s speech briefly referred to the ECHR by raising but not voicing an opinion on, the question of whether the passing of the Human Rights Act 1998 had raised the status of the ECHR to a written constitution of the United

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Kingdom. Lord Millett’s speech dealt more substantively with the ECHR-related points raised by the appellant. In his speech it was stated that the right of a person detained in custody to have access to a lawyer at any stage of an investigation was protected by Article 6 of the ECHR. Lord Millett pointed out that the infringement of this right could have serious consequences such as an unjustifiably long period of detention in breach of Article 5 of the Convention, or an unfair trial in breach of Article 6. Lord Millett also cited Murray v United Kingdom (1966) 22 E.H.R.R. 29, 66 in support of the notion that Article 6 normally requires that an accused be granted access to a lawyer at the earliest stages of an investigation. Millett L.J. also pointed out, however, that the right could be subject to restrictions for good cause and that the question in every case should be whether, considering the entire set of facts, the accused had been deprived of a fair trial. Having examined the circumstances arising in the appellant’s claim, Millett LJ concluded that since the plaintiff had not made any admissions before he was given unsupervised access to a solicitor, the irregularities complained of could not be said to have rendered his trial unfair or to have infringed on his Convention rights. Lord Millett argued further that even if the appellant had had recourse to the provisions of Section 8 of the Human Rights Act 1998 a claim for damages would have been unsuccessful since i) the actions of the executive did not constitute breaches of his Article 5 and 6 rights; and ii) the ECtHR was not in the habit of awarding nominal damages where no loss had been established; in such instances the decision of the Court that a breach had occurred was seen as sufficient remedy. For these and other reasons unrelated to the application of the Convention, Lord Millett dismissed the Cullen’s appeal. Lord Roger of Earlsferry agreed with the reasoning of Lord Hutton and Lord Millet, finding that the appellant was not entitled to the relief sought.

Based upon the above reported cases it is demonstrable that in the mid to late 1990s the ECHR began to play a role in the manner in which the Courts interpreted the

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630 As already stated, this case is more fully discussed in Chapter 4.
631 This Section, read with Section 6(1), specifically empowers courts to grant relief where public authorities have acted in contravention of the Convention. The Section also requests courts to take account of the principles adopted European Court when deciding whether to award damages and what amount to award.
632 Together with the other reported cases, where Sections dealt with in this thesis were examined by the courts, but with no reference made to any of the International Law instruments dealing with human rights - R v Killen [1974] N.I. 220; R v Lavery & Ors [1976] N.I. 145; R (McCreesh) v County Court Judge for Armagh [1978] N.I. 164; Ex parte Lynch [1980] N.I. 91; R (Secretary of State) v County...
Emergency Provisions Acts, albeit a role which failed to alter the course of justice in those cases in which it was referenced. It is also noteworthy that the mid to late 1990s saw an increase in the number of cases brought before the United Kingdom’s domestic Courts, in which complaints were made against the executive’s use of various counter-terror powers. This can be contrasted with the situation earlier in the 20th Century, where the Courts paid far less attention to international human rights treaties, and where the provisions of the various counter-terror laws were seldom the subject of litigation (despite the draconian nature of many of the earlier laws).


6.1 Background

Although Walker, Gibson and Finn all comment on the role that the IRA terrorist attacks of 21 November 1974 played in the birth of the first Prevention of Terrorism (Temporary Provisions) Act, it would not be accurate to view those attacks as a sine qua non for the emergence of that law. The bomb attacks in Birmingham had been preceded by waves of Northern Ireland-related violence dating back to 1972 when the IRA planted bombs in army barracks at Aldershot resulting in the deaths of seven civilians. In 1973, in response to those attacks, the Home Office drafted a Bill to i) outlaw the IRA; ii) prevent suspected terrorists from entering Great Britain; and iii) restrict travel between Northern Ireland and Britain.

Despite there thus having been a measure of planning involved in the drafting of the legislation, it has been said that the lack of debate which characterised its passage into the law books led to it suffering from a number of deficiencies. In particular, commentators have criticised the Act for having failed to give sufficient respect to

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Walker (1986) at 22.

Gibson (1976) at x.

Finn (1991) at 118.

Walker (1986) at 23.

Ibid.

Ibid.

Ibid at 24.
civil liberties and existing legal traditions designed to protect human rights. The Act’s authors admitted that its measures were draconian, but argued that the threat presented by the IRA provided ample justification. A re-enactment of the 1974 Act including a variety of minor amendments was published on 25 March 1976. A further re-enactment, again including various changes was published on 22 March 1984. The final incarnation of the Act, which introduced a comprehensive set of amendments, was published on March 15th 1989 and repealed on February 19th 2001 by the Terrorism Act 2000.

6.2 Legislation

Many of the counter-terror policies contained in the PTA 1974 drew heavily from the Northern Ireland-centred EPA 1973, including i) the provisions empowering the Secretary of State to proscribe organisations; ii) the offences which the Act created relating to proscribed organisations; ii) the provisions empowering the police to arrest without a warrant any person who committed an offence relating to proscribed organisations; and iii) the provisions which allowed the police to enter and search any premises and person found therein, and seize any article, where there were reasonable grounds to suspect that evidence could be found which could justify the Secretary of State proscribing an organisation, or which could show that a related offence had been committed.

Quite a number of the PTA 1974’s anti-terror policies were adaptations of similar practices established under its predecessor, the PVA, including i) the provisions empowering the Secretary of State to exclude suspected terrorists from Great Britain; ii) the provisions empowering the police to arrest without a warrant those persons who were subject to exclusion orders or who had committed offences related to exclusion orders; iii) the provision which limited to 48 hours, the length of time

640 Ibid.
641 Id at 22.
642 Section 1(3).
643 Section 1.
644 Section 7(1).
645 Paragraph 5(1) of Part II of Schedule 3 to the PTA 1974.
646 Section 3(3), 4(1), 4(3) and 5.
647 Section 7(1).
that persons arrested without a warrant could be detained\textsuperscript{648}; and iv) the provisions which allowed the police to enter and search any premises and person found therein, and seize any article, where there were reasonable grounds for suspecting that evidence could be found which could justify the Secretary of State making an exclusion order or which could show that a related offence had been committed\textsuperscript{649};

Despite the PTA 1974 largely derivative nature, it did introduce a number of novel provisions, including i) Section 3(8), which made it an offence for anyone to assist persons subject to exclusion orders from entering Great Britain or to harbour any such persons\textsuperscript{650}; ii) Paragraph 7(1) of Part II of Schedule 3, which empowered the authorities to stop and search any person, for any articles which would make such a person liable to be arrested under the Act; and iii) Section 8\textsuperscript{651}, which made provision for the authorities to control the entry of persons into the United Kingdom by, \textit{inter alia}, allowing them to arrest and examine such persons to determine whether they were involved the terrorism, or were subject to exclusion orders, or had committed an offence related to the Act’s exclusion order provisions\textsuperscript{652}.

In some respects, the PTA 1974 reformed the counter-terror laws which had preceded it. For example, that Act required the Secretary of State to obtain advice from a nominated third party, where representations were received from any person subject to an exclusion order\textsuperscript{653}. Once the third party’s report was received the Act obliged the Secretary of State to reconsider the case\textsuperscript{654}.

The PTA 1976 also introduced a number of novel counter-terror powers. For example, under that Act it became an offence for any person to i) solicit or invite any other person to give or lend any money or property with the intention that it be used in connection with acts of terrorism; ii) receive or accept from another any money or property, with the intention that it be used in connection with acts of terrorism; or iii)

\textsuperscript{648} Section 7(2). The Section, though, gave the Secretary of State the power to extend the 48 hour period by a further period of 5 days.

\textsuperscript{649} Paragraph 5(1) of Part II of Schedule 3 to the PTA 1974.

\textsuperscript{650} Section 1(3) of the PVA had only allowed the authorities to make a registration order against any person suspected of harbouring persons intending to commit acts of violence. These registration orders obliged those subject to them to, \textit{inter alia}, provide the police with their personal details.

\textsuperscript{651} Read together with Part I of Schedule 3 to the PTA 1974.

\textsuperscript{652} See Section 3(8).

\textsuperscript{653} Section 4(4). Such a reference did not have to be made in instances where the Secretary of State found the representations received to be frivolous.

\textsuperscript{654} Section 4(5).
give, lend or make available any money or property, knowing or suspecting that it would or could be used in connection with acts of terrorism. The PTA 1976 also allowed the Courts, when convicting persons of one of these offences, to order the forfeiture of any money or property which was intended to be used for or in connection with acts of terrorism.

The PTA 1976 also served to reform the earlier PTA 1974 in a number of respects. For example, Section 7(5) stated that where an objection against an exclusion order was made and the matter was referred for advice by the Secretary of State and the objector requested a personal interview, this would be granted, provided they had not already been removed from the United Kingdom.

The PTA 1984 introduced a number of reforms, including i) Section 3(4), which stated that an exclusion order would, unless already revoked, expire three years after coming into existence; ii) Section 7(5) which stated that where any excluded person had consented to their removal, or been prematurely removed, he still had the right to object to the order for 14 days following the removal; and iii) Section 7(6) which provided that where a person timeously exercised their rights to object to an exclusion order, the matter would be automatically referred for advice to the third party nominated by the Secretary of State.

A number of reforming measures were also introduced by the PTA 1989. For instance, Paragraph 6(4) of Schedule 2, stated that no directions could be given for the removal of any person subject to an exclusion order, to any country or territory other than one i) of which the person in question was a national or citizen; ii) in which that person obtained a passport or other identity document; or iii) to which there was reason to believe that person would be admitted. Another example is Paragraph 1(1) of Schedule 3, which stated that where a person had been detained pending removal following an exclusion order, the detention would be periodically reviewed, as soon as practicable after the beginning of the detention; and subsequently at intervals of not

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655 Section 10.
656 Section 10(4).
657 Section 7(5).
658 Nonetheless, Section 3(5) provided that the fact that an exclusion order had expired or been revoked was no bar to the making of a further order.
more than twelve hours. Subparagraph (3) provided that the review officer could only authorise the continued detention if he was satisfied that steps for giving directions for the person’s removal or for removing him were being taken diligently and expeditiously. A similar review regime was put in place for persons detained by the authorities for examination at any port or border\textsuperscript{659}. A further reform was introduced by Paragraph 7(1) of Schedule 3, which stated that where a review officer had authorised the continued detention of any person who had not yet exercised the rights set out in Section 56 or 58 of the Police and Criminal Evidence Act 1984 (PCE 1984)\textsuperscript{660}, the review officer should inform him of those rights or, that their exercise was being delayed under the PCE 1984. Where a review of a person’s detention was carried out under Paragraphs at a time when the exercise of his Section 56 or 558 rights was being delayed, Paragraph 7(2) obliged the reviewing officer to consider whether the reasons behind the delay still existed. Where the reviewing officer was of the opinion that the reasons had ceased to subsist, and he had not personally authorised the delay, Paragraph 7(2) obliged him should inform the authorising officer of his opinion.

The PTA 1989 also served to expand upon many of the provisions and powers contained in the PTA 1974. For example, the 1989 Act broadened the range of activities which constituted offences, related to proscribed organisations, to include i) soliciting or inviting any other person to give, lend or make available money or other property for the benefit of a proscribed organisation; ii) giving, lending or making available or receiving or accepting money or other property for the benefit of such an organisation; or iii) entering into or being concerned in an arrangement where money or other property was made available for the benefit of a proscribed organisation\textsuperscript{661}.

The PTA 1989 also introduced a host of wholly new counter-terror policies. For example, it made it an offence for any person to enter into or be concerned in an arrangement whereby the retention or control by another person of terrorist funds was facilitated\textsuperscript{662}. The PTA 1989 also allowed persons to disclose to a constable i) any

\textsuperscript{659} Paragraphs 2(1) and 3(1) of Schedule III to the PTA 1989.
\textsuperscript{660} These deal with the right of arrested persons to have someone informed of their arrest and to have access to legal advice.
\textsuperscript{661} Section 10.
\textsuperscript{662} Section 11(1).
suspicion or belief that money or other property had been derived from terrorist funds; or ii) any matter on which such a suspicion was based, regardless of any contractual restriction on the disclosure of such information. The Act also broadened the conditions under which property constituting contributions towards i) acts of terrorism; and ii) the resources of proscribed organisations, could be forfeited to the state. The PTA 1989 further included new provisions designed to aid the state in its administration of such forfeited property. It also made it an offence for any person to i) have in his possession any article rise to a reasonable suspicion that such article was for a purpose connected with an act of terrorism; ii) without lawful authority or reasonable excuse, collect or record any information of a nature likely to be useful to terrorists, or have in his possession any record or document containing such information. The authorities were authorised to i) detain any person pending their removal from the United Kingdom; ii) arrest without a warrant any person, pending their removal from the United Kingdom; iii) search any premises where there were reasonable grounds for suspecting that any person, liable to be arrested pending their removal from the United Kingdom, would be found in such premises. The PTA 1989 also empowered the authorities to, with greater ease, conduct searches of premises and seize materials likely to be of substantial value to an investigation. Additional powers were bestowed on the authorities to arrest without a warrant, detain and examine persons entering or leaving or attempting to enter or leave Northern Ireland. The authorities were also empowered to i) board any aircraft or ship in order to conduct a search to establish if there was anyone onboard whom they wished to examine; ii) search any person or baggage so found; and iii) detain any baggage or article found. The PTA 1989 also prohibited ships or aircraft from entering or leaving the United Kingdom through undesignated ports, without the prior approval of the authorities, and obliged any captain of a ship or aircraft arriving in or departing from the United Kingdom to ensure that his passengers and crew

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663 Section 12(1).
664 Section 13.
665 Schedule 4 to the PTA 1989.
666 Section 16A.
667 Section 16B.
668 Paragraph 8(1) of Schedule 2 to the PTA 1989.
669 Schedule 8.
670 Schedule 5.
671 Paragraphs 2, 3 and 4 of Schedule 5 to the PTA 1989.
672 Paragraph 8 of Schedule 5 to the PTA 1989.
disembarked or embarked in accordance with the arrangements of the examining authorities.\footnote{Paragraph 10 of Schedule 5 of the PTA 1989.}

From the above discussion it is clear that many of the counter-terror policies contained in the PTA 1974 drew heavily from both the EPA 1973 and the PVA 1939. Despite the fact that the PTA 1974 was largely a derivative piece of legislation, it did introduce a number of novel counter-terror policies as well as a few mechanisms aimed at preventing abuse of power. Such mechanisms were to a very large extent absent in the United Kingdom’s earlier counter-terror laws. Like the EPA 1973, the PTA 1974 was far more complex than any of the United Kingdom’s previous counter-terror laws. More particularly, the executive powers created by the PTA 1974 were set out in hitherto unheard of detail.

While this specificity meant that the number of powers available to the executive increased under the PTA 1974, it also meant that the overall authority enjoyed by the executive narrowed considerably. Similarly, the PTA 1976, while adding to the powers available to authorities, did not reinvest the executive with the broad powers it had enjoyed under earlier laws. The PTA 1976 also inserted a number of checks and balances, the likes of which were not seen in earlier laws. The PTA 1984 is significant for the purposes of this thesis as Westminster used the Act to bring the United Kingdom’s counter-terror laws further in line with its international law obligations. Such considerations had previously not enjoyed much cache with the United Kingdom’s Parliament. Aside from introducing a raft of novel counter-terror policies, the PTA 1989 broadened a number of the state’s existing powers. Nonetheless, even these bolstered powers did not come close to reinvesting the executive with the (relatively) uninhibited broad powers it had enjoyed until the subsumption by EPA 1973 of the SPA. The PTA 1989 also introduced a number of reforming measures, thus further delineating it from earlier laws.

\subsection{Cases}

\footnote{Paragraph 10 of Schedule 5 of the PTA 1989.}
It has already been shown that prior to the mid 1990s, the decisions of the United Kingdom’s domestic Courts in cases concerning counter-terror laws did not significantly limit the executive powers created under those Acts. It has also become clear that aside from the ROIA, the provisions of the United Kingdom’s pre-1972 counter-terror laws were seldom tested in the United Kingdom’s domestic Courts. This despite the far reaching and broad executive powers created under those laws. This pattern was not repeated in relation to the various EPA. The provisions of the various EPA were challenged in court on a more regular basis. In addition, from the mid 1990s onwards, Courts examining provisions of the EPA began referencing the ECHR\(^\text{674}\) even though human rights considerations failed to alter the course of justice in any given case. These trends continued in relation to the United Kingdom’s domestic courts’ treatment of the various PTA.

From a chronological perspective it is important to note that by the time that the last incarnation of the PTA was repealed\(^\text{675}\), the United Kingdom had signed and ratified a number of international human rights treaties including the European Convention on Human Rights (ECHR)\(^\text{676}\), the International Covenant on Civil and Political Rights (ICCPR)\(^\text{677}\), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^\text{678}\) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPTP)\(^\text{679}\). It is also noteworthy that 3 years prior to the last PTA being repealed, the United Kingdom enacted the Human Rights Act 1998, the aim of which is to give further effect to the rights contained in the European Convention on Human Rights.

The first reported case of interest, relating to the PTA, to be brought before the Courts was *R v Secretary of State for the Home Department; Ex parte Gallagher* [1994] 3 C.M.L.R. 295. The provisions principally dealt with in this case\(^\text{680}\) and their

\(^{674}\) 4 November 1950. ETS 5.

\(^{675}\) In 2000.

\(^{676}\) 4 November 1950. ETS 5.


\(^{679}\) February first 1989. ETS 126.

\(^{680}\) Section 7 of the 1989 Act; Paragraphs 3 and 4 of Schedule 2 to the 1989 Act.
predecessors\textsuperscript{681} had not previously been examined by the Courts. On September 27\textsuperscript{th} 1991 the respondent made an order under Section 7(1) and (2) of the 1989 Act excluding the appellant from the United Kingdom. The appellant initially consented to his removal but later exercised his rights in terms of Paragraph 3(1) and (3) of Schedule 2 to the 1989 Act and objected to his exclusion. The appellant was interviewed by an adviser appointed by the respondent in terms of Paragraph 3(5) but ultimately the respondent, having followed the provisions of Paragraph 4, refused to withdraw the initial order. The appellant applied to have the respondent’s decision judicially reviewed and approached the Court of Appeal after a single judge had dismissed the initial application.

One of the arguments put forward by the appellant’s representatives was that the respondent’s decision to exclude him from the United Kingdom and the procedures surrounding that decision, breached Article 48(1)\textsuperscript{682} of the Treaty of Rome and Articles 6\textsuperscript{683} and 9\textsuperscript{684} of the Free Movement of Workers Directive\textsuperscript{685}.

In his judgment, Farquharson L.J. held, \textit{inter alia}, that though the actions of the respondent appeared to be a \textit{prima facie} breach of Articles 48 and 6, it was clear that both provisions envisioned occasions where rights of movement could be justifiably restricted. Consequentially, the Court argued that those rights could be infringed where this was in the public interest. In relation to the provisions of Article 9, however, the Court held that the respondent may well have been in breach as the recommendations received following the appellant’s interview with the adviser should have been obtained prior to the order being given. Farquharson L.J. also dealt with the issue of whether, despite having been appointed by the respondent, the adviser could for the purposes of Article 9, be considered a competent authority. The Court held that while in the United Kingdom it was usual for government authorities to appoint

\textsuperscript{681} Sections 3 and 4 of the 1974 Act; Sections 4 and 7 of the 1976 Act; and Sections 4 and 7 of the 1984 Act.

\textsuperscript{682} This Article secures the freedom of movement for workers within the European Community.

\textsuperscript{683} This Article states that where a worker’s freedom of movement is restricted they should be informed of the grounds upon which the restriction was put in place, unless this would be contrary to the security of the state involved.

\textsuperscript{684} This Article states that ordering the expulsion of the holder of a residence permit from a territory should other than in urgent cases, not take place before an opinion on the matter has been obtained from a competent authority.

third parties to offer independent advice, the position under community law might be different. Farquharson L.J. concluded by holding that the questions raised in relation to Article 9 should be referred to the ECtHR under Article 177 of the Treaty of Rome.

Steyn L.J.’s concurring judgment began by highlighting the fact that the rights contained in Article 48 could be justifiably restricted based on issues of public policy, public security, or public health. He held that Article 48(1) did not oblige states to divulge the reasons behind restricting a person’s movement in circumstances where this would prejudice their security interests. Steyn L.J. then proceeded to deal with the question of whether the adviser appointed by the respondent constituted a competent authority as envisaged by Article 9. He acknowledged that the Article’s only explicit requirement was that the advising and administrative authority be different entities and examined a number of cases\(^ {686} \) to gain a clearer understanding of the term. Though these cases suggest that in order to constitute a competent authority, an advising authority should have no links to the administrative authority and should be able to exercise absolute independence, Steyn L.J. concluded that the question of whether the administrative authority could appoint the advising authority was an open one. With regard to the question of whether Article 9 had been breached as a result of the recommendations only having been received after the appellant’s interview with the adviser, Steyn L.J. pointed out that European jurisprudence could be interpreted as requiring the matter to be investigated prior to a decision being taken. Steyn L.J. also argued that the right enshrined in Paragraph 3 of Schedule 2 to the 1989 Act could be interpreted as less valuable than one in which no decision at all is taken prior to advice being dispensed.

In his dissenting judgment, Hirst L.J. argued that the fact that i) a purposive construction of the 1989 Act’s provisions interpreted in accordance with community law leads to the absolute independence of the adviser being implicit in that legislation; and ii) the *Adoui and Cornuaille v Belgium* [1982] E.C.R. 1665, [1982] 3 C.M.L.R. 631 judgment highlighted the importance of the adviser’s independence and not the manner in which the adviser was appointed, meant that the Schedule 2 provisions did


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not conflict with Article 9. It was also argued that the Schedule 2 exclusion orders should not be seen as final orders and therefore in conflict with Article 9, as that Schedule provided persons subject to such orders opportunities to, *inter alia*, make representations prior to their actual removal. Hirst L.J. also stated in his judgment that the fact that the appellant had not been given reasons for the respondent’s decision, did not mean that the Schedule 2 provisions were in conflict with Article 6, as that Article made specific provision for reasons to be withheld based on states’ security related issues.

Ultimately, the case was referred to the Court of Justice who held that in passing the 1989 Act the United Kingdom had failed to give effect to the provisions of Article 9687. This decision gave rise to the next case that dealt the workings of one of the provisions of the Prevention of Terrorism (Temporary Provisions) Acts and where mention was made of the international law documents dealing with human rights.

In *R v Secretary of State for the Home Department: Ex parte Gallagher* [1996] 2 C.M.L.R. 951 the appellant sought to amend his claim for judicial review to include an action for damages based upon a breach of community law. Lord Bingham of Cornhill, L.C.J. began his judgment by acknowledging the community law principle that member states should provide adequate redress in situations where such states have violated the law of the community. The Court examined five cases in which the European Court of Justice had discussed the circumstances in which individuals could recover damages from member states. In *Francovich v Italy* [1991] E.C.R. 5357, [1993] 2 C.M.L.R. 66 and *Faccini Dori v Recreb* [1994] I E.C.R. 3325, [1994] 1 C.M.L.R. 665 it was stated that where states had failed to give any legislative effect to a directive, individuals could be compensated if i) the directive had created individual rights; ii) the content of those rights was discernable from the directive; and iii) there was a causal link between the state’s actions and the loss suffered by the claimant. The joined cases of *Brasserie du Pecheur SA v Germany and R v Secretary of State for Transport ex parte Factortame Limited (No. 4)* [1996] 1 C.M.L.R. 889 dealt with instances where, rather than failing to implement community directives, states had promulgated legislation which was held to be in conflict with community law. These

687 *R v Secretary of State for the Home Department: Ex parte John Gallagher* (C-175/94) [1996] 1 C.M.L.R. 557. See Chapter 3 for a full discussion of this case.
cases held that in such instances individuals could claim compensation where i) the compromised rule of law had created individual rights; ii) the breach had been sufficiently serious; and iii) there was a causal link between the state’s actions and the loss suffered by the claimant. In *R v HM Treasury: Ex parte British Telecommunications Plc* [1996] 2 C.M.L.R. 217 it was stated that these stricter requirements should also apply to situations where a claim was based upon a state’s incorrect implementation of a community directive. That case also stated that a breach would be considered sufficiently serious where a state had manifestly and gravely exceeded the limits intended to apply to its powers.

Lord Bingham L.C.J. held that the requirements set out in *British Telecommunications* should apply, arguing that the case involved the incorrect transposition of a community directive. The Court then proceeded to examine the causation requirement, which was the main source of dispute between the parties. The Court stated that it was not sufficient for the appellant merely to show that there had been a loss of a chance of a favourable result. The Court thus held that the appellant was unable to show that the damage he suffered was the result of the United Kingdom’s breach of community law and therefore was not entitled to damages. The Court also held that while the respondent’s breach could be described as manifest, based on the fact that it had not resulted in the appellant being placed in a worse position, it did not amount to a grave departure from the directive. For these reasons the appellant’s request to amend his claim for judicial review was refused.

The next reported case which dealt with the workings of one of the provisions of the Prevention of Terrorism (Temporary Provisions) Acts, and in which mention was made of the international law documents dealing with human rights was *O’Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 W.L.R. 1. The provisions dealt with in this case had previously been examined by the Courts, but without any reference to an international law document dealing with human rights. On

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688 Section 12 of the 1984 Act. That Section’s predecessors were Section 7 of the 1974 Act and Section 12 of the 1976 Act. In the 1989 Act these provisions appeared as Section 14.

December 28th 1985 the appellant had been arrested under Section 12(1)(b) of the 1984 Act. The appellant had been taken to Castlereagh Police Office and on December 29th 1985 the Secretary of State granted an order under Section 12(4) of that Act extending the period of time that the appellant could be legally detained by an additional 5 days. On January 13th 1986 the plaintiff was released without charge. The appellant brought an unsuccessful action for damages against the respondent for, *inter alia*, wrongful arrest. The appellant then unsuccessfully appealed to the Court of Appeal who granted leave for a further appeal to the House of Lords. The principal question that fell to be answered in the appeal was whether the arresting officer had objectively had the reasonable grounds required by Section 12(1) of the 1984 Act to arrest the appellant without a warrant.

Although Lord Steyn’s decision to dismiss the appeal was ultimately not based upon any international law right, his speech made reference to Article 5(1) of the ECHR and the ECHR case of *Fox, Campbell & Hartley v United Kingdom* (1990) 13 E.C.H.R.R. 157 from which it was inferred that officers effecting arrests without warrants should be able to rely on information held by another officer not communicated to the arresting officer. Lord Steyn distinguished these statements of law from Section 12(1) of the 1984 Act, which called for a narrower test of reasonableness in which information not in the mind of the arresting officer could not be considered. Lord Hope of Craighead also referred to the *Fox, Campbell & Hartley* decision as well as Article 5(1), but did not make the same distinction. He merely argued that those sources of law were in harmony with English case law on the point, which stated that in order for an arrest to be lawful an officer needed to have equipped himself with sufficient information for a reasonable suspicion to arise. Based on the evidence that was presented at the trial detailing the information that was available to the arresting officer, both Lords Steyn and Hope held that the appeal should be dismissed. Lord Goff of Chieveley, Lord Mustill and Lord Hoffmann concurred.

Another reported case dealing with one of the Acts and in which reference was made to one of the international human rights law instruments, is *R v Director of Public*


Prosecutions: Ex parte Kebilene and Ors [1999] 3 W.L.R. 175. The case dealt with Sections 16A and 19(1)(aa) of the 1989 Act, which had not previously been examined by the Courts. During the period May 1997 to May 1998 the four applicants had been arrested for having committed acts of terrorism in contravention of Section 16A of the 1989 Act. Three of the applicants were said to have had in their possession, \textit{inter alia}, chemical containers, radio equipment, manuals and money in circumstances which gave rise to a reasonable suspicion that they were in their possession for a purpose connected with an act of terrorism. The 4th applicant was said to have had in his possession, \textit{inter alia}, documents, money and books in circumstances which gave rise to a reasonable suspicion that they were in his possession for a purpose connected with an act of terrorism. The respondent consented to the prosecution of the applicants under Section 19(1)(aa) of the 1989 Act. Midway through the trial of three of the applicants, it was successfully argued that Section 16A was in conflict with Article 6(2) of the ECHR. The applicants’ solicitor wrote to the respondent asking whether he would consider withdrawing his consent for the prosecution and the trial was postponed pending that decision. The Director decided not to withdraw his consent and at the beginning of 1999 Turner J granted all four applicants leave to have that decision judicially reviewed.

The applicants argued that the United Kingdom’s ratification of the ECHR and the enactment of the 1998 Human Rights Act had created a legitimate expectation that the respondent would reconsider his decision to prosecute. In his judgment Lord Bingham C.J. held that since the ECHR had been ratified more than fifty years prior to the prosecution of the applicants, and that it had for most of that time had very little practical impact on the operation of the law in the United Kingdom, the applicants could not argue that the ratification of the ECHR had created a legitimate expectation. Lord Bingham C.J. also held that the wording of the 1998 Act prevented the applicants from successfully arguing that the passing of that Act created a legitimate expectation. The Court based its argument on the fact that the 1998 Act had made it clear that its central provisions would not come into force on the passing of the 1998 Act, but rather at a later date nominated by the Secretary of State. Lord Bingham also argued that it was not within the power of the respondent to give effect to the 1998 Act in direct violation of Parliament’s intentions. He did, however point out that it had been incumbent on the respondent, following Judge Pownall Q.C.’s decision that
Section 16A was in conflict with Article 6(2), to reconsider afresh whether to continue to consent to three of the applicants’ prosecutions, taking into consideration the possible future effect of the coming into operation of the 1998 Act as a whole. The Court thus held that it was appropriate to examine the advice on which the respondent had made his decision to continue to prosecute, on the basis that if that decision had been unsound, an opportunity could be provided for a reconsideration.

The applicants also argued, *inter alia*, that Sections 16A and 16B of the 1989 Act infringed upon their rights to be presumed innocent by requiring them to disprove one of the elements of the charges brought against them. On this point Lord Bingham C.J. held, referring to various judgments of the ECtHR\(^\text{690}\), that Human Rights instruments had to be interpreted so as to properly balance the rights of individuals against those collective rights of the community. For this reason, it was argued that a reverse onus could not be said inherently to infringe upon the right contained in Article 6(2). Lord Bingham C.J. also argued that it was within the Court’s powers, prior to the conclusion of the trial, to evaluate whether any legislative provision was in conflict with the ECHR. The Court held that a literal reading of both Section 16A and 16B revealed inconsistencies with the right to be presumed innocent. The Court rejected the respondent’s argument that the Sections should be upheld based upon clear parliamentary intention, stating that Parliament had also expressed an intention that ultimately the rights contained in the ECHR be legally protected.

Laws L.J. dismissed the respondent’s argument that, in requiring the respondent to reconsider his decision to continue prosecuting the applicants in light of the 1998 Act, the Court would be forcing the respondent to ignore the clear intentions of Parliament. Laws L.J. pointed out that none of the authorities cited by the respondent indicated that he should not be permitted, in exercising his discretion, to take into account an Act of Parliament where certain provisions were yet to come into operation. Laws L.J. held, as Lord Bingham C.J. had, that it was incumbent on the respondent to consider the potential impact of the 1998 Act on the prosecution of the applicants. Laws L.J. also rejected the respondent’s argument that an examination of the compatibility of Sections 16A and 16B with Article 6(2) would be an illegal means of prematurely

bringing the 1998 Act into force. Instead, Laws L.J. argued such an examination was required in light of the fact that the law had required the respondent to take into consideration a broad range of circumstances - including the passing of the 1998 Act - when deciding whether to continue prosecuting the applicants. He rejected the applicants’ argument that the United Kingdom’s ratification of the ECHR created a legitimate expectation that the respondent would reconsider his decision to prosecute. The Court argued that while the ECHR could, prior to the coming into force of the 1998 Act, be used by the government to assist in making decisions based on factual assessments, it would not be legal to use the ECHR as a means of interpreting legislation. Laws L.J. concluded that the reverse onus created by Sections 16A and 16B was in conflict with Article 6(2), and that bowing to the practical reasons behind the laws, put forward by the respondent, would amount to a breakdown of the rule of law.

In *R v Director of Public Prosecutions ex parte Kebilene & Ors* [2000] 2 A.C. 326 the respondent took the above decision on appeal to the House of Lords. One of the main points in issue was whether the Divisional Court’s judgment had infringed upon Parliament’s sovereignty in that Section 16A had been unambiguous in its meaning. Lord Steyn held that the Court had not overstepped that boundary in that its judgment had not requested the appellant to ignore unambiguous legislation, but rather presented an opportunity to reconsider a decision made on the basis of less than sound legal advice. Another of the issues raised in the appeal was whether the 1998 Act had created a legitimate expectation that the appellant would, pending the coming into force of that Act’s main provisions, not consent to any prosecutions that violated Article 6(2). Lord Steyn held that no such legitimate expectation could have arisen based on legislation that expressed a clear intention to postpone the affects of its main provisions. Lord Steyn’s speech did not deal with whether Section 16A was compatible with Article 6(2) as he ultimately held that the appeal should succeed based upon a finding that the appellant’s decision to continue prosecuting the respondents was not subject to judicial review. Lord Slynn of Hadley concurred in Lord Steyn’s decision.

Lord Cooke of Thorndon also concurred in Lord Steyn’s decision but nonetheless chose to comment on a number of matters relating to, *inter alia*, the Divisional
Court’s treatment of Article 6(2). Lord Cooke of Thorndon argued that while the Divisional Court had been correct in holding that the ordinary meaning of Section 16A was repugnant to Article 6(2), it had misdirected itself in not following the rules of interpretation set out in Section 3(1) of the 1998 Act. The Court argued that Section 3(1) had the effect of compelling Courts to, as far as possible, interpret legislation in a way compatible with the ECHR. Lord Cooke of Thornton argued that the Divisional Court should have followed this method of interpretation and held that Section 16A(3) merely created an evidentiary burden and did not transfer the burden of proof from the prosecution to the defence.

As was the case with Lord Steyn, Lord Hope of Craighead decided to grant the appeal on the basis that the appellant’s decision to continue prosecuting the respondents was not subject to judicial review. Nevertheless, Lord Hope opted, in light of the importance of some of the issues raised by the matter, to review the competing arguments around the 1998 Act. He commented that the coming into force of the main provisions of that Act would fetter Parliament’s previously unrestrained ability to transfer a burden of proof in criminal matters, by way of legislation. Lord Hope also discussed the importance of the doctrine of the “margin of appreciation” in the jurisprudence of the ECtHR. This doctrine acknowledges that national authorities are often better placed than the Strasbourg Court to evaluate local conditions and needs. The Court thus plays a supervisory role, allowing countries to develop individual mechanisms for protecting the Convention rights. Lord Hope also pointed out that the Convention should be seen as a set of principles inviting national Courts to balance competing interests, rather than merely a set of rules to be mechanically applied. He argued further that instances could arise where Courts decided to “defer on democratic grounds” to a legislative body’s views when an Act seemed to be in conflict with the Convention. Lord Hope referred to the case of Murray v United Kingdom (1994) 19 E.H.R.R. 193, stating that the Strasbourg Court had acknowledged that when adjudicating on the compatibility of terrorism legislation with the Convention, due account could be taken of the special nature of the threat posed to states. The Court, citing the Salabiaku case\(^691\) also stated that when evaluating whether legislation was in conflict with the ECHR, a fair balance had to be reached.

struck between the general interests of the community and individual human rights. Lord Hope of Craighead concluded that the Divisional Court had erred in finding that Section 16A was obviously in conflict with Article 6(2) and that the question of whether that Section properly balanced the rights of society with the individual rights of suspects, remained open.

Lord Hobhouse of Woodborough held that the Divisional Court had incorrectly decided that the appellant’s decision to continue prosecuting the respondents was open to judicial review. Lord Hobhouse further held that it was questionable whether Section 16A was in fact incompatible with the Convention. Lord Hobhouse quoted the cases of Bates v United Kingdom (Application No. 2628) (unreported) and Salabiaku v France (1988) 13 E.H.R.R. 379 both of which were instances where the Strasbourg Court had held that reverse onuses could, in certain circumstances, be compatible with Article 6(2).

In many respects the above reported cases adhere to the pattern observed earlier concerning the Courts’ treatment of the provisions of the various EPAs. From the mid 1990s onward, the ECHR began to play an ever greater role in the way in which the Courts interpreted the Emergency Provisions Acts. In addition, it is clear that the passing of the 1998 Human Rights Act created new avenues for litigants to challenge the provisions of the Prevention of Terrorism (Temporary Provisions) Acts 1974-1989, even prior to its main provisions coming into force. Nonetheless, it is interesting to note that in O’Hara and Kebilene the House of Lords was able to avoid reaching decisions based on the provisions of the ECHR. Moreover, the approach of

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the House of Lords in *Kebilene* in overturning the Court of Appeal’s decision could be seen as judicially conservative from a human rights perspective.

7. **Conclusion**

With the exception of the early 1930s, the threat of terrorism in Northern Ireland, loomed large throughout the 20th century. This threat was met initially through the use of wartime emergency legislation, namely the various Defence of the Realm Acts 1914-1915 (DORA). These laws suspended the operation of the ordinary criminal law codes and empowered the executive, albeit in a limited sphere, to rule by decree, through issuing Regulations693. The various DORAs were simple Acts which were painted with very broad brush strokes. Rather than describe a limited list of powers which would be available to the executive to counter terrorism, Westminster gave authorities *carte blanche*. In addition, the legislation imposed few checks and balances on the powers granted to the executive.

At the end of the Great War (1914-1918), these laws were superseded by the Restoration of Order in Ireland Act 1920 (ROIA), which applied to the whole of Ireland. The latter legislation, however, drew heavily from its wartime predecessor and a number of harsh wartime Regulations were carried forward into the new Act694. In fact, under the Defence of the Realm Consolidation Act 1914 (the Consolidation Act), the ROIA empowered the executive to continue issuing Regulations695. This arrangement was designed to enable the United Kingdom’s executive to counter any disorder in Ireland, with which the ordinary laws were deemed insufficient to deal. In essence, the remarkably broad powers bestowed upon the executive under the various DORAs were simply extended under the ROIA.

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693 See, for example, Section 1 of the Defence of the Realm Act 1914. The various DORA also authorised a system of interment, see, for example, Regulation 55 made under the DORA.
694 See, for example, Sections 1 and 4 of the Restoration of Order in Ireland Act 1920. The vast majority of the Regulations made under the DORA were carried forward into the ROIA 1920. Nonetheless, a small number of the DORA provisions, were not brought forward into the ROIA 1920, including Regulation 13, which had empowered police constables, customs officer and those authorised by the navy or military to arrest, without a warrant, any person who was suspected of acting in a way prejudicial to the safety of the public.
695 Section 1(1).
Following the Government of Ireland Act 1920 and the creation of Northern Ireland, the defunct ROIA was replaced with Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 – 1943 (SPA 1922 – 1943). The various SPAs, which remained in force until 1973, mimicked their predecessors in that they bestowed upon the executive very broad powers to make Regulations as a means of countering the threat of terrorism\textsuperscript{696}. Northern Ireland’s civil authority\textsuperscript{697} was empowered to act in whatever way necessary for the preservation of peace and the maintenance of order\textsuperscript{698}. Mirroring the DORA and ROIA, the SPA had very few limits placed upon its powers\textsuperscript{699}, and many of its sanctions were conspicuously harsh\textsuperscript{700}.

On the British mainland the situation was markedly different. The threat of terrorism only became a reality in mainland Britain following an IRA bombing campaign in 1939. The government responded by enacting the Prevention of Violence (Temporary Provisions) Act 1939 (PVA 1939), which attempted to deal with the threat, \textit{inter alia}, be i) preventing the immigration of foreigners\textsuperscript{701}; ii) facilitating the deportation of foreigners\textsuperscript{702}; and iii) making it possible for the authorities to register all resident Irish with the British police\textsuperscript{703}. The IRA’s campaign was interrupted by the Second World War and the Act fell into disuse and was allowed to expire in 1954.

In 1972 a review Committee headed by Lord Diplock, was appointed to consider what arrangements could be made in Northern Ireland to deal with the threat of terrorism without the need to resort to internment\textsuperscript{704}. It was recommended, \textit{inter alia}, that trials of scheduled offences should be by a judge sitting without a jury. This recommendation was reflected in the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973), though the state’s power to detain terror suspects was retained,

\begin{footnotesize}
\begin{enumerate}
\item See, for example, Section 1 of the SPA 1922.
\item Section 1(2) defined the civil authority as the Minister of Home Affairs for Northern Ireland, who in turn was given the right to delegate his authority to any police officer.
\item Section 1(1).
\item One notable exception is Section 1, which stipulated that the powers bestowed should only interfere with the country’s ordinary laws, way of life, and enjoyment of property, to the extent necessary to achieve the SPA’s purposes.
\item Section 3(5) specifically authorised the use of corporal punishment for certain offences. Section 6 specifically authorised the use of the death penalty for other offences.
\item Section 1(4) of the Prevention of Violence Act 1939.
\item Section 1(2).
\item Section 1(3).
\item The power to intern had been available to the authorities in Northern Ireland for most of the 20\textsuperscript{th} Century under the DORA and the SPA.
\end{enumerate}
\end{footnotesize}
albeit in slightly curtailed form. In contrast with preceding anti-terror legislation, the 1973 Act was not simply designed to empower the authorities to deal with the terrorist threat by way of Regulations. In this respect the Act was certainly narrower in its scope than the SPA, ROIA and DORA. Nonetheless, the EPA 1973, by introducing a raft of novel provisions, generally increased the executive’s ability to counter perceived threats of terrorism.

In 1974, the Gardiner Committee was mandated to review the workings of the EPA 1973. It is interesting to note that in its report the Committee made specific reference to the obligations of the United Kingdom under the ECHR, as well as to that country’s more general international law obligations. This reference supports one of the principle arguments being set forth in this thesis, namely that the standard Dualist view of the United Kingdom’s treatment of international treaties is inaccurate. Many of the recommendations contained in the Gardiner report were carried forward into the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 (EPA 1975), which substantively reformed the counter-terror laws applicable in Northern Ireland, placing restrictions on the powers available to the United Kingdom’s executive to deal with perceived terrorist threats.

In 1982 Sir George Baker was appointed to report on the state of the United Kingdom’s security legislation and two years later a comprehensive report was published. Despite the appearance of the Baker Report, the 1987 re-enactment of the EPA included only minor amendments. These nonetheless further served to constrain

705 See Section 10, which limited detention of suspected terrorists to periods not exceeding 72 hours. Those persons detained under Interim Custody Orders, in terms of Paragraph 11(1) of Schedule 1 to the Act, could only be detained for a period of 28 days unless their case was referred to a Commissioner by the Chief constable, in which case no limit was applied. Where the Commissioner decided to make a Detention Order under Paragraph 24 of Schedule 1, no limits applied.

706 See, for example, Section 2(1), which provided that any trial on indictment for a scheduled offence, would be conducted by a Court without a jury; Section 15, which extended the authorities’ enter and search powers; Section 16, which extended the authorities stop and search powers.

707 See, for example, Section 4(1) which relaxed the bail provisions applicable to those charged with scheduled offences; Section 5(1), which created a system of legal aid to assist those charged with scheduled offences; and Section 5(1), which reduced to 14 days, the time which a person could be detained under an interim custody order, if the case was not referred on to an adviser. Nonetheless, it should be noted that in 1977 an internal government review of security legislation, called for increased penalties for various offences, resulting in the emergence of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act).
the executive. In 1990 a review of the EPA 1978 and EPA 1987 was undertaken under the chairmanship of the Viscount Colville of Culross, Q.C.. Some of the most important recommendations of that Committee including i) the establishment of effective complaints procedures; and ii) the establishment of codes of practice governing the emergency powers, were included in a re-enactment published on March 22nd 1991. It is thus clear, that despite the fact that the 1975, 1978, 1987, 1996 and in particular, the 1991 Emergency Provisions Acts saw a proliferation of measures designed to tackle perceived terrorist threats, those laws also introduced a succession of measures designed to curb executive powers.

Meanwhile on the British mainland, in response to a series of attacks by the Provisional IRA, the United Kingdom promulgated the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA 1974). In some respects this law empowered the United Kingdom’s executive to a greater extent than its predecessor, the PVA 1939. A reenactment of the PTA 1974, including a variety of minor amendments, was published on March 25th 1976. A further reenactment, again including various changes was published on March 22nd 1984. The PTA 1984 placed a number of limitations on the powers granted by the 1974 and 1976 Acts. The final incarnation

See, for example, Section 2(3) and (7), which relaxed further the EPA’s provisions relating to bail; Section 2 also limited to 28 days, the amount of time any person charged with a scheduled offence could be held in custody by a Magistrates’ Court; Section 8(2)(b) and (3) which extended the circumstances under which statements made by persons accused of scheduled offences could be excluded at a trial; Part II of the 1987 Act introduced various rights in respect of those persons who were detained under Sections 12 or 13 of the Prevention of Terrorism (Temporary Provisions) Act 1984.

See, for example, Section 60(1), which created an independent Assessor of Military Complaints and Procedures in Northern Ireland.

See, for example, Section 61, which obliged the Secretary of State to make codes of practice in connection with the detention, treatment, questioning and identification of persons detained under the 1989 Prevention of Terrorism (Temporary Provisions) Act and also allowed for the promulgation of codes of practice in connection with a) the exercise by police officers of any power conferred by Part II of the EPA 1991 Act or the PTA 1989 Act mentioned above; and b) the seizure and retention of property found by police officers when exercising powers of search conferred by any provision of the Acts mentioned above.

Similar sentiments were echoed by the European Court in the case of Ireland v the United Kingdom Application no 5310/71.

See, for example, Section 1, which introduced, for the first time outside of Northern Ireland, provisions which created various offences connected to proscribed organisations; and Section 2, which introduced for the first time outside of Northern Ireland, provisions restricting public displays in support of proscribed organisations.

See, for example, Section 3(4), which stated that an exclusion order would, unless already revoked, expire three years after coming into existence; Section 7(2) and (4), which increased the timeframe within which any person wishing to object to an exclusion order could make representations to the Secretary of State to 7 days; and Section 7(13), which stated that where representations had been made
of the Act, which introduced a comprehensive set of amendments, was published on March 15th 1989. Although parts of the 1989 Act increased the scope of the emergency powers available to the United Kingdom’s executive, the Act also implemented a variety of procedural safeguards which constrained the executive in its counter-terror powers.

On the whole, the successive counter-terror laws in place in Northern Ireland and on the British Mainland in the 20th Century followed broadly the same arc: The laws passed at the beginning of the 20th Century were concise, simple, pieces of legislation, which bestowed remarkably broad counter-terror powers on the United Kingdom’s executive. These initial Acts also contained very few mechanisms designed to limit authorities’ abuse of power. In contrast, the anti-terror laws enacted later in the 20th Century were more lengthy, complex pieces of legislation bestowing an ever increasing number of more specifically defined powers. Consequently, the powers the executive enjoyed under these laws were inherently constrained. These later laws also introduced a number of reforming measures, which placed further limits on the powers granted to authorities. These changes cannot simply be ascribed to changing terrorist threat levels over time, especially since an historical examination reveals that the 20th Century saw largely constant threat levels in Northern Ireland. In contrast, the terrorist threats on the British mainland were only sporadic. If anything, the threat to the Secretary of State regarding an exclusion order, notification of his decision needed to be given in writing.

See, for example, Sections 10 and 13, which increased the penalties attached to offences relating to proscribed organisations; Section 13 and Schedule IV, which, inter alia, added a number of new provisions dealing with the courts’ powers to order the forfeiture of property relating to i) contributions towards acts of terrorism in general, and ii) contributions to the resources of proscribed organisations; Section 17(1) and Schedule 7, which conferred powers to obtain information for the purpose of investigations into a) the commission, preparation or instigation of i) acts of terrorism; or ii) any other act which appeared to have been done in connection with acts of terrorism; and iii) the resources of a proscribed organisation; Schedule 3 introduced a number of new provisions dealing with the examination of persons on arrival in or departure from the United Kingdom.

See, for example, Paragraph 1(1) of Schedule III, which stated that where a person had been detained following an exclusion order, that detention would be periodically reviewed, with no more than 12 hours passing between reviews; the 1989 Act also i) made the Secretary of State’s powers to extend periods of detention, connected with exclusion orders, subject the requirement that suspects be notified in writing of all applications for such extensions; and ii) made the exercise of the detention powers subject to the supervision contained in Schedule 3 to PTA 1989; Paragraph 3(1) which stated that where a person had been detained under Section 14 or Paragraph 6 of schedule, that detention would be periodically reviewed; Paragraph 6 of Schedule 3, which allowed persons detained under the PTA 1989 to make representations regarding their detention; Paragraph 7 of Schedule 7, which stated that any person detained under the PTA 1989 should be notified of their rights under the Police and Criminal Evidence Act 1984 to i) legal advice; and ii) notify somebody of their detention.

levels experienced on the mainland were more serious in the latter half of the 20th Century than in the preceding 50 years. In this thesis I argue that the narrowing executive powers evident in the United Kingdom’s counter-terror laws has been, to a large extent, the result of the development of international human rights law. I will argue further that international human rights law began impacting on the United Kingdom’s counter-terror laws long before the HRA 1998 was promulgated. I will maintain that this has occurred via a process akin to Koh’s ‘transnational legal process’ \textsuperscript{717}. These conclusions bring into question the traditional Dualist view which prevails, concerning the United Kingdom’s treatment of unincorporated treaties. This, then, contributes to the somewhat grander project afoot in this thesis: an attempt to counter the widely held scepticism concerning international law as law in the proper sense of the word.

From a domestic case law perspective, it is evident that even following the adoption of the UDHR and the signing and ratification by the United Kingdom of various human rights treaties, the executive powers contained in the United Kingdom’s anti-terror laws, were not regularly tested in the United Kingdom’s courts of law. Although the passing of the 1998 Human Rights Act i) created new avenues for litigants to challenge the provisions of the existing counter-terror Acts; and ii) resulted in an increase in the number of cases brought before the United Kingdom’s domestic courts challenging various executive powers, it is interesting to note that, in the last century, this development failed to alter the course of justice in any of the terrorism related cases in which it was referenced\textsuperscript{718}.

\textsuperscript{717} Koh (1999) at 1399.
\textsuperscript{718} See, for example, \textit{R v Director of Public Prosecutions ex parte Kebilene & Ors} [2000] 2 A.C. 326 and \textit{O’Hara v Chief Constable of the Royal Ulster Constabulary} [1997] 2 W.L.R. 1.
1. The Terrorism Act 2000

1.1 Background

As the twentieth century drew to a close, a number of disparate factors converged creating a need for new terrorism legislation in the United Kingdom. The first of these was that the Northern Ireland (Emergency Provisions) Acts 1996 to 1998 were due to expire on 24 August 2000. The second was the 1994 IRA ceasefire and ensuing peace negotiations. One of the requirements of the Belfast Agreement entered into between Britain and Ireland in 1998 was that a review be undertaken of all Northern Ireland-related security matters. A third factor was that in the latter half of the 1990s, Britain’s intelligence services became increasingly concerned about non-Irish terrorist threats within the United Kingdom. The final factor was the enactment of the Human Rights Act 1998 (HRA), which incorporated many of the provisions of the ECHR into the United Kingdom’s domestic law. The passage of the HRA through Westminster placed pressure on the government to conduct a thorough human rights audit of all existing terrorism legislation. Such a review had in fact commenced some years earlier in 1996 when Lord Lloyd of Berwick led an inquiry for the Conservative government into the existing Northern Ireland terrorism legislation. These disparate factors ultimately led to a Terrorism Bill being presented to the House of Commons on 2 December 1999.

1.2 Legislation

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720 Ibid.
721 Ibid.
723 Ibid.
724 Ibid.
725 Ibid.

In many respects, however, the TA 2000 broke new ground in empowering the United Kingdom’s executive to counter perceived terrorist threats. Unlike previous counter-terror legislation, the majority of the provisions of the TA 2000 were not subject to annual renewal by Parliament\textsuperscript{728}. In addition, the Act placed an evidentiary burden on defendants in a number of circumstances\textsuperscript{729}. The TA 2000 was also the first of the United Kingdom’s counter-terror laws to apply to all forms of terrorism, be they domestic, international or Irish\textsuperscript{730}. In addition, the definition of ‘terrorism’ set out in Section 1 of the TA 2000 is more complex and broader in scope than the definitions contained in both the PTA 1989\textsuperscript{731} and the EPA 1996\textsuperscript{732}, thus broadening the United Kingdom’s counter-terror powers. The definition i) takes cognisance of the fact that terrorism may have religious, ideological and political motivating bases\textsuperscript{733}; ii) caters for non-violent actions that could nonetheless have a significant impact\textsuperscript{734}; and iii) includes in its ambit actions not aimed at influencing the government or intimidating the public, where such actions involve firearms or explosives\textsuperscript{735}. In other respects, however, the TA 2000 circumscribed the counter-terror powers available to the United Kingdom’s executive. Though the provisions in the TA 2000 dealing with proscribed organisations are largely based on similar provisions in the PTA 1989\textsuperscript{736} and EPA 1996\textsuperscript{737}, it introduced a number of reforming measures relating

\textsuperscript{726} Section 2. Schedule 1 of the TA 2000 empowered the Secretary of State to temporarily extend the life of various provisions of the EPA 1996.
\textsuperscript{727} Part VII of the TA 2000, which dealt with additional measures applicable only to Northern Ireland, is largely a reprint of the EPA 1996.
\textsuperscript{728} Section 126 requires an annual report on the workings of the Act to be submitted to Parliament.
\textsuperscript{729} Section 12(4), 39(5)(a), 54, 57, 58, 77 and 103. Part VII of the TA 2000 remains subject to annual renewal.
\textsuperscript{730} See for instance Section 9(3), 14(2) and Paragraph 2(2) of Schedule 6.
\textsuperscript{731} Section 20.
\textsuperscript{732} Section 58.
\textsuperscript{733} Section 1(c).
\textsuperscript{734} Section 1(d) and (e).
\textsuperscript{735} Section 1(3). Provided that such actions fall within Subsection 2.
\textsuperscript{736} Sections 1, 2 and 3.
to such proscribed organisations. Some of the more significant include i) a process whereby applications for deproscription could be made to the Secretary of State; ii) the establishment of the Proscribed Organisations Appeal Commission (POAC), where decisions of the Secretary of State regarding deproscription could be heard; iii) a process whereby decisions of the POAC could be appealed; iv) a reference to the Human Rights Act 1998 to cater for circumstances where the POAC, as a public authority, was alleged to have acted in a manner incompatible with a ECHR; v) the granting of limited immunity to any person who sought the deproscription of an organisation; and vi) the introduction of a defence to the offence of managing a meeting addressed by a person belonging or professing to belong to a proscribed organisation. These changes have of course moderated the counter-terror powers available to the executive.

The TA 2000 also restricted the executive’s counter-terror powers, by jettisoning a small number of important provisions that had formed part of the legislation it replaced, including i) the power conferred by the PTA 1989 on the Secretary of State to exclude persons connected with terrorism from the United Kingdom and related provisions; and ii) the duty to disclose information, regardless of where such information was obtained, which could assist in preventing an act of terrorism, or lead to the apprehension of any person involved in an act of terrorism. In addition, membership of a proscribed organisation could no longer be proven by way of possession of a document relating to such an organisation.

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737 Sections 30 and 31.
738 Including, Sections 3(2), 3(3)(c), 3(5), 4, 5, 6, 7, 8, 9 and 10.
739 Section 4. Under the PTA 1989 and EPA 1996 this could only be done by way of judicial review.
740 Section 5 and Schedule 3.
741 Section 6.
742 Sections 6 and 7.
743 Section 9.
744 No evidence of anything done or any documents submitted in deproscription applications or appeals could be used by the Crown in criminal proceedings.
745 Section 12(4).
746 Sections 5, 6, 7 8 and Schedule 2.
747 Section 19 of the TA 2000 contains a similar duty, restricted to information obtained in the workplace.
748 Section 18.
749 Section 1.
In other respects, however, the TA 2000 extended the scope of the executive’s counter-terror powers. For instance, the Act no longer required the Secretary of State’s orders regarding proscribed organisations to be approved by Parliament\textsuperscript{751}, as its antecedent legislation once had. In addition, under the TA 2000 both international and domestic organisations could be proscribed\textsuperscript{752}, whereas previous laws had only allowed for the banning of local organisations. Section 108 of the TA 2000 allowed oral representations by any officer, that an accused belonged to a specified organisation\textsuperscript{753}, to be admitted as evidence where a person was charged with membership of a proscribed organisation. Section 109 allowed Courts to draw inferences about a person’s membership of a proscribed organisation in circumstances where the accused, prior to being charged and having consulted with a solicitor, failed to mention any material fact which he could reasonably have been expected to mention. Section 111 allowed for the forfeiture of money or property in the possession of any person i) found guilty of supporting or belonging to a proscribed organisation; and ii) belonging to a specified organisation, where such money or property could be used in connection with the activities of the specified organisation.

The provisions in the TA 2000 dealing with terrorist property draw heavily on similarly themed provisions in the PTA 1989\textsuperscript{754}. However, unlike the provisions of the PTA 1989 which applied only to Irish and certain specified international terrorism, the TA 2000 applied to all forms of terrorism. In this way the Act broadened the powers of the United Kingdom’s executive. The TA 2000 also introduced a number of new provisions, further extending those counter-terror powers. For instance, it allowed for the seizure, detention and forfeiture of cash connected with terrorism\textsuperscript{755}. It also expanded the circumstances under which persons wishing to report suspicions regarding terrorist property could ignore restrictions on the disclosure of information\textsuperscript{756}. The TA 2000 also added to the circumstances under which terrorist property could be forfeited\textsuperscript{757}. In contrast to the PTA 1989\textsuperscript{758}, money

\textsuperscript{751} Section 1.
\textsuperscript{752} Under the PTA 1989 and EPA 1996 only domestic organisations could be proscribed.
\textsuperscript{753} Section 108 defined the term ‘specified’ organisation as any proscribed organisation or any organisation specified under Section 3(8) of the Northern Ireland (Sentences) Act 1998.
\textsuperscript{754} Part III, particularly Sections 9, 10, 11, 12 and 13.
\textsuperscript{755} Sections 24 - 30.
\textsuperscript{756} Section 20(3).
\textsuperscript{757} Section 23(6).
\textsuperscript{758} Section 13(2).
or property received by a third party as a reward in connection with an act of terrorism, could be forfeited, even where the third party did not intend or suspect that the property had been used in connection with terrorism.

The Sections of the TA 2000 dealing with the investigation of terrorism, including those that allowed for the granting of search, production and explanation orders, were largely based on similar provisions in the PTA 1989\textsuperscript{759}. However, a number of the PTA 1989’s provisions were substantively amended, increasing the executive’s reach. For instance, the search and seizure provisions contained in Schedule 5 to the TA 2000\textsuperscript{760} applied to all materials connected with any terrorism investigation, while the equivalent provisions in the PTA 1989 were limited to materials connected with the investigation for which the warrant had been granted\textsuperscript{761}. The TA 2000 also broadened the circumstances under which a judge could grant an entry, search and seizure warrant. Whereas under the PTA\textsuperscript{762} one of four conditions needed to be present before a warrant could be issued, the TA 2000 allowed for the exercise of discretion in such circumstances\textsuperscript{763}. While this amendment seems, \textit{prima facie}, to be related to the powers of the judiciary, it streamlines the criminal justice process in a manner which indirectly plumps up the executive. The TA 2000 also introduced a provision empowering the police to compel financial institutions to provide information about their customers, in order to aid investigations into terrorism\textsuperscript{764}.

In other respects, the TA 2000’s search, production and explanation provisions placed constraints on the executive’s counter-terror powers. For instance, it limited the conditions under which information obtained by compulsion under an explanation order could be used as evidence for the prosecution of a trial\textsuperscript{765}.

The provisions in the TA 2000 dealing with counter-terrorist powers, including powers of detention and arrest and those relating to port and border controls\textsuperscript{766}, draw

\begin{footnotesize}
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\item \textsuperscript{759} Sections 16C and 17. Schedules 6A and 7.
\item \textsuperscript{760} Paragraphs 1(3)(a), 6(2)(b), 6(3)(a), 11(4), 12(3)(b) and 12(4)(c).
\item \textsuperscript{761} Paragraph 2(1)(a) of Schedule 7.
\item \textsuperscript{762} Paragraph 2(2) of Schedule 7.
\item \textsuperscript{763} Paragraph 1(5)(c) of Schedule 5.
\item \textsuperscript{764} Schedule 6. Paragraph 1(3) made it an offence for institutions to fail to provide such information.
\item \textsuperscript{765} Under Paragraph 6(3)(b) of Schedule 7 of the TPA such information could be used where a second contradictory statement had been made. This was not carried forward into the TA.
\item \textsuperscript{766} Excluding those provisions dealing with treatment during detention.
\end{itemize}
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substantially from similar provisions in the PTA 1989\textsuperscript{767}. However, a number of the TPA’s provisions appear in markedly altered form in the TA 2000. Many of these changes placed limits on the executive in its efforts to meet the threats posed by terrorism. For instance, under the TA 2000 any vehicle or pedestrian stop and search authorisation had to be confirmed or altered by the Secretary of State within 48 hours, failing which they would lapse\textsuperscript{768}. In addition, the so-called carding procedure, whereby passengers arriving or departing from the United Kingdom could be requested to answer certain questions\textsuperscript{769}, was made subject to the TA 2000’s affirmative resolution procedure\textsuperscript{770}. In addition, under the TA 2000, the first order or Regulation specifying the type of information that could be requested relating to crew, passengers or vehicles, was made subject to the affirmative resolution procedure and each subsequent order or Regulation subject to the negative resolution procedure\textsuperscript{771}. The TA 2000 also reduced the maximum period of time\textsuperscript{772} a person could be detained by an examining officer under the port and border control provisions\textsuperscript{773}. Further, non-paying passengers could embark or disembark at non-designated ports, provided that 12 hours notice was given to the police\textsuperscript{774}.

The Sections of the TA 2000 that deal with detention, including the treatment of persons detained, reviews and extensions draw heavily on similarly themed provisions in the PTA 1989\textsuperscript{775}. However a number of the PTA’s provisions relating to detention were amended. A number of these alterations broadened the executive’s counter-terror powers. For instance, under the TA 2000 an officer could delay informing persons, arrested under Section 41, of their rights to i) have someone informed of their incarceration; and ii) consult with a solicitor, for up to 48 hours\textsuperscript{776}, whereas

\textsuperscript{767} Sections 13A, 13B, 14, 15, 16 and 16D. Schedules 3 and 5.
\textsuperscript{768} Section 46(4). This was not the case under the PTA 1989.
\textsuperscript{769} Paragraph 16 of Schedule 7.
\textsuperscript{770} This procedure is set out in Section 123(4), which states that, no order or Regulations can be made unless both Houses of Parliament have approved these. In urgent cases, the Section allows the Secretary of State to make temporary orders or Regulations.
\textsuperscript{771} This procedure is set out in Section 123(2), which states that, any order or Regulation to which the Section applies is subject to annulment by either House of Parliament.
\textsuperscript{772} From 48 hours to 9 hours.
\textsuperscript{773} Paragraph 6(4), Schedule 7.
\textsuperscript{774} Paragraph 12.
\textsuperscript{775} Schedule 3 and Paragraph 6 and7 of Schedule 5. In the PTA 1989 different provisions were outlined for detention i) following arrest; and ii) following on from examination by an examining officer at a border. This was not carried forward into the TA.
\textsuperscript{776} Paragraph 8(2) of Schedule 8.
under the PTA 1989 the delay could be no more than 36 hours\textsuperscript{777}. On the other hand, any review officer determining whether a person’s detention should be continued was obliged to allow that person to make representations, regardless of whether they were asleep at the time of the review\textsuperscript{778}. This was not the case under the PTA 1989\textsuperscript{779} and naturally narrows the scope of the executive’s counter-terror powers.

The TA 2000 also introduced a host of novel provisions relating to the investigation of terrorism\textsuperscript{780}. Some of these additions constrained the executive. For instance, the TA 2000 empowered i) the Secretary of State to order that detainee interviews be audio or video recorded in terms of code of practice\textsuperscript{781}; and ii) the police to direct that any interview between a detainee and his solicitor be conducted in the presence of an officer\textsuperscript{782}. Still other provisions increased the ability of the executive to respond to terrorist threats. For example, the TA 2000 allowed iii) a constable to take so-called ‘non-intimate’ samples\textsuperscript{783} from a detainee\textsuperscript{784}; v) a constable, with the detainee’s consent, to take so-called ‘intimate’ samples\textsuperscript{785}; vi) Courts or juries to draw appropriate inferences where detainees refused to allow ‘intimate’ samples to be taken\textsuperscript{786}.

The various miscellaneous offences set out in the TA 2000, such as weapons training and directing a terrorist organisation, are largely based on similar provisions in the EPA 1996\textsuperscript{787}. However, a number of the EPA’s provisions appeared in amended form in the TA 2000. Some of these amendments further augmented the executive’s authority. For instance, under the TA 2000 it is an offence to provide training or to recruit trainers, on the use of chemical, biological and nuclear weapons and materials\textsuperscript{788}, whereas the EPA 1996 only dealt with training relating to Conventional

\textsuperscript{777} Paragraph 7(1) of Schedule 3.
\textsuperscript{778} Paragraph 26(1)(a) of Schedule 8.
\textsuperscript{779} Paragraph 6(1) of Schedule 3.
\textsuperscript{780} Including, Paragraphs 1, 3, 9, 10, 11, 12, 13, 14, 29, 30, 31, 32, 33, 34, 35, 36, and 37 of Schedule 8.
\textsuperscript{781} Issued by the Secretary of State under Paragraph 3.
\textsuperscript{782} Paragraph 9 and 17.
\textsuperscript{783} E.g. hair.
\textsuperscript{784} Paragraph 10.
\textsuperscript{785} E.g. DNA. Paragraph 10 and 12.
\textsuperscript{786} Paragraph 13.
\textsuperscript{787} Sections 16A, 16B, 29 and 34.
\textsuperscript{788} Section 54(1)(c) and 54(3).
firearms and explosives\textsuperscript{789}. Under the EPA 1996\textsuperscript{790} these offences only applied in Northern Ireland and this was not the case with the TA 2000. Further, under the TA 2000\textsuperscript{791} it is an offence to direct a terrorist organisation anywhere in the United Kingdom, whereas the EPA 1996, limited this offence to Northern Ireland\textsuperscript{792}. The TA 2000 also introduced a number of new offences relating to terrorism\textsuperscript{793}. These include i) inciting acts of terrorism outside of the United Kingdom\textsuperscript{794}, and ii) committing acts of terrorism outside of the United Kingdom\textsuperscript{795}. On the other hand, the TA 2000 introduced a defence catering for those persons accused of providing training for non-terrorist purposes\textsuperscript{796}.

In summary, although the TA 2000 was primarily a consolidation of the PTA 1989 and the EPA 1996, it extended the powers available to the United Kingdom’s executive to counter perceived terrorist threats. It is clear therefore, that in general the TA 2000 extended the form and pattern of its immediate antecedents. This was especially true because it was a lengthy Act, in which i) the counter terror powers available to the executive were individually specified and described in some detail; and ii) a number of specific constraints were placed on the executive, restricting its counter-terror pursuits. This is in stark contrast with the United Kingdom’s terrorism legislation in the first half of the 20\textsuperscript{th} Century. Those laws tended to be very concise and simple while at the same time bestowing remarkably broad powers on the United Kingdom’s executive. At that time it appears that, rather than listing a limited number of executive powers, Westminster chose to create a vast store of potential power, which the executive could dip into if and when the need arose. Those earlier laws were also characterised by an absence of checks and balances on the powers granted to the executive. Thus, while it is perhaps fair to say that the TA 2000 embodied a record \textit{number} of powers, it did not constitute an unprecedentedly \textit{broad} anti-terror law.

\textsuperscript{789} Section 34.
\textsuperscript{790} Ibid.
\textsuperscript{791} Section 56.
\textsuperscript{792} Section 29.
\textsuperscript{793} Sections 59-64.
\textsuperscript{794} Sections 59-61.
\textsuperscript{795} Sections 62-64.
\textsuperscript{796} Section 54(5).
1.3 Cases

One of the aims of this thesis is to show that a chronological examination of the United Kingdom’s counter-terror laws reveals an identifiable pattern. I intend to provide an answer to the question of whether it is possible to show that the executive powers created under that country’s counter-terror laws have become more or less extensive over time. As mentioned in the previous chapter, answering this question, necessitates an examination of the relevant case law, since this will reveal the judiciary’s interpretation and treatment of the various Acts. This thesis also intends to investigate whether international law has impacted on the evolution the United Kingdom’s counter-terror legislation, particularly with reference to the extent and breadth of executive powers created under the various laws. At this point, it is useful to recall a number of the conclusions reached in the course of the preceding chapter\textsuperscript{797}

As concluded in the previous chapter; Despite the broad and far-reaching provisions of many of the United Kingdom’s 20\textsuperscript{th} Century counter-terror measures, these were not regularly tested in that state’s courts of law in the course of the century. This remained the case despite the fact that the United Kingdom signed and ratified a number of human rights treaties in the latter half of the 20\textsuperscript{th} Century. Although the passing of the Human Rights Act 1998 i) created new avenues for litigants to challenge the executive powers enshrined in the existing counter-terror Acts; and ii) resulted in an increase in the number of human rights oriented terrorism cases brought before the Courts, this development failed to alter the course of justice in any such case brought before the House of Lords. It is also evident that in the last years of the 20\textsuperscript{th} Century the House adopted a rather ‘coy’ approach to Human Rights-oriented terrorism cases and on a number of occasions was able to avoid reaching decisions based on the provisions of the ECHR\textsuperscript{798}.

\textsuperscript{797} Chapter 2.
This pattern was not repeated in the first years of the 21st Century. Quite a large body of case law developed around the provisions of the TA 2000 and human rights issues were canvassed in an appreciable number of these cases. To date, two such cases have come before the House of Lords and in one of those decisions the House made a ruling which would have been impossible but for the HRA 1998.

On 14 October 2004 judgment was delivered in the case of Attorney General’s Reference No. 4 of 2002; Sheldrake v Director of Public Prosecutions [2004] U.K.H.L. 43. The relevant part of this conjoined appeal flowed from answers provided by the Court of Appeal in response to a number of questions raised by the Attorney General by way of a reference under Section 36 of the Criminal Justice Act 1972. The Court of Appeal had advised, *inter alia*, that the defence set out in

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799 More than 60 reported cases.


802 The questions posed by the Attorney General were i) what are the ingredients of an offence contrary to Section 11(1) of the TA 2000; and ii) does the defence contained in Section 11(2) of the Terrorism Act 2000 impose a legal, rather than an evidential, burden of proof on an accused, and if so, is such a legal burden compatible with the European Convention and, in particular, Articles 6(2) and 10 of the Convention?
Section 11(2) of the TA 2000 imposed a legal rather than an evidential burden and was compatible with Article 6(2) of the ECHR and would not, save in extraordinary circumstances, infringe a person's Article 10 rights. The reference by the Attorney General followed the acquittal of one A, who had been accused, inter alia, of having professed membership of a proscribed organisation, contrary to Section 11(1) of the TA 2000.

In his leading judgment, Lord Bingham referenced the important impact that the Human Rights Act 1998 (HRA) has had on the United Kingdom’s domestic law. Lord Bingham commented that prior to ‘the coming into force of the Human Rights Act 1998, the issue now before the House could scarcely have arisen’ since the defence contained in Section 11(2) ‘…interpreted in accordance with the canons of construction ordinarily applied in the Courts’, would have been ‘understood to impose…a legal burden to establish that ground of exoneration on the balance of probabilities’ and that ‘the Courts would have been bound to interpret the provisions conventionally’. Lord Bingham acknowledged that the HRA 1998 meant that the House had to enquire whether the ECHR and the accompanying Strasbourg jurisprudence had modified this traditional position. Lord Bingham also commented that it was important ‘that the United Kingdom Courts…take their lead from Strasbourg’.

Lord Bingham examined a number of the ECtHR’s decisions dealing with Article 6(1) and (2) of the ECHR. From this examination, he distilled a number of guiding principles, including the fact that ‘the Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary’. Lord Bingham also observed that the ‘… justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the… case’ and that

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803 Section 11(1) made it an offence to be a member of a proscribed organisation and Section 11(2) provided that it would be a defence for a person accused of membership of a proscribed organisation to prove that the organisation was not proscribed at the time their membership.

804 Any accused wishing to rely on a defence which creates a legal burden, must show on the balance of probabilities that the defence applies, in order to be exonerated. Where an evidential burden is created, the prosecution remains responsible for proving beyond a reasonable doubt that any grounds for exoneration properly raised by an accused, do not apply.

805 The right of everyone charged with a criminal offence to be presumed innocent until proved guilty.

806 The right of everyone to freedom of expression.
security concerns could not absolve member states from their duty to observe basic standards of fairness.

He opined that the most important question before the Court was whether the imposition of a legal burden on a defendant had been a proportionate and justifiable legislative response to the prevailing security issues and pointed out that in order to answer this question ‘the various tests identified in the Strasbourg jurisprudence as interpreted in the United Kingdom authorities fall to be applied’.

Lord Bingham held that i) there was no doubt that Parliament intended Section 11(2) to impose a legal burden on the defendant; ii) the imposition by Subsection (2) of a legal burden on a defendant was not a proportionate and justifiable legislative response to the United Kingdom’s security concerns. The reasons given for the latter decision included the fact that i) the very broad nature of the relevant Section meant that a person innocent of any blameworthy conduct could still fall foul of Section 11(1) and that, therefore, there ‘would be a clear breach of the presumption of innocence, and a real risk of unfair conviction’; ii) the fact that it would be almost impossible for an accused to show that he had not taken part in the activities of an organisation at any time while it was proscribed, so as to satisfy the requirements of Subsection (2)(b); iii) the fact that holding that Section 11(2) imposed a legal burden would rob the Court of its discretionary powers; and iv) the severe consequences for a defendant failing to establish a Subsection 2 defence. In the result, Lord Bingham overturned the Court of Appeal’s decision, by holding that Section 11(2) of the TA 2000 should be read as only imposing an evidential burden, as it would otherwise infringe upon Article 6 of the ECHR. Lord Steyn, and Lord Phillips concurred in Lord Bingham’s judgment.

807 Lord Bingham pointed out that, if convicted, an accused could be punished with 10 years’ imprisonment.
808 Lord Bingham declined to answer the first part of the Attorney General’s question.
809 Lords Carswell and Rodger delivered dissenting opinions. However, neither Lord Carswell nor Lord Roger disagreed with Lord Bingham’s treatment of the ECHR. Lord Rodger found, inter alia, that Section 11(2) did not create a presumption of any kind and that therefore there was no question as to whether the had been kept to within reasonable limits. Lord Carswell found, inter alia, that, given the prevailing circumstances, Section 11(2) did not offend against the fair trial principles protected by Article 6 as the legislation was not unfair or unreasonable and had been designed to achieve legitimate ends.
On 8 March 2006, another case in which the provisions of the TA 2000 were at issue, came before the House of Lords. In Gillan, R (on the application of) v Commissioner of Police for the Metropolis & Anor [2006] U.K.H.L. 12, an independent campaigning organisation, Liberty, appealed a decision of the Court of Appeal\textsuperscript{810} on behalf of Kevin Gillan and Pennie Quinton. The Court of Appeal had affirmed the Court a quo’s decision\textsuperscript{811} to dismiss an application for judicial review of the legality of the actions of police officers who had stopped and searched Gillan and Quinton on 9 September 2003\textsuperscript{812}. The officers had purportedly taken these actions pursuant to an authorisation made under Section 44 of the TA 2000. In his leading judgment, Lord Bingham, \textit{inter alia}, examined the appellants’ arguments that alleged the officers’ actions had infringed their rights as set out in Articles 5\textsuperscript{813}, 8\textsuperscript{814}, 10\textsuperscript{815} and 11\textsuperscript{816} of the ECHR. In his decision, Lord Bingham expressed reservations regarding the Strasbourg jurisprudence which had been referred to by the parties, stating that the ‘jurisprudence is closely focused on the facts of particular cases, and this makes it perilous to transpose the outcome of one case to another where the facts are different’. Nonetheless, he relied on Strasbourg authority in holding that the Gillan and Quinton had not been deprived of their liberty. Lord Bingham referenced Guzzardi v Italy (1980) 3 E.H.R.R. 333 in which it was pointed out that ‘in order to determine whether there has been a deprivation of liberty…account must be taken of a whole range of factors…such as the type, duration, effects and manner of implementation of the measure in question.’ He justified his conclusion based on the fact that stop and search provisions of Sections 44 and 45 of the TA 2000 would ordinarily i) be relatively short-lived; and ii) not involve an arrest, handcuffing, confinement or

\textsuperscript{812}Gillan and Quinton were on their way to a demonstration, which was being held close to an arms fair in the Docklands area of East London.
\textsuperscript{813}The right of everyone to liberty and security of the person. The Article provides that a person can only be deprived of their liberty in accordance with a procedure prescribed by law. Article 5 also provides an exhaustive list of the cases in which a person can be deprived of their liberty. The only one of these that was relevant in this instance was contained in Article 5(1)(b), which provided for the lawful arrest or detention of a person i) for failing to comply with an order of a Court; or ii) in order to secure the fulfilment of any obligation prescribed by law.
\textsuperscript{814}Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) forbids public authorities from interfering with this right, except where such interference is in accordance with the law and necessary in a democratic society in the interests of i) national security; ii) public safety; iii) preventing disorder or crime; and iv) protecting the rights of others.
\textsuperscript{815}The right to freedom of expression.
\textsuperscript{816}The right to freedom of assembly.
removal. He also relied on principles expounded by the ECtHR in holding that there had been no infringement of Gillan and Quinton’s right to private life. The Court, though, employed a more commonsense approach in determining that there had been no breach of Articles 10 or 11. It is also interesting that, while Lord Bingham referenced Strasbourg jurisprudence in his examination of whether the actions of the police had been lawful, it is not clear that the principle on which he ultimately based his decision was drawn from European law. In holding that the actions had been lawful, Lord Bingham stated that the ‘… lawfulness requirement in the Convention addresses supremely important features of the rule of law’ and that the ‘public must not be vulnerable to interference by public officials acting on any…purpose other than that for which the power was conferred.’ Lord Bingham went on to opine that this was ‘what, in this context, is meant by arbitrariness…the antithesis of legality’ and that this constituted the ‘test which any…derogation from a Convention right must meet’ in order to avoid a violation. Lords Hope, Walker, Brown and Scott all agreed with Lord Bingham.

Based upon the above exposition it is evident that the various counter-terror provisions of the TA 2000 generated a significant body of case law. It is also clear that Sheldrake represents a watershed for the House of Lords, in that the Committee acknowledged that it had reached a decision in which the HRA 1998 in conjunction with the ECHR had substantively altered the course of justice. Moreover, Sheldrake demonstrated a willingness on the part of the United Kingdom’s highest Court to stifle laws, such as Section 11(1) of the TA 2000, designed to smooth the way for the executive in its quest to meet the challenge of terrorism. In contrast, Gillan more closely resembles the conservative approach followed by the House in relation to the HRA 1998 in the last years of the 20th Century.

2. **Anti-terrorism, Crime and Security Act 2001**

2.1 **Background**
The Anti-Terrorism, Crime and Security Act was the British government's response to the 2001 attacks on the World Trade Centre and the Pentagon\textsuperscript{817}. Then Prime Minister, Tony Blair, described the events of September 11 as a declaration of war on ‘the free world’\textsuperscript{818}. On 28 September, the United Nations Security Council adopted Resolution 1373\textsuperscript{819}, calling on states to work together urgently to prevent and suppress terrorist acts. In particular, the Security Council called upon all states to \textit{inter alia} ‘…prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts’. The resulting bill, which the government believed was an essential cluster of measures to bolster Britain's security and assist with the detection and prosecution of terrorists, was rushed through Parliament\textsuperscript{820}. In fact, a mere 16 hours were allocated for debating the bill in the Commons and ultimately no amendments were imposed on the government\textsuperscript{821}. In the House of Lords the bill did not enjoy so easy a passage\textsuperscript{822}. In fact, a record number of defeats were inflicted on the government during the debating of the bill\textsuperscript{823}. Nonetheless, the bill emerged from the Lords in less than ten days\textsuperscript{824} and entered the statute books on 14 December 2001.

2.2 \textit{Legislation}

One of the reasons why the Anti-terrorism, Crime and Security Act 2001 (ATCSA) was enacted was to amend certain of the TA 2000’s provisions in order to more fully enable the United Kingdom’s executive to counter the threat of terrorism. However, the ATCSA also introduced a large number of wholly new powers that the authorities could use against perceived terrorist threats.

Part I of the ATCSA dealt with Terrorist Property. Section 1 of the ATCSA together with Schedule 1 to the Act replaced and expanded upon the provisions of the TA 2000\textsuperscript{825} dealing with the forfeiture of terrorist cash. A great many of the TA 2000’s

\textsuperscript{817} Fenwick (2002) at 724.
\textsuperscript{818} Blair (2010) at 7369-75.
\textsuperscript{819} 2001.
\textsuperscript{820} Tomkins (2002) at 205.
\textsuperscript{821} Fenwick (2002) at 729.
\textsuperscript{822} Id at 730.
\textsuperscript{823} Ibid.
\textsuperscript{824} Tomkins (2002) at 205.
\textsuperscript{825} Sections 24-31.
provisions were imported into the ATCSA without substantive change. However, in some respects, the ATCSA widened the counter-terror powers available to the executive. Under the ATCSA it was no longer a requirement that cash had to be in the process of being exported from or imported into the United Kingdom, or taken from Great Britain to Northern Ireland or vice versa, in order for it to be seized and detained. In addition, the ATCSA disallowed the practice of releasing appropriate amounts of detained monies to cover the reasonable legal expenses of any person appealing a cash forfeiture order. Moreover, the circumstances under which cash could be seized and detained were broadened by the ATCSA. Although both the TA 2000 and the ATCSA catered for circumstances where cash in the form of property obtained through terrorism could be seized and detained, the latter Act introduced a number of mechanisms which prevented such powers from being frustrated where i) the property is no longer in the hands of the person who originally obtained it; ii) the property has been disposed of; iii) the property has become mixed with other property; and iv) the property has produced a profit.

Alongside these broader powers, the ATCSA introduced a number of provisions curbing the power of the executive. For example, the ATCSA made community services legal funding and legal aid available in Schedule 1 proceedings and, unlike the TA 2000, the ATCSA provided for the possibility of compensation in circumstances where cash had been seized and detained but where no forfeiture order had been made.

Section 2 of the ATCSA together with Schedule 2 amended and expanded upon a number of the TA 2000 executive powers relating to terrorist property. For the first time, provision was made for so-called ‘account monitoring orders’, which could be obtained by application and could compel a financial institution to provide information about any specified account. The ATCSA also amended the TA

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826 Section 25(3).
827 Paragraphs 11-15 of Schedule 1. See, however, the exceptions contained in Paragraph 16.
828 Section 2(1)-(3).
829 Paragraph 10, Schedule 1.
830 Part I, Schedule 2.
831 Part II, Schedule 2.
2000’s provisions enabling the authorities to obtain restraint orders\(^{832}\) by bringing forward the point at which such an order could be made\(^{833}\). The ATCSA further assisted the executive by making persons involved in certain sections of the financial services industry subject to more exacting levels of accountability in terms of their duty to disclose information regarding terrorist property offences\(^{834}\).

Another means by which the ATCSA sought to deal with the threat of terrorism was by amending the laws dealing with the executive’s ability to freeze the assets of overseas persons or governments\(^{835}\). Under the previous laws\(^{836}\) assets could be frozen where a person or country acted to the detriment of the United Kingdom’s economy. Under the new provisions a threat to the economy or to the life or property of nationals or residents was sufficient cause for a freezing order. Many of the innovations of the ATCSA’s set out above, appear to have been in response to United Nations Security Council Resolution 1373\(^{837}\). This is interesting as it suggests i) a consciousness on the part of United Kingdom lawmakers of their Nation’s international law obligations; and ii) a willingness of the United Kingdom’s Parliament to adapt its anti-terror laws according to international law policies. This approach is in stark contrast with those evident in the previous century.

The ATCSA also introduced new measures\(^{838}\) which gave UK authorities the power to disclose held information to aid criminal investigations or proceedings\(^{839}\). The Act also enabled the Secretary of State to prohibit disclosure in aid of overseas criminal investigations or proceedings, where it appeared that the investigation or proceedings should be being carried out by authorities in the United Kingdom or a third country\(^{840}\).

\(^{832}\) The purpose of these orders was to prevent persons served with notice of such an order from dealing with any specified property.  
\(^{833}\) Anytime after a criminal investigation had begun, whereas previously orders could only be made after charges had been brought.  
\(^{834}\) Part III, Schedule 2.  
\(^{835}\) Part 2.  
\(^{836}\) Section 2 of the Emergency Laws (Re-enactments and Repeals) Act 1964.  
\(^{837}\) 2001.  
\(^{838}\) Part 3 and Schedule 4.  
\(^{839}\) Section 17.  
\(^{840}\) Section 18.
disclose information for law enforcement purposes and to the intelligence services for their purposes.\textsuperscript{841}

Part 4 of the ATCSA dealt with changes to the Immigration and Asylum laws, largely designed to further strengthen the executive’s ability to counter perceived terrorist threats. It empowered the detention\textsuperscript{842} of any non-national i) certified as a threat to national security\textsuperscript{843}; ii) suspected of being an international terrorist; and iii) who could not be removed from the United Kingdom within a realistic period of time\textsuperscript{844}. The Act also listed a set of immigration related actions\textsuperscript{845} which could be taken in respect of a suspected international terrorist despite the fact that actual removal was not possible\textsuperscript{846}. The Act also specified the jurisdiction of the Special Immigration Appeals Commission (SIAC)\textsuperscript{847} in relation to the extended detention powers\textsuperscript{848}. Most notably, SIAC was identified as the only Court able to hear, in the first instance, challenges to the United Kingdom's derogation from Article 5 of the ECHR\textsuperscript{849} or the designation under Section 14(1) of the Human Rights Act 1998 which reflected that derogation\textsuperscript{850}. The ATCSA also provided that substantive consideration of asylum claims could not take place where the Secretary of State certified that a removal would be conducive to the public good\textsuperscript{851}. In addition, Secretary of State was authorized to retain fingerprints taken in certain asylum and immigration cases which were previously destroyed after a case had been decided\textsuperscript{852}.

\textsuperscript{841} Section 19.
\textsuperscript{842} Under Paragraph 16 of Schedule 2 to the Immigration Act 1971.
\textsuperscript{843} Section 21.
\textsuperscript{844} Section 23. Under these conditions, detention had previously not been possible.
\textsuperscript{845} Including i) refusal of entry; ii) refusal to vary leave to enter or remain; and iii) the giving of removal directions and various actions connected with deportation.
\textsuperscript{846} Section 22. Interestingly, the ATCSA lists as possible reasons for removal not being possible i) a point of law wholly or partly relating to an international agreement; or ii) a practical consideration. This is thus an example of the United Kingdom’s domestic counter-terror laws being constrained by international treaties.
\textsuperscript{847} An independent judicial body set up by the Special Immigration Appeals Commission Act 1997.
\textsuperscript{848} Sections 24-27, 29 and 30.
\textsuperscript{849} Westminster, believing that the detention provisions contained Part 4 of the ATCSA violated Article 5(1)(f) of the ECHR, filed notices of derogation under Article 15. Article 5(1)(f) secures the right to liberty and security of person, save in a number of instances, including, the lawful arrest or detention of a person to prevent their unauthorised entry into a country or of a person against whom extradition or deportation proceedings are pending.
\textsuperscript{850} Section 30. Article 14 of the ECHR prohibits discrimination on any ground, including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
\textsuperscript{851} Sections 33 and 34.
\textsuperscript{852} Section 45.
Part 5 of the ATCSA further augmented the UK Executive’s power, by extending the racially aggravated\textsuperscript{853} offences of assault, public disorder, criminal damage and harassment\textsuperscript{854} to cover attacks aggravated by religious hostility\textsuperscript{855}. The laws governing a number of existing offences\textsuperscript{856}, containing elements of racial aggravation were amended so that the same acts committed with religious aggravation constituted offences. The Act also increased the maximum penalty for such offences from 2 to 7 years imprisonment\textsuperscript{857}.

Part 6 of the Act enhanced the executive’s ability to control chemical, nuclear and biological weapons. The provisions set out in Part 7 placed an obligation on managers of laboratories and other premises holding stocks of specified disease-causing micro-organisms and toxins\textsuperscript{858} to make known their holdings\textsuperscript{859}, and to comply with any reasonable security requirements imposed by the Secretary of State or the police\textsuperscript{860}. The ATCSA also made it an offence for occupiers of premises to fail, without reasonable excuse, to comply with any duty or directions imposed by the Act\textsuperscript{861}. The provisions in Part 8 reinforced and updated the regulatory regime for security in the nuclear industry.

Part 9 of the ATCSA amended and extended the powers of the executive to regulate aviation security\textsuperscript{862}. Provision was made for arrest and removal of unauthorised persons from airport restricted zones and from aircraft\textsuperscript{863} and for the detention of aircraft\textsuperscript{864}. Part 10 of the ATCSA amended existing legislation\textsuperscript{865} to provide

\textsuperscript{853}The phrase ‘racially aggravated’ was defined in Section 28(1) of the Crime and Disorder Act 1998. In terms of that provision an offence is racially aggravated for the purposes of Sections 29 to 32 below if 1) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or ii) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

\textsuperscript{855}These statutory offences are set out in Sections 29 – 32 of the Crime and Disorder Act 1998.

\textsuperscript{856}Section 38, which amended Part 3 of the Public Order Act 1986.

\textsuperscript{857}Part 2 of the Crime and Disorder Act 1998.

\textsuperscript{858}Sections 40 and 41, which amend Section 27(3) of the Public Order Act 1986 and Article 16(1) of the Public Order (Northern Ireland) Order 1987.

\textsuperscript{859}Schedule 5.

\textsuperscript{860}Section 59.

\textsuperscript{861}Sections 60-65.

\textsuperscript{862}Sections 67-69.

\textsuperscript{863}Sections 20(3), 21C and 21D of the Aviation Security Act 1982.

\textsuperscript{864}Sections 82 and 84.

\textsuperscript{865}Section 86.

\textsuperscript{865}Sections 27, 54(6), 61 of the Police and Criminal Evidence Act 1984.
additional powers to search, examine, photograph, unmask and fingerprint persons in police detention for identification purposes.\textsuperscript{866}

The Act further amplified the executive’s counter-terror powers in a number of ways. New stop, search and seizure powers were bestowed on police officers in Northern Ireland\textsuperscript{867}, in circumstances where violence was anticipated\textsuperscript{868}. In addition, Sections 98 to 101 and Schedule 7 extended the jurisdiction of the British Transport Police (BTP) in emergencies when asked for assistance by a constable from the local police force, the Ministry of Defence Police (MDP), or the Atomic Energy Authority (UKAEA) constabulary. BTP officers were also given certain additional powers available to local police officers, including a number sourced from the TA 2000. Similarly, changes were introduced for the MDP allowing them to act outside their normal jurisdiction in an emergency when requested by a constable from the local police force, the BTP, or the UKAEA constabulary. The MDP were also given certain additional powers available to local police officers including a number sourced from the TA 2000.

Part 11 further developed the executive’s counter-terror abilities by i) allowing communication service providers to retain data about their customers' communications for access by law enforcement agencies and for national security purposes; and ii) calling for a voluntary code of practice be drawn up governing this practice\textsuperscript{869}. Prior to the ATCSA, service providers were obliged to erase this data when it was no longer needed for billing purposes\textsuperscript{870}. The Act also empowered the Secretary of State to review these arrangements and order the establishment of a mandatory retention direction if necessary\textsuperscript{871}.

Similarly, the ATCSA bolstered the executive’s position in relation to potential terrorism, by creating a number of new offences. For instance, Section 117 inserted a new Section 38A in the TA 2000 making the failure to disclose information about acts

\textsuperscript{866} Sections 89-95.
\textsuperscript{867} Such powers already existed in Great Britain, by way of Section 60 of the Criminal Justice and Public Order Act 1994.
\textsuperscript{868} Sections 96 and 97.
\textsuperscript{869} Sections 102 and 103.
\textsuperscript{870} The Telecommunications (Data Protection and Privacy) Regulations 1999.
\textsuperscript{871} Section 104.
of terrorism a criminal offence\textsuperscript{872}. Further amendments were made to the TA 2000 so as to make it an offence for anyone to: i) disclose information which would likely prejudice an investigation under Section 38A; or ii) interfere with material likely to be relevant to such an investigation. Section 118 extended the existing powers under the TA 2000\textsuperscript{873} to stop, question, detain and search people at a port, to include any person traveling within Great Britain or Northern Ireland.

The above exposition lays bare that the ATCSA represented a major effort on the part of the United Kingdom’s government to broaden the powers available to the executive to counter perceived terrorist threats. Nonetheless, this effort involved increasing both the number of powers available to the executive and the scope of existing individual counter-terror powers, rather than a retreat to the very broadly defined executive powers of the first half of the 20\textsuperscript{th} Century. It is interesting to note that a number of the finance related powers created appear to be a direct response to Security Council Resolution 1373\textsuperscript{874}. Despite the fact that the focus of the international law elements in this thesis is human rights laws, this development is further evidence of a receptiveness to international law on the part of the United Kingdom’s lawmakers. I will argue that this openness predates the passing of the 1998 HRA. Indeed, I will make a case in this thesis that despite the formally Dualist nature of the United Kingdom’s constitutional order, that Westminster has been significantly influenced by international treaty law even in instances where such treaties were not directly incorporated by way of a municipal Act.

2.3 Cases

As previously stated, the turn of the century heralded a marked change in the House of Lords’ approach towards the Convention. Whereas a judicially conservative approach had been in evidence in the last years of the 20\textsuperscript{th} Century, the note struck by the House in Sheldrake was conspicuously more sympathetic towards the ECHR. The House of Lords’ subsequent treatment of a number of cases which dealt with aspects

\textsuperscript{872} Similar to Section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 which was repealed by the Terrorism Act 2000. Section 18, however, was related only to acts of terrorism in Northern Ireland.

\textsuperscript{873} Paragraphs 2-8 of Schedule 7.

\textsuperscript{874} 2001.
of the ATCSA provides further evidence of the Court i) becoming more amenable to checking the powers of the executive, by referencing the HRA 1998 as well as international law; and ii) adopting a less rigid approach to human rights related questions. There are a large number of reported cases that deal with the provisions of the ATCSA 2001, and human rights objections to executive powers were canvassed before the Courts in a great many of these cases. Very significantly, in one case, the House of Lords made a declaration of incompatibility under Section 4 of the HRA 1998. In other decisions the House referenced a variety of international law authorities and acknowledged that when interpreting the ECHR Courts should take into account other international obligations to which member states are subject. An examination of the House of Lords’ treatment of cases dealing with the ATCSA also reveals a level of dissatisfaction amongst a minority of Law Lords regarding the role bestowed upon them by the HRA 1998. Three cases which served before the House of Lords will now be examined in detail.

On 16 December 2004, judgment was handed down at the House of Lords in the case of A & Ors v Secretary of State for the Home Department [2004] U.K.H.L. 56. Nine appellants came before the House challenging a decision handed down by Court of Appeal. The Court of Appeal had all owed the Home Secretary's appeal and

875 More than 60 reported cases.
dismissed the appellants’ cross-appeals against a decision of the Special Immigration Appeals Commission (SIAC)\textsuperscript{880}. The appellants had been certified by the Home Secretary under Section 21 of the ATCSA and detained under Section 23 of that Act. The appellants argued that by their detention, the United Kingdom had failed to meet its obligations under the ECHR and that its derogation from these obligations had been unlawful\textsuperscript{881}. The appellants also contended that the parts of the ATCSA under which they had been detained were inconsistent with the Convention. In his leading judgment, Lord Bingham pointed out that Article 15\textsuperscript{882} of the ECHR required that any measures taken by a member state in derogation of its obligations be subjected to a test of strict necessity or proportionality. He agreed with the appellants’ contentions that the United Kingdom’s derogation had not been strictly necessary. The state had argued that the derogation was necessary to protect the public from a terrorist threat, but Sections 21 and 23 did not rationally address that threat because they i) did not address the threat presented by UK nationals; and ii) permitted foreign nationals suspected of being Al-Qaeda terrorists to pursue their activities abroad if there was any country where they were able to go. His Lordship also found that it was impossible for the state to justify its decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. Lord Bingham held that to do so was a violation of Article 14. Ultimately the appeals were allowed. His Lordship ordered, \textit{inter alia}, that a declaration be made under Section 4 of the HRA 1998, that Section 23 of the ATCSA was incompatible with Articles 5\textsuperscript{883} and 14\textsuperscript{884} of the ECHR, in that it was disproportionate and permitted detention of suspected terrorists in a way that discriminated on the ground of nationality or immigration status. In reaching his decision, Lord Bingham relied heavily on a number of Strasbourg cases, including \textit{Chahal v United Kingdom} (1996)

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\textsuperscript{880} [2002] HRLR 1274.
\textsuperscript{881} Westminster, believing that the detention provisions contained Part 4 of the ATCSA violated Article 5(1)(f) of the ECHR, had filed notices of derogation under Article 15.
\textsuperscript{882} The right of every High Contracting Party, in time of war or other public emergency threatening the life of the nation, to 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.
\textsuperscript{883} The right of everyone to liberty and security of the person. Article 5 also provides an exhaustive list of the cases in which a person can be deprived of their liberty. The only one of these that was relevant in this case is contained in Article 5(1)(f), which provided for the lawful arrest or detention of a person against whom action is being taken with a view to deportation.
\textsuperscript{884} ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. 
\end{flushright}
23 E.H.R.R. 413, in which it was held that ‘any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress’. Lord Bingham also relied on a number of ECtHR decisions in rejecting the appellants’ claims that at the United Kingdom’s derogation had not been made at a time of ‘public emergency threatening the life of the nation’. In reaching this conclusion His Lordship also referenced Article 4(1) of the ICCPR; the associated Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles); a General Comment made by United Nations Human Rights Committee; and an Opinion of the Council of Europe Commissioner for Human Rights. Lord Bingham also made reference to a number of Strasbourg cases; the Siracusa Principles; and an Opinion of the European Commissioner for Human Rights in holding i) ‘the appellants are in my opinion entitled to invite the Courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of Section 23 and the Courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised’; and ii) that the Derogation Order and Section 23 were, in terms of the ECHR, disproportionate measures. Lord Bingham again referenced various decisions of the ECtHR; a resolution of the Parliamentary Assembly of the Council of Europe; guidelines adopted by the Committee of Ministers of the


886 See Article 15(1) of the ECHR.

887 These principles were drawn up by a group of 31 experts in international law who met in Siracusa, Sicily, for a week in 1984 to consider the limitation and derogation provisions of the ICCPR.

888 No. 29 on Article 4 of the ICCPR.


891 In Paragraph 70(b), it is stated that ‘no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge…’.


894 Resolution 1271, which stated, inter alia, that the fight ‘against terrorism must be carried out in compliance with national and international law and respecting human rights’.
Council of Europe\textsuperscript{895}; an opinion of the Commissioner of Human Rights\textsuperscript{896}; General Policy Recommendations of the European Commission against Racism and Intolerance\textsuperscript{897}; the UDHR\textsuperscript{898}; the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live\textsuperscript{899}; a general comment made by the United Nations Human Rights Committee\textsuperscript{900}; the ICCPR\textsuperscript{901}; a report of the United Nations Commission on Human Rights\textsuperscript{902}; the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{903} and the Committee established under that Convention\textsuperscript{904}; and the International Law Association’s Paris Minimum Standards of Human Rights Norms in a State of Emergency\textsuperscript{905}, in concluding that the United Kingdom had violated Article 14 of the ECHR and Article 26 of the ICCPR\textsuperscript{906} and had therefore taken action inconsistent with its other international law obligations within the meaning of Article 15 of the ECHR.

Lords Hope, Nicholls, Hoffmann, Scott, Carswell and Walker concurred in the result. It is interesting to note, however, the cynical approach adopted by Lord Hoffmann, who stated, \textit{inter alia}, that: ‘All that can be taken from them is that the Strasbourg Court allows a wide margin of appreciation to the national authorities in deciding both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it…’ and that ‘What this means is that we, as a United Kingdom Court, have to decide the matter for ourselves’. Lord Hoffmann also stated that he did not ‘find the European cases particularly helpful’. Lord Scott also seemed to regard

\textsuperscript{895}Adopted on 11 July 2002, the guidelines stated inter alia, that ‘measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment’.

\textsuperscript{896}Opinion 1/2002 (28 August 2002), in which the Commissioner, referring to the ATCSA, stated that ‘In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals’.

\textsuperscript{897}Published on 8 June 2004.

\textsuperscript{898}Articles 1 and 2.

\textsuperscript{899}Made by the General Assembly on 13 December 1985.

\textsuperscript{900}General Comment No. 15, adopted in 1986; and General Comment No. 29, adopted on 24 July 2001.

\textsuperscript{901}Articles 4 and 26 (non-discrimination).

\textsuperscript{902}Published on 26 May 2003.

\textsuperscript{903}Article 1.

\textsuperscript{904}By Article 8. The Court referenced the Committee’s Concluding Observations on the United Kingdom (10 December 2003, CERD/C/63/CO/11) as well as its General Recommendation 30, entitled ‘Discrimination against non-citizens’.

\textsuperscript{905}(1985) 79 \textit{AJIL} 1072, 1074.

\textsuperscript{906}By having unlawfully discriminated against foreign nationals by detaining them, but not detaining nationals presenting the same threat.
the HRA 1998 and the ECHR with a degree of cynicism, stating, *inter alia*, that ‘…the Courts are, it seems to me, being asked to perform a function the consequences of which will be essentially political in character rather than legal…’ and that this ‘is not a function that the Courts have sought for themselves’ but rather ‘a function that has been thrust on the Courts by the 1998 Act’.

On 8 December 2005, the appellants in the case discussed above brought a further case before the House, that of *A & Ors v Secretary of State for the Home Department* [2005] U.K.H.L. 71. On this occasion the question that the Committee had to answer was whether the SIAC was entitled, when hearing an appeal under Section 25 of the ATCSA, to receive evidence which had or might have been procured by torture inflicted by foreign officials. At the time when the appellants’ appeals were before the SIAC, that question was answered in the affirmative. The SIAC’s decision to dismiss the appeals was then appealed to the Court of Appeals where a majority of that Court upheld the decision. In final appeal, Lord Bingham pointed out that as a public authority within the meaning of Section 6 of the Human Rights Act 1998, the SIAC was forbidden from contravening a Convention right. His Lordship commented that the right not to be subjected to torture or to inhuman or degrading treatment is absolute, non-derogable and held sacrosanct by the ECtHR. Further, Lord Bingham pointed out that Article 5(4) of the ECHR entitles anyone deprived of his liberty, by arrest or detention, to have the lawfulness of his detention decided speedily in a Court, and that the Strasbourg jurisprudence requires that such proceedings satisfy the basic requirements of a fair trial. Having examined the relevant Strasbourg case law, Lord Bingham rejected the Secretary of State’s submission that the Convention considers the admissibility of evidence a matter to be decided under national law.

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907 This Section enables any person certified under Section 21 of the ATCSA to appeal to SIAC against such certification.
909 Article 3.
910 In support of this, his Lordship referred to a number of cases including *Soering v United Kingdom* (1989) 11 E.H.R.R. 439; and *Aydin v Turkey* (1997) 25 E.H.R.R. 251.
911 In support of this, his Lordship referenced *Garcia Alva v Germany* (2001) 37 E.H.R.R. 335.
Lord Bingham supported the appellants’ reliance on ‘the well-established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed...as intended to carry out the treaty obligation...’. He further pointed out that it was the United Kingdom’s duty under Section 6 of the HRA 1998 ‘not to act incompatibly with a Convention right...and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations’. His Lordship also supported the appellants’ contention that in interpreting the ECHR, Courts should take into account other international obligations to which member states are subject. In support of this, Lord Bingham referenced a number of Strasbourg decisions and the Vienna Convention on the Law of Treaties. His Lordship also pointed out that the ECtHR regularly invokes various international Conventions, including the Torture Convention. Lord Bingham referenced, inter alia, the Charter of the United Nations; the United Nations Universal Declaration of Human Rights; the European Convention; the ICCPR; the General Assembly’s Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the United Nations Convention Against Torture; the International Law Commission's draft Articles on Responsibility of States for internationally wrongful acts; advisory opinion of the International Court of Justice; and even a decision of the International Criminal Tribunal for the Former Yugoslavia, in reaching the conclusion that there ‘can be few issues on which international legal opinion is more clear than on the condemnation of torture’ and ‘the prohibition of torture requires member states to do more than eschew the practice of torture’. This finding played no small role in Lord Bingham ultimately holding that evidence obtained by torturing another human being may not lawfully be admitted against a party to proceedings, irrespective of where, or by whom, or on whose authority, the torture was inflicted.

914 Article 31.
916 Resolution 3452(XXX) 9 December 1975.
917 Article 41.
918 On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004, General List No. 131).
Lord Bingham allowed the appeals, setting aside the orders made by SIAC and the Court of Appeal, and remitting all the cases to SIAC for reconsideration. Lords Nicholls, Hoffmann, Hope, Rodger, Carswell and Brown concurred in the result.

On 19 February 2009, a further human rights orientated case involving the executive powers created by the ATCSA came before the House. *RB (Algeria) v Secretary of State for the Home Department* [2009] U.K.H.L. 10 involved three conjoined appeals all related to the Secretary for the Home Department’s (Home Secretary) desire to deport RB, U and Othman (the appellants) on the ground that they endangered the national security of the United Kingdom. RB, U and Othman argued that this could not be done as it would infringe their Convention rights. The Home Secretary was appealing a decision of the Court of Appeal which had, *inter alia*, partly allowed the appeal of Othman, finding that that his expulsion would contravene Article 6 of the ECHR. RB and U were appealing a decision of the Court of Appeal which had dismissed their appeals from the SIAC. Othman cross-appealed against the rejection of his complaints under Articles 3 and 5 of the ECHR.

Lord Phillips opened his leading opinion by setting out a number of background principles and facts. His Lordship referenced a number of Strasbourg cases which acknowledged the possibility that deportation could result in Convention obligations being infringed, by reason of treatment that deported persons were likely to receive in the destination country. In his opinion, Lord Philips referred to these circumstances as

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920 Lord Bingham, Lord Hoffmann and Lord Nicholls dissented on the question of where the burden of proof should lie where the admissibility of evidence, based on allegations of torture, is challenged before SIAC.

921 RB and U, Algerian nationals, contended that deportation to Algeria would infringe their rights under Article 3 of the ECHR in that it would expose them to a real risk of torture or inhuman or degrading treatment. Mr. Othman, a Jordanian national, contended that if he was deported he would face i) a real risk of torture or inhuman or degrading treatment contrary to Article 3 of the Convention; ii) a real risk of a flagrant breach of his right to liberty under Article 5; and iii) a real risk of a flagrant breach of his right to a fair trial under Article 6 of the Convention.


923 The right of everyone to a fair and public hearing, within a reasonable period of time, by an independent and impartial tribunal.


925 Article 3 prohibits the use of torture or inhuman or degrading punishment.

926 The right of everyone to liberty and security of person.

‘foreign cases’ and I shall do likewise. Lord Philips noted that the ECtHR had not yet upheld a claim in any foreign case involving Articles 4, 5, 6, 7, 8 or 9.

One of the first substantive questions that Lord Philips dealt with concerned the jurisdiction of the Court of Appeal to revisit certain parts of the SIAC’s decisions. It was common cause that the Court of Appeal was only entitled to revisit questions of law. However, there was a dispute of whether that Court had overreached its authority. The appellants referred the House to a number of ECtHR decisions to support their assertions that the Court of Appeal had been entitled to review the SIAC’s conclusion that the facts proved did not amount to a real risk of a flagrant breach of ECHR rights. Lord Phillips rejected this argument, pointing out that Parliament had deliberately limited the scope of review of SIAC decisions which the Court of Appeal was entitled to undertake. Lord Phillips also cited the case of Chahal v United Kingdom (1997) 23 E.H.R.R. 413 in support of the contention that in terms of Article 13 of the ECHR ‘the scrutiny that is required by the national authority does not have to be done by a Court’. His Lordship also rejected the appellants’ alternative argument, that Section 6(1) of the HRA 1998 imposed a duty on the Court of Appeal to carry out a full review of the SIAC’s decision, in order to ensure that there had been no breaches of the Convention. His Lordship reasoned that the ‘…Court of Appeal is a creature of statute and its powers are those conferred by statute’. Lord Phillips thus held that the SIAC’s conclusions could only be attacked if it had i) broken a rule of law; ii) considered irrelevant matters; iii) failed to look at all relevant matters; or iv) been irrational in some way.

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928 Saadi v Italy (application 37201/06, BAILII: [2008] ECHR 179).
929 The appellants also argued, inter alia, that the House should adopt a broad approach to the definition of what amounts to a ‘question of law’ in order to give effect to both the object and the express requirements of the HRA 1998. The appellants argued that the object of the 1998 Act was to ‘bring human rights home’ and to ensure that human rights issues were determined within the United Kingdom rather than in Strasbourg.
930 The right of everyone whose rights and freedoms as set forth in the Convention are violated to an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
931 This Section made it unlawful for a public authority to act in a way which is incompatible with a Convention right.
A further question which was raised before the House was whether rule 4 of the 2003 Rules\textsuperscript{932}, which had been relied upon to justify the admission of closed material in relation to the question of whether the appellants would be safe following deportation, was \textit{ultra vires}. The appellants argued that rule 4 of the 2003 rules was \textit{ultra vires}, in that i) the SIAC procedure had been devised specifically to address the problem of sensitive material relating to national security; and ii) Parliament had been given an assurance that closed material would only be used where this was necessary for national security. In support of the first of these points, the appellants relied on the Strasbourg case of \textit{Chahal}, where it was held, \textit{inter alia}, that ‘…the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic Courts whenever they choose to assert that national security and terrorism are involved’ and that the ‘…requirement of a remedy which is 'as effective as can be' is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial’. Despite the fact that the appellants produced evidence that Parliament had, on the basis of the \textit{Chahal} decision, only intended closed material to relate to matters of national security, Lord Phillips pointed out that the ‘…wording of Subsections (3) and (6) is clear and contains no hint that rules providing for closed hearings can only be made insofar as this is necessary in the interests of national security’ and therefore concluded that rule 4 was not \textit{ultra vires}.

The appellants also argued that Article 3 of the ECHR was not qualified or derogable and that the use of closed material where this right was at stake was contrary to fundamental principles of fairness and was unacceptable. Lord Phillips referenced the case of \textit{In re S (Minors) (Care Order: Implementation of Care Plan)} \textsuperscript{[2002] U.K.H.L. 10 [2002] 2 A.C. 291}, in which it was held that the effect of the Human Rights Act was to convert Convention rights into civil rights. From this his Lordship inferred that ‘…claims brought under the Human Rights Act attract the procedural standard of fairness that Article 6 requires in relation to civil proceedings\textsuperscript{933}, and that as a result

\textsuperscript{932} These rules were made under Section 5 of the Special Immigration Appeals Commission Act 1997 (SIACA 1997). The SIACA 1997 established the Special Immigration Appeals Commission (SIAC).

\textsuperscript{933} Article 6(2) and (3) only apply to those persons charged with criminal offences.
‘…the question of whether Article 5(4)\textsuperscript{934} applied to the appellants' claims would seem of only academic interest’.

Lord Philips also rejected the appellants' contention that they had been denied a fair trial by reason of the use of closed material and added that ‘no requirement has been demonstrated to read down Rule 4 in order to accommodate situations where the use of closed material in relation to safety on return will conflict with the procedural requirements of the Convention’.

A further point raised on behalf of the appellants was that once it was accepted that there was a continuing risk of inhuman treatment in a country, assurances given by that state could not be relied upon unless their effect was to completely remove all risk of ill-treatment. In response to this, Lord Phillips referred to a number of cases\textsuperscript{935} in which the ECtHR had, indirectly, rejected the notion that assurances were unreliable where they had not completely removed all risk of ill-treatment in contravention of Article 3. Despite the fact that authority was presented to the House, in which the ECtHR stated that States were obliged to ‘dispel any doubts’ about the safety of deportees and ‘ensure adequate protection against the risk of ill-treatment…manifestly contrary to the principles of the Convention’, Lord Phillips disagreed that ‘…these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon’.

The House was also called upon to consider whether the deportation of Othman would constitute a flagrant breach of his Article 6 rights. In dealing with this issue, Lord Philips referenced the case of Mamatkulov v Turkey (2005) 41 E.H.R.R. 494 in which the test, approved by the ECtHR, to be applied when determining whether there had been a flagrant breach of Article 6, was elaborated upon. The Grand Chamber commented that ‘the word “flagrant” is intended to convey…a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that

\textsuperscript{934} The right of everyone deprived of their liberty by arrest or detention to be entitled to take proceedings by which the lawfulness of their detention is decided speedily by a Court and a release ordered if the detention is unlawful.

\textsuperscript{935} Mamatkulov v Turkey (2005) 41 E.H.R.R. 494 the ECtHR; Shamayev v Georgia & Russia (application 36378/02 judgment of 12 April 2005 BAILII: [2005] ECHR 233 ); and Hanan Attia v Sweden (17 November 2003, Communication No. 199/2002).
Article’. Lord Philips noted ‘This is neither an easy nor an adequate test of whether Article 6 should bar the deportation of an alien’. He also noted that the phrase ‘a complete denial or nullification of the right to a fair trial’ ‘…cannot require that every aspect of the trial process should be unfair’ and that a ‘…trial that is fair in part may be no more acceptable than the curate’s egg’. Lord Philips, while characterising the Strasbourg jurisprudence as rather ‘tentative’, concluded that before the deportation of an alien will be capable of violating Article 6 there must be substantial grounds for believing that there is a real risk i) that there will be a fundamental breach of the principles of a fair trial; and ii) that this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of one of the victim's substantive, rather than procedural fundamental rights. Lord Philips, applying this test to the facts concluded that if Mr. Othman were deported to Jordan the criminal trial that he would face would not have defects so significant they would fundamentally destroy the fairness of his trial. On this basis, Lord Philips allowed the Secretary of State’s appeal.

The above exposition demonstrates that the approach of the House of Lords towards human rights challenges of counter-terror executive powers continued to evolve following the passing into law of the ATCSA. For the first time, in one of these cases, the Court made a declaration of incompatibility under the HRA 1998. Despite the fact that i) a number of Law Lords expressed dissatisfaction regarding the role bestowed upon the Court by the HRA 1998; and ii) in one instance, Lord Hoffmann appeared to trivialise Strasbourg jurisprudence. It is evident that in its treatment of human rights challenges to aspects of the ATCSA, the House of Lords continued i) to become more comfortable checking the counter-terror powers of the United Kingdom’s executive through reference to the HRA 1998 as well as international law; and ii) to adopt a less rigid approach to human rights related questions.

3. The Prevention of Terrorism Act 2005

3.1 Background

The Prevention of Terrorism Act 2005 (PTA 2005) was, to a large extent, Parliament’s response to the December 2004 ruling by the House of Lords 937 which held that detaining foreign nationals without criminal charge under emergency counter-terrorism powers was unlawful 938. The appeal was made on behalf of nine men detained at Belmarsh Prison under Part IV of the ATCSA 939, which permitted foreign terror suspects to be indefinitely imprisoned without trial. The detainees’ lawyers successfully argued that the men’s imprisonment breached Articles 5 and 14 of the ECHR. The Lords’ decision placed pressure on the government to speedily create new legislation to deal with the threat they believed the Belmarsh detainees posed to the public 940. The Prevention of Terrorism Bill was introduced in the Commons on 22 February 2005, and following protracted debate in both houses received Royal Assent on 11 March.

3.2 Legislation

The purpose of the PTA 2005 was to provide for the making of ‘control orders’ - new measures that imposed obligations on individuals suspected of being involved in activities related to terrorism 941. These control orders were preventative in nature and designed to enable the executive to restrict or prevent the further involvement by individuals in such activity 942. The PTA 2005 thus further served to add to the authorities’ powers aimed at countering terrorism in the United Kingdom.

Under the PTA 2005 a control order could impose any number of obligations necessary for preventing or restricting an individual’s further involvement in activity related to terrorism. The Act allowed for each order to be tailored to the particular risk posed by the individual concerned. Obligations that could be imposed include: i) prohibitions on the possession or use of certain items; ii) restrictions on movement to or within certain areas 943; iii) restrictions on communications and associations; and iv)

937 A & Ors v Secretary of State for the Home Department [2004] U.K.H.L. 56. For a full discussion of this case see 3.3 below.
938 Foster (2006) at 183.
939 Section 23.
940 Ibid.
941 Section 1(3).
942 Ibid.
943 Section 1(5).
requirements concerning place of abode\textsuperscript{944}. Under the Act persons subject to control orders could be required to cooperate with practical arrangements for monitoring compliance, such as wearing and maintaining apparatus\textsuperscript{945}. An order could also require a controlled person to provide information, including advance information, about proposed movements or activities\textsuperscript{946}. The PTA 2005 made it possible to issue control orders against any individual suspected of involvement in activities related to terrorism, irrespective of nationality, or terrorist cause.

Under the Act, control orders not involving a derogation from the ECHR, so-called ‘non-derogating control orders’, could be made by the Secretary of State\textsuperscript{947}. Such orders could be made where the Secretary of State: i) had reasonable grounds for suspecting an individual to be involved in terrorism-related activity; and ii) considered it necessary for protecting the public from a terrorist risk\textsuperscript{948}. The Secretary of State had to seek permission from a Court to make such an order\textsuperscript{949}, although in cases of urgency, this requirement could be waived\textsuperscript{950}. The Act, however, required that where the Secretary of State had made a control order without permission, it should immediately thereafter be referred to a Court\textsuperscript{951}. Initial Court hearings where i) permission for an order was being sought; or ii) a decision to impose an order without the Court’s permission was being examined, could be \textit{ex parte} and held without the knowledge of the affected person\textsuperscript{952}. Where an order had been made without permission, and the Court found the order or any particular part thereof to be obviously flawed, the Act required such orders or parts thereof to be quashed\textsuperscript{953}. In all other instances the Act directed Courts to confirm the order and give directions for a full hearing to take place\textsuperscript{954}. Where this happens, Courts are obliged to make arrangements for the individual in question to be given an opportunity to make

\textsuperscript{944} Section 1(4).
\textsuperscript{945} Section 1(6).
\textsuperscript{946} Section 1(7).
\textsuperscript{947} Section 1(2).
\textsuperscript{948} Section 2(1).
\textsuperscript{949} Section 3(1).
\textsuperscript{950} Section 3(2). The Court’s permission was also not required for orders made prior to 14 March 2005 against an individual certified under Section 21(1) of the Anti-terrorism, Crime and Security Act 2001.
\textsuperscript{951} Section 3(3).
\textsuperscript{952} Section 3(5).
\textsuperscript{953} Section 3(6).
\textsuperscript{954} Ibid.
representations. If at the conclusion of a full hearing, the Court decides that a decision of the Secretary of State was flawed, it could, *inter alia*: i) quash the control order; ii) give directions to the Secretary of State to revoke or modify the order; or iii) decide that the order should continue in force.

Control orders that involved a derogation from the ECHR could only be made by a Court on application from the Secretary of State. Preliminary hearings on such applications could be heard *ex parte* and could be held without the knowledge of the affected person. The PTA 2005 set out the questions a Court had to consider in the initial hearing. At a full hearing on a derogating control order, the Act required the Court to confirm or revoke the control order. The tests which the Act required Courts to apply when considering whether to confirm a derogating control order at a full hearing were more stringent than the tests at initial hearings.

The PTA 2005 also empowered the executive to arrest and detain any individual in respect of whom the Secretary of State sought a derogating control order. Such persons could be arrested and detained for 48 hours with the possibility of the Court extending the detention by a further 48 hours. Under the Act a constable could make an arrest where he considered the individual’s arrest and detention necessary to ensure that notice of a control order had been received. These powers of detention would cease once a person became bound by a derogating control order, or the Court dismissed an application from the Secretary of State.

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955 Section 3(7).
956 Section 3(12) and (13).
957 Section 1(1).
958 Section 4(2).
959 Section 4(3). The Court had to consider, *inter alia*, whether i) there was material capable of being relied on as establishing that the individual is involved in terrorism-related activity; and ii) there were reasonable grounds for believing that the obligations in the control order were necessary to protect the public from a terrorist risk.
960 Section 4(5).
961 Section 4(7). The Court had to consider, *inter alia*, whether i) it was satisfied on a balance of probabilities that the individual is involved in terrorism-related activity; and ii) the control order was necessary to protect the public from a terrorist risk.
962 Section 5(1) to (5).
963 Section 5(4) and (5).
964 Section 5(1).
965 Section 5(5).
The PTA 2005 further strengthened the ability of the executive to counter perceived 
terror threats by stipulating a number of new offences. For instance, any breach of an 
obligation imposed by a control order, without reasonable excuse, became a criminal 
offence. Such offences were punishable, following conviction on indictment, with a 
prison sentence of up to 5 years, or a fine, or both. Following summary conviction, 
a prison sentence of up to 12 months or a fine, or both could be imposed. The 
Act also made it an offence to intentionally obstruct a person delivering a notice 
setting out the terms of a control order.

As with previous counter-terror laws, the PTA sought novel ways to streamline the 
criminal justice process in order to make it easier for the executive to prosecute 
suspected terrorists. In control order proceedings, evidence could be heard in open or 
closed sessions, with so-called Special Advocates representing the interests of the 
individuals involved in the latter. The PTA 2005 also introduced a judicial review test 
in hearings relating to non-derogating control orders. Another noteworthy element of 
the control order proceedings introduced by the Act was the application of the civil 
standard of proof to questions of involvement in terrorism-related activity in hearings 
relating to derogating control orders.

Along with the additional executive powers created by the PTA 2005 and the attempts 
to reshuffle the criminal justice system, the Act also introduced a number of 
moderating measures. For example, a mechanism was created whereby independent 
reviews of the operation of the Act would be undertaken, with the first review to be 
carried out after nine months and subsequent reviews to be carried out annually. The 
Act also called upon the Secretary of State to report to Parliament every three 
months on his exercise of the control order powers during that period. In instances 
where Parliament had already approved a derogation, the Act required annual 
Parliamentary approval of the continuing need to rely on the derogation in 
making/issuing derogating control orders.

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966 Section 9(1)-(3). 
967 Section 9(4). 
968 6 months in Scotland or Northern Ireland. 
969 Section 9(4). 
970 Section 5(3). 
971 Section 14(2). 
972 Section 14(1).
Despite these latter safeguards, it is clear that the PTA 2005 added significantly to the extent of the United Kingdom’s executive counter-terrorism powers. The Act conforms to the pattern set by earlier laws, (including the various EPA, the PTA 1974-1989, the TA 2000 and the ATCSA) by adding incrementally to the number and variety of counter-terrorism powers available to the executive, while at the same circumscribing the use of those powers, at least to an extent. This is in contrast with the United Kingdom’s older counter-terror laws\(^7\) which tended to be much simpler Acts, bestowing more broadly defined executive powers and lacking the degree of formalised constraints (on the exercise of those powers) that was to eventuate.

### 3.3 Cases

As has already been shown, in the first years of the 21\(^{st}\) Century, the House of Lords demonstrated increasing levels of comfort regarding its duties under the HRA 1998 in the matters which were brought before it relating to executive powers created under the United Kingdom’s counter-terror laws. This trend continued in those cases brought before the House or the Supreme Court\(^7\) where aspects of the PTA 2005 were challenged based on Convention rights\(^7\).

On 31 October 2007 the House of Lords handed down judgments in three cases involving ECHR based complaints against various elements of the non-derogating

\(^7\) Those laws introduced in the first half of the 20\(^{th}\) Century.

\(^7\) The Supreme Court was established by Part 3 of the Constitutional Reform Act 2005 and on 1 October 2009 took over from the House of Lords as the United Kingdom’s final appeal Court.
control order regime set out in Sections 2 and 3 of the PTA 2005. In *Secretary of State for the Home Department v MB* [2007] U.K.H.L. 46 the Court dealt simultaneously with two separate appeals. In the first, MB appealed a decision of the Court of Appeal\(^976\) which had overturned the Court a quo’s declaration\(^977\) that the Section 3 of the PTA 1989, which set out the manner in which the making of non-derogating orders was to be supervised by the Courts, was incompatible with the right to a fair hearing under Article 6(1) of the ECHR. In the second, the Home Secretary appealed a decision of Mr. Justice Ouseley\(^978\) who had, *inter alia*, quashed a control order on a finding that the obligations imposed amounted to a deprivation of liberty contrary to Article 5 of the ECHR. AF cross-appealed the judge’s decision that Section 3 of the 2005 Act was compatible with Article 6 of the ECHR, even in instances where its provisions resulted in a case being entirely undisclosed to a defendant.

One of the issues which the Court had to resolve was whether a non-derogating control order imposed under the PTA 2005 constituted a criminal charge for the purposes of Article 6 of the European Convention\(^979\). It was argued on AF’s behalf that i) control order proceedings fell within the criminal limb of Article 6; or ii) failing which, they should nonetheless, because of the seriousness of what is potentially involved, attract the protection appropriate to criminal proceedings. In reaching a decision on this point, Lord Bingham referenced a number of international law sources including, i) a report of the Joint Committee On Human Rights\(^980\); ii) a report of the Council of Europe Commissioner for Human Rights\(^981\); and iii) Strasbourg jurisprudence\(^982\). In fact, despite referencing a number of local cases, Lord Bingham commented that for ‘…present purposes, however, guidance on the distinction between determination of a civil right and obligation and determination of a criminal charge is to be found in the Strasbourg jurisprudence…’. Referring to

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977 [2006] HRLR 878.
979 Article 6 of the ECHR protects the right of everyone to a fair hearing. Paragraphs (2) and (3) of Article 6 identify certain rights specific to persons who have been charged with a criminal offence. These include i) the presumption of innocence; ii) the right to be informed of the nature and cause of the accusations being brought; and iii) the right to call witnesses and to examine witnesses.
981 8 June 2005.
Strasbourg jurisprudence, Lord Bingham noted the ‘...constant principles of preferring substance to form and seeking to ensure that Convention rights are effectively protected, the ECtHR is concerned to ascertain whether a proceeding is, in substance, civil or criminal...’. Despite holding that non-derogating control order proceedings did not involve the determination of a criminal charge\textsuperscript{983}, Lord Bingham held that they should nonetheless, because of the seriousness of what is potentially involved, attract the protection appropriate to criminal proceedings. Significantly, Lord Bingham commented, \textit{inter alia}, that ‘This...approach...seems to me to reflect the spirit of the Convention\textsuperscript{984}. This comment is significant, in that it tends to challenge the strictly Dualist position of the United Kingdom in relation to international treaties. Lord Bingham appears to have been swayed by principles not imported into the United Kingdom’s domestic law by the HRA 1998.

Another issue which the House was requested to examine was whether the procedures provided for by Section 3 of the PTA 2005 Act and the Rules of Court were compatible with Article 6 of the Convention in circumstances where they had resulted in the essence of the case made against AF being entirely undisclosed to him. In tackling this question, his Lordship once again made extensive reference to Strasbourg jurisprudence\textsuperscript{985}. Based on an examinations of these authorities Lord Bingham surmised that although ‘...the entitlement to disclosure of relevant evidence is not an absolute right...’ and it is necessary to ‘...balance...the general interest of the community and the rights of the individual...’ it was important to recognise that ‘...any limitation of the individual's implied right of access to the Court must not

\textsuperscript{983} This conclusion was partly based on Lord Bingham’s observation that ‘Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary...’.

\textsuperscript{984} This approach is in contrast to Lord Hoffmann’s treatment of the same question. Lord Hoffmann commented that the ‘...review of a control order is not the determination of a criminal charge’ and that ‘As a matter of English law, this is beyond doubt’. Furthermore, Lord Hoffmann pointed out that although ‘It is of course true that domestic law is not conclusive for the purposes of Article 6...Strasbourg jurisprudence recognises the distinction between determination and punishment of past guilt and prevention of future suspected wrongdoing’. Lord Hoffmann in rejecting the conclusions reached by Lord Bingham, noted that the House had not been ‘referred to any case in which a genuinely preventative measure based on suspicion of future conduct was held to be the determination of a criminal charge’.

impair the very essence of the right’. Based on these reasons, his Lordship concluded that while there was no doubt that Special Advocates could improve to some degree the levels of procedural justice available, he found that their use was never a sufficient counterweight to the serious disadvantages borne by a person unaware of the case against him. Lord Bingham concluded that in both the case of MB and AF, it was particularly difficult to accept that either controlled person had enjoyed a substantial measure of procedural justice, or that their rights to a fair hearing had not been impaired. The majority of the House were of the same opinion and it was agreed that the relevant provisions of the Act should be read down under Section 3 of the HRA so that they would take effect only where consistent with fairness.

In Secretary of State for the Home Department v JJ & Ors [2007] U.K.H.L. 45 the Home Secretary appealed a decision of the Court of Appeal which had affirmed the Court a quo’s decision quashing certain non-derogating control orders made under the PTA 1989 in respect of JJ, GG, KK, HH, NN and LL. Each of these orders, had, inter alia, provided for: i) an 18-hour curfew; ii) tagging and monitoring; iii) police searches at any time; and iv) the exclusion of social visitors. Lord Bingham began his leading judgment by pointing out that in order to determine whether the respondents had been deprived of their liberty it was necessary to reference the meaning given to ‘deprivation of liberty’ by the ECtHR. Lord Bingham cautioned that it would be perilous to transpose the outcome of one case to another where the facts are

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986 Again, this reasoning is in stark contrast to the treatment that this question received in Lord Hoffmann’s dissenting opinion. Lord Hoffmann argued that ‘…the Strasbourg Court recognised that the confidentiality of security material should be maintained and that the State should be entitled to protect the public interest’ and that ‘the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest’. Lord Hoffmann, in dismissing the conclusions reached by Lord Bingham also pointed out that there was ‘…no Strasbourg or domestic authority which has gone to the lengths of saying that the Secretary of State cannot make a non-derogating control order (or anything of the same kind) without disclosing material which a judge considers it would be contrary to the public interest to disclose’.

987 Lord Carswell, Lord Brown and Lady Hale. Lord Hoffmann dissented. See note 996 for a brief commentary on Lord Hoffmann’s approach to the case.

988 It is interesting to note the reasoning Baroness Hale employed in holding that this remedy would be preferable to a declaration of incompatibility. Baroness Hale stated, inter alia, that ‘…there is good reason to think that Strasbourg would find proceedings conducted in accordance with the Act and rules compatible in the majority of cases. Inviting a derogation in order to cater for the minority where it might not so find may risk even greater incursions into the fundamental requirements of a fair trial which have not yet been shown to be necessitated by the exigencies of the situation’.

989 [2007] Q.B. 446.


991 As a result of Section 2(1) of the HRA 1998.
different’ and acknowledged the Court ought instead to ‘…give fair effect, on the facts…to the principles which the Strasbourg Court has laid down’. Lord Bingham then proceeded to examine a number of the ECtHR’s decisions in an attempt to distil the relevant principles992. Lord Bingham surmised that ‘…the task of a Court is to assess the impact of the measures in question on a person in the situation of the person subject to them…’ and that ‘…account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question’. He also pointed out that the ECtHR had acknowledged ‘...the difficulty attending the process of classification in borderline cases, suggesting that in such cases the decision is one of pure opinion or…judgment’.

In the course of his judgment, Lord Bingham pointed out that the trial judge had referenced a report of the Council of Europe Commissioner for Human Rights993, which stated in relation to the PTA 2005 that: ‘The question of whether the restrictions imposed by the non-derogating control order amount to a deprivation of liberty falling within the scope of Article 5(1)…must inevitably be determined on a case-by-case basis…’. This reference is further evidence of a change of attitude on the part of the United Kingdom’s domestic Courts, and a growing enthusiasm for international law. Ultimately, Lord Bingham found that the conditions imposed by the non-derogating control orders were comparable to those associated with solitary confinement and that the respondents lives were, as a prisoner’s would be, wholly regulated by the Home Office. He concluded that the obligations were incompatible with Article 5 of the ECHR994 and that the Home Secretary’s orders should be quashed. Lady Hale and Lord Brown concurred995.

993 8 June 2005.
994 The right of everyone to liberty and security of person.
995 Lords Hoffman and Carswell dissented. The primary reason for Lord Hoffman’s dissenting judgement was made clear when he stated that, he remained ‘…of the opinion which I expressed in A v Secretary of State for the Home Department [2005] 2 A.C. 68, that the power to derogate in peace time is a narrow one and that…violence, even threatening serious loss of life, does not necessarily threaten the life of the nation within the meaning of the Convention. The liberty of the subject and the right to habeas corpus are too precious to be sacrificed for any reason other than to safeguard the survival of the state. But one can only maintain this position if one confines the concept of deprivation of liberty to actual imprisonment or something which is for practical purposes little different from imprisonment’.
In *Secretary of State for the Home Department v E & Anor* [2007] U.K.H.L. 47, E and his wife S appealed against the Court of Appeal’s decision\(^{996}\) which had allowed the Home Secretary’s appeal from the Court *a quo*\(^ {997}\) and concluded, *inter alia*, that on the facts, the control order made in respect of E had not deprived him of liberty contrary to Article 5 of the ECHR. The control order meant, *inter alia*, that E had to i) wear an electronic tag; ii) reside at a specified address; iii) report to a monitoring company each day; iv) forego all communications equipment save for one telephone line and one or more computers, provided that they could not connect to the internet.

In his leading judgment, Lord Bingham noted that the control order differed from the orders examined in *Secretary of State for the Home Department v JJ & Ors* [2007] U.K.H.L. 45 in that i) the curfew to which E was subject was six hours shorter; ii) . Lord Bingham, referencing the House’s decision in *Secretary of State for the Home Department v JJ & Ors* [2007] U.K.H.L. 45 agreed with the Court of Appeal that ‘…the [trial] judge…erred in law in failing to focus on the extent to which E was actually confined, here an overnight curfew of twelve hours, a period accepted by the Strasbourg authorities…’. Lady Hale, Lord Carswell, Lord Hoffmann and Lord Brown agreed that the appeals should be dismissed.

On 10 June 2009, the House of Lords handed down judgment in the matter of *Secretary of State for the Home Department v AF & Anor* [2009] U.K.H.L. 28. The case was an appeal by AF, AN and AE, who were subject to non-derogating control

\(^{996}\) [2007] 3 W.L.R. 1.
\(^{997}\) [2007] HRLR 472.
orders, made under Section 2 of the PTA 2005998. The appellants sought to overturn a decision of the Court of Appeal999 that complete and full disclosure was not necessary to render a hearing fair for the purposes of Article 61000. The Court of Appeal based their decision on inter alia their understanding that in Secretary of State for the Home Department v MB & AF [2007] U.K.H.L. 46; [2008] 1 A.C. 440, the House of Lords had ‘…concluded that there was no absolute requirement to disclose the gist or essence of the Secretary of State's case to the controlee’. The appellants argued that their Article 6 rights had been violated since the control orders had been made by a judge based on material received in a closed hearing, to which the appellants had not been privy. Lord Philips began his leading judgment by referencing the case of MB and AF where the House had made a ruling on the same question of law raised in this appeal. Lord Philips observed that there had been debate around whether the House had ‘recognised a…principle under which fair process does not require that the nature of the case against the controlee should be disclosed [where the] cogency of the closed material…[satisfied] the judge that no effective challenge could be made to it’. He pointed out that it had been suggested that the House had in fact reached the contrary view that ‘…there was a "core irreducible minimum" of the allegations against a controlee that had to be disclosed’. This uncertainty was the reason that the Court of Appeal took the unusual step of allowing this appeal.

While Lord Phillips expressed an opinion that the Court of Appeal had accurately portrayed the position of the House in MB and AF, he pointed out that the ECtHR’s coincident decision in the case of A & Ors v United Kingdom (Application No. 3455/05), BAILII: [2009] ECHR 301, had made such a determination unnecessary. Lord Philips considered that ‘…the Grand Chamber has provided the definitive resolution…’. Lord Philips surmised the Grand Chamber’s position by stating that ‘the controlee must be given sufficient information…to enable him to give effective instructions…’ and that ‘…there can be a fair trial notwithstanding that the controlee is not provided with…the evidence forming the basis of the allegations’, although ‘[w]here…the open material consists purely of general assertions and the case against

998 The orders had been made on the basis that the Secretary of State had reasonable grounds for suspecting that the appellants were, or had been, involved in terrorism-related activity.
the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied...’. Lord Philips observed that the ECtHR had ‘...made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him’. In the circumstances, Lord Philips held Section 3(10) should be read down and that the appeals should succeed.

Lord Hoffmann agreed with Lord Philips that the appeals should be allowed, but made a number of interesting comments in the course of his opinion. Lord Hoffmann opined, inter alia, that the ECtHR’s decision ‘...requires these appeals to be allowed’ but that ‘I do so with very considerable regret, because I think that the decision of the ECtHR was wrong...’. His Lordship went on to state that he believed that the House had no option in the matter since, although ‘...as a matter of our domestic law, we could take the decision in A v United Kingdom into account but nevertheless prefer our own view...the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation’ and ‘[t]o reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention’. Lord Hoffmann was joined by Lord Rodger in expressing regret at the Court’s obligations under the HRA 1998. Lord Rodger stated that ‘Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: Argentoratum locutum, iudicium finitum - Strasbourg has spoken, the case is closed’. Lord Carswell, in allowing the appeals, expressed similar sentiments.

Lord Hope, who agreed that the appeals should succeed, neatly described the reason why this decision is particularly important in the context of this thesis when he observed that:

‘The tension is all the more acute in this case because the control order regime was introduced...in response to the judgment of this House that the preventive detention regime for aliens suspected of being involved in international terrorism [in place prior to the PTA 2005] was incompatible with their right to liberty under...the European Convention.’
Lord Hope disagreed with Lord Hoffmann’s assessment of the ECtHR’s decision when he stated that ‘I believe that a principled approach to the problem could not do other than the Grand Chamber has done in setting out the basic rule that must be applied’.

Lord Scott’s opinion raised a number of important constitutional points which are germane to the questions raised in thesis. Lord Scott pointed out that ‘It is, of course, open to Parliament to enact legislation that is incompatible with one or more of the Convention rights’ and that ‘…the detail in which and the precision with which the statutory procedure for the judicial hearings is laid down in the 2005 Act makes it impermissible to argue that compliance with the express statutory requirements is not enough to ensure the validity of control orders’. This is in contrast with the opinions expressed by Lord Hoffmann regarding the same question. Lord Scott also agreed that the appeals should be allowed, but ventured the opinion, regarding the Strasbourg ruling, that ‘…the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion’. Lord Walker, Baroness Hale and Lord Brown also agreed that the appeals should be allowed.

On 16 June 2010 the Supreme Court handed down its decision in Secretary of State for the Home Department (respondent) v AP (Appellant) [2010] U.K.S.C. 24. This was an appeal from the Court of Appeal, which had reversed a decision of the High Court allowing AP’s appeal against a modification made by the Secretary of State to his control order, obliging AP to relocate from North London\(^{1001}\) to the Midlands\(^{1002}\). The High Court had, inter alia, decided that the Secretary of State’s decision had not infringed AP’s Article 8 rights, as the interference with his family life had been justifiable and proportionate in the interests of national security. Nonetheless, the High Court held that the overall effect of a 16 hour curfew and AP’s separation from his family constituted an Article 5\(^{1003}\) deprivation of liberty. The Court of Appeal decided that it had been an error in law for the High Court judge to consider AP’s isolation as an important factor in determining whether his Article 5 rights had been breached. In his leading judgment, Lord Brown placed a great deal of emphasis on the

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\(^{1001}\) AP’s family and friends had always lived in North London.

\(^{1002}\) AP’s control order also obliged him, inter alia, to i) submit to a 16 hour curfew; and ii) electronic tagging.

\(^{1003}\) Article 5 of the ECHR.
leading ECtHR case dealing with these issues, namely, Guzzardi v Italy (1980) 3 E.H.R.R. 333. Lord Brown pointed out that one of the principles to be drawn from that case was that ‘…within…the grey area between 14-hour and 18-hour curfew cases, other restrictions than mere confinement can tip the balance in deciding…whether the restrictions overall deprive the controlee of…his liberty’. Lord Brown, applying this principle held, reversing the Court of Appeal’s decision, that restrictions upon Article 8 rights could indeed be taken into account when determining whether certain circumstances amounted to an infringement of Article 5 rights, even to the extent that such restrictions were decisive in relation to the ultimate determination of the matter. Lord Brown specifically stated that a judge could take into account subjective factors or circumstances, such as the particular difficulties of a person’s family visiting him in any given location, when considering whether a control order amounted to a deprivation of liberty. Lords Phillips, Saville, Walker, Clarke, and Rodger and Sir John Dyson SCJ also allowed the appeal.

From the above exposition it is clear that MB and the subsequent case of AF signify a major development in the approach of the House of Lords towards cases involving counter-terror executive powers. Firstly, the purposive approach adopted by Lord Bingham in MB when he prioritised giving effect to ‘…the spirit of the Convention’ is in stark contrast with that Court’s earlier exercises in interpretation. The same reference also challenges the traditional view that the United Kingdom follows a strictly Dualist approach to international treaties and that no signed and ratified treaty has any force or effect unless incorporated in a domestic Act. MB is also noteworthy in that the House opted to make use of Section 3 of the HRA so that the offending part of the PTA 2005 could be ‘read down’ in order to bring it in line with the Convention. The second major development occurred when, remarkably, the House was called upon to revisit the very questions it had examined in MB. The case of AF is particularly noteworthy as i) members of the Committee took the opportunity to express, in a particularly forthright manner, their frustration at having to follow Strasbourg’s jurisprudence; ii) the House, despite these frustrations and in a

1004 The right of everyone has the right to respect for his private and family life, his home and his correspondence.
particularly tension filled situation, gave effect to the ECtHR’s decision; and iii) at least one member of the Committee appeared to make an unprecedented concession in relation to the House of Lords’ status vis-à-vis the ECtHR. Here I am referring to Lord Hoffmann’s submission that, even if the House had decided to substitute its own views for those of the ECtHR, to do so ‘…would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention.’

This comment provides further evidence that a significant trend observed in relation to the ATCSA case law continued in cases dealing with executive powers under the PTA 2005. Aside from becoming more comfortable with the role ascribed to them by the HRA 1998, the Courts have begun to reference international law, including unincorporated treaties.

4. The Terrorism Act 2006

4.1 Background

This Act was penned in the aftermath of the London bombings of July 2005. The government intended the Act to cater for those persons: i) preparing or training to commit terrorism; and ii) disseminating radical material. From the very beginning, two Sections of the bill, namely the 90 day detention clause and the offence of ‘glorifying terrorism’, attracted a great deal of attention and serious opposition from many, including Labour backbenchers. Despite the prospect of a rebellion, the government decided to proceed. On 8 November 2005 Blair suffered his first Commons defeat as prime minister when 49 Labour MPs rebelled and the Commons

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As Lord Hope pointed out, ‘The tension is all the more acute in this case because the control order regime was introduced…in response to the judgment of this House that the preventive detention regime for aliens suspected of being involved in international terrorism [in place prior to the PTA 2005] was incompatible with their right to liberty under…the European Convention.’


Section 23.

Ultimately this offence appeared in altered form in the TA 2006, see Section1 and the offence of encouragement of terrorism.

See the full text of the Commons debate prior to the bill’s second reading, available at: http://www.theyworkforyou.com/debates/?id=2005-10-26b.322.0.
voted to extend the maximum detention time to only 28 days\textsuperscript{1011}. There was further opposition to the government’s remaining proposals, particularly in the House of Lords\textsuperscript{1012}. Ultimately, however, the Tory peers conceded and the Act received Royal Assent on 30 March 2006.

\section*{4.2 Legislation}

The Terrorism Act 2006 (TA 2006) reformed and extended the previous counter-terrorist legislation, providing the United Kingdom’s executive with even greater powers to counter the threat of terrorism in the United Kingdom. A number of the additions and changes made by the Act were required in terms of various international Conventions to which the United Kingdom was party\textsuperscript{1013}. The Act also amended previous legislation relating to investigatory powers and the intelligence services.

Part 1 of the TA 2006: i) provided for new offences; ii) made amendments to existing offences; and iii) set out a number of incidental provisions about various terrorism offences. One of the means by which the executive’s powers were augmented by the TA 2006 was through the creation of new terrorism-related offences. These related to both the encouragement of acts of terrorism\textsuperscript{1014} and to the dissemination of terrorist publications with the intention of encouraging acts of terrorism\textsuperscript{1015}. In respect of both these offences, indirect encouragement could include a statement glorifying the commission or preparation of acts of terrorism, if members of the public could reasonably be expected to infer that the actions glorified were being held out at as conduct that should be emulated\textsuperscript{1016}. Under Sections 1 and 2 a person had a defence to these offences if he could show, amongst other things, that the statement or

\textsuperscript{1012} See, for instance, the Lords’ debate on 22 March 2006, full text of which is available at: http://www.theyworkforyou.com/lords/?id=2006-03-22b.241.3&=terrorism+bill+2005-10-01..2006-06-30+section%3Alords+segment%3A11918072#g258.0.
\textsuperscript{1014} Section 1. This Section implements Article 5 of the CECPT.
\textsuperscript{1015} Section 2.
\textsuperscript{1016} Sections 1(3)and 2(4).
publication in question did not express his views and did not have his endorsement\textsuperscript{1017}.

Specific provision was made in the Act as to how these two new offences would apply to those providing and using the Internet and other electronic services\textsuperscript{1018}. Constables who were of the opinion that any statement, article or record, available on the Internet\textsuperscript{1019}, was unlawfully related to terrorism, were empowered to give notice to any person requiring that the offending content be removed from public view or suitably amended. In instances where the relevant person failed without reasonable excuse to comply with such a notice, the statement or conduct in question was regarded as having been endorsed by such person\textsuperscript{1020}. This in turn meant that defences listed in Sections 1 and 2 of the Act would no longer be available to such a person\textsuperscript{1021}.

The TA 2006 also created new offences relating to: i) the preparation of terrorist acts\textsuperscript{1022}; ii) terrorist training\textsuperscript{1023}; iii) attendance at places used for terrorist training\textsuperscript{1024}; iv) the making or possession radioactive devices and materials\textsuperscript{1025}; v) the misuse of radioactive devices, materials or nuclear facilities\textsuperscript{1026}; vi) the making of terrorist threats relating to radioactive devices, materials, or nuclear facilities\textsuperscript{1027}; and vii) trespass on nuclear sites\textsuperscript{1028}. Provision was also made for powers of forfeiture in respect of items considered by a Court to be connected with the carrying out of terrorist training under Section 6\textsuperscript{1029}.

The Act also further bolstered the executive in its counter-terror efforts, by increasing the maximum penalties available for a number of offences including: i) possession of

\textsuperscript{1017} Sections 1(6) and 2(9).
\textsuperscript{1018} Section 3.
\textsuperscript{1019} Alternatively available via another electronic service.
\textsuperscript{1020} Section 3(2).
\textsuperscript{1021} Sections 1(6) and 2(9).
\textsuperscript{1022} Section 5.
\textsuperscript{1023} Section 6. This Section implements Article 7 of the Convention.
\textsuperscript{1024} Section 8.
\textsuperscript{1025} Section 9. The offences in Sections 9, 10 and 11 were needed for the United Kingdom to ratify the ICSANT.
\textsuperscript{1026} Section 10.
\textsuperscript{1027} Section 11.
\textsuperscript{1028} Section 12.
\textsuperscript{1029} Section 7.
an item for terrorist purposes\textsuperscript{1030}; ii) those involving preparatory acts and threats as set out in Section 2 of the Nuclear Material (Offences) Act 1983\textsuperscript{1031} \textsuperscript{1032}, and iii) those involving failure to comply with a notice, in terms of Part 3 of the Regulation of Investigatory Powers Act 2000, requiring the disclosure or decoding of encrypted information\textsuperscript{1033}.

Part 2 of the TA 2006 included amendments to various Acts including the TA 2000 which: i) widened the grounds on which the executive was empowered to proscribe organisations under the TA 2000\textsuperscript{1034}; and ii) extended the executive’s ability to designate an organisation as proscribed in circumstances where it had been listed as such an organisation in Schedule 2 of the TA, but was operating under another name\textsuperscript{1035}. The Act also contained amendments to certain police and investigatory powers. These changes: i) broadened powers relating to the detention of terrorist suspects under the TA 2000\textsuperscript{1036} and added to the grounds on which such detention could be authorised\textsuperscript{1037}; ii) broadened powers to search premises and seize material under Schedule 5 to the TA 2000\textsuperscript{1038}; iii) introduced new powers to seize and seek forfeiture of terrorist publications\textsuperscript{1039}, iv) created additional powers to search vehicles under Schedule 7 to the TA\textsuperscript{1040}; v) increased the Secretary of State’s powers to issue authorisations or warrants to carry out various acts under the Intelligence Services Act

\textsuperscript{1030} Section 13.
\textsuperscript{1031} That Section created offences relating to receiving, holding or dealing with nuclear material, or the making of threats in relation to nuclear material, with the intention to commit certain offences including, murder, manslaughter, culpable homicide, assault to injury, malicious mischief or causing injury, theft, and extortion.
\textsuperscript{1032} Section 14.
\textsuperscript{1033} Section 15.
\textsuperscript{1034} Section 21.
\textsuperscript{1035} Section 22.
\textsuperscript{1036} Section 23(2) widened the group of people who could apply for a warrant of further detention under Paragraph 29 of Schedule 8 and for an extension of detention under Paragraph 36 of Schedule 8. Section 23(3) amended Paragraph 29(3) of Schedule 8 so that when a Court agreed to an extension of the period of detention, the period of the extension would normally be seven days and not up to seven days. See, however, Section 23(6) which amended Schedule 8, so that an application to extend detention beyond 14 days had to be heard by a senior judge, rather than merely a judicial authority. Section 23(7) further amended Paragraph 36, Schedule 8, so that, \textit{inter alia}, the maximum period that a warrant of further detention can last in total is extended from 14 days to 28 days.
\textsuperscript{1037} Section 24.
\textsuperscript{1038} Section 26(2) and (3). These Sections amended Paragraph 1 of Schedule 5 to the TACT to provide that search warrants under that Schedule could authorise the searching not just of named premises but also any premises occupied or controlled by a specified person.
\textsuperscript{1039} Section 28 and Schedule 2.
\textsuperscript{1040} Section 29.
1994\textsuperscript{1041}; vi) increased the amount of time such authorisations or warrants would be valid\textsuperscript{1042}; vii) increased the amount of time intercept warrants issued under the Regulation of Investigatory Powers Act 2000 (RIPA) would be valid\textsuperscript{1043}; viii) extended the circumstances under which disclosure notices could be granted under the Serious Organised Crime and Police Act 2005 (SOCAP) to terrorist investigations\textsuperscript{1044}; ix) extended the definition of terrorism, as set out in the TA 2000\textsuperscript{1045}; and x) amended the manner in which terrorist cash-seizure hearings were held under the TA 2000, allowing the initial hearing to take place \textit{ex parte}\textsuperscript{1046}.

The vast powers entrusted to the United Kingdom’s executive under the TA 2006, were to an extent ameliorated by the provisions of Part 3 of that Act. It provided for the supervision of the operation of Part 1 of the Act and the TA 2000 through an independent annual review\textsuperscript{1047}.

From the above exposition, it is clear that the TA 2006 added substantially to the counter-terrorism powers available to the United Kingdom’s executive, even considering and despite the safeguards contained in Part 3 of the Act. The TA 2006 follows the general pattern set by earlier laws, including the various EPA, the PTA 1974-1989, the TA 2000, the ATCSA and the PTA 2005 by seeking to increase the number and scope of powers available to the executive to act against perceived terrorism threats, while at the same time establishing mechanisms to monitor and if necessary check the use of these powers. This is in contrast with the United Kingdom’s counter-terror laws enacted in the first half of the 20\textsuperscript{th} Century\textsuperscript{1048}, which were markedly simpler pieces of legislation, bestowing more broadly defined executive powers and lacking in the way of formalised constraints on the exercise of those powers.

\textsuperscript{1041} Section 31(2).
\textsuperscript{1042} Section 31(4) and (5).
\textsuperscript{1043} Section 32(2).
\textsuperscript{1044} Section 33(1).
\textsuperscript{1045} Section 34. The definition was amended so as to include the carrying out of acts where the use or threat is designed to influence an international governmental organisations. This was done to bring the United Kingdom’s definition of terrorism in line with that of various international Conventions that the United Kingdom intended to implement, such as the CECPT.
\textsuperscript{1046} Section 35.
\textsuperscript{1047} Section 36.
\textsuperscript{1048} Those laws introduced in the first half of the 20\textsuperscript{th} Century.
4.3 Cases

The TA 2006 has not been tested in Courts to the extent that a number of earlier counter-terrorism laws have been. Nonetheless, the Courts have been approached on a few occasions to settle matters relating to the Act, in which human rights arguments were canvassed.

Hussain, R (on the application of) v Crown Prosecution Service [2006] E.W.H.C. 2467 (Admin), was an application for permission to apply for judicial review of a decision, made by a High Court judge under the provisions of the TA 2000 as amended by the TA 2006, which permitted the ongoing detention of the applicant. A preliminary question which had to be considered was whether the Court had jurisdiction to entertain the application, considering that case law precludes any decision of a High Court judge exercising the jurisdiction of the High Court, from being challenged on judicial review. The applicant’s representative, referencing Garcia Alva v Germany countered this by arguing, inter alia, that Article 5(4) of the ECHR guarantees the right of a detained person to have a decision extending the period of detention reviewed or made the subject of an appeal. Lord Richards rejected this point stating that ‘…the hearing before Collins J…gave a fair chance to canvas issues concerning the lawfulness of continued detention and to obtain a judicial ruling on those issues’ and that ‘[t]he requirements of Article 5(4) were satisfied in that way…’. Lord Richards added that ‘Compliance with the Convention does not make it necessary to find some further right to challenge the lawfulness of Collins J's decision itself, whether by way of appeal or by way of review’. In the result, Lord Richards found it unnecessary to examine the applicant’s remaining arguments and refused the application. Mr. Justice Beatson concurred.

On 4 Mach 2009, judgment was handed down in the matter of Da Costa, R v [2009] E.W.C.A. Crim 482. The case was heard by the Court of Appeal and involved a

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1050 Paragraph 36 of Schedule 8 to the 2000 Act.


number of questions around the proper construction of Sections 6 and 8 of the TA 2006. The four defendants, Hamid, Da Costa, Ahmed and Al-Figari had been convicted of terrorist offences, including the provision of terrorist training or instruction\textsuperscript{1053} and being in attendance at such training\textsuperscript{1054}. One of the questions that the Court was called upon to answer was whether the concept of terrorist training contained in Section 6(3)(b) is so wide as to be uncertain and therefore contrary to the common law and the rule contained in Article 7 of the ECHR\textsuperscript{1055}. In his judgment, Lord Hughes conceded that the words of Section 6(3)(b)\textsuperscript{1056} are very wide. However, his Lordship argued that the provision did not offend against the common law or the Convention as its certainty is provided by way of Section 6(1)(b) which requires that before any defendant is convicted under the Section, he must know that at least one of those he is training intends to put the training to terrorist use. Consequentially, his Lordship, Mr. Justice King and Mrs Justice Sharpe concurring, refused the defendants’ applications for leave to appeal.

Despite the fact that the Convention issues raised in the above cases did not impact on either outcome, both decisions serve as examples of courts below the Supreme Court and Court of Appeal grappling with human rights-based challenges to the executive powers created under the TA 2006.

5. \textit{The Counter-Terrorism Act 2008}

5.1 \textit{Background}

In the 2006, by way of the annual Queen's Speech, the Tony Blair’s government confirmed that the fight against terrorism would continue to be an important part of its agenda\textsuperscript{1057}. The speech outlined plans to increase the pre-charge detention period and allow so-called ‘intercept evidence’ to be used in Court\textsuperscript{1058}. Parliament was strongly

\begin{footnotesize}
\begin{itemize}
  \item [1053] Section 6.
  \item [1054] Section 8.
  \item [1055] This Article prohibits the retrospective criminalisation of acts and omissions.
  \item [1056] The training to which the Subsection applies includes ‘…training in any skills which include the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism.’
  \item [1057] See the full text of the Queen’s Speech, available at http://news.bbc.co.uk/2/hi/6150274.stm.
  \item [1058] Ibid.
\end{itemize}
\end{footnotesize}
divided on the contents of the bill, particularly the pre-charge detention proposals\textsuperscript{1059} and by the time it was finally published in 2008, many of the more controversial provisions had been scrapped\textsuperscript{1060}. The most contentious provision to remain was a proposal to extend to 42 days, the maximum period of pre-charge detention for suspected terrorists\textsuperscript{1061}. Despite support from a number of high profile police officers\textsuperscript{1062}, the government's plan faced major opposition across party lines. Ultimately, Labour avoided a defeat in the Commons by the narrowest of margins\textsuperscript{1063}. The bill's passage through the House of Lords was equally tumultuous\textsuperscript{1064}. On 13 October, the Lords rejected the government’s ‘42 days’ proposal compelling the government to abandon its ambitions, for the time being\textsuperscript{1065}. The Act finally received Royal Assent on 26 November 2008.

\subsection*{5.2 Legislation}

Much like the preceding twenty-first century anti-terror legislation, the Counter-Terrorism Act 2008 (CTA) introduced an appreciably large number of new powers that the United Kingdom’s executive could use against perceived terrorist threats. Part 1 of the CTA\textsuperscript{1066} provided for new powers connected with the removal of documents for examination\textsuperscript{1067} following searches under the existing terrorism legislation\textsuperscript{1068}. Wilfully obstructing any officer exercising such powers was also made an offence under Part 1\textsuperscript{1069}. Additional powers were also introduced\textsuperscript{1070} by this Part of the CTA.

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\textsuperscript{1059} See for instance the full text of the Select Committee on Home Affairs’ first report on the bill at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/43/4305.htm#a7.  
\textsuperscript{1060} Including allowing intercept evidence to be used in terrorism cases. See the full text of the bill as introduced to the Commons on 24 January 2008 at http://www.publications.parliament.uk/pa/cm200708/cmbills/063/2008063.pdf.  
\textsuperscript{1061} See the full text of the Commons debate, following its second reading at http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080401/debtext/80401-0007.htm#08040156000001.  
\textsuperscript{1062} See the full text of the Dimbleby Lecture delivered by Metropolitan Police Commissioner Sir Ian Blair in 2005 at http://news.bbc.co.uk/2/hi/uk_news/4443386.stm.  
\textsuperscript{1063} See a record of the result of the Commons vote and the full text of the preceding debate at http://www.publications.parliament.uk/pa/id200708/ldhansrd/text/81013-0002.htm#0810135000003.  
\textsuperscript{1064} See a summary of the bill’s passage through the House of Lords at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04816.pdf.  
\textsuperscript{1065} See the full text of the Lords debate at http://www.publications.parliament.uk/pa/id200708/ldhansrd/text/81013-0002.htm#0810135000003.  
\textsuperscript{1066} Section 1.  
\textsuperscript{1067} In order to ascertain whether or not they could be seized.  
\textsuperscript{1068} The TA 2000, the ATCAS, the PTA 1989 and the TA.  
\textsuperscript{1069} Section 2.  
\textsuperscript{1070} By amending Sections 61, 63, 63A, 64 and 65 of the PACE.
\end{flushright}
allowing constables to take fingerprints and samples from individuals subject to control orders\textsuperscript{1071}. The laws relating to the retention and use of fingerprints and DNA samples were relaxed\textsuperscript{1072} and standardised, making it easier for such evidence to be used for counter-terrorism purposes.

Part 2 of the CTA allowed for the questioning of terrorist suspects after they had been charged or informed that they could be prosecuted\textsuperscript{1073}. The Act provided that such questioning needed to be authorised by a judge\textsuperscript{1074}, sheriff\textsuperscript{1075} or district judge\textsuperscript{1076}. Such authorisation had to include a direction as the duration of the questioning and could also include other conditions such where the questioning should take place\textsuperscript{1077}. The CTA also empowered Courts in England and Wales or Northern Ireland to draw adverse inferences from the silence of any suspect\textsuperscript{1078}.

Part 3 of the CTA dealt with various aspects of the prosecution and punishment of offences related to terrorism. It assisted the executive by altering the common law jurisdictional rules, by providing for specified terrorism offences committed in any part of the UK to be tried domestically\textsuperscript{1079}. This Part of the CTA also dealt with sentencing in cases relating to terrorism, but which were tried under the general criminal law\textsuperscript{1080}. More specifically, where it had been established that there was a terrorist connection\textsuperscript{1081}, the Act compelled Courts to view such connection as an aggravating factor when considering sentence\textsuperscript{1082}. Part 3 also amended\textsuperscript{1083} and extended\textsuperscript{1084} the forfeiture regime applicable in terrorist cases.

\textsuperscript{1071} Sections 10-13. For an exposition of the laws relating to control orders, see the discussion of the PTA 1989 above.
\textsuperscript{1072} Sections 14-17.
\textsuperscript{1073} Sections 22-24 and Schedule 4.
\textsuperscript{1074} Section 22(2).
\textsuperscript{1075} Section 23(2).
\textsuperscript{1076} Section 2(2).
\textsuperscript{1077} Sections 22(3), 23(3) and 24(3).
\textsuperscript{1078} Sections 22(9), 24(9) and (10).
\textsuperscript{1079} Section 28. Though, by Section 28(6), cases that would not ordinarily have been heard in Northern Ireland could not be resolved by way of a non-jury trial.
\textsuperscript{1080} Sections 30, 31 and Schedule 2.
\textsuperscript{1081} Sections 30(1)-(4) and 31.
\textsuperscript{1082} Sections 30(4) and 31.
\textsuperscript{1083} Section 34 replaced Section 23 of the TA 2000. Under the amended provision, a forfeiture order could be made in respect of money or other property which had been used for the purposes of terrorism.
\textsuperscript{1084} Section 35 inserted a new Section 23A into the TA 2000.
Part 4 set out a number of new provisions empowering the authorities in novel ways. For instance, it required that certain individuals, convicted of certain offences related to terrorism, notify the police of certain information. The Act also required such individuals: i) when in the community to provide the police with certain personal information; ii) to notify the police of any subsequent changes to this information; and iii) to confirm the provided information’s accuracy annually. The CTA also made it an offence to fail to comply with any of these notification requirements without reasonable excuse or to provide false information. Under Schedule 5 to the Act a Court could, on application, impose a foreign travel restriction order on any individual subject to the above notification requirements, restricting that person’s overseas travel.

Part 5 of the CTA dealt with the financing of terrorism and money laundering. It conferred powers on the United Kingdom’s executive under certain circumstances to direct persons operating in the financial sector to take certain actions in respect of business or transactions with persons resident in countries associated with money laundering, terrorist financing or the development or production of nuclear, radiological, biological or chemical weapons. The CTA also made it an offence to fail to comply with any requirement imposed by a direction, or to provide false information in order to obtain a licence, so exempting certain acts which would otherwise be subject to a direction.

Part 6 introduced the possibility of financial restrictions proceedings. A statutory basis was created for persons affected by certain kinds of decision taken by the

1085 Sections 44-46.
1086 Section 41. Regarding offences listed in Schedule 2, the provision applies in circumstances where a Court determined that an offence had a terrorist connection in accordance with Sections 30 or 31.
1087 Section 47(1)-(3) set out the information which had to be supplied to the police as well as the timescales within which that notification had to be made.
1088 Section 48(4).
1089 Section 48(3).
1090 Section 49.
1091 Section 54.
1092 Part 1 of Schedule 7.
1093 Part 2 of Schedule 7.
1094 Part 3 of Schedule 7.
1095 Section 62 and Schedule 7.
1096 See Paragraph 17.
1097 Part 7 of Schedule 7.
Treasury, to apply to have such decisions set aside\textsuperscript{1098}. The decisions to which Part 6 related are those made under: i) the United Nations Terrorism Orders; ii) Part 2 of the Anti-terrorism, Crime and Security Act 2001; and iii) Schedule 7 to the CTA\textsuperscript{1099}. Part 6 also provided for the creation of rules of Court governing such applications\textsuperscript{1100} and more particularly, the procedure which would apply in instances where the Treasury wished to rely on certain information in proceedings, but opted to make an application to withhold certain information on the basis of public interest concerns\textsuperscript{1101}. In such cases, any such ‘closed’ material, relevant to the Treasury's decision, would be considered at a closed hearing where a Special Advocate would represent the interests of the applicant\textsuperscript{1102}. Of special interest is Section 67(6) which confirmed that nothing in that Section, or in rules of Court made under Section 67, should be taken to require a Court to breach the provisions of Article 6 of the ECHR\textsuperscript{1103}.

Part 7 of the CTA amended the Regulation of Investigatory Powers Act 2000 to make further allowance for intercepted material to be disclosed at inquiries held under the Inquiries Act 2005\textsuperscript{1104}. In addition the CTA broadened the definition of terrorism in Section 1 of the TA by including acts done for the purpose of furthering a racial cause\textsuperscript{1105}. Part 7 also created the additional offence of eliciting, publishing or communicating information about members of the armed forces, the intelligence services, or of constables, which was likely to be of use to terrorists\textsuperscript{1106} and extended the powers available to constables in the context of control orders under the PTA 1989. Constables were authorised to enter and search the premises of individuals subject to control orders who were reasonably suspected of absconding or of failing to grant access to premises when required to do so, and to apply for a warrant to enter and search premises for the purpose of monitoring compliance with any control order\textsuperscript{1107}. The CTA also amended the PTA 1989 so as to extend the amount of time

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{1098} Chapter 1, Part 6.
\item\textsuperscript{1099} Section 63.
\item\textsuperscript{1100} Section 66.
\item\textsuperscript{1101} Section 67.
\item\textsuperscript{1102} Sections 67 and 68.
\item\textsuperscript{1103} This provision was included to ensure that Part 6 and rules of Court made under would comply with the ECHR, following the House of Lords decision in Secretary of State for the Home Department v MB [2007] U.K.H.L. 46.
\item\textsuperscript{1104} Section 74.
\item\textsuperscript{1105} Section 75.
\item\textsuperscript{1106} Section 76.
\item\textsuperscript{1107} Section 78.
\end{itemize}
\end{footnotesize}
available to persons against whom non-derogating control orders had been made to make representations\textsuperscript{1108}.

5.3 Cases

One of the executive powers contained in the CTA has already fallen foul of a human rights-orientated judgment in one of the United Kingdom’s High Courts. Bank Mellat, a privately owned Iranian institution, accused of providing financial services to companies engaged in Iran’s nuclear and ballistic missile programmes, applied\textsuperscript{1109} to overturn a direction by the Treasury\textsuperscript{1110} stopping all financial companies doing business with it. *Mellat v Her Majesty's Treasury (Rev 1)* [2010] E.W.C.A. Civ 483 was an appeal arising from two decisions made by the Court a quo. The first was that the standard of disclosure required of Her Majesty's Treasury in its dealings with Mellat was the same as that detailed by the House of Lords, in *Secretary of State for the Home Department v AF (No. 3)* [2009] U.K.H.L. 28. The second concerned the detailed and specific directions the Court gave as to the extent of the disclosure required of the Treasury. The Treasury’s appeal arose out of the first decision, and the bank’s cross-appeal concerned the second.

The Treasury argued that the degree of disclosure called for by Mitting J was, in the circumstances of the case, too generous. The bank, on the other hand, argued that the judge had misdirected himself concerning the specific disclosure requirements. The bank argued, *inter alia*, that the Treasury’s direction was unlawful, that it infringed the bank's rights under the ECHR, and that it was introduced in a procedurally unfair way. In his leading judgment, Lord Neuberger expressed his agreement with the first instance Court that Article 6(1) of the ECHR applied to the proceedings, and that in terms of both Strasbourg and English case law, the Treasury was obliged to afford the bank sufficient disclosure to enable it to give effective instructions about the essential allegations made against it. The Treasury argued that Mitting J had erred in his rigid interpretation of the case law and failed to appreciate that a balance needed to be struck between the rights of the party subject to an order and the public interest. His

\textsuperscript{1108} Section 80.

\textsuperscript{1109} Under Section 63 of the CTA.

\textsuperscript{1110} The direction was contained in the Financial Restrictions (Iran) Order 2009, made pursuant to schedule 7 to the Counter-Terrorism Act 2008.
Lordship, however, pointed out that there are a set of minimum rights which Article 6(1) accords to any party involved in litigation to which the Article applies. In dismissing both appeals, Lord Neuberger reiterated that every party to litigation has the right to be given enough information concerning the evidence against him for effective legal instructions to be imparted. Lords Kay and Sullivan agreed with Lord Neuberger. This case presents further evidence of the more liberal approach of the United Kingdom’s Courts have adopted towards the Convention in the 21st Century.

6. **Terrorism Prevention and Investigation Measures Act 2011**

6.1 **Background**

On 13 May 2010, Gordon Brown announced that he was resigning as Prime Minister. Less than two hours later, Conservative leader, David Cameron become the youngest Prime Minister in almost 200 years. In order to unseat Brown, Cameron, along with Nicholas Clegg, leader of the Liberal Democrats, formed the first coalition government since the Second World War. The Coalition’s Programme for Government, launched on 20 May 2010, stated *inter alia* that the government would ‘urgently review control orders as part of a wider review of counter-terrorist legislation, measures and programmes.’ On 13 July 2010 the Home Secretary made a statement to the House of Commons confirming that such a review was underway and on 26 January 2011 the government published its Review of Counter-Terrorism and Security Powers. The review findings and recommendations included a commitment to put an end to control orders and introduce a replacement system of terrorism prevention and investigation measures (TPIM). As with the PTA 2005’s control orders, these would be civil preventative measures intended to protect the public from the risk posed by certain suspected

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1112 For a copy of the relevant parts of the government’s programme, see http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk/civil-liberties/
1113 Hansard, House of Commons, columns 797 to 809.
1114 Cm 8004. For a copy of the review findings and recommendations, see http://www.official-documents.gov.uk/document/cm80/8004/8004.pdf
1115 By repealing the PTA 2005.
terrorists\textsuperscript{1116}. The TPIM would impose restrictions on those subjected to them, intended to prevent or disrupt their engagement in terrorism-related activity. The Home Secretary believed that the regime would be capable of imposing less intrusive restrictions than those available under the PTA 2005. The review also stated that there would be increased safeguards for the civil liberties of those subject to the measures\textsuperscript{1117}.

6.2 Legislation

The Terrorism Prevention and Investigation Measures Bill was introduced to Parliament on 23 May 2011 and received royal assent on 14 December 2011. The main purpose of the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA) is to abolish control orders and introduce a new regime to protect the United Kingdom from terrorism. Section 1 of the TPIMA repeals the PTA 2005 and Section 2 introduces a replacement system of terrorism prevention and investigation measures (TPIM).

The TPIMA empowers the Secretary of State to impose by way of notice, specified TPIM\textsuperscript{1118} on an individual where certain conditions have been met\textsuperscript{1119}. This represents a curtailment of the United Kingdom’s counter-terror executive powers, as the PTA 2005 did not attempt to limit the obligations which the Secretary of State could impose\textsuperscript{1120}. The conditions under which the TPIMA allows for TPIMs to be imposed are i) the Secretary of State must reasonably believe that the individual concerned is, or has been, involved in terrorism-related activity (TRA)\textsuperscript{1121}; ii) some or all of the activity must be new TRA\textsuperscript{1122}; iii) the Secretary of State must reasonably consider that

\textsuperscript{1116} Those suspected terrorists, who cannot be prosecuted or in the case of foreign nationals, cannot be deported.
\textsuperscript{1117} For instance, the review stated that there would be no provision in the replacement system for derogation from the ECHR.
\textsuperscript{1118} These measures are set out in Schedule 1 of the Act.
\textsuperscript{1119} Section 3.
\textsuperscript{1120} See, Section 1(3) and 1(4) of the PTA 2005.
\textsuperscript{1121} Section 3(1). Section 4 states that involvement in TRA may include i) the commission, preparation or instigation of acts of terrorism; ii) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; iii) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; iv) conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct described in i) and ii) above.
\textsuperscript{1122} Section 3(2).
it is necessary to impose the TPIM for purposes connected with protecting members of the public from terrorism; iv) the Secretary of State must reasonably consider it is necessary to impose the TPIM for purposes connected with preventing or restricting the individual’s involvement in TRA; v) the court must have given the Secretary of State permission under Section 6, or the Secretary of State must reasonably have considered that the urgency of the case required TPIMs to be imposed without obtaining such permission. These conditions are narrower than those under which the Secretary of State could make control orders under the PTA 2005. For instance, under the PTA 2005, the Secretary of State merely had to have reasonable grounds for suspecting that the individual concerned was or had been involved in TRA. In addition, while the PTA 2005 allowed control orders to be made, imposing obligations, incompatible with individuals’ rights to liberty under Article 5 of the ECHR. Under the TPIMA this is no longer possible. The TPIMA specifies a two year time limit on measures imposed under a TPIM notice. This also represents a narrowing of the executive’s counter-terror powers, as the TPA 2005 allowed for non-derogating control orders to be renewed for 12 months on one or more occasions.

The TPIMA also places a statutory duty on the Secretary of State to keep the necessity of the measures under review while they remain in force. This represents a curtailment of the executive’s counter-terror powers as it was not a requirement under the PTA 2005.

It is thus clear that the TPIMA introduced a number of important limits to the executive’s counter-terror powers. In some other respects, the TPIMA’s provisions are very similar to those contained in the PTA 2005. For instance, the TPIMA requires the Secretary of State to seek the court's permission before imposing any TPIM, except in the most urgent cases where the notice has to be referred immediately to the court for confirmation. In addition, the TPIMA calls for a full review hearing of each case in which the court will review the Secretary of State's decision that the relevant conditions were met in relation to imposing the

1123 Section 3(3).
1124 Section 5.
1125 See Section 2(4)(b).
1126 Section 11.
1127 Schedule 2.
measures. Similar arrangements were in place under the PTA 2005. The TPIMA also requires the Secretary of State to consult the chief officer of the appropriate police force on the prospects of prosecuting an individual subject to, or about to be subject to, a TPIM notice for a TRA. The TPIMA places a statutory duty on the chief officer to report back to the Secretary of State on the on-going review of the investigation of the individual’s conduct. A similar arrangement formed part of the PTA 2005. Section 12 and 13 of the TPIMA allow the Secretary of State to revoke, revive, or vary the measures specified in, a TPIM. The individual to whom a TPIM notice relates may also make an application to the Secretary of State for i) the variation of measures specified in the TPIM notice or ii) the revocation of the TPIM notice. The Act also allows individuals to appeal against refusal of a request to revoke or vary the measures. The above powers are similar to those found in the PTA 2005. The Act also requires the Secretary of State to appoint an independent reviewer to carry out an annual review of the operation of the TPIMA. The Act also obliges the Secretary of State to report to Parliament on the exercise of powers under the TPIMA. The TPIMA creates the offence of contravening a measure in a TPIM without reasonable excuse. Again, these provisions appeared in similar form in the PTA 2005.

It is thus apparent that the TPIMA borrowed extensively from the provisions of its predecessor, the PTA 2005. In other respects, however the TPIMA increased the scope of the executive’s counter-terror powers. Schedule 5 introduces specific powers

\[1128\] Section 8(4) and 9.
\[1129\] See Section 3.
\[1130\] See Section 3.
\[1131\] See Section 8.
\[1132\] See, Section 8.
\[1133\] Section 12(1) allows for the variation of TPIM where i) the variation consists of the relaxation or removal of measures; ii) the variation is made with the consent of the individual; or iii) the Secretary of State reasonably considers that the variation is necessary for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity.
\[1134\] Section 12(2).
\[1135\] Section 13(3).
\[1136\] Section 16.
\[1137\] See Section 7.
\[1138\] See Section 14.
\[1139\] See Section 7.
\[1140\] See Section 14.
of entry, seizure, search and retention in relation to TPIMs. This Schedule confers powers of entry, search, seizure and retention on constables in connection with the imposition of measures on individuals. Such provisions were wholly absent from the PTA 2005 and thus represent extensions to the United Kingdom’s executive’s counter-terror powers. Paragraph 4A empowers constables to use reasonable force, where necessary, for the purpose of exercising any of the powers conferred by Schedule 5. Paragraph 5 empowers constables to enter and search any premises for purposes of serving a TPIM notice. Paragraph 6 allows constables to search, without a warrant, the individual being subjected to the TPIM or the premises at time of serving TPIM notice, where a TPIM notice is being, or has just been, served on an individual. Paragraph 5(6) empowers constables to seize anything found in the course of a search i) for the purpose of ascertaining whether measures specified in the TPIM notice are being or are about to be contravened by the individual; ii) for the purpose of securing compliance by the individual with measures specified in the TPIM notice; or iii) if the constable has reasonable grounds for suspecting that the thing is or contains evidence in relation to an offence, and it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. Where a constable reasonably suspects that an individual in respect of whom a TPIM notice is in force has absconded, he may, without a warrant, enter and search certain specified premises\textsuperscript{1142} i) for the purposes of determining whether the individual has absconded; ii) if it appears that the individual has absconded, for anything that may assist in the pursuit and arrest of the individual. Paragraph 7(4) empowers a constable, under certain circumstances\textsuperscript{1143}, to seize anything that is found in the course of a search.

Paragraph 8(1)A empowers constables to apply for the issue of a warrant for the purpose of determining whether an individual in respect of whom a TPIM notice is in force is complying with measures specified in the notice. Such a warrant may authorise a constable to i) search the individual; ii) enter and search the individual’s place of residence or any other premises that are specified in the warrant.

\textsuperscript{1142} The specified premises are i) the individual’s place of residence; ii) other premises to which the individual has power to grant access; iii) any premises to which the individual had power to grant access and with which there is reason to believe that the individual is or was recently connected.

\textsuperscript{1143} Where, i) if the constable reasonably believes that the thing will assist in the pursuit or arrest of the individual; ii) if the constable has reasonable grounds for suspecting that the thing is or contains evidence in relation to an offence, and it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.
Paragraph 8(5) allows constables to seize anything found in the course of such a search i) for the purpose of ascertaining whether any measure specified in the TPIM notice has been, is being, or is about to be, contravened by the individual; ii) for the purpose of securing compliance by the individual with measures specified in the TPIM notice; or iii) if the constable has reasonable grounds for suspecting that the thing is or contains evidence in relation to an offence, and it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

Paragraph 10(1) empowers constables to, without a warrant, search an individual in respect of whom a TPIM notice is in force for the purpose of ascertaining whether the individual is in possession of anything that could be used to threaten or harm any person. Subparagraph (3) empowers constables to seize anything found in the course of a search i) if the constable has reasonable grounds for suspecting that the thing may be used to threaten or harm any person; ii) if the constable has reasonable grounds for suspecting that the thing is or contains evidence in relation to an offence, and it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed.

Despite these novel search, entry and seizure provisions, it is clear that overall, the TPIMA reduced the extent and reach of the United Kingdom’s executive counter-terrorism powers. Nonetheless, the Act conforms largely to the pattern set by earlier laws, (including the various EPA, the PTA 1974-1989, the TA 2000, the ATCSA and the PTA 2005) by, to an extent, adding to the number and variety of counter-terrorism powers available to the executive, while at the same introducing various limits. This is in contrast with the United Kingdom’s older counter-terror laws\(^{1144}\) which tended to be much simpler Acts, bestowing more broadly defined executive powers and lacking the degree of formalised constraints of the later laws.

6.3 Cases

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\(^{1144}\) Those laws introduced in the first half of the 20\(^{th}\) Century.
A number of reported cases dealing with the TPIMA have already come before the United Kingdom’s domestic courts\(^{1145}\). One case of particular interest is *Secretary of State for the Home Department v BM* [2012] E.W.H.C. 714 (Admin) as it provides further evidence of the United Kingdom’s domestic courts’ growing affinity for the ECHR as the decisions of the ECtHR. As previously mentioned, this enthusiasm was almost wholly absent in the 20\(^{th}\) Century.

On 6 April 2011, BM was served with a control order which was made under the PTA 2005. Shortly after, the PTA 2005 was repealed by the TPIMA. As has already been pointed out that Act abolished control orders, and replaced them with TPIM. Paragraph 1 of Schedule 8 to the TPIMA provides that a control order which is in force immediately prior the commencement date of the Act\(^{1146}\) will remain in force for a further 42 days. Following the expiry of that period, a TPIM was imposed on BM\(^{1147}\). In his judgment, Mr. Justice Collins, pointed out that the procedural requirements in relation to court proceedings following the imposition of a TPIM are substantially similar to those which applied under the control order regime. One of these requirements is the need for a hearing, in circumstances where the state wishes to rely on closed material and the Special Advocate argues that further disclosure is needed in order for there to be a fair hearing, within the meaning of Article 6 of the ECHR. Such a hearing, under the previous regime’s rules was held before Silber J. in November 2011 and further disclosure was ordered. Although the hearing before Silber J. was taken as having achieved compliance with the rules under the new TPIMA regime, Mr. Justice Collins nonetheless opted to evaluate whether, considering the extant case law involving control orders, closed material and Article 6 of the ECHR, further disclosure was required by the state.

In pursuing this course, Mr. Justice Collins began, by stating that the crucial question is whether there had been sufficient disclosure to enable the respondent to have a fair hearing, based on the fact that he knew enough to enable him to give meaningful


\(^{1146}\) 14 December 2011.

\(^{1147}\) 13 January 2012.
instructions to the Special Advocates. Mr. Justice Collins then went on to affirm that the test which must be applied in deciding whether the requirements of Article 6 have been met is set out in Secretary of State for the Home Department v AF (No. 3)[2010] 1 A.C. 269. In his leading speech, Lord Phillips acknowledged that the decision of the ECtHR in A v United Kingdom (2009) 49 E.H.R.R. 625 was binding on the House of Lords. Mr. Justice Collins then identified the following extract from A v United Kingdom (2009) 49 E.H.R.R. 625 as being the most critical sentence in that case:

‘Where, however, the open material consisted purely of general assertions and SIAC’s decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied.’

Mr. Justice Collins then went on to point on, however that in the same judgment, the ECtHR stated that there could be a fair hearing even where most of or even all the incriminating evidence remained undisclosed, provided that the open allegations were specific enough to enable the subject to meet the state’s case. Mr. Justice Collins then opined that, while it may be that the restrictions which can be imposed by TPIMs are slightly less severe than those which could be imposed by control orders, the approach to be adopted is that set out in Secretary of State for the Home Department v AF (No. 3)[2010] 1 A.C. 269. Mr. Justice Collins then cautioned, that in deciding whether there has been sufficient disclosure to enable any particular allegation to be relied on by the state, the court must recognise that there is a need to balance the protection against terrorism against the rights of the subject in question. Mr. Justice Collins then pointed out that while, that balance had to be applied in accordance with the principles set out in Secretary of State for the Home Department v AF (No. 3)[2010] 1 A.C. 269, the manner in which this was done, would depend on the facts of each individual case. Mr. Justice Collins pointed out, for instance, that Importantly, that the nature of any allegation must be considered and that is important to bear in mind that the need for disclosure is not avoided because the view is taken that there can be no answer to the undisclosed material. Mr. Justice Collins then asserted that a relevant consideration is the reaction of the subject to the information as has been disclosed to him. In support of this assertion, Mr. Justice Collins quoted from Lord
Hope’s speech in *Secretary of State for the Home Department v AF* (No. 3)[2010] 1 A.C. 269:

‘What will be needed in the application of this principle will, of course, vary from case to case. The judge is entitled to take the view that a person who really does have a case to answer will make every effort to provide his Special Advocate with the information he needs to make the challenge. He will also note that the Strasbourg court was careful not to insist on disclosure of the evidence. It is a sufficient statement of the allegations against him, not the underlying material or the sources from which it comes, that the controlled person is entitled to ask for. The judge will be in the best position to strike the balance between what is needed to achieve this and what can properly be kept closed. Thus a failure to deal with allegations to the extent which is possible having regard to the disclosure given can be taken into account against a subject.’

Mr. Justice Collins then pointed out that in the instant case, BM had made a number of statements in relation to the control order and the TPIM. Nine allegations of TRA or intended TRA since April 2009 had been brought to the attention of the respondent. Most of these allegations had been made with at least a degree of specificity. Mr. Justice Collins then distinguished the instant case from that of *Secretary of State for the Home Department v MB* [2007] Q.B. 41, where nothing beyond general allegations was disclosed. The respondent’s representative, Mr. Otty submits that none of the allegations provide enough detail to enable BM to be able to deal with them effectively. Mr. Otty submits, that there must be more than an opportunity to guess at what might lie behind the various allegations. Mr. Justice Collins then stated that it is here that the court has to strike the balance between protection of the public from TRA and the need for a subject to be treated fairly.

Mr. Justice Collins went on to state that BM knows what he has or has not done and that the allegations are based on some information available to the Security Service. He will not know the source or sources of any information nor the extent of it. Nonetheless, Mr. Justice Collins continued, he can give instructions which deal with what he may have said or done to show that it was nothing to do with TRA. In
addition, Mr. Justice Collins pointed out that BM knows the identities of those with whom he must have no contact and it is open to him to explain what his relationships, if any, with them are. In particular, he could explain that such relationships have nothing to do with terrorism. Mr. Justice Collins then pointed out that while BM is not obliged to explain himself, his failure to do so when he could, can properly be used to form the view that an adverse conclusion is justified. Mr. Justice Collins concluded that there had been sufficient disclosure of the specific allegations made and observed that BM’s ongoing intentions were supported by those allegations and well as his reaction to the open evidence. Mr. Justice Collins was thus satisfied that there was reason to believe that BM has been, is and will continue to be involved in TRA and concluded that a TPIM was necessary.

7. Protection of Freedoms Act 2012

7.1 Background

Part 5 of the TA 2000 contains ‘counter-terrorist powers’ including two police stop and search powers. Section 43 of the TA 2000 enables a constable to stop and search a person they reasonably suspect to be a terrorist to discover whether that person has in his or her possession anything that may constitute evidence that they are a terrorist\textsuperscript{1148}. Section 44\textsuperscript{1149} of the TA 2000 enables a constable to stop and search any person or any vehicle within an authorised area for the purposes of searching for articles that could be used in connection with terrorism. This power does not require any grounds for suspicion that such items will be found.

In the case of Gillan and Quinton v The United Kingdom 50 E.H.R.R. 45, the ECtHR held that the stop and search powers in Section 44 violated Article 8 of the ECHR because they were inadequately circumscribed and therefore not ‘in accordance with the law’. Section 41\textsuperscript{1150} of the TA 2000 brought into effect permanent legislation on pre-charge detention which allowed the police to detain a terrorist suspect for up to seven days without charge. The Terrorism Bill introduced in the 2005-06 Session by

\textsuperscript{1148} This power extends to stopping but not to searching a vehicle.

\textsuperscript{1149} Together with the associated provisions in Sections 45 to 47.

\textsuperscript{1150} Together with Schedule 8.
the then government included amendments to Schedule 8 to the 2000 Act to extend the maximum period of pre-charge detention from 14 to 90 days. However, ultimately the maximum period of pre-charge detention was set at 28 days and this is now encapsulated in Section 25 of the TA 2006. The Counter-Terrorism Bill introduced in the 2007-08 Parliamentary session included provisions to extend the maximum period of pre-charge detention to 42 days. The relevant clauses were rejected by the House of Lords on 13 October 2008\textsuperscript{1151} therefore preserving the 28 day maximum put in place by the TA 2006.

The Coalition Government’s Programme for Government\textsuperscript{1152} states that the government ‘will introduce safeguards against the misuse of anti-terrorism legislation’. The Home Secretary announced a review of counter-terrorism and security powers in an oral statement to Parliament on 13 July 2010\textsuperscript{1153}. The outcome of the review was reported in Parliament on 26 January 2011\textsuperscript{1154}. The review concluded \textit{inter alia} that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that relevant provisions of the TA 2006 should be repealed. The review also found that a power to stop and search individuals and vehicles without reasonable suspicion in exceptional circumstances was operationally justifiable. Nonetheless, the review recommended significant changes to bring the power into compliance with ECHR\textsuperscript{1155}. Lord Macdonald of River Glaven QC, who provided independent oversight of the review, published a separate report of his findings\textsuperscript{1156}. Lord MacDonald agreed with the conclusions of the review mentioned above.

\textsuperscript{1151} Hansard, column 491 to 545.
\textsuperscript{1152} Section 3 on Civil Liberties.
\textsuperscript{1153} Hansard, House of Commons, columns 797 to 809.
\textsuperscript{1154} Hansard, House of Commons, columns 306 to 326. For a copy of the review, see, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary2
\textsuperscript{1155} These recommended changes included i) altering the test for authorisation to be where a senior police officer reasonably suspects that an act of terrorism will take place; ii) altering the laws so that an authorisation could only be made where the powers are considered ‘necessary’, rather than the current requirement of merely ‘expedient’; iii) the maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days; iv) the duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent a suspected act of terrorism; and v) the purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.
\textsuperscript{1156} For a copy of the report, see http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary39
The Protection of Freedoms Act 2012 (PFA) was, in part, enacted to give effect to the review’s conclusions in respect of the use of stop and search powers and the maximum period of pre-charge detention for terrorist suspects.\footnote{The PFA also deals \textit{inter alia} with i) the regulation of biometric data; ii) the regulation of CCTV and other surveillance technology; and iii) the protection of property from disproportionate enforcement action.}

7.2 \textit{Legislation}

To a large extent, the PFA serves to reduce the scope and reach of the United Kingdom’s executive’s counter-terror powers.\footnote{Part 4 of the PFA deals with counter-terrorism powers.} For example, Section 57(1) of the PFA amends Paragraph 36(3)(b)(ii) of Schedule 8 to the TA 2000 so as to make the maximum period of pre-charge detention, as provided for by that Act, 14 days. Section 57(2) repeals Section 25 of the TA 2006 so as to remove the order-making power contained in that provision and as a result, the ability to revert to a maximum period of pre-charge detention of 28 days, by way of that mechanism. Section 58 inserts a revised Paragraph 38 into Schedule 8 to the TA 2000, providing a new power for the Secretary of State to make an order that will increase the maximum period of detention to 28 days. The power to make an order can only be used where the Secretary of State considers it necessary by virtue of urgency, and can only be exercised during a period when Parliament is dissolved or in the period before the first Queen’s Speech of a new Parliament. Where an order is made, the maximum period of pre-charge detention under Schedule 8 is extended to 28 days. Any applications for warrants of further detention which would take the period of detention beyond 14 days must be made to a senior judge, and be made with the consent of the Director of Public Prosecutions.\footnote{In England and Wales, or the Director for Public Prosecutions for Northern Ireland, in Northern Ireland or the Lord Advocate, in Scotland.} Section 58(2) provides that an order made under the revised Paragraph 38 must be approved by Parliament within 20 days. Section 58(3) requires the person appointed as Independent Reviewer of Terrorism Legislation under the TA 2006, or someone acting on his behalf, to conduct a review of any application for a warrant of further detention which takes the period of detention in respect of an individual or individuals, beyond 14 days. Another way
in which the PFA Act has curtailed the state’s executive powers is by repealing Sections 44 through 47 of the TA 2000\textsuperscript{1160}.

Nonetheless, these repealed powers were replaced by way of Section 60 of the PFA. In some respects, these replacement executive powers have greater reach than those they replaced. For instance, Section 60(2) of the PFA supplements the existing stop and search powers contained in Section 43 of the TA 2000, by providing that where a vehicle is stopped in the course of stopping a person under Section 43, the constable may search the vehicle as well as the person. In addition, Section 60(3) creates a new stop and search power in respect of vehicles by inserting a new Section 43A into the TA 2000. Section 43A empowers the police to stop and search a vehicle, including its driver, any passengers and anything in or on the vehicle, if a constable reasonably suspects the vehicle is being used for the purposes of terrorism. Anything discovered during a search which the officer reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism, may be seized and retained.

However, in most respects, the replacement powers set out in the PFA are more narrowly defined than the repealed powers. For example, Section 61 inserts a new Section 47A into the TA 2000\textsuperscript{1161}. The new powers allow a senior police officer to issue an authorisation to allow the stop and search of vehicles and pedestrians, to search for anything that may constitute evidence that a person is a terrorist, or that the vehicle is being used for the purposes of terrorism. A constable in uniform may exercise the powers, once authorised, regardless of whether he or she has a reasonable suspicion that he or she will find such evidence. Under the new Section 47A, an authorisation can only be given if the person giving it reasonably suspects that an act of terrorism will take place and considers that the authorisation of the powers is necessary to prevent such an act and that the area or place specified in the authorisation are no greater than is necessary and the duration of the authorisation is no longer than is necessary. Under the original TA provisions, authorisation could be given on the mere basis of expediency\textsuperscript{1162}. In addition, under the new PFA provisions,

\textsuperscript{1160} By way of Section 59 of the PFA. Sections 44 through 47 of the TA 2000 dealt with stop and search powers.
\textsuperscript{1161} Section 47A replaces in part the powers contained in Sections 44 to 46 of the 2000 Act, repealed by Section 59 of the PFA.
\textsuperscript{1162} Section 44(3).
any senior police officer who has made an authorisation orally under the new Section 47A, has a duty to confirm it in writing as soon as reasonably practicable. Further, Paragraph 6 provides that individual authorisations cannot be in place for any period exceeding 14 days. In addition, Paragraph 7 empowers the Secretary of State to amend any authorisation before confirming it, shortening its duration or limiting the geographical extent of the authorisation. Moreover, Paragraph 9 of Schedule 6B, confers a power on a senior police officer to cancel an authorisation, shorten its duration, or reduce its geographical extent.

Certain other elements of Part 4 of the PFA mirror more closely the repealed provisions of the TA 2000. For instance, Paragraph 1 of the new Schedule 6B states that a constable searching a person in public under powers given by the new Section 47A, cannot require that person to take off more than headgear, footwear, outer coat, jacket or gloves. This provision was originally reflected in Section 45(3) of the TA 2000. Paragraph 2 provides that a person or vehicle can be detained for as long as is reasonably required to search the person or vehicle, at or near to the place where the person or vehicle is stopped. This provision was originally contained in Section 45(4) of the TA 2000. Paragraph 4 requires that if a pedestrian or vehicle is stopped under new Sections 47A and the pedestrian or driver of the vehicle requests a statement that they were stopped by virtue of those Sections, then a written statement must be provided, as long as it is requested within 12 months of the stop taking place. A similar provision was originally in place in the form of Section 45(5) of the TA 2000. Paragraph 5 states that an authorisation given under new Section 47A has effect from the time it is given and ends at the time or date specified in the authorisation, subject to the following Paragraphs of the Schedule. Paragraph 7 places a requirement on the senior police officer who has given an authorisation, to inform the Secretary of State as soon as reasonably practicable. If the Secretary of State does not confirm the authorisation within 48 hours, it ceases to have effect. Substantially similar provisions were originally set out in Section 45(1), (3) and (4) of the TA 2000. Paragraph 8 gives

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1163 Paragraph 3 of Schedule 6B to the TA 2000, as inserted by Schedule 5 to the PFA.
1164 See, Schedule 6B to the TA 2000, as inserted by Schedule 5 to the PFA.
1165 See, Schedule 6B to the TA 2000, as inserted by Schedule 5 to the PFA.
1166 Schedule 5 to the PFA inserted a new Schedule 6B into the TA 2000 which makes further provision about authorisations and searches in specified areas or places, as created by the new Section 47A.
the Secretary of State a power to cancel an authorisation at any time. This power was originally reflected in Section 45(6) of the TA 2000.

Section 62 of the PFA inserts new Sections 47AA through 47AE into the TA 2000. It makes provision for a code of practice for terrorism stop and search powers. The new Section 47AA places a duty on the Secretary of State to prepare a code of practice about the powers in Sections 43 and 43A of the TA 2000 and those created by new Section 47A of the 2000 Act. The new Section 47AB makes provision for the code to be brought into force by order, subject to the affirmative resolution procedure. The new Section 47AC requires that the code is kept under review and that any amendments to the code or replacement code are subject to the same parliamentary procedure as provided for in new Section 47AB. The new Section 47AD requires that the code and any altered versions are published. The new Section 47AE(1) requires a police officer, or police community support officer to have regard to the code when exercising the powers to which it relates. Similar provisions were in place under Paragraphs 5 and 6 of Schedule 14 to the TA 2000.

Despite the fact that the PFA introduced a small number of novel counter-terror policies, it is clear that on the whole, it narrowed the United Kingdom’s executive’s counter-terror powers. Along with the TPMIA, the PFA provides proof that of late, there has been an acceleration in the number of formal constraints on counter-terror executive powers. Such constraints have been in evidence since the end of the Second World War, but it is clear that recent times have witnessed unprecedented enthusiasm for reforming measures. In other respects, the PFA conforms to the pattern set by earlier laws, (including the various EPA, the PTA 1974-1989, the TA 2000, the ATCSA, the PTA 2005 and the TPIMA) in that the counter-terrorism powers it creates are described very specifically set out in detail. This is in contrast with the

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1167 These are stop and search powers, exercisable on the basis of reasonable suspicion.
1168 This procedure is set out in Section 123(4) of the TA 2000, which states that, no order or Regulations can be made unless both Houses of Parliament have approved these. In urgent cases, the Section allows the Secretary of State to make temporary orders or Regulations.
1169 The new Section 47AE(2) provides that a failure to adhere to any aspects of the code of practice would not, of itself, render a person liable to civil or criminal proceedings. However, in terms of the new Section 47AE(3), the search powers code is admissible in criminal or civil proceedings. In addition, under the new Section 47AE(4), and a court or tribunal may take into account any failure by a police officer, or community support officer to comply with the duty to have regard to the code.
United Kingdom’s older counter-terror laws\textsuperscript{1170} which tended to be much simpler Acts, bestowing more broadly defined executive powers and lacking the degree of formalised constraints (on the exercise of those powers) that was to eventuate.

7.3 Cases

As yet, the PFA has not been tested in Courts to the extent that a number of earlier counter-terrorism laws have been\textsuperscript{1171}. The Courts have been approached on a few occasions to settle matters relating to the Act, but on those occasions, the Sections of the PFA under review were not connected with counter-terror provisions\textsuperscript{1172}.

8. Conclusion

The first years of the 21\textsuperscript{st} Century saw an unprecedented volume of counter-terror laws promulgated in the United Kingdom. On the whole, each successive Act had the effect of expanding the number and scope of powers available to the state to deal with terrorism. Nonetheless, the new century has also heralded reforms in the area of counter-terror executive laws, unprecedented in number and scope. It is also interesting to note that some of the counter-terror mechanisms introduced by Westminster, such as the ‘control order’ system were abandoned after relatively short periods. This is in stark contrast to the situation which prevailed in the first part of the 20\textsuperscript{th} Century where many harsh laws were on the statute books for decades\textsuperscript{1173}.

It is also noteworthy that counter-terror laws currently in place in the United Kingdom are to an extent more narrowly defined, measured laws than those enacted prior to the Second World War. These observations are particularly startling when one considers that the United Kingdom’s most serious terror threats emerged i) in the latter half of

\textsuperscript{1170} Those laws introduced in the first half of the 20\textsuperscript{th} Century.
\textsuperscript{1172} See, for example, RMC & Anor, R (on the application of) v Commissioner of Police of the Metropolis & Ors [2012] E.W.H.C. 1681 (Admin); and Hicks & Ors, R (on the application of) v Commissioner of Police for the Metropolis [2012] E.W.H.C. 1947 (Admin) (18 July 2012).
\textsuperscript{1173} See, for example, the Civil Authorities (Special Powers) (Northern Ireland) Act 1922, which was only repealed in 1973.
the 20\textsuperscript{th} Century\textsuperscript{1174}; and then again in 2001. This thesis will argue that this anomaly is largely due to the development and proliferation of international human rights law. I will also argue that international treaty law has impacted on the evolution of the United Kingdom’s counter-terror laws in a way which flies in the face of conventional thinking around the relationship between international law and the United Kingdom’s domestic law. I will contend that even unincorporated treaties have impacted on the development of the United Kingdom’s counter-terror laws and that this casts doubt on the assumed Dualist nature of that nation. These observations have important ramifications for the question of whether international law constitutes actual law. This is because, one of the reasons often cited for concluding that international law does not amount to law in the true sense of the word, is that it is ineffective.

This chapter has also revealed a general trend in relation to the domestic case law concerning executive powers under the various 21\textsuperscript{st} Century counter-terror laws. Aside from becoming more comfortable with the role given to them by the 1998 HRA, the Courts have begun to discuss and reference international law, including unincorporated treaties\textsuperscript{1175}. This development approximates the ‘creeping Monism’ identified by Waters in her study of various common law jurisdictions\textsuperscript{1176} and casts further doubt on the traditional Dualist label applied to the United Kingdom.

Quite patently, the number of powers available to the executive has increased over time. Nonetheless, the real extent of the executives overall power has narrowed. It is also evident that there has been a growing proliferation over the years of counterbalances on executive powers. As already stated in Chapter 2, I will contend in this thesis, that a similar process to Koh’s ‘transnational legal process’\textsuperscript{1177} has been responsible for the trends sketched above. In other words, international law has over time been meaningfully internalised by the United Kingdom, but not by way of an incorporating Act. If this is indeed the case, then I will have succeeded in contributing to the defence of international law against those who doubt its status as real law.

\textsuperscript{1174} 1972 is the year in which most lives were lost due to political violence in Northern Ireland.
\textsuperscript{1175} In Chapter 2 it was demonstrated that in the previous century the Courts adopted a markedly more conservative, Dualist orientated approach.
\textsuperscript{1176} Waters (2007) at 635.
\textsuperscript{1177} Koh (1999) at 1399.
CHAPTER 4

INTERNATIONAL HUMAN RIGHTS LAW AND THE UNITED KINGDOM’S COUNTER-TERROR POLICIES AND PROCEDURES

1. Introduction

A chronological examination of the counter-terror laws in place in Northern Ireland and on the British Mainland in the 20th Century\textsuperscript{1178} reveals a distinct pattern. The laws passed at the beginning of the 20th Century were concise, simple pieces of legislation, which bestowed remarkably broad counter-terror powers on the United Kingdom’s executive. These early 20\textsuperscript{th} Century laws also contained very few mechanisms designed to constrain the authorities’ abuse of power. In contrast the anti-terror laws enacted later in the 20th Century were more lengthy and complex, bestowing on the executive an ever increasing number of more specifically defined powers. The specificity of these laws resulted in a narrowing of the powers exercisable by the United Kingdom’s executive. Moreover, these later laws introduced a variety of reforming measures, which placed further limits on the powers available to authorities to counter terrorism. This legislative evolution, cannot simply be ascribed to changing terrorist threat levels over time, as the 20th Century saw largely constant levels of threat in Northern Ireland and irregular, sporadic threats on the British mainland. Indeed, it might be argued that if anything, the threat levels experienced on the mainland were more serious in the latter half of the 20th Century than in the preceding fifty years. The legislative trend sketched above seems therefore somewhat of an historical anomaly.

The first years of the 21st Century saw an unprecedented volume of counter-terror laws enacted in the United Kingdom\textsuperscript{1179}. Although a number of reforms were introduced, on the whole, each successive Act had the effect of expanding the number and scope of powers available to the state to deal with terrorism. Nonetheless, the general pattern followed by the United Kingdom’s 20\textsuperscript{th} Century counter-terror laws seems to be continuing in the first years of the 21\textsuperscript{st} Century. The laws currently in

\textsuperscript{1178} For a full discussion of these laws, see Chapter 2.
\textsuperscript{1179} For a full discussion of these laws, see Chapter 3.
place in the United Kingdom are, to an extent, more narrowly defined than those enacted prior to World War Two. These observations are somewhat surprising when one considers that the United Kingdom’s most serious terror threats emerged in the latter half of the 20th Century and the first years of the 21st Century.

In this thesis I wish to examine whether the trend described above has, to any extent, been the result of the development of international human rights law. One particular area of interest which I wish to investigate, is whether international human rights treaties impacted on the United Kingdom’s counter-terror laws prior to the promulgation of the HRA 1998. In order to answer these questions I intend to i) trace the origins and development of international human rights law midway through the 20th Century; ii) create an historical inventory of the United Kingdom’s international human rights treaty obligations; iii) examine the interaction over time between the bodies tasked with monitoring states' adherence to treaty obligations and the United Kingdom, particularly around that nation's counter-terror laws and policies; and iv) examine the decisions of the Strasbourg based ECtHR of Human Rights, involving the United Kingdom’s counter-terror laws. This will then allow me to i) identify the direct ways in which unincorporated international human rights treaties have impacted on the United Kingdom’s counter-terror laws; and ii) comment on whether these unincorporated treaties have had any indirect influence on the United Kingdom’s terrorism related laws. This latter aim will be achieved by observing whether there is a ‘chronological fit’ between the trend observed in Chapters 2 and 3; and the interaction over time of international human rights law and the United Kingdom in relation to that state’s domestic counter-terror laws.

If I am able to show that unincorporated international human rights treaties have influenced the United Kingdom’s domestic counter-terror laws, this would bring into question the traditional Dualist view which prevails, concerning that nation’s treatment of unincorporated treaties. This would consequently contribute to a more ambitious endeavour, namely, an attempt to counter the widely held scepticism concerning international law as law in the true sense of the word.

2. International Human Rights Law and the United Kingdom’s Counter-terror Laws Prior to 1945
2.1 The Origins of International Human Rights Law

The recognition and protection of human rights in the England can be traced back to the 13th Century. In June 1215, King John I of England assented to a document drawn up by a group of the country's foremost nobles. The nobility of the day were unhappy as they believed that the monarch was overreaching his authority. The manuscript assented to by John I was the first draft of one of the most important and influential legal charters ever known, namely the Magna Carta. The Magna Carta is widely acknowledged as the first proclamation that the Crown’s subjects had legal rights and that the monarch was bound by the rule of law. It became the first document to set out the right of habeas corpus and was the predecessor to England’s first Bill of Rights, which was passed in 1689 and codified the civil and political rights of all men, not only the nobility. The Bill of Rights guaranteed, inter alia, i) freedom from taxation by royal prerogative; ii) freedom to petition the monarch; iii) freedom to elect members of Parliament without interference; iv) freedom of speech and of parliamentary privilege; v) freedom from cruel and unusual punishment; and vi) freedom from fine and forfeiture without trial. It is therefore apparent that human rights have enjoyed a measure of recognition and protection in England for many centuries.

It is also true, however, that in 17th Century England, contemporary international human rights treaties would have been anathema to Parliament. This is because until midway through the 20th Century the internal affairs of any state were considered sacrosanct and beyond the reach of international law. As a result, the United Kingdom’s early 20th Century counter-terror laws were all promulgated at a time where the protection of individuals’ human rights was beyond the scope of international law. The value which was attached to the notion of sovereignty is neatly

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1180 Hindley (2008) at 205.
1182 Id at 23
1183 Id at 24.
1184 The Bill of Rights (1689), I Will & Mary, session 2, c. 2.
1185 Dugard (2005) at 308; Goodrich (1949) at 14.
reflected in Article 15 of the Covenant of the League of Nations, which deals with disputes between Members of the League:

‘If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.’1187

Further testament to the value which states placed on sovereignty, prior to the Second World War, is the failed Olney-Pauncefote Arbitration Treaty of 1897. This treaty was an attempt to establish a system of arbitration in order to resolve disputes between the United Kingdom and the United States. It was drafted primarily by Secretary of State Richard Olney and Sir Julian Pauncefote, British ambassador to the United States. Although Westminster ratified the treaty, ratification failed in the Senate. According to Goodrich, one of the reasons for this was the Senate’s desire to insulate the United States’ domestic jurisdiction from international obligations.1188

The approach sketched above contributed significantly to Europe’s permissive attitude towards Hitler and Germany in the lead up to the Second World War1189. The atrocious treatment by Germany of her own nationals before and during the conflict convinced world players that a change in attitude was essential1190. The London Charter of the International Military Tribunal was a decree issued on August 8th 1945, which allowed for the trial of Nazi leaders1191. The Charter was a significant milestone in the development of international human rights law as it signalled the end of the unqualified supremacy of national law1192.

2.2 International Law and the United Kingdom’s Counter-terror Laws: 1900 - 1944

1187 Article 15(8).
1188 Goodrich (1949) at 15.
1189 Ibid.
1190 Ibid.
1191 Ibid.
1192 Ibid.
As already discussed, the period 1900 to 1944 was characterised by a general aversion to international law interfering in the domestic affairs of states. The principal counter-terror laws in place in the United Kingdom in the same period\footnote{The Defence of the Realm Acts 1914 – 1915 (DORA), the Restoration Of Order In Ireland Act 1920 (ROIA), the Civil Authorities (Special Powers) (Northern Ireland) Acts 1922 – 1943 (SPA). For a full discussion of these laws, see Chapter 2.}, granted extraordinarily broad powers to the United Kingdom’s executive and contained very few mechanisms to prevent abuse of power by the authorities. Many of the specific wartime counter-terror powers contained in the DORA later found their way into both the ROIA and the SPA. Although a small number of important reforms were introduced by the SPA, at the same time a variety of novel, explicit powers became available to executive to deal with terrorism. In contrast, the Prevention of Violence (Temporary Provisions) Act 1939\footnote{For a full discussion of this law, see Chapter 2.} bestowed a limited number of relatively narrowly defined (albeit harsh) counter-terror powers on the United Kingdom’s executive. This constituted a break with the past, in which counter-terror laws had granted far broader powers to the executive. The PVA also differed from its predecessors, in that it contained a fair number of mechanisms designed to prevent abuse of power by the authorities.

3. International Human Rights Law and the United Kingdom’s Counter-terror Laws From 1945 to 1975

3.1 The United Nations Charter

The Charter is the foundational treaty of the United Nations. It was signed by the United Kingdom\footnote{Together with 49 of the other founding members of the United Nations.} on 26 June 1945 and came into force on 24 October the same year. The Charter’s Preamble makes clear the organisation’s commitment to human rights, and aims to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women\footnote{The Charter’s Preamble has been referenced in a number of cases including Al-Jedda, R (on the application of) v Secretary of State for Defence [2007] U.K.H.L. 58.}. A number of the Charter’s Articles reference human rights\footnote{Articles 1 and 13.}, however, most significant in this regard are Article 55 and 56. Article 55 commits the United Nations to promoting
'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’. In Article 56 all member states commit themselves to act in co-operation with the United Nations in order to achieve the purposes set out in Article 55. Despite these references to human rights, it is not clear whether the Charter creates any specific obligations. In any event, it contains no enforcement mechanisms\textsuperscript{1198}. The United Kingdom gave limited effect to the Charter in its domestic law by means of the United Nations Act 1946 (UNA)\textsuperscript{1199}. The Act dealt with Article 41 of the Charter\textsuperscript{1200}, which empowered the Security Council to require member states to take certain non-military actions in order to deal with threats to peace and acts of aggression. None of the Charter’s human rights Articles has been incorporated in the United Kingdom’s domestic law.

\subsection*{3.2 The Universal Declaration of Human Rights}

On 10 December 1948 the United Kingdom, together with 47 other members of the General Assembly, voted in favour of the Universal Declaration of Human Rights (UDHR)\textsuperscript{1201}. The UDHR proclaims various first-generation civil and political rights together with other aspirational, second-generation, economic, social and cultural rights. Some of the rights\textsuperscript{1202} contained in the UDHR which could potentially have impacted on the United Kingdom’s counter-terror executive powers include i) the right to life, liberty and security of person\textsuperscript{1203}; ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment\textsuperscript{1204}; iii) the right not to be subjected to arbitrary arrest, detention or exile\textsuperscript{1205}; iv) the right to a fair and public hearing by an independent and impartial tribunal\textsuperscript{1206}; v) the right to be

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\textsuperscript{1198} Chapter VII of the Charter bestows upon the Security Council various powers to deal with any ‘threat to the peace, breach of the peace, or act of aggression’.


\textsuperscript{1200} Article 41 empowered the Security Council to decide what non-military measures should be employed to give effect to its decisions and to call upon the Members of the United Nations to apply such measures. These measures could include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.


\textsuperscript{1202} All of these are first-generation rights.

\textsuperscript{1203} Article 3.

\textsuperscript{1204} Article 5.

\textsuperscript{1205} Article 9.

\textsuperscript{1206} Article 10.
presumed innocent until proved guilty\textsuperscript{1207}; vi) the right not to be subjected to arbitrary interference with privacy, family, home or correspondence\textsuperscript{1208}; vii) the right to freedom of movement and residence within the borders of each signatory state\textsuperscript{1209}; viii) the right to seek and enjoy asylum in other countries\textsuperscript{1210}; ix) the right not to be arbitrarily deprived of property\textsuperscript{1211}; x) the right to freedom of opinion and expression\textsuperscript{1212}; and xi) the right to freedom of peaceful assembly and association\textsuperscript{1213}.

The Declaration is not a treaty, however, but a resolution of the General Assembly and is therefore not legally binding on state parties\textsuperscript{1214}. During the period under review, 1945 to 1975, the UDHR remained unincorporated into the United Kingdom’s domestic law.

3.3 The European Convention on Human Rights

The European Convention on Human Rights (ECHR)\textsuperscript{1215}, formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms, was drafted in 1950 by the Council of Europe and came into force on 3 September 1953. The United Kingdom signed the Convention on 4 November 1950 and it was ratified on 8 March 1951.

A number of the civil and political rights contained in the UDHR are also reflected in the ECHR, including i) the right to life\textsuperscript{1216}; ii) the right not to be subjected to torture or inhuman or degrading treatment or punishment\textsuperscript{1217}; iii) the right to liberty and security of person\textsuperscript{1218}; iv) the right to a fair and public hearing\textsuperscript{1219}; v) the right to be presumed innocent until proved guilty\textsuperscript{1220}; vi) the right to respect for private and

\textsuperscript{1207} Article 11(1).
\textsuperscript{1208} Article 12.
\textsuperscript{1209} Article 13(1).
\textsuperscript{1210} Article 14(1).
\textsuperscript{1211} Article 17(2).
\textsuperscript{1212} Article 19.
\textsuperscript{1213} Article 20.
\textsuperscript{1214} Nonetheless the UDHR inspired treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights.
\textsuperscript{1215} 4 November 1950. ETS 5.
\textsuperscript{1216} Article 2.
\textsuperscript{1217} Article 3.
\textsuperscript{1218} Article 5.
\textsuperscript{1219} Article 6(1).
\textsuperscript{1220} Article 6(2).
family life, home and correspondence\textsuperscript{1221}; vii) the right to freedom of expression\textsuperscript{1222} and viii) the right to freedom of peaceful assembly and freedom of association\textsuperscript{1223}.

The ECHR also introduced a number of rights, which may have impacted on the United Kingdom’s counter-terror laws, including i) the right of any arrested person to be informed promptly of the reasons for the arrest and details of any charges brought\textsuperscript{1224}; ii) the right of any arrested or detained person to be brought promptly before a judge or other judicial officer and to a trial within a reasonable time or to release pending trial\textsuperscript{1225}; iii) the right of any arrested or detained person to bring proceedings by which the lawfulness of his detention could be decided speedily and his release ordered if the detention was not lawful\textsuperscript{1226}; iv) the right of any arrested or detained person to compensation, where the state party has failed to implement any of their obligations under the Convention\textsuperscript{1227}; and v) the right of any person charged with a criminal offence to a proper defence\textsuperscript{1228}. The United Kingdom signed the first protocol to the ECHR on 20 March 1952, with ratification following on 3 November 1952. The protocol served to protect various rights including i) property rights\textsuperscript{1229}; ii) the right to education\textsuperscript{1230}; and iii) the right to free elections\textsuperscript{1231}.

In order to secure states’ observance of the ECHR, Section II established a European Commission of Human Rights (the European Commission) and a European Court of Human Rights (ECtHR). In addition, the Convention empowered the Secretary-General of the Council of Europe to compel any contracting state to furnish an explanation of how its internal laws ensured the effective implementation of the provisions of the Convention\textsuperscript{1232}. The Convention also empowered the Commission to consider inter-state complaints\textsuperscript{1233}. It also enabled non-governmental organisations,

\textsuperscript{1221} Article 8.
\textsuperscript{1222} Article 10.
\textsuperscript{1223} Article 11.
\textsuperscript{1224} Article 5(2).
\textsuperscript{1225} Article 5(3).
\textsuperscript{1226} Article 5(4).
\textsuperscript{1227} Article 5(5).
\textsuperscript{1228} See the various related rights contained in Article 6(3).
\textsuperscript{1229} Article 1 disallowed anyone from being deprived of property except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
\textsuperscript{1230} Article 2.
\textsuperscript{1231} Article 3.
\textsuperscript{1232} Section V, Article 57.
\textsuperscript{1233} Article 24.
individuals and groups of individuals to make complaints against states party to the Convention\textsuperscript{1234}. Once such petition was received by the Commission, it had to attempt to establish the facts and attempt to secure a friendly settlement\textsuperscript{1235}. Failing this, the Commission was mandated to draw up a report on the facts and provide an opinion as to whether there had been a breach. The report would then be transmitted to the Committee of Ministers who would make a final decision as to whether there had been a violation of the Convention\textsuperscript{1236}. In instances of a breach, the Committee of Ministers then prescribed a period during which the relevant contracting state had to take prescribed remedial measures\textsuperscript{1237}. Where states failed to take such measures, it fell to the Committee of Ministers to decide what action should be taken\textsuperscript{1238}.

Initially, only Signatory States, together with the Commission had the right to submit matters to the Court\textsuperscript{1239}. Each contracting state was able to decide whether or not to grant the Court jurisdiction over matters concerning the ECHR\textsuperscript{1240}. In instances where the Court found that i) a state’s action or decision was in conflict with its obligations; and ii) the internal law of the relevant country only allowed for partial reparation to be made, the Court could award just satisfaction to the injured party\textsuperscript{1241}.

\section*{3.4 International Law and the United Kingdom’s Counter-terror Laws: 1945 - 1975}

At the time the Charter was ratified and the United Kingdom voted in favour of the UDHR, the main counter-terror laws in place in the United Kingdom were the Civil Authorities (Special Powers) Acts (Northern Ireland) Acts 1922 – 1943 (SPA) and the Prevention of Violence (Temporary Provisions) Act 1939 (PVA). These laws were still in place at the time that the United Kingdom ratified the ECHR.

\begin{footnotesize}
\begin{enumerate}
\item Article 25. It should be noted, however, that each signatory state to the Convention was given the choice of whether or not to recognise the Commission’s jurisdiction in these matters. In 1966 the United Kingdom recognised the Commission’s jurisdiction to hear complaints from individuals.\textsuperscript{1235} Article 28.
\item Article 32. This can only occur if the matter has not been referred to the Court in terms of Article 48.\textsuperscript{1237}
\item Article 32(2).\textsuperscript{1238}
\item Article 32(3).\textsuperscript{1239}
\item Article 44.\textsuperscript{1240}
\item Article 46.\textsuperscript{1241}
\item Article 50.
\end{enumerate}
\end{footnotesize}
In Chapter 2, it was shown that the SPA shared a number of common attributes with the counter-terror laws that preceded it. Many of the wartime counter-terror powers adopted by the United Kingdom at the beginning of the 20th Century later found their way into the SPA. As a result, the SPA, like the DORA and ROIA before it, bestowed remarkably broad powers on the United Kingdom’s executive and contained very few mechanisms to prevent abuse of power by the authorities. A small number of important reforms were introduced by the SPA, though at the same time a host of new specific executive powers became available to authorities to counteract terrorist threats.

The PVA differed quite dramatically from its antecedents. Unlike the preceding DORA, ROIA and SPA, the PVA bestowed a limited number of relatively narrowly defined (albeit harsh) counter-terror powers on the United Kingdom’s executive. This constituted a break from the past, in which counter-terror laws had granted far broader powers to the executive. The PVA also differed from its predecessors, in that it contained a fair number of mechanisms designed to prevent abuse of power by the authorities. The PVA remained in force until 1953, at which point the legislation was allowed to expire.

The SPA remained in force until 1973, when it was repealed by the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973). Although the executive powers created under the EPA 1973 were based largely on those contained in the SPA, very often they were harsher than their antecedents had been. In addition, the specific executive powers created by the EPA 1973, were set out in far more detail than any of those made under the SPA. This specificity, however, resulted in a concomitant narrowing of the powers available to the executive to counter terrorism. It is also noteworthy that the EPA 1973 introduced a limited number of reforms, some of which made appreciable inroads into the powers available to the United Kingdom’s executive to deal with terrorist threats. In June 1974 the Gardiner Committee was mandated to appraise the workings of the EPA 1973. It is noteworthy that in its report, the Committee referenced the obligations of the United Kingdom in relation to the rights contained in the ECHR as well as to the country’s more general

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1242 The Secretary of State for Northern Ireland presented the report to Parliament in January 1975. Cmnd. 5847.
international obligations. Many of the recommendations contained in the report were carried forward into the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 (EPA 1975). As a result, the EPA 1975 introduced a number of important reforms and concessions.

The period 1945 to 1975 witnessed the birth of international human rights law as well the United Kingdom’s first encounters with that law. In the era under review, none of the international human rights treaty obligations assumed by the United Kingdom were incorporated into that nation’s domestic law. Nonetheless, the development of international human rights law and the United Kingdom’s first encounters with that law coincided with a change in the state’s counter-terror laws. On the whole, the executive powers created in the period under review became progressively more specific and set out in ever greater detail. This growing specificity resulted in a simultaneous narrowing of the powers available to the executive to counter terrorism. The first thirty years following the end of the Second World War also saw, for the first time, the introduction of a limited number of reforming measures, some of which made appreciable inroads into the powers available to the United Kingdom’s executive to deal with terrorist threats.


4.1 The International Covenant on Civil and Political Rights

The United Kingdom signed the International Covenant on Civil and Political Rights (ICCPR) on the 16th of September 1968. The Covenant was, however, only ratified on the 20th of May 1976. In the period under review, the treaty remained

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1243 The Committee maintained that the 1973 Act was not in breach of International Law, as Article 15 of the ECHR gave any contracting State Party the right to derogate from its obligations under the Convention in times of war or public emergency. The report suggested, though, that as a result of the United Kingdom’s membership of the then European Community and North Atlantic Treaty Alliance it would be required to intervene in any civil war or violence which spilled over into the Irish Republic.


unincorporated into the United Kingdom’s domestic law\textsuperscript{1246}. Many of the civil and political rights contained in the UDHR were imported into the ICCPR, including i) the inherent right to life protected by law\textsuperscript{1247}; ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment\textsuperscript{1248}; iii) the right to liberty and security of person and the right not to be subjected to arbitrary arrest or detention\textsuperscript{1249}; iv) the right to liberty of movement and the freedom of choice of residence\textsuperscript{1250}; v) the right to a fair and public hearing by a competent, independent and impartial tribunal established by law\textsuperscript{1251}; vi) the right to be presumed innocent until proved guilty according to law\textsuperscript{1252}; vii) the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence\textsuperscript{1253}; viii) the right to freedom of expression\textsuperscript{1254}; and ix) the right of peaceful assembly\textsuperscript{1255}. The ICCPR also introduced a number of rights, relevant to an analysis of counter-terror legislation, that did not feature in the UDHR, including i) the right of any arrested person to be informed, at the time of arrest, of the reasons for the arrest and nature of any charges\textsuperscript{1256}; ii) the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial officer and to a trial within a reasonable time, or to release\textsuperscript{1257}; iii) the right of anyone deprived of their liberty to approach a Court to establish the lawfulness or otherwise of the detention\textsuperscript{1258}; iv) the right of any

\textsuperscript{1246} In fact the treaty is yet to be directly incorporated in the United Kingdom’s law. See, for instance, Paragraph 1 of the United Kingdom’s First Report to the Human Rights Committee (CCPR/C/1/Add.17) and the cases of European Roma Rights Centre & Ors, R (on the application of) v Immigration Officer at Prague Airport & Anor [2004] U.K.H.L. 55 & A & Ors v Secretary of State for the Home Department [2004] U.K.H.L. 56. In the case of McCrory, Re Application for Judicial Review [2001] N.I.Q.B. 19, Kerr J stated that ‘It has been consistently held that international instruments such as the International Covenant do not afford individuals rights enforceable in domestic law...’. However, elements of the treaty have been indirectly incorporated. See, for instance, McCartney & Anor, Re Judicial Review [2009] N.I.Q.B. 62, where Weatherup J stated that ‘Section 133 of the Criminal Justice Act 1988 represents the adoption of Article 14(6) of the International Covenant on Civil and Political Rights’. In addition, some of the rights contained in the ICCPR were indirectly incorporated in 2000, by way of the HRA 1998. 

\textsuperscript{1247} Article 6(1). The death penalty though, was not outlawed completely. See Article 6(2). However, the United Kingdom has signed and ratified the 2nd optional protocol to the ICCPR, which outlaws the death penalty altogether. 

\textsuperscript{1248} Article 7. 

\textsuperscript{1249} Article 9. 

\textsuperscript{1250} Article 12. 

\textsuperscript{1251} Article 14(1). 

\textsuperscript{1252} Article 14(2). 

\textsuperscript{1253} Article 17. 

\textsuperscript{1254} Article 19(2). 

\textsuperscript{1255} Article 21. 

\textsuperscript{1256} Article 9(2). 

\textsuperscript{1257} Article 9(3). 

\textsuperscript{1258} Article 9(4).
victim of unlawful arrest or detention to compensation; v) the right of any person deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; vi) the right of any person charged with a criminal offence to a proper defence; vii) the right of any person convicted of a crime to have their conviction and sentence reviewed by a higher tribunal; viii) the right to hold opinions without interference; and ix) the right to freedom of association with others.

State parties to the ICCPR are obliged to ensure that their domestic legal systems are able to redress violations of the Covenant, including violations committed by government officials. The Human Rights Committee is a body of independent experts created by the ICCPR and mandated to monitor the implementation of the Covenant by signatory states. States are obliged to submit regular reports to the Committee on how the Covenant rights are being implemented. States are required to report one year after acceding to the Covenant and thereafter on request by the Committee. In addition to the reporting procedure, the Covenant empowers the Committee to consider inter-state complaints.

The first optional protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by signatory States. In the period under review, the United Kingdom did not sign this optional protocol.

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1259 Article 9(5).
1260 Article 10(1).
1261 See the various rights encompassed in Article 14(3).
1262 Article 14(5).
1263 Article 19(1).
1264 Article 22(1).
1265 Article 2.
1266 Article 18.
1267 Article 40.
1268 Article 40.
1269 Article 41. Under the Covenant states are not automatically subject to such scrutiny, but rather have to opt in, by stating that they recognise the competence of the Committee to receive complaints from other states.
1270 In fact, the protocol remains unsigned to this day. The protocol was opened for signature at New York on 19 December 1966.
Article 4 of the Covenant allows States, under certain circumstances\textsuperscript{1271} to take measures derogating from their obligations. However, States are barred from derogating from commitments regarding \textit{inter alia} i) the right to life\textsuperscript{1272}; and ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment\textsuperscript{1273}.

On 17 May 1976 the United Kingdom took advantage of the provisions of Article 4 for the first time, giving notice of its intention to take measures derogating from its Covenant obligations. Citing the dangers of Northern Ireland related terrorism, the United Kingdom advised that it had become necessary for it to implement various counter-terror measures, including powers of arrest and detention and exclusion, that could be inconsistent with a number of its Covenant obligations\textsuperscript{1274}. Some twelve years later, on 22 August 1984, the United Kingdom terminated these derogations.

\textbf{4.2 The European Court}

\textit{Ireland v The United Kingdom}\textsuperscript{1275} was a case referred to the Court by the government of Ireland. The Court handed down judgment on January 18\textsuperscript{th} 1978. The case involved the emergency powers exercised in Northern Ireland from August 1971 until December 1975\textsuperscript{1276}, more particularly those laws that authorised the use of extrajudicial powers of arrest, detention and internment. The case dealt with the scope and the operation of those measures together with the alleged ill-treatment of persons deprived of their liberty under the laws. The Irish government alleged breaches of Articles 1 and 3; Article 5 taken with 15; Article 6 taken together with 15; and Article 14 read with Articles 5 and 6. Ireland also maintained that the British government had failed on several occasions to fulfil its duty to cooperate fully with the investigation.

\textsuperscript{1271} A public emergency threatening the life of the nation, the existence of which is officially proclaimed. Measures taken could not be inconsistent with States’ obligations under International Law and could not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

\textsuperscript{1272} Article 6.

\textsuperscript{1273} Article 7.

\textsuperscript{1274} Articles 9, 10 (2), 10 (3), 12 (1), 14, 17, 19 (2), 21 or 22.

\textsuperscript{1275} Application no. 5310/71.

Article 3 places a moratorium on torture or inhuman or degrading treatment or punishment. The applicant’s allegation that the United Kingdom had, through its use of the so-called ‘five techniques’ of interrogation in Northern Ireland, breached Article 3 was not disputed by that state. However, the respondent called on the Court to decline to exercise its jurisdiction, arguing that the objective of the application had already been accomplished and that an adjudication on the merits would serve no purpose. The United Kingdom pointed out that i) its non-contestation had been widely publicised; ii) it had already abandoned its use of the five techniques; and iii) it had made a solemn undertaking not to reintroduce the techniques. The Court disagreed, arguing that its responsibilities under the ECHR included making pronouncements on non-contested allegations of violations, since such decisions helped elucidate and develop the Convention’s provisions, thereby contributing to states’ observance of their obligations.

The Irish government also requested the Court to hold that violations of Article 3 had occurred in relation to the United Kingdom’s treatment of certain individual detainees. In addition to contesting the merits of these claims, the United Kingdom also argued that the complaints did not concern a practice but rather individual cases in which effective domestic remedies were available to the persons involved. On this basis, the respondent argued that the claims fell outside the area demarcated by the Commission on 1 October 1972, when it had accepted that the United Kingdom’s practice of ill-treating persons in custody, was in breach of Article 3.

The Court conceded that the allegations dealt with by the Commission concerned a practice or practices rather than individual cases and that the Court’s sole task was to give a ruling on those allegations. However, it was pointed out that any practice contrary to the Convention could result only from individual violations and that it was therefore open to the Court to examine specific cases.

1277 Including one, T3, who had been held at Ballykinler Regional Holding Centre in August 1971 and one, T5, who had been held at St. Genevieve’s School, Belfast in August 1972 as well as in numerous other places in Northern Ireland from 1971 to 1974.
The Court pointed out that ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3. It elaborated that the assessment of this minimum would depend on all the circumstances of the case, including the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim. The tribunal also pointed out that the Convention prohibits in absolute terms, torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.

The Grand Chamber noted the Commission’s opinion, that based on the facts presented, the United Kingdom’s use of the so-called five techniques, amounted to a practice not only of inhuman and degrading treatment, but also of torture. It also noted that the applicant was seeking confirmation of this opinion, which was not being contested by the respondent. The Court pointed out that five techniques often caused intense physical and mental suffering together with acute psychiatric disturbances and that they therefore fell into the category of inhuman treatment within the meaning of Article 3. It explained that the techniques were also degrading in that, typically they would arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. It was noted that in order to determine whether the five techniques also amounted to torture, the Court needed to have regard to the distinction, embodied in Article 3, between torture and inhuman or degrading treatment. It was of the view that this distinction involves principally a difference in the intensity of the suffering inflicted. The Court concluded that although the five techniques, undoubtedly amounted to inhuman and degrading treatment, they did not cause suffering of the particular intensity and cruelty implied by the word torture. The Grand Chamber thus held that the United Kingdom’s use of the five techniques only amounted to a practice of inhuman and degrading treatment in breach of Article 3.

Ireland also claimed that at least some of the fourteen persons subjected to the five techniques, had also been subjected to other kinds of treatment, including physical violence, contrary to Article 3. The Court found that only one of the 14, T6, had been subjected to such violence. These actions amounted to inhuman treatment. The Grand Chamber also held that the evidence presented before it supported a conclusion that a practice of inhuman treatment had been followed in the autumn of 1971 in the illustrative cases of T2, T8, T12, T15, T9, T14 and T10. However, it did not find that
the practice amounted to torture, arguing that the severity of the suffering did not attain the necessary level.

The Irish government argued that practices in breach of Article 3 had existed in Northern Ireland from 1971 to 1974, at places such as Girdwood Park and Ballykinler. This allegation was denied by the United Kingdom. The Court first examined the situation at Ballykinler military camp and noted that the RUC, with the assistance of the army, had used Ballykinler as a holding and interrogation centre for a number of days early in August 1971. The Court noted further that dozens of people were held there in extreme discomfort and were made to perform tiresome and painful exercises. The bench held that there had thus been a practice rather than isolated incidents. In determining whether this practice violated Article 3, the Court noted that the Compton Committee had found that although the exercises the detainees had been made to do involved some degree of compulsion and must have caused hardship, they had not been intended to hurt or degrade. As a result, the Court held that they had not infringed Article 3.

Regarding the remaining locations referred to by the applicant, the Grand Chamber held that those incidents of ill-treatment that had been proved, were not sufficiently numerous and inter-connected to amount to a practice. It rejected as a mere presumption, the applicant’s argument that the same men who worked at Ballykinler were also responsible for the running of the other detention centres and that it was improbable that these men observed Article 3 in these centres when they contravened it at Ballykinler. The bench declined to re-open the investigation into the detention centres, in light of i) the preventive measures which had been taken by the United Kingdom; and ii) the domestic remedies open to any person who wished to claim that their Article 3 rights had been violated in Northern Ireland. The Grand Chamber therefore concluded that it could not find any additional practices in breach of Article 3.

The applicant argued that the various powers exercised by the United Kingdom in Northern Ireland from August 1971 to March 1975, relating to extrajudicial
deprivation of liberty did not satisfy the conditions prescribed by Article 5\textsuperscript{1278} and failed to meet in full the requirements of Article 15\textsuperscript{1279} read with Article 5. It was also alleged that these powers had been exercised in a discriminatory manner and consequently also violated Article 14\textsuperscript{1280} taken together with Article 5.

The tribunal decided that it should first ascertain whether the measures complained of derogated from Article 5 before assessing them under Article 15. It noted that in the Commission’s opinion, the powers at issue did not comply with Paragraphs 1 to 4 of Article 5 and that the respondent government did not contest such a conclusion. It was also noted that Paragraph 1 of Article 5 contained a list of the cases in which it is permissible under the Convention to deprive someone of their liberty. The Court found that the different forms of deprivation of liberty in the instant case clearly did not fall under Subparagraphs (a)\textsuperscript{1281}, (b)\textsuperscript{1282}, (d)\textsuperscript{1283}, (e)\textsuperscript{1284} and (f)\textsuperscript{1285} of Paragraph 1.

It conceded that at first sight, the different forms of deprivation of liberty complained of appeared to bear some resemblance to the cases contemplated in Subparagraph (c)\textsuperscript{1286}. It was pointed out, however, that a suspicion of an offence, was not required before a person could be arrested under Regulation 10\textsuperscript{1287}, nor did it have to be considered necessary to prevent the person committing an offence or fleeing after having done so. Indeed, the Court noted that the powers complained of were sometimes used to interrogate the person concerned about the activities of others. While the other Regulations complained of by the Irish government\textsuperscript{1288} did require a

\begin{itemize}
  \item \textsuperscript{1278}The right of everyone to liberty and security of person.
  \item \textsuperscript{1279}The right of any Signatory State, under certain conditions, to take measures derogating from its obligations under the Convention.
  \item \textsuperscript{1280}This Article stated that the enjoyment of the rights and freedoms set forth in this Convention had to be secured without discrimination on any ground including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
  \item \textsuperscript{1281}The lawful detention of a person after conviction by a competent Court.
  \item \textsuperscript{1282}The lawful arrest or detention of a person for non-compliance with the lawful order of a Court or in order to secure the fulfilment of any obligation prescribed by law.
  \item \textsuperscript{1283}The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.
  \item \textsuperscript{1284}The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, or drug addicts, or vagrants.
  \item \textsuperscript{1285}The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
  \item \textsuperscript{1286}The lawful arrest or detention of a person effectuated for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
  \item \textsuperscript{1287}Made under the SPA.
  \item \textsuperscript{1288}Including Regulation 11(1) and (2) of the SPA; and Regulation 12(1); Section 2(4) of the SPA.
\end{itemize}
suspicion to be present, for Subparagraph (c) to apply, the detention had to have been
effected for the purpose of bringing the detainee before a competent legal authority.
The Grand Chamber noted that in the present case, this condition had not been
fulfilled.

It was also pointed out that Paragraphs 2 to 4 of Article 5 obliged contracting states to
provide several guarantees in cases where someone was deprived of their liberty. The
tribunal stated that under Paragraph 2, everyone arrested had the right to be informed
promptly of the reasons for the arrest and the nature of any charge being brought. No
such provision was made in either Regulations 10 and 11(1) or in Section 10 of the
SPA. The Court stated that in reality, arrested persons were not normally informed
why they were being arrested. Regarding Paragraph 3, the Grand Chamber found that
the impugned measures were not effected for the purpose of bringing the persons
concerned promptly before a competent legal authority. It conceded that persons
detained under the measures complained of were sometimes brought before the
ordinary Courts, but pointed out that Paragraphs 1(c) and 3 of Article 5 obliged states
to ensure that this happened in every single case governed by those Paragraphs.
Regarding Paragraph 4, which the Court noted is applicable to all those deprived of
their liberty, it was pointed out that under Regulations 10, 11(1) and (2) there was no
entitlement to ‘take proceedings by which the lawfulness of the detention could be
decided speedily by a Court’ and to ‘release…if the detention’ proved unlawful.

Regarding Regulation 12(1), the Court held that the advisory Committee to which
internees had the possibility of making representations could at most recommend, as
opposed to order, release and that the Committee’s procedure did not afford the
fundamental guarantees inherent in the notion of a ‘Court’ as used in Article 5(4). The
Court came to similar conclusions regarding the commissioners and the appeal
tribunal entrusted with supervisory functions by the Detention of Terrorists (Northern
Ireland) Order 1972 and, subsequently by the Northern Ireland (Emergency
Provisions) Act 1973. The Court noted that detainees were not entitled to ‘take
proceedings’ in respect of an interim custody order and had no means of contesting
the ‘lawfulness’ of their detention, either during the initial twenty-eight day period or
during any extension pending the commissioner’s adjudication. The Court conceded
that when an adjudication resulted in a detention order, the individual concerned
could challenge the order before the appeal tribunal, but pointed out that in general, that tribunal did not give its decision ‘speedily’. Accordingly, the Grand Chamber found that the commissioners and appeal tribunal did not meet the requirements of Article 5(4).

The Irish government also alleged that the powers relating to extrajudicial deprivation of liberty applied in Northern Ireland from 9 August 1971 to March 1975 did not conform to Article 15 and thereby violated Article 5. This claim was rejected by the Commission and disputed by the United Kingdom. The bench noted that Article 15 only applies in times of war or other public emergency threatening the life of the nation. It admitted that the existence of such an emergency in Northern Ireland was clear from the facts put before it. The tribunal also noted that contracting States could only make use of their right of derogation, ‘to the extent strictly required by the exigencies of the situation’. The Court noted that by reason of their direct and continuous contact with the pressing needs of the moment, national authorities are in principle in a better position than international judges to decide on the presence of an emergency and on the nature and scope of derogations necessary to avert it. In this regard, the Court noted, Article 15 bestows upon those authorities a wide margin of appreciation. The Grand Chamber pointed out, however, that states do not enjoy unlimited discretion. Referencing the Lawless case, the bench pointed out that its task was to enquire into the necessity of i) the deprivation of liberty contrary to Article 5(1); and ii) the failure of the extant guarantees to attain the level fixed by Article 5(2) to (4). The Court conceded that considering the nature and extent of violence that threatened the United Kingdom, the authorities had been reasonably entitled to conclude that normal legislation was inadequate and that recourse to measures outside the scope of the ordinary law was called for. However, it was noted that under Regulation 10, a person, in no way suspected of a crime or offence or of violent.

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1289 Article 15(1) stated that during times of war or other public emergencies threatening the life of the nation, any contracting state could take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures were not inconsistent with its other obligations under international law. Article 15(2) stated that no derogation could be made from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7. Article 15(3) stated that any contracting party availing itself of the right of derogation had to keep the Secretary-General of the Council of Europe fully informed of the measures taken and the reasons therefore, together with when such measures had ceased to operate and the provisions of the Convention were again being fully executed.

1290 The right of everyone to liberty and security of person.

activities prejudicial to peace, could be arrested for the sole purpose of obtaining information about others. The Court stated that this type of arrest was only justifiable in very exceptional situations, but concluded that the conditions prevailing in Northern Ireland at the time in question, constituted such exceptional circumstances.

The Grand Chamber held that the extrajudicial measures brought into operation could reasonably have been considered strictly necessary for the protection of public security and accepted that the limits of the margin of appreciation left to contracting states by Article 15(1) had not been exceeded by the United Kingdom. The tribunal then examined under Article 15(1), the necessity for the far-reaching derogations found by it to have been made from Paragraphs Article 5(2) to (4).

It was noted that neither Regulations 10 and 11(1), nor Section 10 of the SPA afforded any remedy, judicial or administrative, for unlawful arrests made under those provisions. Although persons arrested under Regulation 11(1) could, before 7 November 1972, apply to the Civil Authority for release on bail, the Detention of Terrorists (Northern Ireland) Order 1972 deprived them of this right by revoking Regulation 11(4) under which it arose. The Court also noted that Regulation 11(2), Article 4 of the Terrorists Order and Paragraph 11 of Schedule 1 to the Emergency Provisions Act did not provide for any remedy for unlawful arrests. The Court noted however, the valuable, if limited, review effected by the Courts under the common law. The tribunal also commented that when a state is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required simultaneously, from the outset, to implement its chosen means of action, while ensuring proper safeguards were in place. In this regard, the Court noted that the emergency laws applicable in Northern Ireland were becoming increasingly sensitive to the importance of human rights. The tribunal found that, in view of the contracting states’ margin of appreciation, it had not been established that the United Kingdom had exceeded the ‘extent strictly required’, referred to in Article 15(1). The Grand Chamber found that since the requirements of Article 15 were met, the derogations from Article 5 were not, in the circumstances of the case, in breach of the Convention.
The tribunal noted that from 9 August 1971 to 5 February 1973, the measures involving deprivation of liberty, taken by the respondent state were used exclusively against Republican terrorism even though Loyalist terrorism had already become fairly common. It was also noted that even after 5 February 1973, the measures were applied against Republican terrorism to a much greater extent than against Loyalist terrorism. The Court then examined whether the difference of treatment between the two types of terrorism violated Article 14 of the Convention. The United Kingdom argued that the laws complained of were not in and of themselves discriminatory and that it was the mere application of laws which had created the unequal results. The Court, referencing its own case law, sided with the respondent on this issue. The applicant also submitted, in the alternative, that the difference of treatment in question lacked an ‘objective and reasonable justification’. The bench examined the reasons why Loyalist terrorism had not been not fought with the same laws as Republican terrorism and found that there were profound differences between the two types of terrorism. Prior to 1972, the IRA constituted a far more serious menace than the Loyalist terrorists. Thereafter, the Court observed, there had been a spectacular increase in Loyalist terrorism. Nonetheless, the IRA remained responsible for the majority of violent terrorist acts and Loyalist suspects were, the Court noted easier to bring to justice by traditional means. The Grand Chamber therefore refused to declare that, during the period under consideration, the United Kingdom had violated Article 14, taken together with Article 5 by employing the emergency powers against the IRA alone.

The applicant government also alleged that the various powers of extrajudicial deprivation of liberty, which were used in Northern Ireland from 9 August 1971 to March 1975 did not satisfy the conditions prescribed by Article 6 of the

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1292 Article 14 stated that the enjoyment of the rights and freedoms set out in the Convention should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1293 Swedish Engine Drivers’ Union judgment of 6 February 1976, Series A no. 20, p. 17, Paragraphs 45 in fine and 46; Schmidt & Dahlström judgment of 6 February 1976, Series A no. 21, p. 17, Paragraphs 39 in fine and 40; Engel & Ors judgment of 8 June 1976, Series A no. 22, p. 42, Paragraphs 102 in fine, and 103 in fine; Handsyde judgment of 7 December 1976, Series A no. 24, pp. 30-31, para. 66.

1294 Article 6(1) asserted the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and the right to have the judgment pronounced publicly. Trials could be conducted out of the public view in the interests of morality,
Convention. It was argued further that those powers violated Article 6 since they were not in full conformity with the requirements of Article 15 and that they were implemented discriminately and consequently also violated Article 14 taken together with Article 6. The applicability of Article 6 to the present case was disputed by the respondent government and the Commission. The Grand Chamber found it unnecessary to give a decision on this point since it had already held that the derogations from Article 5 met the requirements of Article 15 and in the circumstances of the case, it felt compelled to arrive at the same conclusion regarding the derogations from Article 6. The Court, similarly found that the powers complained of had not been exercised in a discriminatory manner.

The Irish government also alleged that the United Kingdom had breached Article 1 of the Convention, in that the laws in force in the six Northern Ireland counties had failed to prohibit violations of the rights protected by Articles 3, 5, 6 and 14; and that several of those laws had even authorised or permitted such violations. Neither the British government nor the Commission concurred with this. They argued that Article 1 could not be the subject of a separate breach since it grants no rights in addition to those mentioned in Section I of the Convention. The Court

public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice. Article 6(2) asserted the right of everyone charged with a criminal offence to be presumed innocent until proved guilty according to law. Article 6(3) provided the following minimum guarantees to everyone charged with a criminal offence (a) to be informed promptly and in detail, in a comprehensible language, the nature and cause of the accusation; (b) to have adequate time and facilities for the preparation of a defence; (c) to defence, which in circumstances where legal council could not be afforded, the right to legal aid; (d) to examine or have examined the prosecution’s witnesses and to obtain the attendance and examination of witnesses for the defence; (e) to have the free assistance of an interpreter if the language of the Court was incomprehensible.

1295 The right of any signatory state, under certain circumstances, to take measures derogating from its obligations under the Convention. 1296 Article 1 obliged the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms contained in Articles 1 through 18 of the Convention. 1297 The right of everyone not to be subjected to torture or to inhuman or degrading treatment or punishment. 1298 The right of everyone to liberty and security of person. 1299 Article 6(1) asserted the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and the right to have the judgment pronounced publicly. 1300 Article 14 stated that the enjoyment of the rights and freedoms set out in the Convention should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1301 Articles 1 through 18.
pointed out that Article 1 references the other provisions contained in Section I and only comes into operation when taken in conjunction with them. The bench opined that a violation of Article 1 follows automatically from, but adds nothing to, a breach of those provisions. The Grand Chamber also pointed out that in the past it had never held that Article 1 had been violated. Despite this, the Grand Chamber noted that the Convention creates, over and above a series of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from ‘collective enforcement’. The Court pointed out that by virtue of Article 24, the Convention allows contracting states to require the observance of those obligations without having to prove an interest in the matter. The Court also stated that by substituting the words ‘shall secure’ for the words ‘undertake to secure’ in the text of Article 1, the drafters of the Convention had intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of a contracting state. It was pointed out that Article 1 obliges contracting states to secure the enjoyment of the Convention rights and freedoms and to prevent or remedy any breach. The bench also pointed out that the question which arose as a result of the Irish government’s Article 1 claims was whether a contracting state was entitled to challenge under the Convention, a law in abstracto.

The tribunal observed that an examination of the legislation in force at the relevant time in Northern Ireland reveals that it never introduced, directed or authorised recourse to torture or to inhuman or degrading treatment and that on the contrary, it forbade any such ill-treatment in increasingly clear terms. The Court also noted that as from the end of August 1971, the United Kingdom’s authorities took a number of steps to prevent or remedy the individual violations of Article 3. With regard to Article 14 taken together with Articles 15, 5 and 6, it was noted that the applicant government did not challenge the legislation as such. Furthermore, the respondent government did not introduce, direct or authorise any discrimination in the exercise of its extrajudicial powers. The Court stated that the applicant’s claim only concerned the legislation’s application, which the Court had already declared consistent with the

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1302 ‘...the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law...take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration...’.

1303 The right of any High Contracting Party to refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.
Convention. The bench then noted that in respect of Article 15 taken together with Articles 5 and 6 the legislation itself had been criticised by the Irish government. The Court opined that certain aspects of the legislation were concerning. It was noted that neither Regulations 11(1) and 11(2), nor Article 4 of the Terrorists Order, nor Paragraph 11 of Schedule 1 to EPA 1973 set any limits on the duration of the deprivation of liberty they authorised. Furthermore, they did not afford to the persons concerned any judicial or administrative remedies beyond the restricted right to apply for bail, a right that was abolished on 7 November 1972 with the revocation of Regulation 11(4). The Court stated that the first-mentioned shortcoming resulted from the mere silence of the legislation on the point and was mitigated in practice. Regarding the second shortcoming, the bench stated that it appeared more serious, especially as regards Regulation 11(2), Article 4 of the Terrorists Order and Paragraph 11 of Schedule 1 to EPA 1973. The Court noted, however, that these deficiencies were in part made good through the application by the ordinary Courts of the common law. The Court also referenced the public emergency that had existed at the relevant time in Northern Ireland, which threatened the life of the nation, stating that the emergency provisions under scrutiny could not be taken out of context. Accordingly, the Grand Chamber held that there had been no breach of Articles 5, 6 and 15, taken together with Articles 1 and 24.

4.3 Human Rights Committee: First Periodic Report of the United Kingdom

The Committee considered the initial report submitted by the United Kingdom\textsuperscript{1304} at its 67th, 69th and 70th meetings on 30 and 31 January and 1 February 1978\textsuperscript{1305}. The report attempted to demonstrate how the United Kingdom was giving effect to each of the Covenant’s provisions. Concerning Article 4 of the Covenant\textsuperscript{1306} various members of the Committee requested more information on measures in place in Northern Ireland derogating from the United Kingdom’s covenant obligations. Members also questioned whether the United Kingdom was considering the cancellation of those

\textsuperscript{1305} CCPR/C/SR.67, 69 and 70.
\textsuperscript{1306} In terms of Article 4(1), in times of public emergency which threaten the life of the nation, the existence of which is officially proclaimed, signatory states can take measures derogating from their obligations to the extent strictly required by the exigencies of the situation, provided that these measures are not inconsistent with other international law obligations and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
emergency measures. Other members expressed doubt that the situation in Northern Ireland constituted a public emergency within the meaning of Article 4(1) of the Covenant. In connection with Article 4 of the Covenant, the United Kingdom’s representative stated that, because of the situation in Northern Ireland, which threatened the life of the nation, the United Kingdom had availed itself of the right of derogation provided for in that Article. He explained in detail the reasons why his government felt it necessary to reserve the right to derogate from the provisions of Articles 9\textsuperscript{1307}, 10\textsuperscript{1308}, 12\textsuperscript{1309}, 17\textsuperscript{1310}, 21\textsuperscript{1311} and 22\textsuperscript{1312} of the Covenant.

In relation to Article 9 of the Covenant\textsuperscript{1313}, members sought clarification on the statement in the report that ‘in general, an arrested person must be informed of the true ground of his arrest.’ Members also requested more clarity on those instances in which a person could be taken into custody without a warrant. Members also asked whether the remedy of habeas corpus was in force in England, Scotland, Wales and Northern Ireland. Members also asked whether the United Kingdom considered the remedy of habeas corpus sufficient to meet the requirements of Article 9\textsuperscript{1314}. Members questioned whether Courts in the United Kingdom, considering a writ of habeas corpus, examine the lawfulness of detention in every respect.

As regards arrests without a warrant, the United Kingdom’s representative indicated that police officers could resort to them only in respect of serious offences, described by the law as ‘arrestable’ offences, and certain other offences expressly specified in particular statutes. With regard to applications for a writ of habeas corpus, the person having recourse to such procedure relied on the fact that being kept in custody was illegal except for specified reasons, the existence or absence of which the Court would have to consider. He stressed that the habeas corpus procedure or its equivalent was available in Northern Ireland as in any other part of the United Kingdom.

\textsuperscript{1307} The right of everyone to liberty and security of person.
\textsuperscript{1308} The right of everyone deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person.
\textsuperscript{1309} The right of everyone to liberty of movement and the freedom to choose one’s residence.
\textsuperscript{1310} The right not to be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on a person’s honour and reputation.
\textsuperscript{1311} The right of peaceful assembly.
\textsuperscript{1312} The right of everyone to freedom of association.
\textsuperscript{1313} The right of everyone to liberty and security of person.
\textsuperscript{1314} Ibid.
Regarding Article 14, Paragraph 3(b) of the Covenant\textsuperscript{1315}, members asked the United Kingdom to explain when the right to legal representation arose and whether there were any remedies available to persons deprived of this right. In reply to questions put to him under Article 14 of the Covenant, the representative said that a person in police custody was allowed to telephone his solicitor or friends provided that no hindrance was reasonably likely to be caused to the processes of investigation or the administration of justice.

As regards Article 17 of the Covenant\textsuperscript{1316}, the United Kingdom’s representative was asked whether existing laws provided for electronic surveillance and for searches without a warrant. Responding to questions under Article 17 of the Covenant, he said that no law had yet been enacted prohibiting the use of electronic equipment for the surveillance of the private lives of persons.

At its 147th, 148th and 149th meetings, held on 25 and 26 April 1979\textsuperscript{1317}, the Committee continued its consideration of the initial report of the United Kingdom\textsuperscript{1318} and the supplementary report containing additional information\textsuperscript{1319} submitted in reply to the questions which had been put by the Committee during the consideration of the initial report at the 69th and 70th meetings.

Members of the Committee noted that the United Kingdom had not derogated from Article 14 of the Covenant concerning the right to a fair trial, and that no derogation from Article 7, prohibiting torture or degrading treatment, could be made under Article 4. Nevertheless, according to one member, the Bennett Committee on Police Interrogation Procedure in Northern Ireland had found that in many cases people under interrogation had suffered injuries that were not self-inflicted and that, in an unusually large number of cases, convictions had been obtained as a result of confessions where detailed records of the interrogations were unavailable. Concerning

\textsuperscript{1315} The right of anyone charged with a criminal offence to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

\textsuperscript{1316} The right not to be subjected to arbitrary or unlawful interference with a person’s privacy, family, home or correspondence; nor to unlawful attacks on a person’s honour and reputation.

\textsuperscript{1317} CCPR/C/SR.147, 148 and 149.

\textsuperscript{1318} CCPR/C/1/Add.17.

\textsuperscript{1319} CCPR/C/1/Add.35.
the right to liberty and security of person, members asked i) whether there were safeguards regarding the length of time detainees could be held for questioning; and ii) to what extent habeas corpus or equivalent remedies could be effective if, as was the case of Northern Ireland, persons could be arrested by the police without a warrant on the mere suspicion of being terrorists and detained for up to 72 hours.

Replying to these comments and questions, the representative stated that the Bennett Committee, while acknowledging that it was sometimes necessary and lawfully permissible for police officers to restrain prisoners in order to defend themselves, had made a number of recommendations for improving the control and supervision of the interrogation process and that the government accepted its broad conclusions and endorsed its approach. As to the question of habeas corpus and the power to arrest without a warrant, the representative stated that it would be an answer to a writ of habeas corpus that the defendant had exercised a statutory power and that the main objective of such a writ would be to inhibit the purported use of powers which did not exist.


At the beginning of 1984, the main counter-terror laws in place in the United Kingdom, were the Prevention of Terrorism (Temporary Provisions) Act 1976 and the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973) as amended by the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 (EPA 1975). In Chapter 2, it was shown that although many of the counter-terror executive powers contained in the EPA 1973 and EPA 1975 were adaptations of similar practices established under previous emergency laws, such as the SPA, very often these updated powers were more repressive than the earlier laws had been. Chapter 2 also evidenced the fact that the specific executive powers created by the EPA 1973 and EPA 1975, were set out in far more detail than any of those made under previous counter-terror laws. Nonetheless, the specificity of these later laws, resulted in a contraction of the powers available to the executive to counter terrorism. It is also

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1320 This law was only applicable in Great Britain.
1321 These latter Acts were only applicable in Northern Ireland.
noteworthy that the EPA 1973 introduced a limited number of reforms, some of which made considerable inroads into the powers available to the United Kingdom’s executive to deal with terrorist threats.

Many of the counter-terror policies contained in the PTA 1976 drew heavily from the PTA 1974, which in turn borrowed extensively from both the EPA 1973 and the PVA 1939. Despite the fact that the PTA 1976 was largely a derivative piece of legislation, it did introduce a number of novel counter-terror policies as well as a number of mechanisms aimed at preventing abuse of power. Such mechanisms were to a very large extent absent in the United Kingdom’s earlier counter-terror laws. Like the EPA 1973, the PTA 1976 was far more complex than any of the United Kingdom’s previous counter-terror laws. More particularly, the executive powers created by the PTA 1976 were set out in hitherto unheard of detail. Although this specificity meant that the number of powers available to the executive increased under the PTA 1976, it also meant that the overall authority enjoyed by the executive narrowed appreciably.

In time, the PTA 1976 came to be replaced by the PTA 1984 and the EPA 1973 further amended by the EPA 1978. While the former introduced further checks and balances, constraining the counter-terror powers of the executive, the latter introduced increased penalties for various offences, following a 1977 internal government review. Overall, the years 1976 to 1984 saw the United Kingdom’s counter-terror laws grow increasingly complex and the executive powers set out therein, increasingly more narrowly defined and numerous. At the same time, the inclusion of checks on the executive’s counter-terror powers became ever more common.

At the same time that the patterns described above were unfolding, so a trend relating to the interaction between the United Kingdom, on the one hand, and international human rights law on the other began to emerge. In 1976, The United Kingdom ratified the International Covenant on Civil and Political Rights (ICCPR)\footnote{G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.}, thus obliging itself to give effect to a number of human rights and subjecting itself to the enforcement mechanisms of the Covenant. The period 1976 to 1984 also witnessed the first inter-state case brought before the ECtHR\footnote{Ireland v The United Kingdom (5310/71) [1978] ECHR 1.} and as such, the first ever legal
proceedings between states before an international human rights tribunal. Despite the fact that the majority of the complaints brought before the Court were dismissed, the case is significant in that i) the Grand Chamber held that the ‘five techniques’ interrogation methods constituted a practice of inhuman and degrading treatment in violation of Article 3; and ii) the Court was able to examine whether the United Kingdom was fulfilling its obligations under the Convention. Similarly, the Human Rights Committee’s consideration of the United Kingdom’s First Period Report is noteworthy in that members of the Committee were able to scrutinize the United Kingdom’s efforts to satisfy its obligations under the ICCPR.

Despite the fact that in the era under review, the United Kingdom failed to pass legislation, incorporating any of its international human rights treaty obligations, that state’s counter-terror legislation continued to evolve in a manner which prima facie appears to have been influenced by those obligations. For instance, the years under review saw a steady growth in the number of checks and balances enacted, restraining the executive in its counter-terror actions. In addition, although on the whole the executive powers created in the period 1976 to 1984 became progressively harsher, they were also set out in unprecedented detail. In other words, the laws enacted in the period under review delineated the boundaries of the executive’s counter-terror powers more precisely than ever before. This resulted in a further narrowing of the powers available to the executive to counter terrorism.

5. International Human Rights Law and the United Kingdom’s Counter-terror Laws From 1985 to 1999

5.1 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was signed by the United Kingdom on 15 March 1985 and ratified on 8 December 1988. The Convention is grounded in Article 5 of the

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1324 The number of counter-terror powers available to the executive also increased.
Universal Declaration of Human Rights\textsuperscript{1326} and Article 7 of the International Covenant on Civil and Political Rights\textsuperscript{1327}. Some of obligations placed on the United Kingdom by the CAT\textsuperscript{1328} were incorporated into the law of that state by Section 134 of the Criminal Justice Act 1988\textsuperscript{1329}, which came into force on 29 September 1988. Section 134\textsuperscript{1330} created the new crime of torture under United Kingdom law. As required by the CAT, all torture, regardless of where it is committed was made criminal under United Kingdom law and justiciable in the United Kingdom. A number of the CAT’s provisions are relevant to an analysis of counter-terror executive powers. The CAT forbids the extradition of any person to a country where there are substantial grounds for believing that such a person would be in danger of being tortured\textsuperscript{1331}. In addition, the CAT also obliges signatories thereto to ensure that education and information regarding the prohibition against torture is included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of arrested, detained or imprisoned persons\textsuperscript{1332}. The Convention also obliges States to continually keep under review any interrogation rules, arrangements for the custody and treatment of arrested or detained persons, in order to prevent cases of torture\textsuperscript{1333}. Signatory States are also obliged to ensure that competent authorities proceed with prompt and impartial investigations, wherever there are reasonable grounds to believe that an act of torture has been committed\textsuperscript{1334}. The Convention also guarantees the right of any person who alleges that they have been subjected to acts of torture, to have their case promptly and impartially heard by a competent

\textsuperscript{1326} The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
\textsuperscript{1327} The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and in particular, the right not to be subjected without his free consent to medical or scientific experimentation.
\textsuperscript{1328} In fact, Section 134(1) only covers elements of Article 2(1) and 4(1).
\textsuperscript{1330} Section 134(1) states that any public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere, he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
\textsuperscript{1331} Article 3(1).
\textsuperscript{1332} Article 10.
\textsuperscript{1333} Article 11.
\textsuperscript{1334} Article 12.
authority. Under the Convention, tortured persons’ rights to adequate compensation are also asserted. The Convention also prohibits Signatory States from using any statements made as a result of torture as evidence in any proceedings, except against persons accused of torture. States parties to the Convention are also obliged to prevent all other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.

The CAT obliges signatory states to take effective legislative, administrative, judicial or other measures to prevent acts of torture. The Committee against Torture is a body of independent experts created by the CAT and mandated to monitor the implementation of the Covenant by states parties. All states are obliged to submit regular reports to the Committee on the measures they have taken to give effect to their undertakings.

If the Committee receives reliable information indicating that torture is being practised in any territory of a state party, it is bound by the CAT to invite that state to co-operate in an examination of the information and to comment on the allegations. Based on the results of such investigations the Committee may, if warranted designate one or more of its members to make an urgent, confidential inquiry and to report to the Committee. In these instances, the Committee is obliged to seek the co-operation of the country concerned. After examining the findings, the Committee is obliged to transmit these to the state concerned, together with any comments or suggestions it may have.

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1335 Article 13. This Article also obliges states to ensure that complainants are not subjected to intimidation or ill-treatment.
1336 Article 14.
1337 Article 15.
1338 Article 16.
1339 Article 2(1).
1340 Article 17(1).
1341 Article 19(1).
1342 Article 20(1).
1343 Article 20(2).
1344 Article 20(3). These inquiries may include a visit to its territory.
1345 Article 19(4).
In addition to the above procedures, the Covenant empowers the Committee to consider inter-state complaints\textsuperscript{1346} together with complaints from individuals\textsuperscript{1347}. However, individuals are not entitled to bring complaints against the United Kingdom as it has not recognized the authority of the Committee in this regard\textsuperscript{1348}. Upon its signing, the United Kingdom also stated that it reserved the right to formulate, upon ratifying the Convention, any reservations or interpretative declarations which it might consider necessary\textsuperscript{1349}.

5.2 Human Rights Committee: Second Periodic Report of the United Kingdom

The Committee considered the second period report of the United Kingdom of Great Britain and Northern Ireland at its 593rd to 598th meetings, held from 9 to 11 April 1985\textsuperscript{1350}. The report was introduced by the representative of the state party who advised the Committee that all the recommendations of an independent inquiry into the operation of the prevention of terrorism legislation, which were designed to mitigate the severity of some of that legislation’s provisions, had been implemented in the Prevention of Terrorism (Temporary Provisions) Act 1984 and the government was currently reviewing the Northern Ireland emergency legislation in the light of the recommendations of a 1984 inquiry into that legislation.

With reference to the state of emergency in Northern Ireland, members of the Committee wished to know i) whether the rights covered by the Covenant which had been derogated from had been fully restored following the termination of the state of emergency on 22 August 1984; ii) whether there were any differences in that regard between Northern Ireland and other parts of the United Kingdom; and iii) whether any other emergency or exceptional measures were still in force and, if so, whether they impacted any Covenant rights. Members also questioned whether the Diplock Courts

\textsuperscript{1346} Article 21. In terms of Article 21 each state can declare whether or not it will recognise the competence of the Committee to receive such complaints. The United Kingdom has recognised the competence of the Committee in this regard, provided that any complaining state has similarly submitted to the authority of the Committee.

\textsuperscript{1347} Article 22.

\textsuperscript{1348} In terms of Article 22 states can declare whether or not they will recognise the competence of the Committee to receive such complaints.

\textsuperscript{1349} At the time of writing no such reservations or declarations have been made.

in operation in Northern Ireland were consistent with Articles 2(1), 14 and 26 of the Covenant. They also asked i) whether the recommendations of the Bennett Committee on police interrogation practices had been put into effect and, if so, to what extent; and ii) whether there was any parliamentary control over the emergency powers of the executive in Northern Ireland, including the police, who appeared to have the power to carry out investigations into police misconduct and to decide whether prosecutions were warranted. Members also requested information about the nature and extent of each right derogated from and why it was now thought possible to operate within the provisions of Articles 9 and 14 of the Covenant.

Replying to those questions, the representative of the state party said that his government had withdrawn its notice of derogation from the Covenant not because there was no longer an emergency in Northern Ireland, but because it believed that the rights in the Covenant were currently fully observed throughout the United Kingdom. In fact, there were still two Acts of Parliament in force which provided special powers: the Northern Ireland Emergency Provisions Acts 1978, which conferred special powers of arrest and search and established special judicial procedures; and the Prevention of Terrorism (Temporary Provision) Act 1984. Those measures were considered sufficient to deal with the situation, but the government was also currently considering various recommendations based on an independent inquiry into Northern Ireland emergency legislation by Sir George Baker.

As to the questions whether there was an inconsistency between the judicial procedures in use in Northern Ireland and Articles 2(1), and 26 of the Covenant, the representative responded that in his government’s view the application of different degrees of protection in the trial of offenders, or in the existence of Diplock Courts, did not constitute a breach of those Articles and it had not therefore been considered necessary to derogate from those Articles. The special procedures were necessary because experience had shown that intimidation made it impossible to guarantee a fair trial by jury.

Replying to questions concerning the United Kingdom’s derogations from certain Articles when it had ratified the Covenant and why such derogations had been withdrawn, the representative explained that the derogation from Article 9 had been
considered necessary in 1976 because the provision for detention without trial in Northern Ireland had still been in force at that point\textsuperscript{1351}. Similar considerations applied to the derogation from Article 14, because proceedings before commissioners might not have been compatible with its provisions. The derogation from Article 10, Paragraphs 2 and 3, could be withdrawn, since juveniles convicted of terrorist offences were now detained in two new centres and no longer had to be accommodated together with adult offenders. Article 12(1), had been derogated from because it had been felt that the powers then in force to prevent the movement of suspects between Northern Ireland and Great Britain might not have been compatible with that provision. Such powers had since been drastically reduced and could now be considered to fall within the exceptions allowed by Article 12(3). Similar considerations applied to other derogations which had been made 1976, and the United Kingdom was again confident that it was giving full effect to the provisions of the Covenant in Northern Ireland. The United Kingdom had never derogated from its obligations under Article 3 of the Covenant, and the emergency measures that had been taken were found by the ECtHR to have been strictly required by the exigencies of the situation\textsuperscript{1352}.

With reference to the right to liberty and security of the person\textsuperscript{1353}, members of the Committee wished to receive information on the circumstances and periods for which persons might be held in preventive detention without being charged. Members also enquired about remedies for those who felt that they were being wrongfully detained and on the effectiveness of such remedies. Questions were also raised concerning the observance of Article 9, Paragraph 2 and 3, of the Covenant\textsuperscript{1354}, particularly regarding prompt judicial control of conditions of arrest and detention. Members also enquired about the maximum period of detention pending trial and on contact between arrested persons and their legal representatives. The Committee also asked whether families

\textsuperscript{1351} It was discontinued in 1980.
\textsuperscript{1352} Here the United Kingdom’s representative is referring to the ECtHR’ decision in \textit{Ireland v The United Kingdom} (5310/71) [1978] ECHR 1, discussed above.
\textsuperscript{1353} Article 9 of the ICCPR.
\textsuperscript{1354} Article 9(2) states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Article 9(3) states that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. As a general, persons awaiting trial shall not be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
were promptly informed of an arrest and whether the various ‘codes of practice’ were merely instructions to the police or were envisaged as having the force of law. Concerning habeas corpus, it was asked whether persons detained under Section 12 of the Prevention of Terrorism Act 1976, which allowed detention for up to seven days prior to presentation before a Court, were not in fact being deprived of their right of recourse to habeas corpus.

In his reply, the United Kingdom’s representative explained that in Northern Ireland, the police could detain suspected terrorists for questioning for up to 72 hours. Detainees could be held without bail for seven days at a time and there was no specific time-limit on the period that bail could continue to be denied, except that eventually statutory time-limits for detention would be reached. The remedy of habeas corpus was available to prisoners who believed that they were being improperly detained, and the Police and Criminal Evidence Act would make it easier for them to start such proceedings. The representative pointed out that if such persons succeeded, they would have the right to seek compensation through the Courts for false imprisonment.

In response to questions raised by members of the Committee concerning detentions under Section 12 of the Prevention of Terrorism Act 1984, the representative stated that persons suspected of involvement in terrorism could be held by the police for up to 48 hours, a period that could be extended by the Home Secretary for an additional five days. That provision did not deprive such detainees from availing themselves of the remedy of habeas corpus. The representative admitted however that it was likely that such persons would find it difficult to establish before a judge that their detention was unreasonable.

With reference to the issue of the right to a fair trial and equality before the law\textsuperscript{1355}, the Committee wished know whether the EPA 1976, which was in force at the time in Northern Ireland, authorised the use of methods to secure confessions that would not be permissible under common law. With reference to Article 14(6)\textsuperscript{1356}, members expressed regret that there was no statutory basis in the United Kingdom for the right

\textsuperscript{1355} Article 14 of the ICCPR.  
\textsuperscript{1356} The right to compensation where persons have been punished as a result of a miscarriage of justice.
of compensation for miscarriages of justice and urged that appropriate measures be taken to ensure full compliance with that Article.

In reply, the United Kingdom’s representative stated that in the case of Article 14(6), while it might be considered that the Article was not applied to the letter, since the compensation system that had been established did not have the force of law, it was nevertheless clear that the system did conform to the spirit of Paragraph 6. This was the case as the system operated within clearly defined rules from which the Home Secretary could not easily derogate without running a high risk that his decision would be reversed by the Courts.

With regard to the implementation of Article 14, Paragraph 3(g) of the Covenant\textsuperscript{1357} the United Kingdom’s representative admitted that it was true that the rules under the Northern Ireland Emergency Provisions Act were not as favourable to the accused as under English Law and that suspected terrorists could at times be subjected to long interrogations. However, that Act expressly prohibited the use of torture or any inhuman or degrading treatment to obtain confessions and no one was compelled to testify against himself or to confess guilt.

5.3 \textit{The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment}

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)\textsuperscript{1358} was opened for signature at Strasbourg on 26 November 1987. The United Kingdom signed the Convention on the same day and ratified on 24 June 1988. The Convention established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)\textsuperscript{1359}. The Committee is tasked with visiting Signatory States to examine the treatment of persons deprived of their liberty, with a view to strengthening the protection of such persons from torture and inhuman or degrading treatment or punishment. Article 2 of the Convention obliges states to permit such visits at any place within their

\textsuperscript{1357} The right not to be compelled to testify against himself or to confess guilt.
\textsuperscript{1358} 1 February 1989. ETS 126.
\textsuperscript{1359} Article 1.
jurisdiction. Only under exceptional circumstances\textsuperscript{1360} can such visits be avoided\textsuperscript{1361}. In any event, the Convention makes it plain that even under such conditions, the functions of the Committee should not be frustrated\textsuperscript{1362}. Reports drawn up by the Committee following their visits can, however, only be published on request of the state involved\textsuperscript{1365}.

\section*{5.4 The European Court}

Judgment in \textit{Brogan \& Ors v The United Kingdom}\textsuperscript{1364} was handed down on 29 November 1988. The first applicant, Mr. Brogan had been arrested in September 1984 by police officers under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA 1984). He was detained for a period of five days and eleven hours. During his detention he was questioned about his suspected involvement in a terrorist act as well as his suspected membership of the proscribed Provisional Irish Republican Army. He maintained total silence and was visited by his solicitor on 19 and 21 September. The second applicant, Mr. Coyle was arrested in October 1984 under Section 12 of the PTA 1984. He was detained for six days and sixteen and a half hours. He was questioned about his suspected involvement in various terrorist activities as well as his suspected membership of the Provisional IRA. He refused to answer any questions and was visited by his solicitor on 3 and 4 October. The third applicant, Mr. McFadden was arrested in October 1984 under Section 12 of the 1984 Act. He was detained for a period of four days and six hours. He was questioned about his suspected involvement in various terrorist activities and his suspected membership of the Provisional IRA. He refused to answer any questions concerning these matters and was visited by his solicitor on 3 October 1984. The 4th applicant, Mr. Tracey, was also arrested in October 1984 under Section 12 of the 1984 Act. He was detained for a period of four days and eleven hours. He was questioned about his involvement in various acts of terrorism and his suspected membership of the proscribed Irish National Liberation Army. He remained silent in response to all questions concerning these matters and was visited by his solicitor on 3 October 1984.

\textsuperscript{1360} Involving issues of national defence, public safety, serious disorder, the medical condition of the detained or an urgent interrogation relating to an ongoing serious crime.
\textsuperscript{1361} Article 9(1).
\textsuperscript{1362} Article 9(2).
\textsuperscript{1363} Article 11.
\textsuperscript{1364} Application no. 11209/84; 11234/84; 11266/84; 11386/85.
All of the applicants were informed at the time of their arrests that they were being arrested under Section 12 of the PTA 1984 and that there were reasonable grounds for suspecting that they had been involved in acts of terrorism. They were all cautioned that they need not say anything, but that anything they did say might be used in evidence against them. On the day following their arrests each applicant was informed that the Secretary of State for Northern Ireland had agreed to extend his detention by a further five days under Section 12(4) of the PTA 1984. None of the applicants was charged or brought before a judicial officer.

The applicants alleged that their Article 5(1)(c) rights had been breached. They argued that they had not been arrested on suspicion of an ‘offence’ and that the purpose of their arrest had not been to bring them before the competent legal authority. However, the respondent state pointed out that the applicants had been arrested on suspicion i) of their being members of proscribed organisations; and ii) of their involvement in specific acts of terrorism and that these constituted offences under the law of Northern Ireland. The Court agreed that the applicants had been arrested on suspicion of acts that constituted ‘offences’. The applicants argued that there had never been any intention of bringing them before a competent legal authority and pointed out that they were neither charged nor brought before a Court during their detention. The bench, however, found that the fact that the applicants were neither charged nor brought before a Court did not necessarily mean that the purpose of their detention was not in accordance with Article 5(1)(c). The Court held that the respondent’s failure to bring charges against the applicants did not necessarily point to a lack of bona fides on the part of the police. The Court thus held that there had been no violation of Article 5(1)(c).

The applicants also claimed that their extended detention had resulted in their Article 5(3) rights being infringed. The tribunal pointed out that the fact that a detained

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1365 The right of everyone to liberty and security of person. ‘No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…(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…’.

1366 By 16 votes to 3.

1367 The right of everyone arrested or detained in accordance with the provisions of Article 5(1)(c) to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to be tried within a reasonable time or to be released pending trial.
person is not charged or brought before a Court does not in itself amount to a violation of the first part of Article 5(3). The Court stated that no violation occurs where the arrested person is released ‘promptly’ before any judicial control of his detention would have been feasible. However, the tribunal also pointed out that if the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer. The Court argued that the use in the French text of Convention of the word ‘aussitôt’, meaning ‘immediately’, in Article 5(3) underscored that the limited degree of flexibility that could be attached to the word ‘promptly’ in the English text. The bench noted that whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features could never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3). The tribunal acknowledged the difficulties involved in the investigation of terrorist offences and accepted that in Northern Ireland the state of unrest and terror meant that authorities could prolong the time that a suspected terrorist could be kept in custody before bringing him before a judicial officer. However, the Court found that even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr. McFadden, fell outside the constraints as to time permitted by the first part of Article 5(3). To find otherwise, the Court suggested, would be to stretch the plain meaning of the word ‘promptly’ to breaking point. The bench thus held that each of the four applicants’ Article 5(3) rights had been violated.

The applicants also argued that since Article 5 had not been incorporated into the respondent’s domestic law, the lawfulness of their detention could not be reviewed, breaching Article 5(4). The Court pointed out that the remedy of habeas corpus had been available to the applicants, but that they chosen not to avail themselves of it. The bench noted that such proceedings would have examined the state’s compliance with the procedural requirements set out in Section 12 of the 1984 Act as well as the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention. Consequentially, the Court held unanimously that there had been no breach of Article 5(4).

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1368 By 12 votes to 7.
1369 The right of everyone who is deprived of his liberty by arrest or detention to be entitled to take proceedings by which the lawfulness of his detention can be decided speedily by a Court and his release ordered if the detention is not unlawful.
As to the infringement of the applicants’ Article 5(5) rights, the tribunal pointed out that the applicants had been arrested and detained lawfully under the respondent’s domestic law but in breach of Article 5(3). The bench noted that that violation could not give rise, either before or after the findings made by the ECtHR in the present judgment, to an enforceable claim for compensation before the United Kingdom’s domestic Courts. As a result, the Court held that there had been a breach of the applicants’ Article 5(5) rights.

5.5 The International Convention on Civil and Political Rights

On 23 December 1988, citing the reasons it had posited in 1976, the United Kingdom once again gave notice of its intention to take measures derogating from its obligations under Article 9(3) of the Covenant. This notice was given as a result of the United Kingdom’s intention to continue to make use of legislation which allowed it to detain without charge, persons reasonably suspected of involvement in terrorism for periods of up to five days. On 31 March 1989, this derogation was extended, following the introduction of the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA 1989), which contained similar provisions.

5.6 The European Court

Judgment in Fox, Campbell and Hartley v The United Kingdom was given on 21 March 1991. In this case, Mr. Fox, Ms Campbell and Mr. Hartley claimed that their arrest under Section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978 and detention had not been justified under Article 5(1) of the Convention and that there had also been breaches of subparagraphs 2, 4 and 5 of Article 5. They further

1370 The right to compensation of everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5.
1371 By 13 votes to 6.
1372 The right of anyone arrested or detained to be brought promptly before a judge and to be tried within a reasonable time or to be released.
1373 Section 12(4) and (5) of the Prevention of Terrorism (Temporary Provisions) Act 1984. The derogation was triggered by the case of Brogan & Ors v The United Kingdom (Application no. 11209/84; 11234/84; 11266/84; 11386/85) in which the ECtHR held that, by allowing for internment without trial for up to 5 days, the Prevention of Terrorism (Temporary Provisions) Act 1984 had violated Art. 5(3) of the European Convention on Human Rights.
1374 Applications no. 12244/86; 12245/86; 12383/86.
alleged that, contrary to Article 13\textsuperscript{1375}, they had no effective remedy before a national authority in respect of their Convention complaints. After their arrest, Mr. Fox and Ms Campbell were shown a notice which explained their rights. They were not brought before a judge or given any opportunity to apply for release on bail. They were held for 44 hours and 44 hours, 5 minutes respectively before being released without charge. After Mr. Hartley was arrested, he was shown a notice which explained his rights. He was held for 30 hours, 15 minutes before being released without charge.

In holding that there had indeed been a breach of Article 5(1)(c)\textsuperscript{1376}, the tribunal pointed out that the Convention should not be applied so as to make the policing of terrorism unreasonably difficult for the contracting states. Nonetheless, the Court argued, it must be placed in a position where it can ascertain whether the essence of the safeguard afforded by Article 51(c) has been secured. As a result, the respondent government would need to provide at least some information capable of demonstrating that the arrested person was reasonably suspected of having committed the alleged offence. The Court accepted that the arrest and detention of each of the applicants was based on a \textit{bona fide} suspicion and that each of them was questioned as a suspect about specific terrorist acts. The bench held that Mr. Fox and Ms Campbell’s previous terrorist convictions could not form the sole basis of a suspicion justifying their arrest. The Court also commented that the fact that all the applicants were questioned about specific terrorist acts, only confirmed that there was a genuine suspicion rather than providing that there were objective reasonable grounds for the suspicion. In the absence of further evidence, the Court held\textsuperscript{1377} that there had been a breach of Article 5(1).

\textsuperscript{1375} The right of everyone whose Convention rights have been violated to an effective remedy before a national authority regardless of whether the violation was committed by persons acting in an official capacity.

\textsuperscript{1376} The right to liberty and security of person. The right not to be deprived of 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…’.

\textsuperscript{1377} By 4 votes to 3.
In response to the applicant’s allegations that their Article 5(2) rights had been violated, the Court noted that Article 5(2) obliges contracting states to ensure that any person arrested is told, in simple, non-technical language that he can understand, the grounds for his arrest, so as to enable him to challenge the lawfulness of the arrest. On being arrested, the applicants were all told that they were being arrested under Section 11 (1) of the 1978 Act on suspicion of being terrorists. The bench held and the respondent state conceded, that this was insufficient for the purposes of Article 5(2). However, the Court also held that in the process of being questioned by the police, the applicants must have come to appreciate sufficiently clearly the reasons for their arrests. Consequently, the Court held unanimously that there had been no breach of Article 5(2).

The applicants also argued that as the Convention had not been incorporated into United Kingdom law, they had been unable to challenge the lawfulness of their detention before the domestic Courts in accordance with Article 5(4). The Court however, did not find it necessary to consider this complaint pointing out that Article 5(4) became devoid of meaning where, as was the case with the applicants, detainees are released before a speedy determination of the lawfulness of the detention could take place. The applicants also alleged that there had been a breach of Article 5(5). This complaint was upheld by the Court, which pointed out that since the respondent state’s breach of Article 5(1) could not give rise to a claim for compensation under the law in Northern Ireland, the applicants’ Article 5(5) rights had indeed been infringed.

5.7 Human Rights Committee: Third Periodic Report of the United Kingdom

The Committee considered the third periodic report of the United Kingdom of Great Britain and Northern Ireland at its 1045th to 1050th meetings, on 1 to 3 April

1378 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
1379 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article (art. 5) shall have an enforceable right to compensation.
1380 By 4 votes to 3.
1381 CCPR/C/58/Add.6, Add.11 and Add.12.
The report was introduced by the representative of the state party, who noted that exceptional measures to help counter the threat of terrorism were still needed, and among them was the power to detain suspects for up to seven days under the Prevention of Terrorism (Temporary Provisions) Act. In that latter respect, the government had decided in December 1988 to avail itself of the right of derogation laid down in Article 4 of the Covenant and in Article 15 of the European Convention on Human Rights.

In connection with that issue, members of the Committee wished to receive information concerning the government’s current views on the problem of extended detention. In addition, it was asked how legislation applicable in Northern Ireland, especially the provisions of the Northern Ireland (Emergency Provisions) Act of 1978 relating to the application of conditional release and the admissibility of evidence, could be reconciled with Articles 10(3) and 14(3)(g) of the Covenant. Clarification was also requested i) of the Parliament’s specific powers in its regular reviewing of emergency legislation; ii) of the safeguards against abuse of the seven-day period of detention; and iii) of the government’s intentions in respect of the judgement of the European Court on Human Rights in the case of Brogan and Ors.

In his reply, the representative of the state party said that one of the features of terrorist activities was the extreme difficulty in obtaining evidence, not least because of the fear which terrorist activities engendered in people who might otherwise be willing to help. Furthermore, time was needed to collect, examine and analyse evidence and information which might result in the establishment of a criminal case. For that reason, the power to arrest a person suspected of terrorist activities and to detain the suspect for a maximum period of seven days was not in any sense arbitrary. Although the possibility of incorporating some form of judicial procedure into such arrangements had been seriously examined, it had been concluded that many difficulties would be involved because of the danger that disclosure would create for the source of the information. There were safeguards, however, to protect those who

1383 Article 10(3) states that the penitentiary system of member states shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.
1384 The right not to be compelled to testify against oneself or to confess guilt.
had been arrested and were being questioned under the powers to arrest persons suspected of terrorist activities. The European Court on Human Rights\footnote{Brogan & Ors v The United Kingdom (Application no. 11209/84; 11234/84; 11266/84; 11386/85).} had found that there had been a violation of Article 5, Paragraph 3, and Article 5, Paragraph 5, of the European Convention on Human Rights, but it had made clear its understanding of the difficult situation the United Kingdom faced in Northern Ireland and had not held that the legislation under consideration was either unnecessary or undesirable.

Members requested clarification concerning the reservation made by the United Kingdom, on ratifying the Covenant, relating to the right to apply to persons lawfully detained in penal establishments, such laws and procedures as it might deem necessary for the preservation of discipline. Members also requested more information concerning the provisions relating to the admissibility of confessions in Northern Ireland.

In his reply, the representative of the state party stated that while allegations of serious ill-treatment aimed at obtaining confessions had occasionally been made, they had been very rare in recent years. If the allegation was made in the course of a criminal trial, the matter was decided during the trial itself and, if upheld, such statements were not admitted as evidence. The Police and Criminal (Northern Ireland) Order contained extensive provisions relating to ordinary criminal offences and ensured that statements obtained under duress were not admissible and allowed the judge to rule on admissibility if there was any suggestion that evidence had been unfairly obtained. A wide-ranging programme of measures to prevent ill-treatment of suspects had been introduced in recent years, mostly under the Police and Criminal Evidence Act 1984.

With reference to that issue, members of the Committee enquired whether legislation similar to the Police and Criminal Evidence Act, 1984, had come into operation in Northern Ireland. Members also asked whether ex gratia payments to persons who had been detained in custody resulted from an enforceable right to compensation, as envisaged by Article 9(5) of the Covenant. Further information was also requested
about the provision in the Prevention of Terrorism (Temporary Provision) Act of 1989 relating to the duty of the police officer reviewing a person’s detention to consider the need to withhold the right of the detained person to have someone informed of his arrest and to see a solicitor.

In his reply, the representative of the state party stated that there was no provision in United Kingdom’s domestic law for an enforceable right to compensation in respect of arrest or detention that was lawful under domestic law but was inconsistent with Article 9 of the Covenant. The representative advised that Sections 14 and 15 of the Northern Ireland (Emergency Provisions) Act 1987 gave detained persons the right to have access to legal advice and to have someone informed of their arrest. While the special circumstances of a particular case might dictate a temporary delay, both the maximum length of the delay and the circumstances in which the delay could be authorised were closely controlled. Such delay was justified in circumstances in which the provision of the information to the person whom the accused or suspected terrorist had asked to be informed might, in particular, lead to interference in the collection of information about terrorist acts, or make it more difficult to prevent an act of terrorism or to secure the apprehension of a person suspected of having committed an act of terrorism.

With regard to the right to a fair trial, members of the Committee wished to know whether the decision of a person to remain silent in judicial proceedings was considered tantamount to an admission of guilt. Members also wished to be given clarity on the provisions of the Northern Ireland (Emergency Provisions) Act which reversed the burden of proof. In his response, the United Kingdom’s representative advised that, regarding the right to remain silent, there was a requirement that a formal warning be given by the police that anything said might be used as evidence and that suspects were therefore clearly notified of their right to remain silent. The provisions of the Police and Criminal Evidence (Northern Ireland) Order neither removed the right to silence nor reversed the burden of proof. The silence of the accused was no evidence in itself but could serve to corroborate other evidence in the case. Section 9 of the Northern Ireland (Emergency Provisions) Act provided that if a person had been charged with a particularly serious offence, such as possession of explosive substances, and the prosecution had proved that both the accused and the
particular article were found together at the time of the offence, it was up to the defence to prove that the accused did not have the article in his possession.

The Committee asked whether there were any legal criteria for determining that an organisation should be prescribed under Section 1 of the Terrorism Act of 1989. The United Kingdom’s representative responded, stating that decisions to proscribe organisations were subject to full parliamentary control. Under the Prevention of Terrorism (Temporary Provisions) Act 1989, the maximum penalty for membership in a proscribed organization was imprisonment not exceeding 10 years, and mere membership in such organization was considered an offence. However, in cases where a person had been a member of an organisation before it had been proscribed, and where that person had not taken an active role in the organization after its proscription, there was a defence to the offence of membership. Very few organizations had been proscribed under the legislation and those that were, were proscribed because of their involvement in terrorism.

5.8 Committee against Torture: First Periodic Report of the United Kingdom

The Committee considered the initial report of the United Kingdom of Great Britain and Northern Ireland at its 91st and 92nd meetings, held on 13 November 1991. The representative stated that terrorism continued to be a real threat in the United Kingdom and especially in Northern Ireland. While it was still necessary to maintain the exceptional measures contained in the Prevention of Terrorism Act and in the Northern Ireland Emergency Provisions Act, there were valuable safeguards, such as the annual debate in Parliament on the renewal of the measures, following an annual review of the legislation by an independent reviewer. New safeguards had been proposed, in particular, for the questioning of terrorist suspects in Northern Ireland. In addition, the Northern Ireland ‘Guide to Emergency Powers’ which set out the rules regulating conditions of detention, was soon to be replaced by a statutory Code of

1386 The initial report presented to the Committee was discussed at its 91st and 92nd meetings in November 1991. The United Nations Office at Geneva (UNOG) Library provided me with the corresponding summary records: CAT/C/SR.91 and CAT/C/SR.92 (with a corrigendum). When the CAT meets, the proceedings of each meeting are recorded in summary, rather than verbatim form. A number of meetings held by the CAT are closed or private, and in these instances, summary records are not available to the public.
Practice. This Code would be admissible in civil and criminal proceedings governing the detention, treatment, questioning and identification by police officers of persons detained under the Prevention of Terrorism Act. The government was also considering the appointment of an independent commissioner to monitor procedures at holding centres, with the right to visit those centres at any time of his or her choosing. The Commissioner's main task would be to ensure that the proper procedures relating to the treatment of terrorist suspects were being followed and, more generally, that the arrangements for the detention of suspects were satisfactory.

Referencing Article 2(1)\textsuperscript{1387} and Article 11 of the Convention\textsuperscript{1388}, members of the Committee drew attention to the differences which existed in the legal protection of persons charged with or suspected of offences of terrorism in Northern Ireland compared to those enjoyed by citizens in the rest of the United Kingdom. Members also referenced information received from non-governmental sources which indicated that 90 per cent of cases brought before the Diplock Courts, in which a judge alone conducted the trial, relied solely or mainly on confessions as evidence. Members suggested that this situation could put pressure on interrogators to obtain confessions and create an opportunity for conduct which could contravene the provisions of the Convention. In that context, information was requested concerning the Independent Commission for Police Complaints, which had reviewed a number of investigations into alleged ill-treatment and torture, brought to the Committee’s attention by Amnesty International. Members of the Committee also drew attention to the \textit{prima facie} case of ill-treatment of Mr. Brian Gillen during interrogation at Castlereagh and asked whether any legal disciplinary actions had been taken against the alleged perpetrators. Committee members also asked whether compensation had been provided to persons who had been ill-treated by interrogating officers, particularly at Castlereagh. Members of the Committee also noted that police authorities seemed reluctant to make video recordings of interrogations and that this might be out of fear that they would provide evidence of ill-treatment.

\textsuperscript{1387} The duty of each State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.  
\textsuperscript{1388} The duty of each State Party to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.
With regard to Article 15 of the Convention, members of the Committee noted the statement in the report that confessions made by an accused person could not be used by the prosecution as evidence, if they had been obtained by oppression and asked for clarification of the term ‘oppression’. Members also wished to know whether the prohibition of the use of such confessions was part of common or statutory law and whether, in line with the scope of the Convention, that prohibition covered not only confessions but also statements in general.

In his reply, the representative referred to the situation in Northern Ireland and noted that the principal power of arrest lay with the police and that the powers of arrest of the armed forces in Northern Ireland were very limited. The latter could detain a suspect only for a maximum of four hours and in all cases had to transfer the suspect to a police station. Concerning the regime existing in Northern Ireland for the interrogation of terrorist suspects, the representative stated that the need for detention for more than 48 hours had to be reviewed every 12 hours by a uniformed officer of at least inspector rank. Moreover, the interrogation of terrorist suspects was monitored by a closed-circuit television system. Written interview records had to be made, timed and signed. Detailed custody records had to be opened as soon as practicable for each person in detention and had to be reviewed periodically by a police officer. If there was a complaint of ill-treatment, a report had to be made to an officer who was not connected with the investigation. In the event of suspected use of force, a medical officer had to be called immediately. In addition, access to a medical officer had to be provided at a set time every day. The United Kingdom’s representative also pointed out that the right of access to a solicitor during police detention could only be delayed beyond 48 hours upon the authorisation of an officer of at least the rank of superintendent and that the reasons for the delay had to be submitted to the detainee in writing.

Regarding the concerns members had expressed over the law on the right to silence as provided for in the Criminal Evidence (Northern Ireland) Order, the representative stated that this Order was merely a limited measure which removed an advantage.

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1389 The duty of each State Party to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.
enjoyed by those persons who refused to answer questions with a view to bringing police investigations to a halt. A research programme was being carried out to determine the effects of the Order in relation to terrorist crimes and the government would consider the results of that research. Referring to the concern expressed about trial without jury in the Diplock Courts, the representative indicated that his government accepted that that solution was not ideal but considered that in such trials appropriate safeguards were provided to defendants, such as the automatic right to appeal to a three-judge Court. The representative also stated that a large majority of defendants in Diplock Courts pleaded guilty.

Referencing the allegations of ill-treatment reported by Amnesty International, the representative informed the Committee that the allegations would be investigated and disciplinary measures would be taken, as appropriate, against the guilty parties. On the matter of the conduct of investigations into complaints of ill-treatment and the safeguard of the right to redress, the representative provided a description of the powers of the Independent Commission for Police Complaints in Northern Ireland. He indicated that the Commission's primary task was to ensure that complaints about police behaviour were thoroughly investigated and that appropriate disciplinary action was taken. The representative advised that compensation might be awarded to a victim even where no disciplinary proceedings had taken place or in the absence of a guilty verdict, because the standards of proof which applied in disciplinary and civil proceedings were different. The representative also advised that Mr. Brian Gillen had accepted the sum of 7,500 pounds sterling as compensation. With regard to the use of video recordings in interrogations, the representative stated that his government was not intractable on that point but was not yet convinced that the introduction of such recordings would not jeopardise the interview procedure.

In connection with Article 15 of the Convention, the representative referred to the definition of oppression as provided for in Section 76 of the Police and Criminal Evidence Act 1984. Where it was alleged that a confession had been obtained by oppression, the Court was required not to accept it into evidence, unless it had been

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1390 The duty of each State Party to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.
established by the prosecution that it had not been obtained by such means. Section 11 of the Northern Ireland (Emergency Provisions) Act 1991 did not use the term ‘oppression’, but explicitly referred to torture, inhuman or degrading treatment and to violence or threat of violence. The use of written statements in proceedings was governed by Section 78 of the Police and Criminal Evidence Act, by Article 76 of the Northern Ireland Police and Criminal Evidence Order and by the general law on the exclusion of evidence. A written statement by a witness to the police was admissible only with the consent of the accused. If the statement was contested by the defendant, the witness had to come to Court and give oral testimony and if he confirmed his earlier statement in oral testimony, he could be challenged by the defence.

5.9 The European Court

Judgement in Brannigan and McBride v The United Kingdom\textsuperscript{1391} was handed down on 26 May 1993. The first applicant had been arrested under Section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984. He was then detained at Gough Barracks, where he was served with a written notice which informed him of his legal rights. The first applicant was detained for a total period of six days, fourteen hours and thirty minutes. During his detention he was interrogated on forty-three occasions and denied access to books, newspapers and writing materials as well radio and television. In addition, the first applicant was not allowed to associate with other prisoners. His access to a solicitor was initially delayed for forty eight hours because the police believed that such access would interfere with their investigations. The first applicant was seen by a medical practitioner on seventeen occasions during police custody. The second applicant had also been arrested under Section 12(1)(b) of the 1984 Act. He was then detained at Castlereagh Interrogation Centre where he was served with a written notice informing him of his legal rights. The second applicant was detained for a total period of four days, six hours and twenty-five minutes. During his detention he was interrogated on twenty-two occasions and was subject to the same regime as the first applicant. He received two visits from his solicitor and was seen by a medical practitioner on eight occasions during his detention. The second applicant was killed in 1992 by a policeman who had attacked the Belfast Sinn

\textsuperscript{1391} Application no. 14553/89; 14554/89.
Fein Headquarters. The applicants had been detained very shortly after the United Kingdom’s derogation of 23 December 1988 under Article 15 of the Convention\textsuperscript{1392}. The applicant’s complained that their Article 5(3)\textsuperscript{1393} and Article 5(5)\textsuperscript{1394} rights had been infringed upon. The applicants argued that it would be inconsistent with Article 15(2)\textsuperscript{1395} if, in derogating from safeguards recognised as essential for the protection of non-derogable rights such as Articles 2\textsuperscript{1396} and 3\textsuperscript{1397}, the respondent state was afforded a wide margin of appreciation. The applicants argued that this was particularly the case where the emergency was of a semi-permanent nature such as that existing in Northern Ireland. The applicant’s argued further that the granting of a wide margin of appreciation in such circumstances would also be inconsistent with the *Brogan and Ors* judgment where the Court had regarded judicial control as one of the fundamental principles of a democratic society and had already extended to the respondent state a margin of appreciation by taking into account the context of terrorism in Northern Ireland.

The Court noted that national authorities are in principle in a better position than international judges to decide both on the presence of an emergency situation and on the nature and scope of derogations necessary to deal with such a situation. Nonetheless, the Court pointed out that Contracting Parties do not enjoy an unlimited power of appreciation and that it is the Court’s duty to rule on whether states have been guilty of heavy-handedness. The bench also noted that in exercising its supervision role the it must give appropriate weight to such relevant factors as i) the nature of the rights affected by the derogation; ii) the circumstances leading to; and iv) the duration of the emergency situation. Referencing its own case law\textsuperscript{1398} and assessing all the material before it relating to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom the Court

\textsuperscript{1392} The United Kingdom exercised its right of derogation conferred by Article 15(1) following the *Brogan & Ors* judgment, to the extent that Section 12 of the 1984 Act, which enabled further detention without charge for up to 5 days, might be inconsistent with the obligations imposed by Article 5(3) of the Convention.

\textsuperscript{1393} Everyone arrested or detained person has the right to be brought before a judge promptly or other officer authorised by law to exercise judicial power.

\textsuperscript{1394} Everyone arrested or detained in contravention of the provisions of Article 5 has an enforceable right to compensation.

\textsuperscript{1395} No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 shall be made under this provision.

\textsuperscript{1396} The right to life.

\textsuperscript{1397} That right not to be subjected to torture or to inhuman or degrading treatment or punishment.

\textsuperscript{1398} *Lawless v Ireland* Application no. 332/57.
concluded that there was no doubt that a public emergency had existed at the time of the United Kingdom’s derogation. The tribunal also held that the derogation had been a genuine response to the emergency situation, in light of the fact that the respondent state believed that judicial control compatible with Article 5(3) was not feasible because of the difficulties associated with the investigation and prosecution of terrorist offences. The Court rejected the applicants’ assertion that the derogation was invalid since it was intended to be an interim measure and Article 15 did not cater for such a situation. The bench stated that the process of continued reflection that the respondent state intended to pursue was in keeping with Article 15(3) and implicit in the very notion of proportionality. In examining the question of whether the respondent state’s decision that the Judiciary would not oversee extended detention was justified, the Court noted the United Kingdom’s views that i) it was essential that the detainee and his legal adviser should not be privy to the type of information on which decisions regarding the extension of detention are made; ii) in the adversarial system the independence of the judiciary would be compromised if judges were to be involved in the granting of extensions; and iii) the introduction of a judge into such proceedings would not necessarily ensure compliance with Article 5(3) as European case law required that the procedure be infused with a judicial character. The Court concurred holding that the state had not exceeded its margin of appreciation. The tribunal also sided with the United Kingdom on the question of whether there were sufficient safeguards in place to prevent abuse of the process. The Court pointed out inter alia i) the availability of the remedy of habeas corpus; ii) the absolute and enforceable right of detainees to consult with a solicitor; and iii) the fact that any decision delaying access to a solicitor was susceptible to judicial review. The Court therefore held that the derogation lodged by the United Kingdom had satisfied the

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1399 The right of everyone arrested or detained in accordance with the provisions of Paragraph 1(c) to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

1400 The right of Contracting Parties to derogate from their obligations at times of war or public emergencies threatening the life of the nation.

1401 The duty of Contracting Parties to i) keep the Secretary-General of the Council of Europe fully informed of the measures taken and the reasons therefore; and ii) to inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

1402 By 22 votes to 4.
requirements of Article 15 and that the applicants could not validly complain of a violation of Article 5(3) or Article 5(5)\textsuperscript{1403}.

The applicants also complained that their rights under Article 13\textsuperscript{1404} had been infringed. In response the Court noted that it had been open to the applicants to challenge the lawfulness of their detention by way of habeas corpus proceedings and that the Court in \textit{Brogan and Ors} had found that this remedy satisfied Article 5(4) of the Convention. The Court held\textsuperscript{1405} that since the requirements of Article 13 are less strict than those of Article 5(4) that there had been no breach of that provision.

\textbf{5.10 \hspace{1em} European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of 1993 Visit}

A delegation from the CPT visited Northern Ireland from 20 to 29 July 1993. The delegation visited a number of police establishments and prisons including Gough Barracks Holding Centre, Castlereagh Holding Centre, Belfast and Belfast Prison. The CPT found that a substantial number of those persons interviewed alleged that they had been treated poorly by the security forces either i) at the time of their arrest; or ii) during their detention. Based on the information gathered the CPT concluded that instances of physical ill-treatment had of late decreased markedly. The Committee, however, found that instances of psychological ill-treatment were still common. The Committee conceded that the questioning of persons detained in relation to terrorist offences was never likely to be a pleasant process. However the Committee pointed out that threats of death or serious physical injury had no proper place in the interrogation process. The Committee was struck by the large number of allegations of ill-treatment received as well as their consistency regarding, \textit{inter alia}, the types of ill-treatment employed. The CPT noted that since voice recordings of these interviews had not been made, it was not possible to ensure that psychological abuse of detainees did not occur. The CPT found that the state was guilty of imposing

\begin{footnotes}
\footnotetext[1403]{The right of everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 to have an enforceable right to compensation.}
\footnotetext[1404]{The right of everyone whose rights and freedoms as set out in the Convention are violated to have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.}
\footnotetext[1405]{By 22 votes to 4.}
\footnotetext[1406]{Not including those persons being held for ordinary offences.}
\end{footnotes}
immense psychological pressure on detainees, by way of, *inter alia*, lengthy periods of interrogation which amounted to inhuman treatment. The CPT concluded that persons arrested in Northern Ireland under the PTA were at significant risk of psychological forms of ill-treatment during their detention, and that occasionally the authorities resorted to physical forms of ill-treatment. The CPT conceded that there were instances where, in the interests of justice, it may be necessary to delay a detainees’ right of access to a particular lawyer of his choice. The CPT, however, stated that this should never result in the right of access to a lawyer being comprehensively denied. The CPT pointed out that in such circumstances access to another independent and trusted lawyer should be organised. The CPT recommended *inter alia*, i) that senior RUC officers communicate clearly to their subordinates that resorting to ill-treatment was unacceptable; ii) members of the security forces be reminded that, when affecting arrests, only reasonably necessary force should be used and that there could be no justification for striking an arrested person; iii) detained persons have access to an independent lawyer from the outset of their detention; and iv) the possibility of introducing voice recording of interviews with detainees be reviewed by the United Kingdom.

In its response to the CPT’s report the United Kingdom stated that all members of the RUC were fully aware that their behaviour needed to accord with both criminal law and the police disciplinary Regulations, and reiterated that any breach of those laws would be subject to a formal investigation. The United Kingdom also denied that detained terrorist suspects were placed under considerable psychological pressure in an effort to achieve cooperation.

### 5.11 The European Court

Judgment in *Murray v The United Kingdom*[^1407] was handed down by the Court on 28 October 1994. The first applicant, Margaret Murray and the second applicant Thomas Murray, were husband and wife and the other four applicants, their children. On 26 July 1982, one Corporal D attended an Army briefing at which she was told that the first applicant was suspected of providing financial aid to the IRA in contravention of

[^1407]: Application no. 14310/88.
Section 21 of the Northern Ireland (Emergency Provisions) Act 1978 and Section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1976. The corporal was instructed to go to the first applicant’s house and arrest her under Section 14 of the 1978 Act so that she could be questioned about her activities. Corporal D entered the applicants’ house together with several soldiers. The applicants were woken and instructed to assemble in the living room. The house was not searched but notes were taken pertaining to as to the applicants and the interior of the house. Corporal D then arrested the first applicant, and when asked under what Section the arrest was being made, stated “Section 14”. The first applicant was then interviewed, but refused to answer any questions. She also refused to be photographed and when examined by a medical orderly refused to co-operate. She was then questioned by Sergeant B but once again chose to remain silent. At some point during her detention she was photographed without her knowledge or consent. The first applicant was then released without charge.

In 1984 the first applicant brought an action against the Ministry of Defence for, *inter alia*, false imprisonment. She argued that her arrest had amounted to an institutionalised form of unlawful screening by the military who had merely wanted to obtain low level intelligence without having had i) any genuine suspicion that she had committed a criminal offence; or ii) any genuine intention of questioning her about a criminal offence alleged to have been committed by her. Based largely on the testimony of Corporal D and Sergeant B, Murray J dismissed the first applicant’s action. She then appealed to the Court of Appeal which reached a similar decision to the trial Court. The first applicant then appealed to The House of Lords. The appeal was based upon i) an allegation that from the time that Corporal D had entered the family home until she was notified of her arrest, the first applicant had been unlawfully detained; ii) an allegation that the first applicant’s arrest had been rendered unlawful by Corporal D’s decision to delay informing her that she was being arrested; and iii) an allegation that the period of the first applicant’s detention had exceeded what was reasonably required to make a decision whether to release her or hand her over to the police. The House of Lords rejected all of these complaints and dismissed the appeal.
The applicants then approached the ECtHR for relief. The first applicant alleged that her arrest and detention were in breach of Article 5(1) of the Convention.\(^\text{1408}\) She submitted that she had not been arrested on reasonable suspicion of having committed a criminal offence, and that the purpose of her arrest and subsequent detention had not been to bring her before a competent legal authority.

On examining the question of ‘reasonable suspicion’, the Court referenced the case of Fox, Campbell and Hartley, which was concerned with arrests carried out by the Northern Ireland police under a similarly worded provision of the 1978 Act. In that case, the Court pointed out that the ‘reasonableness’ of the suspicion on which an arrest must be based, formed an essential part of the safeguard against arbitrary arrest and detention laid out in Article 5(1)(c). The bench also noted that having a ‘reasonable suspicion’ required the existence of facts or information which would satisfy an objective observer that the person concerned could have committed the offence. The Court noted that terrorist crime falls into a special category and that because of the risks associated with terrorism, the police are often obliged to act speedily on all leads provided, including those received from secret sources. In the present case, the respondent state contended that much of the information on which the first applicant’s arrest had been based could not be disclosed as it could undermine the state’s safety. The tribunal acknowledged the existence of a terrorist campaign in Northern Ireland and accepted that the power of arrest granted by Section 14 of the 1978 Act represented a bona fide attempt by the respondent state to deal with that threat under the rule of law. Under the circumstances, the Court was prepared to attach some credence to the respondent’s declaration concerning the existence of reliable but confidential information grounding its case against the first applicant. The bench also found that sufficient facts had been presented to provide a plausible and objective basis for a suspicion that the first respondent may have committed an offence and that she had therefore been arrested and detained on ‘reasonable suspicion’ within the meaning of Article 5(1)(c). The Court then examined the first applicant’s contention that she had been arrested for an improper purpose. It noted that it was not within its power to substitute its own finding of fact

\(^{1408}\)Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…(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…’.
for that of the domestic Courts, since that Court was in a better position to assess the evidence brought before it. The Court rejected the first applicant’s argument that the state’s failure to charge her signified an absence of a bona fide reason behind her arrest. The bench observed that considering the first applicant’s refusal to answer any questions during her detention, it was unsurprising that no charges had been brought. The Court thus held\textsuperscript{1409} that the arrest had been executed for purposes specified in Article 5(1)(c) and that there had been no breach of that provision.

The first applicant also alleged that her Article 5(2) rights had been infringed upon\textsuperscript{1410}. Once again, the Court referenced the case of Fox, Campbell and Hartley. In that case, it was stated that in terms of Article 5(2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, to enable him, should he so choose, to apply to a Court to challenge its lawfulness. In that case, the Court noted that while such information had to be conveyed promptly, it need not be related in its entirety at the time of the arrest. The Court also noted that whether the content and promptness of the information conveyed were sufficient for the purposes of the Convention had to be assessed on a case by case basis. In the present case, the Court opined that it must have been apparent to the first applicant that she was being questioned about her possible involvement in the collection of funds for the purchase of arms for the IRA by her brothers. The Court held that even though the questions directed at the first applicant during her detention had not specifically focused on the collection of monies for the purchase of arms, this could be attributed to Mrs Murray’s choosing not to answer any of the question put to her. The tribunal thus found that the reasons for her arrest had been sufficiently brought to the first applicant’s attention. It was also held that considering the short period of time that elapsed between the moment of the first applicant’s arrest and her being made aware of the reasons for the arrest, the time constraints imposed by the notion of promptness in Article 5(2) had not been exceeded. The Court therefore held\textsuperscript{1411} that there had not been a breach of Article 5(2).

\textsuperscript{1409} By 14 votes to 4.
\textsuperscript{1410} The right of everyone who is arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
\textsuperscript{1411} By 13 votes to 5.
All six applicants complained that their rights under Article 8 of the Convention had been infringed. The respondent state conceded that in entering and searching the applicants’ home it had interfered with their rights to enjoy their private and family life and home. However, the respondent insisted that its actions had i) been in accordance with the law; ii) been for a legitimate aim; and iii) had been necessary in a democratic society. The Court held, following the reasoning of the House of Lords, that the actions had indeed been in accordance with the law. The Court also found that the actions had ‘undoubtedly’ been carried out for the legitimate aim of preventing crime. The bench then dealt with the question of whether the actions had been necessary in a democratic society. It noted that a certain margin of appreciation was called for in terrorism cases, when deciding what measures states were entitled to take to protect their citizens. The Court found that, taking into account the prevailing circumstances in Northern Ireland, that the actions the state take in relation to the applicants was not out of proportion to the stated aim. The Court thus held that there had been no infringement of the applicants’ Article 8 rights.

The first applicant also submitted that, contrary to Article 13 of the Convention, she had no effective remedy under domestic law in respect of her claims under Articles 5 and 8. The Court found that in relation to the first applicant’s complaints surrounding the army having entered and searched her house, a domestic remedy did exist, in the form of an action based on the tort of unlawful trespass to property. The first applicant also complained that she had no remedy in domestic law in respect of the respondent having i) photographed her without permission and retained the photograph; and ii) retained personal information pertaining to the first respondent. The Court though pointed out that even in the event that it was shown that such complaints could not be remedied under Northern Ireland law, Article 13 was not applicable in the instant case since no breach of Article 8 had been made out. The

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1412 The right of everyone to respect for his private and family life, his home and his correspondence. In addition, the Article stated that there should be no interference by a public authority with the exercise of the right described above, except such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

1413 By 15 votes to 3.

1414 The right of everyone whose Convention rights are violated to an effective remedy before a national authority regardless of whether the violation was committed by persons acting in an official capacity.
Court therefore held unanimously that there had been no breach of the first applicant’s Article 13 rights.

5.12 *The European Convention on Human Rights*

A number of the ECHR’s enforcement mechanisms have changed dramatically since the original agreement was reached in Rome on November 4, 1950. The 11th protocol to the Convention established a new permanent Court, where all alleged violations of the rights of persons are directly referred. The Court deals with individual and inter-state petitions. The United Kingdom signed the protocol on 11 May 1994 and ratified it on 9 December 1994. The 6th protocol abolished the death penalty, outside of times of war or threats of imminent war. The protocol was signed by the United Kingdom on 27 January 1999 and ratified on 20 May of the same year.

5.13 *Human Rights Committee: Fourth Periodic Report of the United Kingdom*

The Committee considered the United Kingdom’s 4th periodic report\(^{1415}\) at its 1432nd, 1433\(^{rd}\) and 1434\(^{th}\) meetings and in July 1995 adopted its concluding comments on the report\(^{1416}\). The Committee noted that despite the ceasefire and political negotiations that were taking place in Northern Ireland at the time, the United Kingdom’s continued reliance on emergency legislation was preventing full implementation of the ICCPR. The Committee expressed its regret that the United Kingdom was not willing to withdraw its reservations under the Convention. The Committee also commented that laws that i) extended detention without charge or delayed access to legal advisers; ii) allowed private property to be searched without a warrant; and iii) allowed exclusion orders within the United Kingdom, were excessive. The Committee expressed its concern over the provisions of the Criminal Justice and Public Order Act 1994 (CJPA 1994), which extended legislation originally only applicable in Northern Ireland\(^{1417}\), whereby certain inferences could be drawn from accused persons choosing to maintain silence. The Committee

\(^{1415}\) CCPR/C/95/Add.3.
\(^{1416}\) CCPR A/50/40 (1995).
\(^{1417}\) The Criminal Evidence (Northern Ireland) Order 1988.
recommended the United Kingdom i) consider withdrawing its notice of derogation from the ICCPR under Article 4; and ii) dismantle its emergency laws. The Committee also recommended that the United Kingdom review the CJPA 1994 in order to reconcile its provisions with those of Article 14 of the Convention.\footnote{1418}

### 5.14 Committee against Torture: Second Periodic Report of the United Kingdom

The Committee considered the second periodic report of the United Kingdom\footnote{1419} at its 234th and 235th meetings\footnote{1420} and in November 1995 adopted a number of conclusions and recommendations. The CAT praised the United Kingdom for having introduced Codes of Practice to be applied to interrogations of suspected terrorist detainees. It also expressed its pleasure at the United Kingdom’s practice of allowing detainees in Northern Ireland, being held in respect of terrorist-related offences, to consult in private with a lawyer. The Committee noted that the maintenance of i) emergency legislation in Northern Ireland; and ii) separate detention or holding centres, would inevitably continue to create conditions leading to breaches of the ICCPR. The Committee also noted its regret that individuals could not invoke the Convention since the United Kingdom had not made a declaration under Article 22 of the Convention. The Committee also expressed its concern over the practice of vigorous interrogation of detainees under the emergency powers. Concern was also expressed over the renewal of the emergency laws in Northern Ireland and regret over the United Kingdom’s failure to allow legal representation during interrogations in Northern Ireland for terrorist-related offences. It recommended that detention centres in Northern Ireland be abolished and the emergency legislation be repealed. The Committee also recommended that the United Kingdom make a declaration in favour of Article 22.

Mr. Morris, the United Kingdom’s representative, referred the Committee to the cease-fire declared by the Provisional IRA on 31 August 1994 and by the Loyalist terrorist organisations on 13 October 1994. He advised that the cessation of violence

\footnote{1418} Article 14 asserts, \textit{inter alia}, i) the right to be presumed innocent until proved guilty according to law; and ii) the right not to be compelled to testify against himself or to confess guilt.

\footnote{1419} CAT/C/25/Add.6.

\footnote{1420} CAT/C/SR.234 and 235.
in Northern Ireland had enabled his government to lift most exclusion orders and withdrawing a number of troops. The representative advised that the emergency powers were being used less by members of the executive. He advised that between April 1994 and June 1994, 160 persons had been detained for more than 48 hours at a holding centre and that 158 of those had been delayed in obtaining access to their solicitor. In the corresponding period in 1995, not a single person had been held for over 48 hours and no person had been delayed in obtaining access to a solicitor.

The United Kingdom’s representative reiterated his government’s view that the exceptional executive powers contained in the PTA 1989 and the EPA 1991 were temporary and would not be retained any longer than necessary. Mr Morris advised that following independent reviews of those laws, it had been concluded that the Acts were still necessary and that they had been renewed for a further year. The representative also advised that the Secretary of State for Northern Ireland had announced that providing the cease-fires continued, the government would undertake a comprehensive review of its counter-terrorist legislation.

5.15 The European Court

Judgment in the case of John Murray v The United Kingdom was handed down by the Court on 8 February 1996. The applicant had been found guilty of aiding and abetting the false imprisonment of a certain person, referred to as ‘L’. The Court a quo’s decision was largely based on inferences that it drew from the applicant’s failure to i) give evidence on his own behalf; and ii) account for his presence at the location where L was being held. These inferences were drawn based on Articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988. Having been taken into custody by the police the applicant’s right to consult with a solicitor had been delayed under Section 15 of the Northern Ireland (Emergency Provisions) Act 1987. The applicant appealed unsuccessfully to the Court of Appeal in Northern Ireland. The Court of Appeal argued that considering the very strong case presented against the applicant, it has been inevitable that the trial judge would make the

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1422 On the basis that the police had reasonable grounds to believe that the exercise of the right of access would, *inter alia*, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act.
inferences he did. The applicant then lodged an application with the ECtHR, arguing that his Article 6 rights had been infringed as a result of i) his being deprived of his right to remain silent and not to incriminate himself; and ii) his lack of access to a solicitor. The Court held that the inferences that the trial Court had made under Articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988 had not infringed the applicant’s Article 6 rights. It was argued that the right to remain silent and the right not to incriminate oneself are not absolute. At the same time, the Court pointed out that an accused remaining silent could never on its own secure a guilty verdict, as it was essential that a prima facie case be established. The Court argued that where a prima facie case has been established there was no reason why an accused’s failure to respond should not be taken into account. The accused had been found by the police in the house where L was being held captive and the Court argued that the inferences that the trial Court had drawn had amounted to common sense and had not been unfair or unreasonable. The Court rejected the applicant’s argument that it was unfair to draw adverse inferences from his silence, since he had been refused access to a solicitor for the first 48 hours of his detention. The Court argued that the applicant had been warned under the Criminal Evidence (Northern Ireland) Order 1988 that his silence could result in adverse inferences being drawn and that there was no reason to believe that he had not understood the significance of the warning. However, the Court did hold that the applicant’s Article 6 (3)(c) right to consult with a solicitor had been infringed. The Court, citing the case of Imbrioscia v Switzerland (1994) 17 E.H.R.R. 441 observed that this right applies even during preliminary investigations and that the manner in which the right should be applied depends on the circumstances of each case. The Court argued that due to the nature of the scheme contained in the Order, it is of paramount importance that an accused has access to a lawyer at the initial stages of police interrogation. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. The Court argued that to deny access to a lawyer for the first 48 hours of police questioning, in a situation

1423 Article 6(1).
1424 Article 6(2).
1425 By 14 votes to 5.
1426 By 12 votes to 7.
where the rights of the defence may be irretrievably prejudiced, is, regardless of the justification for such denial, incompatible with the rights of the accused under Article 6.

5.16 Committee against Torture: Third Periodic Report of the United Kingdom

The CAT considered the third periodic report of the United Kingdom at its 354th, 355th and 360th meetings and in July 1998 and adopted a number of conclusions and recommendations1427. Mr. Pearson, the United Kingdom’s representative advised the Committee that his government had passed legislation to give effect to the European Convention on Human Rights. He also advised that rights, safeguards and equality of opportunity had formed a central theme in the Northern Ireland peace accord signed in Belfast on Good Friday 1998. In addition to establishing a devolved Assembly, the agreement had also sought to make provision for a new body, to be called the Northern Ireland Human Rights Commission. Its role was to include keeping under review the adequacy and effectiveness of laws and practice and making recommendations to the Government as necessary. The representative advised that his government had not yet published its consultation paper on the permanent United Kingdom-wide counter-terrorism legislation referred to in its report, but that it would do so shortly. The representative advised that the EPA 1998 made provision for the audio-recording of police interviews with terrorist suspects. He also stated that silent video-recording of police interviews with terrorist suspects had become mandatory on 10 March 1998.

The Committee commended the United Kingdom for having enacted the Human Rights Act 1998 and for the role it played in the Northern Ireland Peace Process. It once again noted that the emergency legislation in place in Northern Ireland was making that state’s task of observing the ICCPR very difficult. The Committee expressed its concern over the United Kingdom’s ongoing use of detention centres in Northern Ireland the rules of evidence in use in Northern Ireland1428, which i) allowed for the admission of confessions of suspected terrorists into evidence upon a lower

1427 See CAT/C/SR.354. (Summary Record); CAT/C/SR.355. (Summary Record).
test than in ordinary cases; and ii) allow for the admission of derivative evidence in instances where confessions have been excluded. The committee noted the United Kingdom’s policy of making silent video-recordings or audio-recordings of interviews with terrorist suspects and asked whether it was possible to have a combination of the two. The Committee questioned whether the extant practices were in place to continue to allow the police to threaten suspects in a clandestine manner. The Committee expressed the view that the United Kingdom’s current practice of holding person for to seven days without access to legal advice was inconsistent with the provisions of the ECHR. The Committee agreed with the European Commission on Human Rights that such practices were unsatisfactory in a democracy.

The United Kingdom responded by advising the Committee that all persons arrested under the anti-terrorist legislation had the right of access to a lawyer of their choosing and that the exercise of that right could be delayed for up to 48 hours. The United Kingdom also advised that it was considering instituting judicial regulation of the existing possibility of extending detention for up to seven days and that this would enable it to withdraw its derogation from the provisions of the ECHR. With regard to the admissibility of evidence, the representative advised that courts in Northern Ireland were obliged, under the EPA 1998, to exclude evidence obtained through torture, inhuman or degrading treatment, or violence or threats of violence. The representative commented that although the ordinary evidentiary rules appeared to set a stricter standard, it was interesting to note that, according to a report on the matter, all evidence declared admissible by the courts under the EPA would also have been admissible under ordinary legislation.

5.17 **European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of 1999 Visit**

A delegation from the CPT visited Northern Ireland for a second time in November 1999. The CPT visited a number of police establishments and prisons including Castlereagh Holding Centre and Gough Barracks Holding Centre. The delegation noted that the dramatic reduction in the number of persons being detained for offences related to terrorism had coincided with a decline in the quantity of allegations of ill-treatment from such persons. The CPT observed that nonetheless a small number of
such allegations of ill-treatment persisted. The delegation found that the most common complaint centred around physical ill-treatment at the time of arrest. The CPT noted that compared with its 1993 visit there had been a significant reduction in the number of complaints of physical ill-treatment made by detainees. Nonetheless the delegation found that such physical ill-treatment had not been completely eradicated. The CPT referenced a case in which there was video footage which appeared to show a detainee being physically assaulted. The United Kingdom denied that any detainee had been physically assaulted, despite the fact that there was video footage supporting the detainees’ allegations. The CPT noted that there had been a significant reduction in the number of complaints of psychological ill-treatment at the holding centres. The delegation also noted that since the introduction of audio-taping of interviews in January 1999, allegations of threats by detectives to include compromising material in interview notes seemed to have come to an end and that complaints about the verbal conduct of police officers during formal interviews had slowed appreciably. However, the CPT pointed out that complaints of psychological abuse were still being raised and that it had established that unauthorised ‘off-tape’ interviews were being held. The CPT reiterated its 1993 recommendation that members of the security forces be reminded that no more force than is reasonably necessary should be used when effecting an arrest, and that once arrested persons have been brought under control, there was no justification for them being struck. The CPT recommended that police officers be reminded that shouting at detainees, insulting them, and attempting to browbeat them into making confessions was behaviour that had no proper place in the interrogation process. The CPT also recommended that i) all detainees be granted the right to have access to another, independent, lawyer when access to a specific solicitor was delayed; ii) those provisions which permitted delaying access to a lawyer for successive periods of 48 hours be repealed; and iii) that detainees be entitled to have a lawyer present during police interrogations.

In its response the United Kingdom pointed out that all members of its armed forces were trained in the use of reasonable force and were required to carry a specific instruction card containing guidance on that subject. From February 2001 the card would be updated to stipulate that, in all situations, no more force should be used than was absolutely necessary. The United Kingdom also pointed out that all of its police
Interviewers had received training in the Planning & Preparation; Engage & Explain; Account; Closure; Evaluation (PEACE) investigative interviewing model. The model came into effect in 1995 and is a standardised police interviewing model used throughout the United Kingdom. The United Kingdom explained that the model uses interviewing techniques suitable for willing and co-operative witnesses as well as hostile witnesses and suspects. The United Kingdom also pointed out that i) in September of 1999 the Chief constable had announced that solicitors would henceforth be allowed to sit in on interviews with terrorist suspects; and ii) Schedule 8 of the Terrorism Act 2000 provides for access to a solicitor and that these provisions would be governed by a Code of Practice which would come into force in February 2001. It was also stated that the Chief constable had announced the introduction of sound and vision video recording of all interviews with terrorist suspects in Northern Ireland.

5.18 International Law and the United Kingdom’s Counter-terror Laws: 1985 - 1999

At the beginning of 1985, the EPA 1973, as amended by the EPA 1975 and the EPA 1978 was still in force, as was the PTA 1984. In Chapter 2, it was shown that one of the functions of the EPA 1973 had been to introduce a limited number of reforms, some of which made inroads into the powers available to the United Kingdom’s executive to deal with terrorist threats. The EPA 1987 continued this trend, by initiating a further collection of checks and balances, constraining the executive in its counter-terror activities. The EPA 1991 contained an even greater number of reforming measures than the EPA 1987, including i) the establishment of effective

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1429 The Act limited to 28 days the time that any person charged with a scheduled offence could be held in custody by a magistrates’ Court. A further example is Section 8 of the 1987 Act which made it more difficult for the prosecution to have a confession admitted into evidence. Subsection 2 allowed such statements to be excluded, disregarded, or a fresh trial ordered, where *prima facie* evidence was adduced showing that the accused had been induced into making the statement by violence or the threat of violence, whether or not it amounted to torture. Subsection 3 allowed courts to exclude a statement or order a fresh trial where this would avoid i) unfairness to the accused; or ii) injustice. Part II of the 1987 Act guaranteed various rights of persons detained under Sections 12 or 13 of the Prevention of Terrorism (Temporary Provisions) Act 1984, including the right of any person detained under those provisions to i) have one person informed of their detention and location; ii) consult with a solicitor; and iii) be informed of the latter right as soon as practicable, after being detained.

1430 Published on 22 March 1991.

1431 For a full account of these reforms, see Chapter 2.
complaints procedures; and ii) the establishment of various codes of practice. The penultimate incarnation of the EPA was published on 15 March 1996 and included additional checks on United Kingdom’s counter-terror executive powers. The EPA 1998, introduced similar constraining measures. It is thus fair to say that as time passed, so the various EPA introduced an ever growing number of checks and balances on the United Kingdom’s executive powers. At the same time, Chapter 2 showed that the specific executive powers created by the numerous EPA, were set out in far more detail than any of those made under the earlier SPA. Importantly, however, the specificity of the various EPA resulted in a narrowing of the powers available to the executive to counter terrorism.

The final incarnation of the PTA was published on 15 March 1989. Aside from introducing a raft of novel counter-terror policies, the PTA 1989 broadened a number of the state’s existing powers. Nonetheless, even these bolstered powers did not come close to reinvesting the executive with the, relatively uninhibited broad powers it had enjoyed until the subsumption by EPA 1973 of the SPA. In addition, the PTA 1989 also implemented a variety of procedural safeguards which constrained the executive in its counter-terror powers.

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1432 That Act created an independent Assessor of Military Complaints and Procedures in Northern Ireland, tasked with, *inter alia*, i) reviewing the procedures for receiving, investigating and responding to relevant complaints; ii) receiving and investigating any representations concerning those procedures; iii) investigating the operation of those procedures in relation to any particular complaint; and iv) making recommendations concerning any inadequacies in those procedures.

1433 Section 61(1) of the 1991 Act obliged the Secretary of State to make codes of practice in connection with the detention, treatment, questioning and identification of persons detained under the 1989 Prevention of Terrorism (Temporary Provisions) Act (PTA 1989), and also allowed for the making of codes of practice in connection with i) the exercise by police officers of any power conferred by Part II of the EPA 1991 Act or by the PTA 1989 Act; and ii) the seizure and retention of property found by police officers when exercising powers of search conferred by any provision of the Acts mentioned above. Section 62 of the EPA 1991 allowed the Secretary of State to make similar codes of practice governing the exercise the powers bestowed on the armed forces under Part II of that Act.


1435 Section 53, for instance, obliged the Secretary of State i) to make a code of practice in connection with the video recording of police interviews; and ii) to make an order requiring that all such video recording comply with that code.

1436 Section 5 obliged the Secretary of State to i) to make a code of practice in connection with the audio recording of police interviews; and ii) make an order requiring that all such audio recording comply with the code.


1438 See, for example, Paragraph 1(1) of Schedule III, which stated that where a person had been detained following an exclusion order, that detention would be periodically reviewed, with no more than 12 hours passing between reviews; The 1989 Act also i) made the Secretary of State’s powers to extend periods of detention, connected with exclusion orders, subject the requirement that suspects be notified in writing of all applications for such extensions; and ii) made the exercise of the detention
In the period under review, the patterns observed above were mirrored by an emerging trend relating to the interaction between the United Kingdom, on the one hand, and international human rights law on the other. In 1998 the United Kingdom signed and ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) together with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPTP). In addition, the ECtHR handed down judgment in a number of cases dealing with the United Kingdom’s counter-terror executive powers. Judgment in *Brogan & Ors v The United Kingdom* was handed down on 29 November 1988. In *Brogan*, the ECtHR held that, by allowing for internment without trial for up to 5 days, the Prevention of Terrorism (Temporary Provisions) Act 1984 had violated Article 5(3) of the European Convention on Human Rights. In response, on 23 December 1988, the United Kingdom once again gave notice of its intention to take measures derogating from its obligations under Article 9(3) of the Convention. Judgment in the case of *John Murray v The United Kingdom* was handed down by the Court on 8 February 1996. The Court held that the applicant’s Article 6 (3)(c) right to consult with a solicitor had been infringed. At the same time, the United Kingdom’s counter-terror powers were subjected to unprecedented levels of scrutiny, by international treaty bodies.

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1439 The CPTP was ratified in June 1988 and the CAT in December 1988.
1440 *Brogan & Ors v The United Kingdom* Application no. 11209/84, 11234/84, 11266/84, 11386/85; *Fox, Campbell & Hartley v The United Kingdom* Application no. 12244/86; 12245/86; 12383/86; *Brannigan & McBride v The United Kingdom* Application no. 14553/89, 14554/89; *Murray v The United Kingdom* Application no. 14310/88; *John Murray v The United Kingdom* Application no. 18731/91.
1441 Applications no. 11209/84; 11234/84; 11266/84; 11386/85.
1442 Applications no. 11209/84; 11234/84; 11266/84; 11386/85.
1443 The Court argued, inter alia, that to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may be irretrievably prejudiced, is, regardless of the justification for such denial, incompatible with the rights of the accused under Article 6.
1444 The Human Rights Committee considered the United Kingdom’s Second, Third and Fourth Periodic Reports. The Committee against Torture considered the United Kingdom’s First, Second and Third Periodic Reports. In addition, the years 1985 to 1999 saw the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visit the United Kingdom on two occasions.
Although in the era under review, the United Kingdom failed to pass legislation, incorporating any of its international human rights treaty obligations\textsuperscript{1445}, that state’s counter-terror laws continued to develop in a manner which \textit{prima facie} appears to have been influenced by those obligations. For instance, the years under review saw an acceleration in the number and extent of reforming measures enacted, constraining the executive in its counter-terror activities. In addition, although on the whole the executive powers created in the period 1984 to 1999 became progressively harsher\textsuperscript{1446}, they were also set out in unprecedented detail. In other words, the laws enacted in the period under review delineated the boundaries of the executive’s counter-terror powers more precisely than ever before. This resulted in a further narrowing of the powers available to the executive to counter terrorism.


6.1 \textit{The European Court}

Judgement in \textit{Averill v The United Kingdom}\textsuperscript{1447} was handed down on 6 June 2000. The applicant had been arrested under Section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 on suspicion of murder. Shortly after his arrest, head hair comings were taken from the applicant and sent for forensic examination along with the clothes he was wearing at the time of his arrest. He was then interviewed by police officers who cautioned him in terms of Articles 3\textsuperscript{1448} and 5\textsuperscript{1449} of the Criminal Evidence (Northern Ireland) Order 1988. The applicant did not reply to questions about his movements on the day of the murders or about the fibres from the balaclavas and gloves which were found on his hair and clothing and which tied

\textsuperscript{1445} The provisions of the Human Rights Act 1998 only came into force in 2000.

\textsuperscript{1446} The number of counter-terror powers available to the executive also increased.

\textsuperscript{1447} (2001) 51 E.H.R.R. 56.

\textsuperscript{1448} Article 3 allowed adverse inferences to be drawn by a judge at a trial in instances where i) before being charged with an offence, on being questioned by the police a defendant fails to mention any fact relied on in his defence; or ii) on being charged with an offence, a defendant fails to mention any fact, which in the circumstances, he could reasonably have been expected to mention when so questioned.

\textsuperscript{1449} Article 5 allowed for adverse inferences to be drawn by a judge at a trial in instances where i) a person is arrested by a constable, and there is on, \textit{inter alia}, his person any object, substance or mark, or there is any mark on any such object; ii) and a constable reasonably believes that the presence of the object, substance or mark may be due to the participation of the person arrested in the commission of an offence; and iii) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and iv) the person does not do so.
him to the murders. He maintained silence throughout the interview process. At his trial, the prosecution’s case was based on the forensic evidence linking the balaclava and the gloves found in the car which was involved in the shooting and the applicant. At the trial, the applicant alleged that on the day prior to his arrest, he had worn black gloves and a rolled up balaclava as protective clothing at his place of work. The applicant was convicted of, inter alia, two counts of murder and one count of attempted murder. The judge relied on the circumstantial evidence together with the adverse inferences which he drew from the applicant’s silence during questioning, in terms of Articles 3 and 5 of the 1988 Order. The applicant took the matter to the Court of Appeal, but was unsuccessful in his bid to reverse the guilty verdict. The applicant then approached the ECtHR, arguing that he had been denied a fair trial in breach of Article 6(1) of the Convention. The Court noted that the right to silence is not an absolute right and that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case. The Court also noted that the extent to which adverse inferences should be drawn from an accused's failure to respond to police questioning should be limited. However, the Court opined that the decision of the trial judge to draw adverse inferences was only one of the elements upon which the applicant had been found guilty beyond reasonable doubt. The Court argued that the presence of incriminating fibres in the applicant's hair and clothing had called for an explanation from him and that his failure to do so allowed, as a matter of common sense, an adverse inference to be drawn. This, the Court argued was especially true, considering that the applicant had enjoyed access to a solicitor for much of the time during which he was questioned. The Court therefore held that there had been no violation of Article 6(1) of the Convention. The applicant also argued that his lack of access to a solicitor for the first twenty-four hours of his interrogation breached the provisions of Article 6(1) read with Article 6(3)(c). The Court noted, with reference to the John Murray decision, that having been cautioned under Order, an accused is confronted at the very beginning of an interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him.

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1450 The right of everyone against whom criminal charges have been brought to a fair hearing.
1451 By 6 votes to 1.
1452 The right of everyone charged with a criminal offence to defend himself in person or through the legal assistance of his own choosing or, if he has insufficient means to pay for such legal assistance, to be given it free when the interests of justice so require.
and if he breaks his silence he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. The Court concluded that in such circumstances the concept of fairness enshrined in Article 6 requires that an accused have the benefit of legal advice at the initial stages of interrogation. The Court therefore found that the applicant’s rights under Article 6(1) read with Article 6(3)(c) had been breached.

Judgement in Magee v The United Kingdom was also handed down on 6 June 2000. The applicant had been arrested under Section 12 of the Prevention of Terrorism Act 1984 in connection with an attempted bomb attack. The applicant was taken to Castlereagh police station where his access to a solicitor was delayed pursuant to Section 15 of the Northern Ireland (Emergency Provisions) Act 1987. Prior to being interviews by the authorities, the applicant was cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 (“the 1988 Order”). On the morning of his second day in detention the applicant complained to a doctor that he had been ill-treated during some of the interviews. Prior to his being given access to legal advice, the applicant broke his silence and gave detailed answers to a number of questions admitting to his involvement in the assembly and planting of the bomb. During the 7th interview the applicant signed a lengthy statement which described in considerable detail his part in the conspiracy to plant and detonate the bomb. The applicant was charged with, inter alia, conspiracy to cause explosions and membership of the Irish Republican Army and tried by a single judge sitting without a jury. The applicant pleaded not guilty. The prosecution case was based on the admissions made by the applicant. The applicant applied under Section 8 of the Northern Ireland (Emergency Provisions) Act 1978 to have the admissions excluded on the basis of his alleged ill-treatment. The application was rejected on the basis that the applicant's admissions were entirely consistent with the evidence presented by others charged with offences arising out of the same incident. The trial judge found that there was scant evidence supporting the applicant’s allegations and that he had been an unreliable witness, lying to the Court on several occasions. The judge, in convicting the applicant found that the admissions were sufficiently detailed to establish the several charges that had been laid against him. The applicant appealed to

1453 By 6 votes to 1.
the Court of Appeal of Northern Ireland. The Appeal Court agreed with the findings of the Court *a quo* and the applicant's appeal was rejected.

The applicant then approached the ECtHR alleging that he had been denied a fair trial, in breach of Article 6(1)\(^{1455}\) of the Convention taken in conjunction with Article 6(3)(c)\(^{1456}\). He complained that while the Criminal Evidence (Northern Ireland) Order 1988 allowed adverse inferences to be drawn from an accused's failure to respond to police questioning, an accused is not entitled to have a solicitor present at such times. The applicant further argued that the implications of the Order for the rights of the defence can only be properly understood and assessed with the help of legal advice. The Court noted that the trial judge had not been called upon to exercise his discretion under Article 3 of the Order since the applicant had already made an admission and that although the applicant chose not to testify at his trial, no inferences were drawn as a result. The Court also noted that regarding the applicant's complaint that he had not been allowed to consult with a solicitor, the question that the Court had to address was whether that restriction, in the light of the entirety of the proceedings, had deprived him of a fair hearing. The Court referenced the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in respect of the Castlereagh Holding Centre, where the applicant had been detained. It concluded that the austerity of the conditions of the applicant’s detention and his exclusion from outside contact were intended to be psychologically coercive and would have encouraged the applicant not to remain silent. Under these circumstances, he should have been given access to a solicitor at the initial stages of his interrogation. The Court noted that though no adverse inferences under Article 3 of the 1988 Order had been drawn, the caution administered to the applicant was doubtless a factor that had contributed to his vulnerable psychological state. The Court thus unanimously held that there has been a violation of Article 6(1) of the Convention read with Article 6(3)(c).

The applicant also complained that he had been discriminated against on grounds of national origin and/or association with a national minority, breaching his Article 14

\(^{1455}\) The right of everyone charged with a criminal offence to a fair trial.

\(^{1456}\) The right of any person charged with a criminal offence to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
The applicant’s complaint was based on the fact that suspects arrested and detained in England and Wales under prevention of terrorism legislation could have access to a lawyer immediately and that have a lawyer present during interviews. The Court pointed out that to the extent that the differences in treatment complained about by the applicant were a reality, those differences were not the result of personal characteristics, but rather on the geographical location where the individual is arrested and detained. The Court thus unanimously held that such differences did not amount to discriminatory treatment within the meaning of Article 14 of the Convention.

6.2 The Human Rights Act 1998

The ECHR was given domestic effect in the United Kingdom by the Human Rights Act 1998. However, the HRA 1998 didn't come into force until 2nd October 2000. The rights incorporated into the United Kingdom’s domestic law by the HRA 1998 are those set out in Articles 2 to 12 of the ECHR, Articles 1 to 3 of the first protocol to the ECHR and Article 1 of the 13th protocol. A number of the ECHR’s Articles were incorporated into the United Kingdom’s domestic law in modified form. For instance, Article 13, which protects the right to an effective remedy where rights and freedoms are violated, even where the violations have been committed by a public official, was included in the HRA 1998 in diluted form. While Section 6(1) makes it unlawful for a public authority to contravene Convention rights, Section 6(2) places limitations on this right. In addition, the rights contained in protocol 4 and rights. The enjoyment of the rights and freedoms of the Convention shall be secured without discrimination on any ground including national...origin, association with a national minority,...or other status.’


1458 Section 1 of the HRA 1998.

1459 Subsection 2(a) states that as the result of one or more provisions of primary legislation, the authority could not have acted differently; and Subsection 2(b) states that in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. In addition, Section 6(3) states that, inter alia, the term ‘public authority’ does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

1460 Article 1 prohibits the deprivation of liberty on the ground of inability to fulfil a contractual obligation. Article 2 protects the right of everyone lawfully within the territory of a State to liberty of
protocol 7 to the ECHR were not incorporated into the United Kingdom’s domestic law by the HRA 1998. The Ninth and Twelfth Protocols have also not been incorporated into the United Kingdom’s domestic law.

It is interesting to note that many of the rights contained in the UDHR were indirectly incorporated into the United Kingdom’s domestic law by way of the HRA 1998. Other rights, including the right to seek and to enjoy asylum from persecution in other countries were not incorporated by the HRA 1998.

A number of the rights contained in the ICCPR were also indirectly incorporated by way of the HRA 1998. Other rights such i) the right of all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; ii) the right of all accused persons to be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; iii) the right of accused juvenile persons to be separated from

movement and freedom to choose his residence. Article 2 also protects the right of everyone to leave any country, including his own. Article 3 prohibits the expulsion of any person by means either of an individual or of a collective measure, from the territory of the State of which he is a national. Article 3 also prohibits anyone from being deprived of the right to enter the territory of the State of which he is a national. Article 4 prohibits the collective expulsion of aliens.

The rights protected under the 7th protocol to the ECHR include i) the right of aliens to procedural guarantees in the event of expulsion from the territory of a State; ii) the right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal; iii) the right to compensation in the event of a miscarriage of justice; iii) the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted; and iv) equality of rights and responsibilities as between spouses.

The 9th protocol affords an applicant the right to refer a case to the Court in certain circumstances. This protocol provides for a general prohibition of discrimination. The original non-discrimination provision contained in Article14 of the ECHR was limited because it only prohibited discrimination in the enjoyment of one or the other rights guaranteed by the Convention. The new protocol removes this limitation and guarantees that no person shall be discriminated against on any ground by any public authority.

Although the HRA 1998 was only intended to ‘give further effect to rights and freedoms guaranteed under the European Convention on Human Rights’, some of the rights contained in the UDHR are also found in the ECHR.

Other rights not included in the HRA 1998 include i) the right to a nationality; ii) the right to social security; iii) the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; iv) the right to equal pay for equal work; v) the right to rest and leisure; and vi) the right to an adequate standard of living. These rights are, however, not relevant to an analysis of counter-terror executive powers.

Although the HRA 1998 was only intended to ‘give further effect to rights and freedoms guaranteed under the European Convention on Human Rights’, some of the rights contained in the ICCPR are also found in the ECHR.

Article 10(1).

Article 10(2).
adults and brought as speedily as possible for adjudication; iv) the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; v) the right of everyone lawfully within the territory to liberty of movement and freedom of choice of residence; vi) the right of everyone to leave any country; vii) the right of lawful aliens not to be expelled other than in pursuance of a decision reached in accordance with law and, except where compelling reasons of national security otherwise require, to be allowed to submit reasons against expulsion and to have the case reviewed by a competent authority; viii) the right not to be compelled to testify against himself or to confess guilt; viii) the right to be tried in person; ix) the right to his conviction and sentence being reviewed by a higher tribunal according to law; x) the right to be compensated where there has been a miscarriage of justice, wrongful conviction and punishment; and xi) the right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country find no expression in the HRA 1998.

6.3 The International Covenant on Civil and Political Rights

On 21 February 2001, just 7 months prior to the September 11 terrorist attacks, the United Kingdom gave notification that its derogation from Article 9(3) of the Covenant would terminate on 26 February 2001. However, following the Al-Qaeda-led attacks, the United Kingdom once again derogated from its Covenant obligations. The reasons given were the events of September 11 and the dangers of international terrorism, which the United Kingdom argued, constituted a public

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1470 Article 10(3).
1471 Article 11.
1472 Article 12(1).
1473 Article 12(2).
1474 Article 13.
1475 Article 14(3)(g).
1477 Article 14(5).
1478 Article 14(6).
1479 Article 14(7).
1480 In addition, the HRA 1998 does not prohibit propaganda for war, whereas the ICCPR does. See Article 20 of the ICCPR.
1481 The right of anyone arrested or detained to be brought promptly before a judge and to be tried within a reasonable time or to be released.
emergency in terms of Article 4(1). The notice of derogation flowed specifically from the provisions of the Anti-terrorism, Crime and Security Act 2001 (ATCSA), which bestowed upon the state extended powers to arrest and detain foreign nationals, where deportation had been intended but was not immediately possible. On 15 March 2005 the United Kingdom withdrew the above notification after the Anti-terrorism, Crime and Security Act 2001 ceased to operate on 14 March 2005.

6.4 Human Rights Committee: Fifth Periodic Report of the United Kingdom

The Committee considered the 5th periodic report submitted by the United Kingdom at its 1960th to 1963rd meetings, held in October 2001. In its concluding observations the Committee welcomed the conclusion of the Belfast Agreement in April 1998 and the United Kingdom’s move away the extraordinary measures in place in Northern Ireland. In particular, the Committee commended the establishment of the independent Police Ombudsman with jurisdiction over complaints in regard to all use of force on the part of the police and with significant powers of investigation and enforcement, as well as the creation of a Human Rights Commission in Northern Ireland. The Committee also welcomed the United Kingdom’s withdrawal of its notice of derogation relating to Article 9(3) of the ICCPR. It expressed its concern over the intentions expressed by the United Kingdom that it would give effect to its obligations to combat terrorist activities by introducing laws which could potentially impact severely on rights guaranteed in the ICCPR. The Committee advised the United Kingdom to ensure that any measures undertaken were fully compliant with the Covenant, including, where applicable, the provisions on derogation. The Committee acknowledged the United Kingdom’s move to prohibit the drawing of adverse inferences from a suspect’s silence while his or her lawyer was absent. However, it expressed reservations about the prevailing principle that

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1483 In terms of this Article, in times of public emergency which threaten the life of the nation, the existence of which is officially proclaimed, signatory states can take measures derogating from their obligations to the extent strictly required by the exigencies of the situation, provided that these measures are not inconsistent with other international law obligations and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

1484 The Act was replaced by the Prevention of Terrorism Act 2005.


1486 Article 4.
juries may draw negative inferences from the silence of accused persons. The Committee recommended that this aspect of criminal procedure be repealed to bring the laws into line with Article 14 of the Convention. The Committee expressed concern over the continued existence of the Diplock Courts in Northern Ireland and reminded the United Kingdom that under the ICCPR, these types of altered criminal procedures can only be justified on the basis of objective and reasonable grounds. The Committee recommended that that this requirement be incorporated in the relevant legislation, including the Northern Ireland (Emergency Provisions) Act 1996, and that the United Kingdom carefully monitor the situation in Northern Ireland and continually evaluate whether the measures are required. It expressed its concern over the Terrorism Act 2000 provisions which allow suspects to be detained for 48 hours without access to a lawyer, arguing, inter alia, that the provisions could well be in conflict with Articles 9 and 14 of the ICCPR and less intrusive measures could be introduced to achieve the aims of the laws. The Committee stated that the United Kingdom had failed to justify the powers and recommended that the powers be reviewed.

The Committee also expressed concern over the fact that asylum-seekers had been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience. In fact, the Committee stated that it found any detention of asylum-seekers in prisons unacceptable. The Committee also expressed its dismay over the fact that asylum-seekers, after final refusal of their request, could also be held in detention for an extended period where deportation was not possible.

6.5 The European Court

Judgement in O'Hara v The United Kingdom was handed down by the Court on 16 October 2001. The applicant had been arrested under Section 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984 for his suspected

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1487 Article 14 asserts, inter alia, i) the right to be presumed innocent until proved guilty according to law; and ii) the right not to be compelled to testify against himself or to confess guilt.
1488 Schedule 8.
1489 The right of anyone arrested or detained to be brought promptly before a judge and to be tried within a reasonable time or to be released.
involvement in the murder of Kurt Konig. Prior to his arrest the applicant’s house had been searched. He was questioned about his possible membership of the IRA and his suspected involvement in Kurt Konig’s murder. He did not respond to any questions and was released without charge after six days and thirteen hours in custody. The applicant then instituted an action for damages in the High Court in Northern Ireland for, inter alia, assault, seizure of documents, false imprisonment and unlawful arrest. The Court found, inter alia, that there had been no false arrest and unlawful imprisonment. In successive appeals, neither the Court of Appeal in Northern Ireland nor the House of Lords found differently. Following this the applicant brought a complaint before the ECtHR arguing that his arrest on 28 December 1985 had breached his Article 5(1)(c) rights. The Court noted that in order for an arrest to satisfy the safeguards contained in Article 5 of the Convention, the arresting officer must have evidence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence justifying arrest. The Court observed that in the instant case the standard of suspicion set by the United Kingdom’s domestic law for the arrest was that of an honest suspicion on reasonable grounds. The Court, referencing European case law, observed that there is a fine line between those cases where the suspicion grounding the arrest is sufficiently founded on objective facts and those which are not. The Court further noted that whether the requisite standard is satisfied and whether the guarantee against arbitrary arrest laid down by Article 5(1)(c) is thereby satisfied, depends on the particular circumstances of each case. The Court noted that informers had identified the applicant as having been involved in the murder of Mr. Konig and that no material had been placed before it challenging the respondent state in this regard. The Court observed that the arrest was a pre-planned operation and was based on more specific detail than in Fox, Campbell & Hartley. In the circumstances the Court found that the domestic Courts’ approach was not incompatible with the standards imposed by

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1491 The Secretary of State for Northern Ireland having extended the applicant’s period of detention beyond the initial 48-hour period, by five days.
1492 The right of everyone to liberty and security of person. The right not to be deprived of 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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
1493 Section 12(1)(b) of the 1984 Act.
1494 The cases of Fox, Campbell & Hartley v The United Kingdom Application no. 12244/86; and Murray v The United Kingdom Application no. 14310/88.
Article 5(1)(c) of the Convention. Consequentially the Court held that there had been no breach of that provision. The applicant also alleged that he had not been brought promptly before a judge after his arrest, resulting in his Article 5(3)\textsuperscript{1495} rights being infringed. The Court held that considering i) that the respondent state had not disputed that the applicant had been held for six days and thirteen hours and that this had been contrary to its Article 5(3) obligations; and ii) in terms of its case law\textsuperscript{1496} detention periods exceeding four days for terrorist suspects were incompatible with the Convention, there had been a violation of Article 5(3) of the Convention.

Judgment in *Brennan v The United Kingdom*\textsuperscript{1497} was also handed down on 16 October 2001. The applicant had been arrested under Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 for the murder of a former member of the Ulster Defence Regiment. The applicant was interviewed for thirty-five hours on consecutive days by RUC. The applicant’s right to see a solicitor was delayed for twenty-four hours. The police alleged that the applicant admitted to his involvement in the murder in an interview which was held at a time when he had not yet accessed legal advice. The police also alleged that during a later interview the applicant signed statements admitting to his role in the murder as well as his involvement in additional terrorist activities. The applicant alleged that these statements had not been given freely and had been extracted by abusive treatment, threats of abuse, threats to his family and intimidation. These allegations were denied by the RUC. At no point did the applicant advise his solicitor that he was being mistreated, though all of their meetings took place within earshot of RUC guards. The applicant’s statements had all been made following cautions in terms of Article 3 of the Criminal Evidence (Northern Ireland) Order 1988\textsuperscript{1498}. The applicant’s solicitor was not allowed to be present at any of the interviews. The applicant was tried for a total of eighteen serious offences including murder, attempted murder and membership of a proscribed organisation, and was found guilty on all counts. The disputed statements were the

\textsuperscript{1495} The right of everyone arrested or detained to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to be tried within a reasonable time or released pending trial.

\textsuperscript{1496} *Brogan & Ors v The United Kingdom* Application no. 11209/84, 11234/84, 11266/84, 11386/85.

\textsuperscript{1497} [2002] Crim. L.R. 216.

\textsuperscript{1498} ‘You do not have to say anything. Unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in Court, your failure to take this opportunity to mention it may be treated in Court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence.’
only evidence connecting the applicant to the charges. At the trial officers of the RUC and doctors who had examined the applicant during his detention gave evidence supporting the proposition that there had been no abusive treatment or intimidation. This evidence was accepted by the trial judge without reservation. Despite the fact that evidence was led showing that the applicant was of unusually low intelligence and should have received independent support during the interviews, the judge ruled that the questioning of the applicant had not been unfair. The judge also held that the decision to deny the applicant access to legal advice for twenty-four hours, had not been unreasonable considering the RUC’s fears that messages might be passed through the solicitor with a view to alerting other suspected terrorists. The judge also noted that the applicant’s admissions had been made after the twenty-four hour delay had elapsed and that the solicitor had been absent of his own accord. The applicant unsuccessfully appealed against his conviction to the Court of Appeal of Northern Ireland and was then denied leave to appeal to the House of Lords.

The applicant then approached the ECtHR arguing that his Article 6(1)(c) rights had been infringed. Regarding the question of the applicant’s delayed access to legal advice, the Court, referencing its decision in John Murray v the United Kingdom, stated that the question in each case is whether the restriction, in the light of the entire proceedings, has deprived the accused of a fair hearing. The Court concluded, based on the same reasoning employed by the trial judge that the applicant’s rights under Article 6(1) or 3(c) of the Convention had not been infringed.

The applicant also complained that during his interviews he had not been permitted to have his solicitor present and that there had been no videotaping or audio-recording of the interviews. While the Court agreed that these factors do provide safeguards against police misconduct, it concluded that they are not indispensable preconditions of fairness in the context of Article 6(1). The Court observed that the essential issue in such cases was whether, giving the extant facts, the applicant received a fair trial. The Court considered that the adversarial procedure of the trial Court gave the applicant ample opportunity to demonstrate any alleged oppressive conduct by the RUC and

1499 The right of everyone charged with a criminal offence to defend himself in person or through the legal assistance of his own choosing or, if he has insufficient means to pay for such legal assistance, to be given it free when the interests of justice so require.
that the lack of additional safeguards had not rendered his trial unfair. The Court unanimously held therefore that there had not been a violation of Article 6(1) or 6(3)(c) of the Convention.

Finally, the applicant complained that his rights under Article 6(3)(c) to be assisted by a lawyer had been violated when the consultations he had with his solicitor had been attended by a police officer. The Court noted that Article 6(3) normally requires an accused be allowed to benefit from the assistance of a lawyer at the initial stages of an interrogation. In addition, an accused’s right to communicate with his legal adviser out of hearing of a third person is part of the basic requirements of Article 6(3)(c). Nonetheless, the Court acknowledged that rights could be subject to restrictions for good cause and that the question in each case was whether the restrictions, in the light of the entire proceedings, had deprived the accused of a fair hearing. In the instant case, the Court observed that the consultation at the centre of the applicant’s complaint had been the first occasion since the arrest, that he had been able to speak to his lawyer. In addition, the Court pointed out, referencing the John Murray decision, that he had been cautioned under Article 3 of the 1988 Order and that his decisions as to whether to answer particular questions or risk inferences being drawn against him was potentially of great importance to his defence. Consequentially, the Court concluded that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor. The Court therefore unanimously held that there had been a violation of Article 6(3)(c) of the Convention read with Article 6(1).

6.6 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the 2002 Visit

A delegation of the CPT carried out a visit to the United Kingdom from 17 to 21 February 2002. The visit followed the terrorist attacks of 11 September 2001 and the passing into law by the United Kingdom of ATCSA and the United Kingdom’s derogation from Article 5(1)\textsuperscript{1500} of the ECHR. The Committee decided to carry out a

\textsuperscript{1500}Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…(c) the lawful arrest
visit to the United Kingdom in order to examine the situation of persons detained pursuant to the ATCSA. The delegation did not receive any reports from those detained under the ATCSA of physical ill-treatment by police officers or immigration service officials. However, one of the persons interviewed did complain about physical ill-treatment at the hands of prison officers. In its response to the report, the United Kingdom stated that the incident complained of involved prison officers having to restrain a detainee’s arms in an effort to protect him from self-harm. The United Kingdom denied that the prisoner had been punched in the chest as had been alleged. Other detained persons who were interviewed complained that they had been verbally abused by prison authorities. In its response the United Kingdom, *inter alia*, stated that the use of offensive language or manner was of great concern to the Directorate of High Security Prisons and to the HMP Belmarsh Senior Management Team. The United Kingdom alleged that the prisoner in question was given the opportunity to make a formal complaint but that this was declined. The United Kingdom reiterated that upon receipt of any such complaints full investigations would be conducted and that where the allegations were proved, actions would be taken in terms of HM Prison Service Policy.

The delegation noted that the ATCSA contains no reference to the right of access to a lawyer, which the CPT regards as a fundamental safeguard for detained persons. The United Kingdom informed the Committee that this right was guaranteed to immigration detainees in general and that, as a result, it also applies to persons detained under the ATCSA. The Committee noted, however, that the United Kingdom had not provided clarification as to the precise legal provisions which guaranteed that right. In its response to the report, the United Kingdom stated that the rights of immigration detainees were embodied within the Detention Centre Rules 2001. The delegation found that a number of persons detained under the ATCSA had not been granted access to a lawyer from the outset of their detention. In fact, the delegation noted that none of the persons interviewed by the delegation had seen a solicitor on the day of their arrest. Most of the detainees complained that they had been made to wait for a week or more before they were allowed to have contact with a solicitor. The delegation was informed by the United Kingdom that these delays had been the result of detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence...
of clearing procedures applied to Category A prisoners. The United Kingdom also advised that procedures had been put into place which would ensure rapid contact with a solicitor. Complaints were also received by the Committee, that on occasion, subsequent professional visits had been hindered.

The CPT noted that persons detained under the ATCSA could apply for bail and lodge an appeal against their certification and therefore their detention and that the ATCSA provides for the review of persons’ certification at regular intervals. The Committee pointed out that under the Act, bail, appeal and review procedures lay with the Special Immigration Appeals Commission (the SIAC). The CPT expressed its concern over the fact that the SIAC could consider evidence against a person without disclosing it and could exclude the interested party and their lawyer from hearings. The United Kingdom expressed surprise over the Committee’s concerns. It pointed out that the procedure complained of was referred to without disapproval by the ECtHR in the case of *Chahal v United Kingdom*\(^1\)\(^2\). The United Kingdom stated that the procedure was based on a Canadian model and was widely considered to be the fairest that could be devised. The Committee also requested clarification from the United Kingdom regarding Section 28 of the ATCSA, which stipulates that a person will be appointed to review the operation of Sections 21 to 23 of the Act. The United Kingdom advised the CPT that on 22 November 2001 the Secretary of State appointed Lord Carlile of Berriew to review the operation of the relevant Sections of the ATCSA.

In the course of the visit, the CPT's delegation also interviewed a small number of persons detained on criminal charges of a terrorist nature. The delegation heard no allegations of ill-treatment of these persons at the hands of law enforcement officials or prison officers. The CPT's delegation heard accounts that persons detained under Section 41 of the Terrorism Act 2000 and whose custody had been extended by judicial decision in their absence. The CPT requested comment from the United Kingdom regarding these allegations. The information gathered indicated that the three basic safeguards against ill-treatment by the police advocated by the CPT, including the access to a lawyer, were operating in a satisfactory manner. The CPT

requested an update from the United Kingdom regarding i) those situations where, in the interests of justice, access to a specific lawyer is delayed; and ii) the recommendations it had made in this regard in 2002.

The CPT recommended that prison officers at the High Security Unit at Belmarsh Prison be reminded that force should only be used as a last resort and must not be more than is strictly necessary. The Committee also recommended that police and prison officers dealing with persons detained pursuant to the ATCSA keep in mind that all forms of ill-treatment, including verbal abuse, are not acceptable. In its response to the report, the United Kingdom pointed out that i) the Prison Service has strict Regulations regarding any use of physical restraint; ii) all staff are aware of the rules governing the use of force; and iii) since the beginning of 2002 there had only been one incident when a prisoner had had to be restrained. The CPT also recommended that steps be taken to ensure that, in case of any further detentions pursuant to the ATCSA, the right of access to a lawyer be guaranteed as from the outset of custody.

6.7 The European Convention on Human Rights

The 13th protocol to the ECHR banned the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war. This protocol was signed by the United Kingdom on 3 May 2002 and ratified on 10 October the same year.

6.8 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the 2004 Visit

A delegation of the CPT carried out a visit to the United Kingdom from 14 to 19 March 2004. The visit focused on those persons who had been certified by the United Kingdom's Home Secretary as suspected international terrorists and detained pursuant to the ATCSA. The delegation was tasked with assessing what developments had occurred since the CPT's visit in February 2002. The CPT noted that the ATCSA

1502 For a copy of the report presented to the United Kingdom following the visit, see http://www.cpt.coe.int/documents/gbr/2005-10-inf-eng.htm.
made no direct reference to detainees’ rights of access to legal advice. The Committee called upon the United Kingdom to ensure that the legislation be amended to directly protect detainees’ rights of access to such advice, from the very outset of their detention and observed that access to a lawyer on arrival in prison had not caused problems for ATCSA detainees following the CPT’s 2002 visit. The CPT noted that arrangements had been made in the prisons visited by the delegation to ensure detainees’ rapid access to their lawyers. The Committee noted, however, that at Belmarsh, follow-up visits by lawyers were not always possible during detention and called upon the United Kingdom to rectify the situation. The United Kingdom acknowledged the importance of detainees’ right of access to legal advice. It was explained that an administrative fault had meant that certain detainees were not able to consult with their solicitors. In particular, insufficient notice had been given to the prison concerned of the proposed consultations.

The CPT recollected that in its 2002 report it had expressed concern about the ability of the SIAC to i) consider evidence against a person without disclosing it; and ii) exclude the interested party and their lawyer from hearings. The Committee noted that its concerns had since been echoed by various authorities in the United Kingdom\textsuperscript{1503}. The CPT requested that the United Kingdom clarify whether it intended to take any measures to remedy the procedural disadvantage complained of. In its response to the report, the United Kingdom denied that the Home Secretary’s power to object to the disclosure of evidence created a procedural disadvantage for ATCSA detainees. The United Kingdom pointed out that the legitimacy of domestic tribunals having regard to closed material had been confirmed at the ECtHR on numerous occasions\textsuperscript{1504}.

The CPT noted the existence of the Special Advocate, appointed to represent the interests of ATCSA detainees in instances where the Secretary of State objects to the disclosure of evidence and the detainees and their lawyers are excluded from hearings. The Committee observed, however, that the extant rules restrict Special Advocates’ contact with detainees and their lawyers and that in practice such contact

\textsuperscript{1503} See, for example, Paragraph 187 of the Newton Committee Report presented to Parliament pursuant to Section 122(5) of the Anti-terrorism, Crime and Security Act 2001 and ordered by the House of Commons to be printed 18th December 2003.

\textsuperscript{1504} Chahal v United Kingdom (1996) 23 E.H.R.R. 413; Tinnelly & Sons Ltd & Ors & McEllduff & Ors v United Kingdom Application no. 20390/92 and Al Nashif v Bulgaria Application no. 50963/99.
had been very limited or even non-existent. The CPT requested the United Kingdom to advise it of any steps taken to improve contact between the Special Advocate, detainees and their own lawyers. In its response to the report, the United Kingdom rejected the suggestion that the Special Advocates system was deficient in any way. The United Kingdom explained that some of the detainees, in consultation with their lawyers had decided not to consult with a Special Advocate and pointed out that once the closed material had been served no further contact was possible.

The CPT also noted that during its visit several persons had expressed concern over the SIAC’s apparent power to take into consideration evidence that may have been obtained by coercion or torture outside of the United Kingdom. The Committee underscored that such an approach would contravene universal principles governing the protection of human rights and the prohibition of torture and other forms of ill-treatment under international law.

The United Kingdom stated that it unreservedly condemned the use of torture and that i) the common law; and ii) Human Rights Act 1998 contained safeguards against the use of evidence procured through torture. The United Kingdom pointed out that evidence obtained as a result of any acts of torture by British officials, or in which British authorities were complicit, would be inadmissible, regardless of where the evidence was obtained. The United Kingdom also pointed out that the Home Secretary had made a commitment not to rely on evidence which he knew or believed to have been obtained by a third country by means of torture.

In its response to the CPT’s report, the United Kingdom referenced the 2004 decision of the House of Lords1505 in which i) it had been decided that Section 23 of the ATCSA was incompatible with Articles 5 and 14 of the ECHR; and ii) the United Kingdom’s derogation order had been quashed. The House of Lords had decided that the detention of suspected foreign nationals was discriminatory and disproportionate in that i) the measures targeted foreign nationals alone; and ii) it could not be said that measures short of detention could not meet the threat posed by international terrorists. The United Kingdom advised that following this decision it had introduced measures

that could apply to British nationals and foreigners alike and which did not involve imprisonment.

6.9 **Committee against Torture: Fourth Periodic Report of the United Kingdom**

The Committee considered the 4th periodic report of the United Kingdom at its 624th and 627th meetings, held on 17 and 18 November 2004 and adopted a number of conclusions and recommendations. The United Kingdom’s representative, Mr. Spencer advised the Committee that his government was determined that to act in strict compliance with international law as well as the provisions of the CAT. The terrorist attacks of 11 September 2001 had demonstrated that international terrorists were able to inflict destruction on a massive scale. Since that date, the United Kingdom had received a series of explicit threats and, in November 2003, the Consulate-General in Istanbul had been attacked. The Anti-Terrorism, Crime and Security Act 2001 had introduced exceptional powers to counter the risks posed by terrorist groups. The powers set out in Part 4 of the Act enabled the Home Secretary to certify and detain foreign nationals believed to present a risk to national security. In order to forestall any argument that such detention violated the right to liberty and security as set out in Article 5 of the European Convention on Human Rights, the United Kingdom had derogated from that Article. A parallel derogation had also been sought from Article 9 of the International Covenant on Civil and Political Rights. Those derogations had been a necessary and proportionate response to the emergency that threatened the life of the nation.

The Committee was pleased to note the United Kingdom’s affirmation that evidence obtained as a result of acts of torture would not be admissible in criminal or civil proceedings in the United Kingdom. The Committee was also pleased to note the United Kingdom’s unreserved condemnation of the use of torture, as well as its early ratification of the optional protocol to the Convention. However, the Committee noted

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1506 See, The Prevention of Terrorism Bill 2005 which was enacted on 10 March 2005 and which introduced the control order system.
1507 The Committee’s conclusions and recommendations can be found at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/451/02/PDF/G0445102.pdf?OpenElement. The Committee against Torture will consider the United Kingdom’s Fifth Periodic Report at its 50th session, from 6 May to 31 May 2013.
a number of reservations regarding the United Kingdom’s observance of the Convention.

The Committee expressed its concern over the incomplete factual and legal grounds advanced to the Committee justifying i) the United Kingdom’s derogations from its international human rights obligations; and ii) the emergency powers set out in Part IV of the Anti-terrorism, Crime and Security Act 2001. Similarly, with respect to Northern Ireland, the Committee expressed its reservations concerning the United Kingdom’s failure to provide it with precise information on the continued necessity of the emergency provisions for that jurisdiction, contained in the Terrorism Act 2000. The Committee also criticised the United Kingdom for having resorted to the potentially indefinite detention of foreign nationals suspected of terrorism, under the ATCSA 2001. The Committee also suggested that the United Kingdom should re-examine its review processes, with a view to strengthening independent periodic assessment of the justification for both the ATCSA 2001 and the TA 2000. It further recommended that the United Kingdom review the alternatives available to indefinite detention under the ATCSA 2001. The United Kingdom was also called upon to provide the Committee with details on how many cases of extradition subject to receipt of diplomatic assurances had occurred since 11 September 2001; what its minimum contents were for such assurances; and what measures of subsequent monitoring had been undertaken in such cases. The Committee also recommended that the United Kingdom make the declaration under Article 22 of the Convention.

The United Kingdom’s representative advised that with regard to the state of emergency in Northern Ireland, his government was committed, under the Belfast Agreement, to the ultimate removal of the temporary provisions of the TA 2000. However such action would only be taken when the security situation allowed. The representative advised that in the interim, the special legislation in place in Northern Ireland had to be renewed annually following a debate in both Houses of Parliament and wherever possible provisions were allowed to lapse. The Committee were advised that although levels of violence in Northern Ireland had decreased, some terrorist

1508 Recognising the competence of the Committee to receive and consider complaints from or on behalf of individuals claiming to be victims of a violation of the provisions of the Convention.
groups were still active, which made it necessary to retain the current counter-terror provisions.

6.10 The European Convention on Human Rights

The period 2000 to 2005 saw changes in the ECHR’s enforcement mechanisms. The 14th protocol empowers the Committee of Ministers to bring proceedings before the Court where a state has refused to comply with a judgment. It also empowers the Committee of Ministers to ask the Court for an interpretation of a judgment, in order to assist the Committee in its task of supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment. The United Kingdom signed this protocol on 13 July 2004 and ratified it on 28 January 2005.

6.11 The European Convention on Human Rights

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6.12 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the First 2005 Visit

A delegation of the CPT carried out a visit to the United Kingdom from 11 to 15 July 2005. The Prevention of Terrorism Act 2005 was adopted on 11 March 2005 and provided for the making of control orders, which imposed obligations on individuals whom the Home Secretary believed were involved in terrorism. On 12 March 2005

\[1509\] For a copy of the report presented to the United Kingdom following the visit, see http://www.cpt.coe.int/documents/gbr/2006-26-inf-eng.htm.
the Home Secretary issued non-derogating control orders in respect of ten individuals previously certified under Part IV of the ATCSA. The Committee decided to examine the practical operation of the PTA 2005 and to meet with a number of the persons who had been served with control orders, many of whom the Committee had met in 2002 and 2004 when they were being held under Part IV of the ATCSA. The delegation interviewed eight persons under control orders in the course of the visit.

The CPT noted that the TA 2000 permitted the police, on their own authority, to detain terrorist suspects for a maximum period of 48 hours, and allowed for a warrant to be obtained for further detention of up to seven days. It was further noted that this seven day period could be judicially extended for a further seven days. The Committee noted that the United Kingdom intended to amend these provisions so as to increase to 28 days the maximum possible period of custody by the police. The CPT expressed considerable concern about all of these provisions.

The Committee also noted that it had received reports that under the TA 2000, detained persons were not always physically brought before the judge when the possible extension of police custody for a further period of up to seven days was considered and that such hearings were occasionally conducted by way of a video conferencing link. The Committee noted a number of reservations in this regard including i) it was more difficult for judges to make accurate assessments regarding the physical and psychological wellbeing of detainees; and ii) victims of ill-treatment would be less likely to feel free to make statements regarding his ill-treatment. The Committee thus recommended that the United Kingdom take steps to ensure that persons detained under terrorism legislation in respect of whom extensions of police custody are sought, are always brought physically before the judge responsible for deciding this question. In its response the United Kingdom pointed out, *inter alia*, that the judicial authority had ultimate responsibility for deciding whether the physical presence of a detainee at a hearing was necessary. Further, the CPT stated that detainees should have the right to be assisted by a lawyer at such hearings. The United Kingdom, in its response, pointed out that under the TA 2000 legal representation was guaranteed at such hearings. The Committee also recommended that in instances where police custody had been extended, judicial reviews of such
extensions should be conducted at least every 4 days. No substantive reply was received from the United Kingdom in response to this recommendation.

The Committee noted that its visit of July 2005 had revealed, regarding persons detained on suspicion of offences of a terrorist nature, that on the whole the systems in place to provide detainees with access to a lawyer were operating in satisfactorily. The CPT expressed its pleasure at the fact that the detainees were offered access to a lawyer from the very outset of their detention. The CPT was also pleased to note that a provision on the question of access to another lawyer when access to a specific lawyer is delayed, had now been brought into being\textsuperscript{1510}. The Committee also recalled the absolute prohibition on sending people back to countries where they face a real risk of torture or inhuman or degrading treatment or punishment.

6.13 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the Second 2005 Visit

Subsequent to the Committee’s first visit in 2005, a number of the persons who had been subject to control orders were re-arrested with a view to returning them to their countries of origin. Subsequently the United Kingdom sought to conclude memoranda of understanding with states from the Middle East and North Africa, in an attempt to secure the safety of the deportees. In the light of these developments, the Committee decided to carry out a further visit to the United Kingdom from 20 to 25 November 2005\textsuperscript{1511}.

The CPT observed that, regarding the issue of access to a lawyer at the outset of the deprivation of liberty, the lessons from 2001 under the ATCSA had not been learned. The Committee noted that the detainees arrested in August 2005, all of whom had been under control orders, were unable to exercise this right expeditiously. The Committee recommended that special measures be taken to address their concerns. The United Kingdom did not respond substantively to this recommendation, but rather merely restated the relevant provisions of the TA 2000.

\textsuperscript{1510} See, the Code of Practice for the detention, treatment and questioning of persons by police officers. \textsuperscript{1511} For a copy of the report presented to the United Kingdom following the visit, see http://www.cpt.coe.int/documents/gbr/2006-28-inf-eng.htm.
The delegation discovered that persons detained under TA 2005 were not being placed in the presence of the judge responsible for deciding the question of the initial extension of police custody beyond 48 hours. The Committee observed that this initial hearing was also being held by video conferencing link. The CPT repeated its recommendation that steps be taken to ensure that persons detained under terrorism legislation were always physically brought before the judge responsible for deciding the question of an extension of police custody.

The United Kingdom responded by stating that i) in its view, robust and appropriate safeguards were in place to protect the rights of individuals detained under the TA 2000; and ii) the decision of whether a person’s physical presence was required at any given hearing was taken judicially.

The CPT expressed concern over allegations that access to a lawyer could be denied on the authority of a police superintendent for a period up to 48 hours. The CPT recommended that if these reports were indeed accurate, the United Kingdom authorities amend the relevant legal provisions so as to remove that authority and ensure that all persons arrested have the right of access to a lawyer from the outset of their deprivation of liberty. The United Kingdom responded to this recommendation by pointing out that such delays could only be authorised in exceptional circumstances. The United Kingdom also pointed out that where such a delay is authorised it was standard practice to then offer the detained person access to an alternative lawyer.

The Committee also expressed a view that the cumulative effect of obligations imposed by control orders on a given individual might in certain circumstances be considered a deprivation of liberty. The United Kingdom responded by asserting that the TA 2005 was fully compliant with the ECHR and that it contained rigorous safeguards to protect the rights of the individual, including judicial oversight and reporting and renewing requirements.

At the beginning of 2000, the EPA 1996 and 1998 were still in force, as was the PTA 1989. However, only months later the Terrorism Act 2000 (TA) received Royal Assent\textsuperscript{1512} and superseded those laws. In Chapter 3, it was demonstrated that although the TA 2000 was largely a consolidation of the PTA 1989 and the EPA 1996, it did extend the powers available to the United Kingdom’s executive to counter perceived terrorist threats. In general the TA 2000 extended the prevailing legislative trend of the preceding 100 years. It was a lengthy Act, in which the counter terror powers available to the executive were individually specified and described in some detail. In addition, the Act placed a number of explicit, detailed constraints on the executive, restricting its counter-terror exercises. This contrasts with the United Kingdom’s terrorism legislation in the first half of the 20\textsuperscript{th} Century. Those laws tended to be very concise and simple while at the same time bestowing remarkably broad powers on the United Kingdom’s executive. Likewise these earlier laws placed few specific checks on the executive. In any event, those limits which were included tended to be couched very broadly. While the TA 2000 embodied a record number of powers, it did not constitute an unprecedentedly broad anti-terror law.

The Anti-Terrorism, Crime and Security Act (ATCSA) was the British government’s response to the 2001 attacks on the World Trade Centre and the Pentagon\textsuperscript{1513}. Chapter 3 demonstrated that the ATCSA represented a major endeavour on the part of the United Kingdom to broaden the powers available to the executive to counter perceived terrorist threats. Nonetheless this effort involved increasing both the number of powers available to the executive and the scope of existing individual counter-terror powers, rather than a retreat to the very broadly defined executive powers of the first half of the 20\textsuperscript{th} Century.

The Prevention of Terrorism Act 2005 (PTA 2005) was, to a large extent, Parliament’s response to the December 2004 ruling by the House of Lords\textsuperscript{1514} which held that detaining foreign nationals without criminal charge under emergency

\textsuperscript{1512} On 20 July 2000.
\textsuperscript{1513} Fenwick (2002) at 724.
\textsuperscript{1514} A & Ors v Secretary of State for the Home Department [2004] U.K.H.L. 56. For a full discussion of this case see page 142 above.
counter-terrorism powers was unlawful\textsuperscript{1515}. The PTA 2005 added significantly to the extent of the United Kingdom’s executive counter-terrorism powers. The Act extended the legislative pattern already described, by adding incrementally to the number and variety of counter-terrorism powers available to the executive, while at the same time circumscribing the use of those powers.

In the years 2000 to 2005, the trend observed above was reflected by another pattern unfolding in a different area of the law. The time period under review saw the further emergence of a trend relating to the interaction between the United Kingdom and international human rights law. Although the United Kingdom failed to ratify any further human rights treaties in that time, the ECtHR handed down an unprecedented number of judgments in which the United Kingdom’s counter-terror practises were found to be in breach of the ECHR\textsuperscript{1516}. In \textit{Averill}\textsuperscript{1517}, the applicant had been denied access to a solicitor for the first twenty-four hours of his interrogation. On this basis the Court found\textsuperscript{1518} that the applicant’s rights under Article 6(1)\textsuperscript{1519} read with Article 6(3)(c)\textsuperscript{1520} had been breached. In \textit{Magee}\textsuperscript{1521}, the Court also held that the United Kingdom had breached Article 6(1)\textsuperscript{1522} read with Article 6(3)(c)\textsuperscript{1523} in denying the applicant legal representation during his interrogation. In \textit{O’Hara}\textsuperscript{1524} the Court held that the fact that the applicant had been held for six days and thirteen hours before being brought before a judge amounted to a violation of Article 5(3) of the Convention. Finally, in \textit{Brennan}\textsuperscript{1525}, the Court held that the United Kingdom had breached the applicant’s rights under Article 6(3)(c) when the consultations he had with his solicitor had been attended by a police officer. The period 2000 to 2005 was

\textsuperscript{1515}Foster (2006) at 183.
\textsuperscript{1517}(2001) 51 E.H.R.R. 56.
\textsuperscript{1518}By 6 votes to 1.
\textsuperscript{1519}The right of everyone against whom criminal charges have been brought to a fair hearing.
\textsuperscript{1520}The right of everyone charged with a criminal offence to defend himself in person or through the legal assistance of his own choosing or, if he has insufficient means to pay for such legal assistance, to be given it free when the interests of justice so require.
\textsuperscript{1521}(2001) 31 E.H.R.R. 35.
\textsuperscript{1522}The right of everyone against whom criminal charges have been brought to a fair hearing.
\textsuperscript{1523}The right of everyone charged with a criminal offence to defend himself in person or through the legal assistance of his own choosing or, if he has insufficient means to pay for such legal assistance, to be given it free when the interests of justice so require.
\textsuperscript{1524}(2002) 34 E.H.R.R. 32.
\textsuperscript{1525}[2002] Crim. L.R. 216.
also characterised by the United Kingdom’s counter-terror powers being subjected to hitherto unmatched scrutiny by various international treaty bodies.\textsuperscript{1526}

The era under review also heralded legislation directly incorporating into the United Kingdom’s domestic law, a significant portion of a ratified human rights treaty. This was an unprecedented move by the then Tony Blair’s Labour government. The HRA 1998 imported Articles 2 to 12 of the ECHR, Articles 1 to 3 of the first protocol to the ECHR and Article 1 of the 13th protocol into the United Kingdom’s municipal law. It has already been observed, that in the years preceding the HRA 1998, the United Kingdom’s counter-terror laws evolved in a style which \textit{prima facie} appears to have been influenced by that state’s unincorporated international treaty obligations.

This trend continued following the coming into force of the HRA 1998. For instance, the years currently being examined saw a number reforming measures enacted, constraining the executive in its counter-terror activities. In addition, although many of the executive powers created in the period 2000 to 2005 were particularly harsh, they were defined very precisely. This meant that the executive powers created, were not as broad in scope as those that existed in the first half of the 20th Century. There appears to be a strong correlation between i) the comparative narrowing over time of the United Kingdom’s counter-terror executive powers, and a proliferation of checks and balances on those powers, on the one hand; and ii) the development of international human rights law and the growing interaction between that law and the United Kingdom.

\section*{7. International Human Rights Law and the United Kingdom’s Counter-terror Laws From 2006 to 2012}

\subsection*{7.1 The United Nations Human Rights Council}

In 2006, following the conclusion of its 62\textsuperscript{nd} session, the United Nations Commission on Human Rights\textsuperscript{1527} was dismantled and replaced by the United Nations Human

\textsuperscript{1526}The Human Rights Committee considered the United Kingdom’s Fifth Periodic Report and the Committee against Torture considered the United Kingdom’s Fourth Periodic Report. In addition, the years 2000 to 2005 saw the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visit the United Kingdom on four occasions.
Rights Council (UNHRC). The UNHRC is an inter-governmental body made up of 47 States\textsuperscript{1528} which is responsible for strengthening the promotion and protection of human rights globally. The Council was created by the United Nations General Assembly on 15 March 2006 with the main purpose of examining situations of human rights violations and making recommendations on them. One of the ways in which the Council fulfils its mandate is by way of the Universal Periodic Review (UPR) mechanism which aims, over time to assess human rights in all 192 UN member states. The UNHRC employs a complaints procedure mechanism which allows individuals and organisations alike to bring complaints about human rights violations to the attention of the Council. The Council continues to work closely with the UN ‘Special Procedures’ established by the former UNCHR. ‘Special Procedures’ is the general name given to those mechanisms which address either specific country situations or thematic issues in all parts of the world. Currently, there are 33 thematic\textsuperscript{1529} and 8 country mandates\textsuperscript{1530}. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates. Most Special Procedures receive information on specific allegations of human rights violations and send urgent appeals or letters containing allegations to governments asking for clarification. Mandate holders also carry out country visits to investigate human rights situations at a national level\textsuperscript{1531}. Some countries have issued standing invitations, which means that they are, in principle, prepared to receive visits from any Special Procedures Mandate Holder. The United Kingdom issued such an invitation in March 2001. After

\textsuperscript{1527} The United Nations Commission on Human Rights (UNCHR) was established in 1946, initially to draft the International Bill of Human Rights. It was a subsidiary body of the Economic and Social Council (ECOSOC). The Commission was assisted by the Sub-commission on Prevention of Discrimination and Protection of Minorities. Initially the Commission adopted a non-interventionist approach and restricted itself to promoting human rights and preparing human rights instruments. However, in 1967 the ECOSOC passed a resolution allowing the UNCHR and the Sub-commission to examine information regarding gross human rights violations and make recommendations. The effectiveness of these investigations was limited by the fact that they could only take place with the consent of the State in question.

\textsuperscript{1528} The United Kingdom is presently a member of the UNHRC.

\textsuperscript{1529} The thematic mandates of particular relevance are i) The Special Rapporteur on the promotion and protection of human rights while countering terrorism; ii) The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; iii) The Special Rapporteur on the rights to freedom of peaceful assembly and of association; and iv) The Working Group on Arbitrary Detention.

\textsuperscript{1530} The United Kingdom does not currently feature on this list.

\textsuperscript{1531} Since the UNHRC came into being there have been no mandate-holder visits to the United Kingdom relevant to an analysis of counter-terror legislation.
their visits, Special Procedures Mandate Holders issue mission reports containing their findings and recommendations.

7.2 *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The optional protocol to the CAT, which came into being in June 2006, creates the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). The SPT has a mandate to visit places in Signatory States where persons are deprived of their liberty. Parties to the optional protocol are obliged to establish an independent organisation for the prevention of torture at a domestic level, mandated to inspect places of detention. The United Kingdom has signed and ratified the optional protocol to the Convention against Torture and Other Cruel or Degrading Treatment or Punishment.

7.3 *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the 2007 Visit*

A delegation of the CPT carried out a visit to the United Kingdom from 2 to 6 December 2007. The delegation re-examined the safeguards afforded to persons detained by the police under the TA 2000 as well as the conditions of detention of those persons. The CPT repeated its concerns over the fact that persons could be detained for up to 28 days prior to being charged, under the TA 2000. The Committee also expressed concern about Counter-Terrorism Bill, which was introduced to Parliament in January 2008 and which made provision for the maximum limit of pre-charge detention to be extended to 42 days. The CPT recommended that the necessary steps be taken to ensure that i) all persons suspected of offences under the terrorism

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1532 The United Kingdom designated its National Preventative Mechanism (NPM) in March 2009. The NPM is currently made up of 18 inspecting bodies who visit places of detention such as prisons, police custody, immigration detention centres, children’s secure accommodation and mental health institutions. The NPM is coordinated by HM Inspectorate of Prisons.  
1533 26 June 2003.  
1535 However, the subcommittee has not yet undertaken a visit of the United Kingdom’s places of detention.  
1536 For a copy of the report presented to the United Kingdom following the visit, see http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.htm.
legislation, whose detention beyond 14 days had been authorised, be transferred to prison; and ii) these suspects were able to exercise their rights, including that of access to a lawyer. The United Kingdom responded by asserting that in its view no changes were required to the existing arrangements.

The delegation observed that persons detained under the terrorism legislation were still not physically brought before the judge responsible for deciding either i) the question of the possible extension of pre-charge detention beyond 48 hours; or ii) whether there would be further extensions. The Committee reiterated its view that such arrangements were inadequate from the standpoint of the prevention of ill-treatment. In response to the United Kingdom’s previous reasoning that the judicial authority concerned had ultimate responsibility for deciding whether the physical presence of a detainee at a hearing was necessary, the CPT affirmed that the physical presence of a detainee was essential. The United Kingdom reiterated its view that it was not always necessary for a detained person to be brought within the direct physical presence of a judge. The United Kingdom asserted that conducting hearings by way of video link was cost effective and expeditious.

7.4 United Nations Human Rights Council: First Periodic Review of the United Kingdom

The Working Group on the Universal Periodic Review (UPR) held its first session in 2008 and the review of the United Kingdom was held at the 7th meeting on 10 April 2008. On 28 February 2008 the Human Rights Council selected rapporteurs from Egypt, the Russian Federation and Bangladesh to facilitate the review. In its report, the United Kingdom justified i) its plans to extend pre-trial detention periods; ii) its use of control orders; and iii) its policy of deporting terrorist suspects, arguing that terrorism undermines fundamental human rights such as the right to life. The United Kingdom pointed out that it had a responsibility to take action to reduce the threat of terrorism whilst respecting the fundamental rights of every individual.

Established in accordance with Human Rights Council resolution 5/1 of 18 June 2007.
The United Kingdom advised that in instances where suspected terrorists could not be prosecuted or deported, it considered control orders, restricting the movement and activities of terrorist suspects, to be the best solution. The United Kingdom further advised that control orders were subject to mandatory review by the High Court. The United Kingdom also defended its policy of using diplomatic assurances as a way of achieving deportation in accordance with its international obligations. It submitted that it always ensured that monitoring arrangements were in place in the countries with which it has made such agreements. The United Kingdom advised that nothing in the Saadi\textsuperscript{1539} judgment would affect its policy of seeking assurances where it considered that to be necessary.

The Syrian Arab Republic questioned the United Kingdom over the need for its updated counter-terror legislation\textsuperscript{1540}. Syria also expressed concern over i) the possibility that detention of suspects could be extended to 42 days; and ii) the fact that the scrutiny of evidence could be done in secret. Syria also suggested that the United Kingdom’s counter-terror laws seemed designed for specific ethnic groups. In reply, the United Kingdom noted that new counter-terror powers were needed to deal with the developing terrorist. It also noted that the powers introduced attract extensive legal review by the Courts. The United Kingdom also pointed out that only in very limited circumstances is secret evidence used to justify the detention of suspected terrorists. It also provided assurances that the measures would not be directed towards any particular race, religion or group.

The Islamic Republic of Iran expressed concern at i) the disproportionately high number of stop and searches targeting ethnic or racial minorities; ii) racial profiling in the United Kingdom’s counter-terrorism efforts; and iii) the abuse of counter-terrorism laws which are perceived to target the Muslim population. The United Kingdom responded that the stop and search powers were intelligence-led, and were more likely to be effective if based on up-to-date intelligence rather than an individual’s racial profile. The United Kingdom advised that the powers were aimed at terrorists and criminals regardless of their backgrounds.

\textsuperscript{1539} Saadi v Italy Application no. 37201/06.
\textsuperscript{1540} The Terrorism Acts of 2005 and 2006.
Algeria raised concerns over i) the broad definition of terrorism contained in several of the United Kingdom’s counter-terror laws; and ii) the fact that pre-charge detention was raised from 14 to 56 days. In reply the United Kingdom stressed that such measures were proportionate, with built-in safeguards and that continued detention could only be authorised where a judge was satisfied that it was necessary and that the investigation was being carried out diligently and expeditiously. The following recommendations were made to the United Kingdom: i) to continue to review all counter-terrorism legislation and ensure that it complies with the highest human rights standards; ii) to curtail excessive pretrial detention; iii) to protect by way of legislation, the right of immediate access of detainees to a lawyer; and iv) to introduce strict time limits on pre-charge detention of those suspected of terrorism.

7.5 Human Rights Committee: Sixth Periodic Report of the United Kingdom

The Committee considered the 6th periodic report submitted by the United Kingdom at its 2541st, 2542nd and 2543rd meetings on 7 and 8 July 2008. The Committee noted in its concluding observations that the ICCPR was not directly applicable in the United Kingdom and that several Covenant rights were not included among the provisions of the European Convention on Human Rights, incorporated into the domestic legal order through the Human Rights Act 1998. The Committee also noted that the United Kingdom was still not a party to the optional protocol to the ICCPR. The Committee recommended that the United Kingdom should ensure that all rights protected under the Covenant were given effect in domestic law and should make efforts to ensure that judges were familiar with the provisions of the Covenant. It also recommended that the United Kingdom consider accession to the optional protocol to the Covenant. The Committee expressed regret over the United Kingdom’s intention to maintain its reservations to the Convention and recommended that these should be reviewed with a view to withdrawing them.

For a copy of the Committee’s report, see http://www.unhcr.org/refworld/docid/46820b202.html. Ratifying the protocol would mean that the United Kingdom would be obliged to recognise the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation of the ICCPR by that State Party.
The Committee noted with concern that the United Kingdom had, until the ECtHR’s decision in *Saadi v Italy*,1543 defended the position that persons suspected of terrorism could under certain conditions be returned to countries without the appropriate safeguards to prevent treatment prohibited by the Covenant. Furthermore, the Committee expressed concern over the fact that the United Kingdom did not always ensure that affected individuals are not subjected to treatment contrary to Article 7 of the Covenant1544. The Committee recommended that every effort be made to ensure that all individuals, including those suspected of terrorism, not be returned to another country if there are substantial reasons for fearing that they would be subjected to torture or cruel, inhuman or degrading treatment or punishment.

The Committee also noted with concern that, in order to combat terrorist activities, the United Kingdom was considering adopting laws which would heavily impact on Convention rights. The Committee expressed reservations over the extension of the maximum period of detention without charge of terrorist suspects under the Terrorism Act 2006 from 14 days to 28 days1545 and the proposed extension of this period under the counter-terrorism bill 2008 to 42 days1546. The Committee recommended that the United Kingdom ensure that that any terrorist suspect arrested be promptly informed of any charge and tried within a reasonable time or released. It further expressed concern over the control order regime established under the Prevention of Terrorism Act 20051547, which involves the imposition of a wide range of restrictions, including curfews of up to 16 hours, on individuals suspected of being involved in terrorism, but who have not been charged with a criminal offence. The Committee also expressed reservations about the judicial procedure whereby the imposition control orders could be challenged, as far as the provisions allowed Courts to consider secret material in closed session, thus infringing Articles 91548 and 141549. The Committee recommended that the United Kingdom review the control order regime established

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1543 Application no. 37201/06.
1545 Section 23.
1546 This extension never came to pass.
1547 Section 1 to 3.
1548 The right of anyone arrested or detained to be brought promptly before a judge and to be tried within a reasonable time or to be released.
1549 Article 14 asserts, *inter alia*, i) the right to be presumed innocent until proved guilty according to law; and ii) the right not to be compelled to testify against himself or to confess guilt.
under the Prevention of Terrorism Act 2005 in order to ensure that it is in conformity with the provisions of the Covenant and expressed concern that, despite improvements in the security situation in Northern Ireland, some elements that territory’s criminal procedures continue to differ from those in the remainder of the United Kingdom.

In particular, the Committee expressed concern over the Justice and Security (Northern Ireland) Act 2007, in terms of which persons whose cases are certified by the Director of Public Prosecutions for Northern Ireland, are tried in the absence of a jury. Concern was also expressed over the fact that there is no right of appeal against such decisions. The Committee recommended that the United Kingdom carefully monitor the situation in Northern Ireland and continually evaluate whether these measures are required, with a view to abolishing them.

The Committee noted with concern that, under Schedule 8 to the Terrorism Act 2000, access to a lawyer could be delayed for up to 48 hours where the police concluded that such access would lead, for instance, to interference with evidence or alerting another suspect. It stated that the United Kingdom had failed to justify these powers and recommended that the laws be altered so that anyone arrested or detained on a criminal charge, including persons suspected of terrorism, have immediate access to a lawyer. The Committee also noted with concern that the offence of ‘encouragement of terrorism’ had been defined in Section 1 of the Terrorism Act 2006 in very broad and vague terms and recommended that the United Kingdom consider amending that part of Section 1 of the Terrorism Act 2006 to bring it in line with the state’s obligations to protect freedom of expression.\(^{1550}\)

The United Kingdom’s representative advised that assurances in cases of deportation were usually verified by independent monitoring bodies. He assured the Committee that his government would not deport an individual where there was a material risk of torture. The adequacy of the assurances provided was assessed on a case by case basis. He stated further that the assurances obtained were detailed, reciprocal, negotiated at a high level and fit for purpose. The representative advised that his

\(^{1550}\) Article 19.
government had intervened in the *Saadi v Italy* case to argue for a balancing test between the individual deportee’s right to be free of the risk of torture and the right of the rest of the population to be free of the risk of terrorist violence, in other words to enjoy the right to life as enshrined in Article 6 of the Covenant. Prior to the *Chahal v the United Kingdom* such a test had been possible. The United Kingdom, acting in support of the Government of Italy, had asked the Court to reconsider its approach, but the Court had declined. As a result, the United Kingdom did not apply a balancing test and its deportation policy did not rely on such a test.

The representative advised that pre-charge detention was the subject of considerable controversy and debate both within Parliament and outside. He advised that such detention was used solely for the purpose of pursuing investigations and not for preventive detention. The representative defended the United Kingdom’s right to implement of 28 day pre-charge detention as well as the 42 day pre-charge detention in exceptional circumstances. He commented that the trend over the previous 10 years had been towards more sophisticated and complex terrorist plots involving more international connections and more complicated forensic work. The representative advised that his government hoped that it would not need to have recourse to the 42 day option, but it might need to if an even more complex and dangerous terrorist plot occurred.

7.6  *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Report of the 2008 Visit*

A delegation of the CPT carried out a visit to the United Kingdom from 18 November to 1 December 2008. The delegation visited a number of police stations and prisons in the United Kingdom. In its report the Committee referenced the principle of co-operation set out in Article 3 of the Convention, pointing out that under the Article, following visits by a delegation of the CPT, signatories to the Convention were obliged to take decisive action in the light of the Committee’s key recommendations. In this regard, the CPT expressed concern about the fact that little or no action had been taken in respect of certain recommendations made in previous

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1551 For a copy of the report presented to the United Kingdom following the visit, see [http://www.cpt.coe.int/documents/eng.htm](http://www.cpt.coe.int/documents/eng.htm).
reports, particularly those concerning the legal safeguards in place protecting against the ill-treatment of persons held under the Terrorism Act 2000. In its response, the United Kingdom denied the allegations of the Committee, stating that where possible it did give effect to the CPT’s recommendations.

The CPT stated that it found that the responses of the United Kingdom to its 2007 report did not adequately address the concerns raised by the Committee. In particular, the CPT reiterated its belief that all persons detained under terrorism legislation should be brought physically before a magistrate at the moment when an extension of their custody was being decided, instead of having the hearing conducted via video-link. The CPT stated further that the United Kingdom’s objections based on efficiency and resources were unacceptable and inappropriate when dealing with a fundamental safeguard against ill-treatment. In its response to the report, the United Kingdom reiterated its position that it was not necessary for a detained person always to be brought within the direct physical presence of a judge. The United Kingdom pointed out that if physical appearance before the judge was automatic in every case, investigations would be slowed down significantly and would require additional resources.

7.7  The European Court

Judgment in A & Ors v The United Kingdom\textsuperscript{1552} was delivered on 9 February 2009. This was a case involving the derogation order which the United Kingdom made under Section 14 of the Human Rights Act 1998, following the terrorist attacks on the United States by al’Qaeda on 11 September 2001. In that derogation order, the United Kingdom set out the terms of a proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the ECHR. In the notification the United Kingdom alleged that due to the attacks and the close relationship between it and the United States, a public emergency within the meaning of Article 15(1) of the Convention existed in the United Kingdom. As a result, the United Kingdom intended to promulgate legislation which would allow for extended powers of arrest and detention of foreign nationals in instances where it is intended to

\textsuperscript{1552} Application no. 3455/05.
remove or deport the person from the United Kingdom but where this is not immediately possible, with the consequence that the detention would, under existing laws, be disallowed. Aware that these new measures might be contrary to the provisions of Article 5(1)(f)\textsuperscript{1553} of the ECHR, the United Kingdom decided to derogate from the Convention in terms of Article 15(1). The new powers were eventually included in the Anti-Terrorism, Crime and Security Act 2001 which came into force on 4 December 2001.

Ultimately sixteen people, including the eleven applicants, were certified under Section 21 of the Act and detained. The first seven applicants challenged the legality of the derogation, claiming that their detention was in breach of their rights under Articles 3, 5, 6 and 14 of the Convention. They also challenged the Secretary of state's decision to certify them as international terrorists.

The matter eventually came before the House of Lords\textsuperscript{1554}. A majority of the Law Lords found that the applicants' detention under the 2001 Act did not fall within the exception to the general right of liberty set out in Article 5(1)(f) of the Convention. The House of Lords also held by eight to one that there was indeed a public emergency threatening the life of the nation. However, the majority of the Law Lords rejected the government's submission that it was for Parliament and the executive, rather than the Courts, to judge the response necessary to protect the security of the public. The majority therefore went on to examine whether the detention regime under the 2001 Act was a proportionate response to the emergency situation. It was concluded that it did not rationally address the threat to security and was a disproportionate response to that threat\textsuperscript{1555}. The majority also held that the 2001 Act was discriminatory and therefore inconsistent with Article 14 of the ECHR\textsuperscript{1556}. The House of Lords granted a quashing order in respect of the derogation order, and a

\textsuperscript{1553} That provision permits the detention of a person only in circumstances where 'action is being taken with a view to deportation'.

\textsuperscript{1554} [2004] U.K.H.L. 56.

\textsuperscript{1555} The Court argued that i) the detention scheme applied only to non-nationals and did not address the threat which came from citizens; ii) that it left suspected international terrorists at liberty to leave the United Kingdom and continue their activities overseas; and iii) the legislation was too broad, in that it could apply to individuals suspected of involvement with international terrorist organisations which did not fall within the scope of the derogation.

\textsuperscript{1556} Article 14 states that enjoyment of the rights and freedoms of the Convention have to be secured without discrimination on any ground, including nationality.
declaration under Section 4 of the Human Rights Act that Section 23 of the 2001 Act was incompatible with Articles 5(1) and 14 of the Convention. Prior to the House of Lords handing down its decisions, the applicants proceeded to challenge their certification as suspected terrorists before the Special Immigration Appeals Commission (SIAC). The SIAC held, *inter alia*, that information which might have been obtained by torture should not automatically be excluded, but that the Court should have regard to any evidence about the manner in which it was obtained and judge its weight and reliability accordingly.

Ultimately this decision was brought on appeal before the House of Lords, which held unanimously that that evidence obtained by torture could never lawfully be admitted against a party to proceedings in a United Kingdom Court. The House of Lords then remitted each of the applicant’s cases to the SIAC. Following on from this, only one of the applicants had his certificate cancelled. The declaration of incompatibility made by the House of Lords had no retrospective effect and the applicants remained in detention. This, together with the fact that the United Kingdom’s domestic law did not allow the applicants to claim compensation in respect of their detention, led to the matter being brought before the ECtHR.

The applicants alleged that their detention had breached their rights under Article 3 of the Convention. They also alleged that they were denied an effective remedy for their Article 3 complaints in breach of Article 13 of the Convention. The Court pointed out that the circumstances that the applicants found themselves in did not amount to an irreducible life sentence of the ilk described in the *Kafkaris* judgment, as they had domestic remedies available to them to challenge the lawfulness of their incarceration. In addition, the Court found that since the applicants had failed to take advantage of the various remedies that had been available to them in relation to the alleged poor conditions under which they were being held, they did not comply with the requirement under Article 35 and that as a result the conditions complained of could not be taken into account when deciding whether there had been

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1557 Except for the second and 4th applicants who elected to leave the United Kingdom, and the 5th applicant who was released on bail on conditions amounting to house arrest.
1558 That right not to be subjected to torture or to inhuman or degrading treatment or punishment.
1559 The right of everyone whose Convention rights are violated to have an effective remedy before a national authority.
1560 *Kafkaris v Cyprus* Application no. 21906/04.
a breach of Article 3. The Grand Chamber therefore held that the detention of the applicants had not amounted to inhuman and degrading treatment and that their Article 13 rights had not been infringed.

The applicants also contended that their detention had been unlawful and incompatible with Article 5(1) of the Convention. With regard to the 2nd and 4th applicants, the Grand Chamber held that considering the relatively brief period of their incarceration, it could reasonably be said that the authorities were attempting to establish they could safely be removal to their countries of origin or to other countries and that therefore there was no violation of Article 5(1) of the Convention. However, the Court added that it could not be said that the United Kingdom was actively pursuing the deportation or extradition of the first, third, 5th, 6th, 7th, 8th, 9th, 10th and 11th applicants while they were being detained. Their detention, therefore, did not fall within the exception to the right to liberty set out in Paragraph 5(1)(f) of the Convention.

The Court then examined the question of whether the United Kingdom had validly derogated, in terms of Article 15, from its obligations under the Convention. The Court agreed with the House of Lords that there was a public emergency threatening the life of the nation, on the basis that i) due to practical considerations, national authorities enjoy appreciable leeway under Article 15 in assessing whether the life of their nation is threatened by a public emergency; and ii) in previous cases the ECtHR had been prepared to take into account a broad range of factors in determining the nature and degree of the actual or imminent threat to the ‘life of a nation’.

The bench then examined whether the measures which were taken had been strictly required by the exigencies of the situation. The United Kingdom challenged the

1561 That right not to be subjected to torture or to inhuman or degrading treatment or punishment.
1562 ‘The right of everyone to liberty and security of person. One exception to this right is to be found in Article 5(1)(f) of the Convention which involves the deprivation of liberty by reason of the lawful arrest or detention of a person…against whom action is being taken with a view to deportation or extradition.’
1563 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.
1564 Brannigan & McBride v the United Kingdom Application no. 14553/89, 14554/89; Marshall v the United Kingdom Application no. 41571/98.
House of Lords’ decision that the actions that the government had taken in relation to the applicants had not been strictly required by the exigencies of the situation on a number of grounds i) they had failed to afford a wide enough margin of appreciation to the executive and Parliament to decide whether the applicants' detention was necessary; ii) they had erred in examining the legislation in abstract rather than considering the applicants' actual cases; and iii) they had made a mistake by focusing on the different consequences the 2001 Act had for non-national and national terrorists. The United Kingdom also argued that i) it had been correct in confining the measures to non-nationals, taking into account the sensitivities of the British Muslim population; and ii) it had been correct in confining the measures to non-nationals as this group of people constituted the greatest threat to the country’s safety.

The Grand Chamber rejected each of these points arguing that i) the ‘margin of appreciation’ doctrine was not intended to be applied between two organs of state and that in any event the House of Lords had given sufficient consideration to the views of the executive and Parliament; ii) Article 15 called for an examination of the legislation in abstract as well as the prevailing circumstances in order to determine whether the measures derogating from the Convention are proportionate to the threat; iii) the United Kingdom had failed to provide any evidence to suggest that British Muslims were more likely to react negatively to the detention without charge of local rather than foreign Muslims; and iv) no evidence had been adduced demonstrating that non-nationals presented a greater threat than nationals. Accordingly the Court held unanimously that there had been a violation of Article 5(1) in respect of the first, third, 5th, 6th, 7th, 8th, 9th, 10th and 11th applicants.

The applicants also alleged that their Article 5(4) rights had been infringed\(^5\). They complained, *inter alia*, that the procedure before SIAC under Section 25 of the 2001 Act had been unfair. In particular, the applicants’ complaints centred around SIAC’s use of ‘closed’ material and Special Advocates. The judges, sitting as SIAC, were able to consider both the ‘open’ and ‘closed’ material, while the applicants and their legal advisers could not see the closed material. Instead, the closed material was

\(^5\)“The right of everyone who is deprived of his liberty by arrest or detention to 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.”
disclosed to one or more Special Advocates who could make submissions on behalf of the applicant, but who was not permitted to have any contact with the applicant or his representatives once he had been privy to the closed material. The Court pointed out that it was essential that i) as much information as possible be disclosed about the allegations and evidence against each applicant, without compromising national security or the safety of others; and ii) where full disclosure was not possible, the difficulties this caused were to be dealt with in such a way that each applicant could still challenge the allegations against him.

The Court found that ultimately the fairness or otherwise of the procedure had to be determined on a case by case basis by referencing the nature of the open material. In instances where the open material was of a specific nature, it was irrelevant what proportion of the evidence before the Court was closed or open. Based on these conclusions, the tribunal examined the individual circumstances of the eleven applicants and held unanimously that in respect of the 6th, 7th, 8th, 9th and 11th applicants, there had been no violation of Article 5(4). However, the Grand Chamber also held that in respect of the first, third, 5th and 10th applicants there had been a breach.

The applicants also complained that despite having been unlawfully detained in breach of Article 5(1) and 5(4), they had no enforceable right to compensation which was in breach of Article 5(5)\textsuperscript{1566}. In response the Grand Chamber held unanimously that as the Article 5(1) and 5(4) violations could not have given rise to an enforceable claim for compensation in the United Kingdom’s Courts, that there had been a violation of Article 5(5).

Judgment in \textit{Gillan & Quinton v The United Kingdom}\textsuperscript{1567} was handed down by the Court on 12 January 2010. The background to the case involved an arms fair held in London late in 2003 which was the subject of protests and demonstrations. On 9 September 2003 the first applicant, who was on his way to the fair, was stopped and searched by two police officers who told him he was being searched under Section 44

\textsuperscript{1566} The right of everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

\textsuperscript{1567} 50 E.H.R.R. 45
of the Terrorism Act 2000 for items which could be used in connection with terrorism. Nothing incriminating was found and he was allowed to go on his way after having been detained for approximately 20 minutes. On the same day the second applicant, a journalist, was stopped close to the arms fair. She had apparently emerged from some bushes. She was searched by a police officer and told to stop filming. The police officer told her that she was using her powers under Sections 44 and 45 of the 2000 Act. Nothing incriminating was found and the second applicant was also allowed to go on her way. There was a dispute regarding the length of time the second applicant had been detained. The applicants complained that their being stopped and searched by the police under Sections 44-47 of the 2000 Act gave rise to violations of their rights under Article 5(1)\(^{1568}\), (2)\(^{1569}\), (3)\(^{1570}\), (4)\(^{1571}\), (5)\(^{1572}\) as well as Articles 8\(^{1573}\), 10\(^{1574}\) and 11\(^{1575}\) of the Convention.

The Court first considered whether the stop and search measures amounted to an interference with the applicants' Article 8 rights to respect for private life. The Court held that the coercive powers conferred by the legislation required individuals to submit to detailed bodily searches which amounted to a clear interference with the right to respect for private life. It added that the public nature of the search could, in certain cases, compound the seriousness of the interference because of the added elements of humiliation and embarrassment. The tribunal concluded that the searches had constituted interference in the applicants’ rights to respect for private life under Article 8. It then pointed out that such an interference is only justified in terms of Paragraph 2 of Article 8 if it is i) in accordance with the law; ii) pursues one or more of the legitimate aims referred to in Paragraph 2; and iii) is necessary in a democratic

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\(^{1568}\) The right to liberty and security of person. This right is limited by Article 5(1)(a) through (f).
\(^{1569}\) The right of everyone who is arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
\(^{1570}\) The right of everyone arrested or detained in accordance with Article 5(1)(c) to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to be entitled to trial within a reasonable time or to be released pending trial.
\(^{1571}\) The right of everyone deprived of their liberty by arrest or detention to be entitled to take proceedings by which the lawfulness of the detention is decided speedily by a Court and their release ordered if the detention is not lawful.
\(^{1572}\) The right of everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 will have an enforceable right to compensation
\(^{1573}\) The right of everyone to respect for his private and family life, his home and his correspondence. This right is limited by Article 8(2).
\(^{1574}\) The right of everyone to freedom of expression. This right is limited by Article 10(2).
\(^{1575}\) The right of everyone to freedom of peaceful assembly and to freedom of association. These rights are limited by Article 11(2).
society in order to achieve those aims. The Court pointed out that in terms of its case
law ‘in accordance with the law’ requires the impugned measures to have some basis
in domestic law and to be compatible with the rule of law. The bench stated that in
order for domestic laws to meet these requirements they needed to i) afford a measure
of legal protection against arbitrary interference by public authorities with Convention
rights; and ii) indicate with sufficient clarity the scope of any discretion conferred on
the competent authorities and the manner of its exercise. Examining the provisions
and workings of the 2000 Act, the Court held that the respondent state had failed to
show that the safeguards provided by its domestic laws constituted a real curb on the
wide powers afforded to the executive and that consequentially individual did not
have adequate protection against arbitrary interference with their private lives. The
Court concluded that the stop and search powers under Sections 44 and 45 of the 2000
Act were neither sufficiently circumscribed nor subject to adequate legal safeguards
against abuse. As a result the tribunal found that the powers were not in accordance
with the law and that there had therefore been a violation of Article 8 of the
Convention. In light of this decision, the Court found it unnecessary to examine the
applicants’ complaints under Articles 5, 10 and 11 of the Convention.

7.8 United Nations Human Rights Council: Second Periodic Review of the
United Kingdom

The Working Group held its 13th session from 21 May to 4 June 2012. The review of
the United Kingdom of Great Britain and Northern Ireland was held at the 7th
meeting, on 24 May 2012. Responding to questions posed by Norway and Sweden
about pre-charge detention, TPIM and the policy of deportation of terrorist suspects,
the United Kingdom said that the first duty of any government was to protect life and
secure the prosperity of all citizens. The United Kingdom insisted that it was essential
that its executive have access to powers enabling it to meet terrorist threats. At the
same time, it admitted that it was equally necessary for its justice system to be able to
function in a way which is mindful of civil liberties and human rights. The United
Kingdom acknowledged that reconciling these deeply important objectives was a
great challenge.
The United Kingdom advised that it had recently undertaken a review of a number of its counter-terror powers to ensure that it struck a fair balance between liberty and security. As a result, the maximum period for pre-charge detention had been reduced from 28 to 14 days. The review had also concluded that control orders should be replaced by a system of TPIM. The United Kingdom advised that such measures could only be imposed where certain statutory tests had been met. The United Kingdom indicated that one of these requirements was that there be a reasonable belief that the individual concerned is involved in TRA. It was also pointed out that the new laws set up an automatic, in-depth review of any TPIM by the High Court. The new measures required the courts to then consider the necessity and proportionality of each measure and its compliance with the ECHR.

The United Kingdom advised that it would not deport any terrorist suspect where there were substantial grounds for believing that there was a real risk of the individual facing torture or inhuman or degrading treatment or punishment. Nonetheless the United Kingdom asserted that government-to-government assurances were a valid way of preventing such an eventuality. The United Kingdom made assurances that arrangements were in place to verify that assurances are respected. It also pointed out that in its ruling on Abu Qatada, the ECtHR had found that this policy was compatible with Article 3 of the ECHR.

Austria and Switzerland expressed concern about the possibility of pre-charge detention. Responding to these concerns, the United Kingdom said the law was applied consistently across the country. However, those suspected of terrorism offences could be detained for up to 14 days before charge. This, the United Kingdom advised, reflected the particular complexity and the international nature of modern counter-terrorism investigations. The United Kingdom advised further that there were a range of safeguards in place and the British courts had recently confirmed these provisions were compliant with human rights obligations.

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1576 The United Kingdom admitted that the review had recommended that in order to cater for certain exceptional circumstances, fast-track legislation should be drafted, which could be introduced where more than 14 days might be necessary.
1577 Including Article 6.
1578 The prohibition on torture.
Both Austria and Ecuador expressed concern over the admissibility of so-called ‘secret evidence’. In response, the United Kingdom said that in a small number of cases, highly relevant national security evidence, if heard in public, would jeopardize the methods or identities of its security services or their partners. The United Kingdom advised that it was trying to put in place a system that enabled those cases to go to court in accordance with the rule of law.

Germany and Malaysia asked the United Kingdom to respond to concerns regarding reports on regular screening of personal data and house searches of Muslims, solely because of their religious affiliation. In regard to the position of Muslim communities, the United Kingdom advised that its government was working closely with Muslim communities to ensure that they continued play a key role in British society and in finding solutions to the problems faced by that state.

Germany also expressed concern over several seemingly overly broad and vaguely worded provisions in the United Kingdom’s counter-terror legislation. Germany and Brazil expressed concern over the United Kingdom’s use of racial profiling in the exercise of its stop and search powers. Responding to these questions, the United Kingdom said that unless the police had a description of a suspect, a person’s race, age or appearance could not be used alone or in combination as the reason for searching someone. The Police and Criminal Evidence Act 1984 made clear that stop-and-search must not be conducted in a discriminatory way and in particular that a person’s religion should never be considered a reason to stop and search them.

7.9 **International Law and the United Kingdom’s Counter-terror Laws: 2006 - 2012**

The Terrorism Act 2006 (TA 2006) was enacted in the aftermath of the London bombings of July 2005. In Chapter 3 it was shown that the TA 2006 added substantially to the counter-terrorism powers available to the United Kingdom’s

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executive, while at the same time instituting a number of safeguards\textsuperscript{1580}. Much like the TA 2006, the Counter-Terrorism Act 2008 (CTA) introduced an appreciably large number of new powers that the United Kingdom’s executive could use against perceived terrorist threats. The CTA, however, failed to introduce significant checks on the executive powers created by the Act. In contrast, the TPIMA, which repealed the control order regime\textsuperscript{1581} and introduced a replacement system of terrorism prevention measures, introduced a number of measures, which hamper the United Kingdom’s executive in important respects. Likewise, the PFA also introduced a number of reforms in the area of counter-terror law, further constraining the executive.

Despite the differences set out above, on the whole, the TA 2006, CTA, TPIMA and PFA extended the legislative trend described throughout this thesis. Despite the fact that, collectively they increased the number of powers available to the executive to act against perceived terrorist threats, they did not revert to the type of counter-terror laws typical of the first half of the 20\textsuperscript{th} Century\textsuperscript{1582}, which were markedly simpler pieces of legislation, bestowing more broadly defined authority. It is also noteworthy that the United Kingdom’s latest counter-terror laws have added significantly to number and scope of reforming measures and constraints placed on the executive.

In the years 2005 to 2012, the trends observed above were mirrored by another pattern, relating to the interaction between the United Kingdom and international human rights law. Firstly, the United Kingdom ratified the optional protocol to the Convention against Torture and Other Cruel or Degrading Treatment or Punishment, thereby subjecting itself to the scrutiny of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)\textsuperscript{1583}. In addition, the Grand Chamber of the ECtHR handed down two particularly significant judgments. In the case of \textit{A & Ors v The United Kingdom} the Court held, \textit{inter alia}, that i) the detention under the ATCSA had been unlawful and incompatible with Article 5(1) of the Convention; and that ii) the derogation order which the United

\begin{footnotesize}
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1580 See Part 3 of the Act.
1581 Introduced by way of the PTA 2005.
1582 Those laws introduced in the first half of the 20\textsuperscript{th} Century.
1583 The SPT has a mandate to visit places in Signatory States where persons are deprived of their liberty.
\end{footnotes}
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Kingdom made under Section 14 of the Human Rights Act 1998, following the terrorist attacks on the United States by al’Qaeda on 11 September 2001, was invalid due to its being disproportionate and not strictly required by the exigencies of the situation. In *Gillan & Quinton v The United Kingdom* the Court held that there had been a violation of the applicants’ Article 8 rights. The Court also found that the stop and search powers under Sections 44 and 45 of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse and were therefore unlawful. As a result, the Grand Chamber held that there had been a violation of the applicant’s Article 8 rights. The period 2006 to 2012 also witnessed the United Kingdom’s counter-terror powers being subjected to continued scrutiny by various international treaty bodies.

Although in the era under review the United Kingdom failed to incorporate any further international human rights treaties into its municipal law, that state’s counter-terror laws continued to evolve in a manner which *prima facie* appears to have been influenced by its unincorporated international treaty obligations. For instance, the years currently being examined saw a number reforming measures enacted, constraining the executive in its counter-terror activities. In addition, although many of the executive powers created in the period 2006 to 2012 were particularly harsh, they were defined very precisely. This meant that the executive powers created, were not as broad in scope as those that existed in the first half of the 20th Century. As already stated, there appears to be a strong correlation between i) the comparative narrowing over time of the United Kingdom’s counter-terror executive powers and the associated increase of checks and balances on those powers, on the one hand, and ii) the development of international human rights law and the ever increasing interaction between that law and the United Kingdom.

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1584 The right of everyone to respect for his private and family life, his home and his correspondence. In addition, the Article stated that there should be no interference by a public authority in the exercise of the right described above, except such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

1585 The Human Rights Committee considered the United Kingdom’s Sixth Periodic Report and the United Nations Human Rights Council conducted its First Review of the United Kingdom. In addition, the years 2006 to 2012 saw the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visit the United Kingdom on two occasions.

1586 In addition to ICCPR obligations incorporated by way of the HRA 1998.
In the first half of the 20th Century, the United Kingdom’s legal policies towards terrorism tended to be extremely broad and diaphanous, consequently bestowing upon the executive an extraordinary degree of authority in terms of the means by which it could address the perceived threat of terrorism. International human rights law was not a feature of the first half of the 20th Century. This is because, up until the end of the Second World War, the internal affairs of any state were considered sacrosanct and beyond the reach of international law.

In the years following the war, however, international human rights law grew steadily, largely through the propagation of the international treaties. In the second half of the 20th Century, the United Kingdom became increasingly involved in international human rights law, particularly by way of the ratification of a number of treaties. Prior to the year 2000, none of the treaties was directly incorporated into the United Kingdom’s municipal law. The traditional Dualist understanding of the relationship between international treaty law and municipal law in the United Kingdom, would hold that these unincorporated human rights treaties would form no part of that state’s domestic law.

This Dualist assumption is called into question, by a legislative trend which neatly coincides with the United Kingdom’s increased involvement with international human rights. This trend consists of two elements. The first of these is the progressively plethoric and specific ways in which the United Kingdom began to define and construct its anti-terror laws. Although, superficially, this appears to suggest a greater legal response to the threat of terrorism, in truth the executive’s powers were inherently curtailed by the detail and specificity in which this legislation was set out. The second element of the trend referred to above is that, over time, the United Kingdom’s counter-terror laws increasingly began to include checks and balances on the executive.

This chapter has attempted to demonstrate that there is a clear correlation between the two trends described above. In other words, the United Kingdom’s enmeshment with
international human rights law in the years following the Second World War seems undeniably linked with the parallel evolution of that state’s domestic counter-terror laws. The conclusion to this thesis will attenuate its disparate strands of argument to further advance the proposition that international law has impacted significantly on United Kingdom’s counter-terror laws.
CHAPTER 5

CONCLUSIONS

1. The Evolution of the United Kingdom’s Domestic Counter-terror Laws

An inspection of the executive powers available under the United Kingdom’s counter-terror laws from the beginning of the 20th Century to the present, reveals a discernable pattern. The passage of time witnessed an expansion in the number of specific powers available to the executive, and paradoxically, an increase in the quantity of checks and balances on executive powers. The passing years also saw a substantial narrowing of the government’s counter-terror capabilities. This has been due to the ever increasing specificity of the counter-terror Acts. While the earlier legislation, bestowed very broadly defined, pseudo law-making powers on the government, later laws set out each specific counter-terror device in greater, and therefore more restrictive, detail.

The various Defence of the Realm Acts 1914-1915 (DORA) suspended the operation of the ordinary criminal law codes and in certain respects, subjected the citizenry to martial law. The laws empowered the executive, albeit in a limited sphere, to rule by decree by issuing Regulations\textsuperscript{1587}, and allowed for a system of internment to be implemented\textsuperscript{1588}. These laws imposed very few checks and balances on the powers granted to the Crown. At the end of the First World War, these laws were galvanised by the Restoration of Order in Ireland Act 1920 (ROIA). The ROIA drew heavily from its wartime predecessor\textsuperscript{1589} and bestowed similarly broad powers on the executive\textsuperscript{1590}. The ROIA was superseded by the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 – 1943 (SPA 1922 – 1943). Although these laws were

\textsuperscript{1587} See, for example, Section 1 of the DORA 1914.
\textsuperscript{1588} See, for example, Regulation 55 made under the DORA.
\textsuperscript{1589} A number of harsh wartime Regulations were carried forward under the new Act. See, for example, Sections 1 and 4 of the Restoration of Order in Ireland Act 1920. The vast majority of the Regulations made under the DORA were carried forward into the ROIA 1920. Nonetheless, a small number of the DORA provisions were not brought forward into the ROIA 1920, including Regulation 13, which had empowered police constables, customs officer and those authorised by the navy or military to arrest without a warrant any person who was suspected of acting in a way prejudicial to the safety of the public.
\textsuperscript{1590} In fact, Section 1(1) of the ROIA empowered the Crown to issue Regulations, in consultation with Parliament, under the Defence of the Realm Consolidation Act 1914 (the Consolidation Act), despite World War One having come to an end.
largely based on the ROIA\textsuperscript{1591}, they did introduce a number of new counter-terror measures\textsuperscript{1592}. The various SPAs, which remained in force until 1973, mimicked their predecessors in that they bestowed upon the authorities broad powers to make Regulations as a means of countering the threat of terrorism\textsuperscript{1593}. The SPAs also mirrored the DORA and ROIA in that they contained few mechanisms designed to prevent abuse of power.

The Prevention of Violence (Temporary Provisions) Act 1939 (PVA)\textsuperscript{1594}, differed fairly substantially from the United Kingdom’s earlier counter-terror laws. Unlike the preceding DORA, ROIA and SPA, the PVA bestowed only a limited number of relatively narrowly defined, albeit harsh, counter-terror powers on the United Kingdom’s executive. The PVA also differed from earlier laws, in that it contained a number of mechanisms calculated to prevent abuse of power by the authorities\textsuperscript{1595}. The PVA 1939 remained on the statute books until 1953, at which point it was allowed to expire.

In 1973 the SPA was replaced by the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973)\textsuperscript{1596}. In contrast with most preceding anti-terror legislation\textsuperscript{1597}, the

\textsuperscript{1591} See, for example, Sections 1, 9, and 10 of the Civil Authorities (Special Powers) Act 1922. In addition, the first 35 Regulations made under the SPA were sourced directly from the ROIA 1920.

\textsuperscript{1592} See, for instance Regulation 8A, which made it possible to prohibit the erection of monuments or memorials which were deemed to be sympathetic to the aims of any unlawful organisation; Regulation 24A, which made it an offence to become or remain a member of an unlawful association; Regulation 24C, which made it an offence for any person to possess, display or assist in displaying in a public place any flag, emblem or symbol consisting of green, white and yellow horizontal stripes purporting to be the emblem, symbol or flag of the Irish Republican Army, an Irish Republic or any unlawful association.

\textsuperscript{1593} See, for example, Section 1(6) which stated that persons made subject to expulsion, prohibition or registration orders were entitled to oppose such orders and make representations to the Secretary of State in support of their objections. Section 2(1) of the PVA obliged the Secretary of State obtain advice on each objection received, unless he considered an objection to be frivolous . The advice was provided by a person nominated by the Secretary of State, who would, \textit{inter alia}, interview the affected person and examine the nature of the objection . The PVA obliged the Secretary of State to consider the advice and either revoke the order or notify the affected party of his refusal to do so. Section 1(8) of the Act required the Secretary of State to keep Parliament appraised of the number of expulsion, prohibition and registration orders made.

\textsuperscript{1594} The PVA applied only to the British mainland and attempted to deal with the threat of terrorism by \textit{inter alia}, i) preventing the immigration of foreigners ; ii) facilitating the deportation of foreigners; and iii) making it possible for the authorities to register all resident Irish with the British police.

\textsuperscript{1595} See, for example, Section 1(6) which stated that persons made subject to expulsion, prohibition or registration orders were entitled to oppose such orders and make representations to the Secretary of State in support of their objections. Section 2(1) of the PVA obliged the Secretary of State obtain advice on each objection received, unless he considered an objection to be frivolous . The advice was provided by a person nominated by the Secretary of State, who would, \textit{inter alia}, interview the affected person and examine the nature of the objection . The PVA obliged the Secretary of State to consider the advice and either revoke the order or notify the affected party of his refusal to do so. Section 1(8) of the Act required the Secretary of State to keep Parliament appraised of the number of expulsion, prohibition and registration orders made.

\textsuperscript{1596} The Act allowed for trials of scheduled offences to be by a judge sitting without a jury and extended the State’s power to detain terror suspects, albeit in slightly curtailed form. See Section 10, which limited detention of suspected terrorists to periods not exceeding 72 hours. Those persons detained under Interim Custody Orders, in terms of Paragraph 11(1) of Schedule 1 to the Act could only be detained for a period of 28 days, unless their case was referred to a Commissioner by the Chief
1973 Act was not simply designed to empower the authorities to deal with the terrorist threat by way of Regulations. In this respect the Act was narrower in its scope than the SPA, ROIA and DORA. Nonetheless, the EPA 1973 introduced an appreciable number of novel provisions\textsuperscript{1598} which increased the specific powers available to the United Kingdom’s executive to counter terrorism. In contradistinction, the Northern Ireland (Emergency Provisions) (Amendment) Act 1975 (EPA 1975), reformed the counter-terrorism laws applicable in Northern Ireland, by introducing various checks and balances on the executive’s powers\textsuperscript{1599}. Likewise, the 1987\textsuperscript{1600} and 1991\textsuperscript{1601} re-enactments of the EPA introduced limits to the anti-terror powers available to the government. At the same time, the 1975\textsuperscript{1602} and 1991 EPA\textsuperscript{1603} saw a proliferation of new measures designed to tackle perceived terrorist threats.

In 1974 the United Kingdom promulgated the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA 1974), which saw the introduction of a number of specific

\textsuperscript{1597} With the PVA being the one exception.
\textsuperscript{1598} See, for example Section 2(1), which provided that any trial on indictment of a scheduled offence, would be conducted by a Court without a jury; Section 15, which extended the authorities’ enter and search powers; Section 16, which extended the authorities stop and search powers.
\textsuperscript{1599} See, for example, Section 4(1), which relaxed the bail provisions applicable to those charged with scheduled offences; Section 5(1), which created a system of legal aid to assist those charged with scheduled offences; and Section 5(1), which reduced to 14 days, the time which a person could be detained under an interim custody order, if the case was not referred on to an adviser. Nonetheless, it should be noted that in 1977, an internal government review of security legislation, called for increased penalties for various offences resulting in the emergence of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act).
\textsuperscript{1600} See, for example, Section 2(3) and (7), which relaxed further the EPA’s provisions relating to bail; Section 2 also limited to 28 days, the amount of time any person charged with a scheduled offence could be held in custody by a Magistrates’ Court; Section 8(2)(b) and (3) which extended the circumstances under which statements made by persons accused of scheduled offences could be excluded at a trial; Part II of the 1987 Act introduced various rights in respect of those persons who were detained under Sections 12 or 13 of the Prevention of Terrorism (Temporary Provisions) Act 1984.
\textsuperscript{1601} The EPA 1991 introduced a number of reforming measures including i) the establishment of effective complaints procedures; and ii) the establishment of codes of practice governing the emergency powers.
\textsuperscript{1602} For instance, Section 16 of 1975 Act created a new provision, which made it an offence for any person in a public place, without a reasonable excuse, to wear any hood or mask designed to conceal their identity
\textsuperscript{1603} The EPA 1991 empowered authorities conducting searches of any premises for munitions, scanning devices and radio transmitters, to control the movement of persons in and out of those premises for the duration of the search. The Act also empowered the authorities, when searching any premises, place or person, to examine any document or record found, so far as was reasonably required to ascertain the nature of the information contained therein. The EPA 1991 also created the offence of possessing any article, reasonably suspected of being intended for Northern Ireland related terrorist purposes. Part VII of the EPA 1991 also introduced for the first time various provisions enabling the identification and confiscation of the proceeds of terrorist-related activities.
counter-terror laws, not included in the PVA 1939\textsuperscript{1604}. A reenactment of the PTA 1974, including a variety of minor changes, was promulgated on 25 March 1976. A further reenactment, again including various alterations, was published on 22 March 1984. The PTA 1984 placed a number of limitations on the executive powers granted by the 1974 and 1976 Acts\textsuperscript{1605}. The final incarnation of the Act, which introduced a comprehensive set of amendments, was published on 15 March 1989. Although parts of the 1989 Act increased the number of counter-terror powers available to the government as well as the severity of the available sanctions\textsuperscript{1606}, the Act also implemented a number of procedural safeguards, curbing the power of the government\textsuperscript{1607}.

The Terrorism Act 2000 (TA 2000) superseded the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA 1989) and the Northern Ireland (Emergency Provisions) Act 1996 (EPA 1996). The TA 2000 borrowed extensively from both the PTA 1989 and the EPA 1996. However, unlike previous counter-terror laws, the majority of the TA 2000’s measures were not subject to annual renewal by

\textsuperscript{1604} See, for example, Section 1, which introduced, for the first time outside of Northern Ireland, provisions which created various offences connected proscribed organisations; and Section 2, which introduced for the first time outside of Northern Ireland, provisions restricting public displays in support of proscribed organisations.

\textsuperscript{1605} See, for example, Section 3(4), which stated that an exclusion order would, unless already revoked, expire three years after coming into existence; Section 7(2) and (4), which increased the timeframe within which any person wishing to object to an exclusion order could make representations to the Secretary of State to 7 days; and Section 7(13), which stated that where representations had been made to the Secretary of State regarding an exclusion order, notification of his decision needed to be given in writing.

\textsuperscript{1606} See, for example, Sections 10 and 13, which increased the penalties attached to offences relating to proscribed organisations; Section 13 and Schedule IV, which, \textit{inter alia}, added a number of new provisions dealing with courts’ powers to order the forfeiture of property relating to i) contributions towards acts of terrorism in general; and ii) contributions to the resources of proscribed organisations; Section 17(1) and Schedule 7, which conferred powers to obtain information for the purpose of investigations into: a) the commission, preparation or instigation of i) acts of terrorism; or ii) any other act which appeared to have been done in connection with acts of terrorism; and iii) the resources of a proscribed organisation; Schedule 3 introduced a number of new provisions dealing with the examination of persons on arrival in or departure from the United Kingdom.

\textsuperscript{1607} See, for example, Paragraph 1(1) of Schedule III, which stated that where a person had been detained following an exclusion order, that detention would be periodically reviewed, with no more than 12 hours passing between reviews. The 1989 Act also i) made the Secretary of State’s powers to extend periods of detention, connected with exclusion orders, subject the requirement that suspects be notified in writing of all applications for such extensions; and ii) made the exercise of the detention powers subject to the supervision contained in Schedule 3 to PTA 1989; Paragraph 3(1) which stated that where a person had been detained under Section 14 or Paragraph 6 of the Schedule, that detention would be periodically reviewed; Paragraph 6 of Schedule 3, which allowed persons detained under the PTA 1989 to make representations regarding their detention; Paragraph 7 of Schedule 7, which stated that any person detained under the PTA 1989 should be notified of their rights under the Police and Criminal Evidence Act 1984 to i) legal advice; and ii) notify somebody of their detention.
Parliament. The TA 2000 created a host of new counter-terror powers and procedures\textsuperscript{1608}, though some reforms were also introduced\textsuperscript{1609}. Although the Anti-Terrorism, Crime and Security Act (ATCSA) introduced a small number of reforming measures\textsuperscript{1610}, it also increased the number of avenues available to the authorities to deal with terrorism\textsuperscript{1611}. Most notably, the ATCSA introduced i) extended powers of detention in respect of suspected terrorists; and ii) novel bail, appeal and review procedures centred around the Special Immigration Appeals Commission (the SIAC)\textsuperscript{1612}. Under the PTA 2005, the ATCSA’s extended powers of detention were replaced by a system of ‘control orders’, which imposed obligations on individuals suspected of being involved in terrorism\textsuperscript{1613}.

The Terrorism Act 2006 (TA 2006) added to the existing counter-terror legislation, providing enforcement agencies with even more capacity to counter the threat of

\textsuperscript{1608} See, for example, Sections 12(4), 39(5)(a), 54, 57, 58, 77 and 103, which introduced evidentiary burdens on defendants in a variety of circumstances; Section 20(3), which expanded the circumstances under which persons wishing to report suspicions regarding terrorist property could ignore restrictions on the disclosure of information; Paragraph 1(5)(c) of Schedule 5, which broadened the circumstances under which a judge could grant an entry, search and seizure warrant; and Paragraph 8(2) of Schedule 8 which stated that an officer could delay informing a person arrested under Section 41 of their rights to i) have someone informed of their incarceration; and ii) consult with a solicitor for up to 48 hours.

\textsuperscript{1609} For example, a number of important provisions were not carried forward into the TA from the EPA 1996 and the PTA 1989, including i) the power conferred by the PTA on the Secretary of State to exclude persons connected with terrorism from the United Kingdom and related provisions; ii) the duty to disclose information, regardless of where such information was obtained, which would assist in preventing an act of terrorism or leading to the apprehension of any person involved in an act of terrorism. Also see, for example, Section 4 which introduced a process whereby deproscription applications could be made to the Secretary of State; Section 5 and Schedule 3, which established a Proscribed Organisations Appeal Commission; Section 12(4), which introduced a defence to the offence of managing a meeting addressed by a person belonging or professing to belong to a proscribed organisation; Section 46(4), which stated that any vehicle or pedestrian stop and search authorisations had to be confirmed or altered by the Secretary of State within 48 hours of their being granted, failing which they would lapse; and Paragraph 3, which empowered the Secretary of State to order that detainee interviews be audio or video recorded in terms of code of practice.

\textsuperscript{1610} See, for example, Section 2(1) to (3), which made community services legal funding and legal aid available in proceedings dealing with the forfeiture of terrorist cash; and Paragraph 10 of Schedule 1, which provided for the possibility of compensation in circumstances where cash has been seized and detained but where no forfeiture order was made.

\textsuperscript{1611} See, for example, Part I of Schedule 2, which made provision for so-called ‘account monitoring orders’, which could be obtained by application and could compel a financial institution to provide information about any specified account; Part 3 and Schedule 4, which gave public authorities in the United Kingdom the power to disclose information held by them to aid criminal investigations or proceedings; Part 10, which amended the Police and Criminal Evidence Act 1984, to provide additional powers to search, examine, photograph, unmask and fingerprint persons in police detention for identification purposes; and Sections 96 and 97, which created new stop, search and seizure powers for police officers in Northern Ireland in circumstances where violence was anticipated.

\textsuperscript{1612} Sections 21 to 45.

\textsuperscript{1613} Sections 1 and 2.
terrorism in the United Kingdom\textsuperscript{1614}. A number of safeguards were, however, included in the TA 2006 in an effort to bring the Act into line with international law\textsuperscript{1615}. The Counter-Terrorism Act 2008 (CTA 2008) further expanded the number and variety of counter-terror powers available to the authorities\textsuperscript{1616}, while at the same time, introducing some reforming measures\textsuperscript{1617}. The TPIMA introduced a number of important limits to the executive’s counter-terror powers\textsuperscript{1618}. In other respects, however, the TPIMA increased the scope of the executive’s counter-terror powers\textsuperscript{1619}. On the whole, the PFA serves to reduce the scope and reach of the United Kingdom’s executive’s counter-terror powers\textsuperscript{1620}. One way in which this was achieved was through the repealing Sections 44 through 47 of the TA 2000\textsuperscript{1621}. In most respects, the replacement powers set out in the PFA are more narrowly defined than the repealed powers\textsuperscript{1622}.

On the whole, therefore, it is evident that the successive counter-terror laws in place in Northern Ireland and on the British mainland from the beginning of the 20\textsuperscript{th} century have evolved in response to changing threats and exigencies.

\begin{itemize}
\item \textsuperscript{1614} See, for example, Section 1, which created the offence of encouraging terrorism; Section 2, which created the offence of disseminating terrorist publications; Section 6, which created an offence related to providing training for terrorists; Section 8, which made it an offence to attend at any place used for terrorist training.
\item \textsuperscript{1615} See, for example, Part 3 which provided for the oversight of the operation of Part 1 of the Act and the TA 2000 by way of an independent annual review.
\item \textsuperscript{1616} See, for example, Part 1 which empowered constables to take fingerprints and samples from individuals subject to control orders; Sections 14 to 17, which relaxed and standardised the laws relating to the retention and use of fingerprints and DNA samples in order to counter terrorism; and Part 7 which created the offence of eliciting, publishing or communicating information about members of the armed forces, the intelligence services, or of constables, which was likely to be of use to terrorists.
\item \textsuperscript{1617} For instance, Section 80 of the CTA amended the PTA 1989 so as to extend the amount of time available to persons against whom non-derogating control orders had been made to make representations.
\item \textsuperscript{1618} For instance, while the PTA 2005 allowed control orders to be made, imposing obligations, incompatible with individuals’ rights to liberty under Article 5 of the ECHR, under the TPIMA this is no longer possible.
\item \textsuperscript{1619} For instance, Schedule 5 introduces specific powers of entry, seizure, search and retention in relation to TPIMs.
\item \textsuperscript{1620} Part 4 of the PFA deals with counter-terrorism powers. For example, Section 57(1) of the PFA amends Paragraph 36(3)(b)(ii) of Schedule 8 to the TA 2000 so as to make the maximum period of pre-charge detention, as provided for by that Act, 14 days.
\item \textsuperscript{1621} By way of Section 59 of the PFA, Sections 44 through 47 of the TA 2000 dealt with stop and search powers.
\item \textsuperscript{1622} For example, under the new Section 47A, an authorisation to allow vehicles and persons to be stopped and searched can only be given based on a reasonable suspicion that an act of terrorism will take place and i) that the authorisation of the powers is necessary to prevent such an act; and ii) that the area or place specified in the authorisation are no greater than is necessary and the duration of the authorisation is no longer than is necessary. Under the original TA provisions, authorisation could be given on the mere basis of expediency. In addition, under the new PFA provisions, any senior police officer who has made an authorisation orally under the new Section 47A, has a duty to confirm it in writing as soon as reasonably practicable.
\end{itemize}
Century onwards, have followed an identifiable arc: the laws passed at the beginning of the 20th Century were concise, simple pieces of legislation, which bestowed remarkably broad counter-terror powers on the United Kingdom’s executive. These initial Acts also contained very few mechanisms designed to limit authorities’ abuse of power. In contrast, the anti-terror laws enacted later in the 20th Century and early in the 21st Century, were more lengthy, complex pieces of legislation bestowing an ever increasing number of more specifically defined powers. Consequently, the powers the executive enjoyed under these later laws were inherently constrained. These more contemporary laws also introduced an ever growing number of reforming measures, which placed further limits on the powers granted to authorities.

These changes cannot simply be ascribed to changing terrorist threat levels over time. History reveals that the 20th Century saw largely constant threat levels in Northern Ireland. In contrast, the levels of threat on the British mainland were sporadic and if anything, more serious in the latter half of the 20th Century than in the preceding 50 years. The 21st Century has seen a reduction in the tensions in Northern Ireland and a corresponding curtailment of the threat of Northern Ireland-related terrorism. At the same time, the unprecedented terrorist attacks of September 11, 2001 signaled the beginning of a new terrorist threat to the United Kingdom. This threat is undoubtedly far more acute than that which the country faced in the 20th Century. These observations raise an important question. If the observed evolution of the United Kingdom’s counter-terror laws has not been a result of uniform reduced levels of threat, what factor has been responsible for the trend? Phrased differently, why are unprecedented terrorist threat levels in the United Kingdom not being met by unprecedentedly broad counter-terror executive powers? This thesis has argued that the reason for this anomaly has been the proliferation of international human rights treaties and the interaction of those agreements with the United Kingdom.

2. The Evolution of the United Kingdom’s relationship with International Human Rights Treaties

Prior to the end of the Second World War, international law was thought only to be of relevance to interstate relations and it was considered inappropriate to interfere in the domestic affairs of states. It is likely that this attitude contributed to Europe’s
permissive attitude towards Hitler and Nazi Germany in the years preceding the Second World War.\textsuperscript{1623} The horrendous conduct of Germany in relation to her own people before and during the war convinced states that a change in approach was essential\textsuperscript{1624}. The London Charter of the International Military Tribunal was an agreement signed by the United Kingdom, France, Russia and the United States, which allowed for the trial of Nazi leaders\textsuperscript{1625}. The Charter was a noteworthy landmark in the development of international human rights law as it signalled the end of the unqualified supremacy of national law\textsuperscript{1626}.

In the thirty years following the London Charter, the United Kingdom took its first steps in engaging with international human rights treaties. The United Nations Charter\textsuperscript{1627} was signed by the United Kingdom\textsuperscript{1628} on 26 June 1945 and came into force later that same year. The Charter’s Preamble makes clear the organisation’s commitment to human rights, and aims to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. Despite a number of references to human rights, it is not clear whether the Charter creates any specific obligations and in any event, it contains no enforcement mechanisms\textsuperscript{1629}. As yet, none of the Charter’s human rights Articles has been directly incorporated in the United Kingdom’s domestic law.

On 10 December 1948 the United Kingdom, together with 47 other members of the General Assembly voted in favour of the Universal Declaration of Human Rights (UDHR)\textsuperscript{1630}. Many of the rights contained in the UDHR deal with freedoms which the counter-terror powers of the day sought to circumscribe\textsuperscript{1631}. The Declaration is not a

\textsuperscript{1623} Goodrich (1949) at 15.
\textsuperscript{1624} Ibid.
\textsuperscript{1625} Ibid.
\textsuperscript{1626} The Agreement was never ratified by the United Kingdom, nor was it incorporated into that state’s municipal law.
\textsuperscript{1627} The Charter is the foundational treaty of the United Nations.
\textsuperscript{1628} Together with 49 of the other founding members of the United Nations.
\textsuperscript{1629} Chapter VII of the Charter bestows upon the Security Council various powers to deal with any ‘threat to the peace, breach of the peace, or act of aggression’.
\textsuperscript{1630} GA res 217A (III), UN Doc A/810 at 71 (1948).
\textsuperscript{1631} These include i) the right to life, liberty and security of person; ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; iii) the right not to be subjected to arbitrary arrest, detention or exile; iv) the right to a fair and public hearing by an independent and impartial tribunal; v) the right to be presumed innocent until proved guilty; vi) the right not to be subjected to arbitrary interference with privacy, family, home or correspondence; vii) the right to freedom of movement and residence within the borders of each signatory state; viii) the right to seek
treaty, however, but a resolution of the General Assembly and is therefore not legally binding on state parties. In addition, the UDHR has never been directly incorporated into the United Kingdom’s domestic law. The European Convention on Human Rights (ECHR), formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms, was drafted in 1950 by the Council of Europe and came into force on 3 September 1953. The United Kingdom signed the Convention on 4 November 1950 and it was ratified on 8 March 1951. A number of the rights contained in the ECHR were sourced from the UDHR, while others made their first appearance in the Convention. Some of the counter-terror powers available to the executive at the time, made inroads into various criminal justice rights, many of which are protected under the ECHR.

Section II of the ECHR established a European Commission of Human Rights (the European Commission) and a European Court of Human Rights (the ECtHR). The Convention empowered the Commission to consider inter-state complaints. It also enabled non-governmental organisations, individuals and groups of individuals to make complaints against states parties to the Convention. Initially, only Signatory States, together with the Commission had the right to submit matters to the European Court of Human Rights.

and enjoy asylum in other countries; ix) the right not to be arbitrarily deprived of property; x) the right to freedom of opinion and expression; and xi) the right to freedom of peaceful assembly and association.

Nonetheless the UDHR-inspired treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights.

It is interesting to note that many of the rights contained in the UDHR were indirectly incorporated into the United Kingdom’s domestic law by way of the HRA 1998.

Including i) the right to life; ii) the right not to be subjected to torture or inhuman or degrading treatment or punishment; iii) the right to liberty and security of person; iv) the right to a fair and public hearing; v) the right to be presumed innocent until proved guilty; vi) the right to respect for private and family life, home and correspondence; vii) the right to freedom of expression; and viii) the right to freedom of assembly and freedom of association.

Including i) the right of any arrested person to be informed promptly of the reasons for the arrest and details of any charges brought; ii) the right of any arrested or detained person to be brought promptly before a judge or other judicial officer and to a trial within a reasonable time or to release pending trial; iii) the right of any arrested or detained person to bring proceedings by which the lawfulness of his detention could be decided speedily and his release ordered if the detention was not lawful; iv) the right of any arrested or detained person to compensation, where State has failed to implement any of their obligations under the Convention; and v) the right of any person charged with a criminal offence to a proper defence.

Article 24.

Article 25. It should be noted, however, that each signatory state to the Convention was given the choice of whether or not to recognise Commission’s jurisdiction in these matters. In 1966 the United Kingdom recognised the Commission’s jurisdiction to hear complaints from individuals.
ECtHR\textsuperscript{1639}. Each contracting state was able to decide whether or not to grant the Court jurisdiction over matters concerning the ECHR\textsuperscript{1640}.

The years 1976 to 2012 saw the United Kingdom begin to engage with a number of international human rights treaties in a continually accelerating fashion. It signed and ratified a number of international treaties, including the ICCPR\textsuperscript{1641}, the CAT\textsuperscript{1642}, and the CPTP\textsuperscript{1643}. In so doing, it obliged itself to respect various rights and freedoms\textsuperscript{1644}. Many of the counter-terror powers in place at the time involved limiting certain of the liberties listed in those treaties. In the period under examination, the United Kingdom also bound itself to various obligations\textsuperscript{1645} and subjected itself to the scrutiny of a growing number of international monitoring and enforcement bodies\textsuperscript{1646} tasked with the duty of ensuring states’ observance of treaty terms. The passage of time also saw a

\textsuperscript{1639} Article 44.
\textsuperscript{1640} Article 46.
\textsuperscript{1641} The Covenant was ratified on 20 May 1976.
\textsuperscript{1642} The Covenant was ratified on 8 December 1988.
\textsuperscript{1643} The Covenant was ratified on 24 June 1988.
\textsuperscript{1644} Some of these rights include i) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; ii) the right to liberty and security of person and not to be subjected to arbitrary arrest or detention; iii) the right to liberty of movement and freedom of choice of residence; iv) the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; v) the right to be presumed innocent until proved guilty; vi) the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence; vii) the right to freedom of expression; and viii) the right to freedom of opinion and expression; ix) the right to be presumed innocent until proved guilty; x) the right of any arrested or detained person to be brought promptly before a judge or judicial officer and to be tried within a reasonable time or released; xi) the right of anyone deprived of their liberty to approach a Court to establish the lawfulness or otherwise of the detention; xii) the right of any victim of unlawful arrest or detention to compensation; xiii) the right of any person deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; xiv) the right of any person charged with a criminal offence to a proper defence; xv) the right of any person convicted of a crime to have their conviction and sentence reviewed by a higher tribunal; xvi) the right to hold opinions without interference; xvii) the right to freedom of association with others; xviii) the right of any person who alleges that they have been subjected to acts of torture, to have their case promptly and impartially heard by a competent authority; and xix) the right of tortured persons to adequate compensation.
\textsuperscript{1645} Including i) not to extradite any person to a country where there are substantial grounds for believing that such a person would be in danger of being tortured; ii) to ensure that all acts of torture are offences under its criminal law; iii) to ensure that education and information regarding the prohibition against torture are included in the training of any persons involved in the custody, interrogation or treatment of arrested, detained or imprisoned persons; iv) to continually review any interrogation rules, arrangements for the custody and treatment of arrested or detained persons, in order to prevent cases of torture; v) to ensure prompt and impartial investigations, wherever there are reasonable grounds to believe that an act of torture has been committed; vi) not to use any statements made as a result of torture as evidence in any proceedings; and vii) to prevent all other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.
\textsuperscript{1646} The Human Rights Committee; the Committee against Torture; the Human Rights Council; and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
rapid increase in the frequency with which these bodies examined the United Kingdom’s compliance with treaty obligations.

In 1978 the Human Rights Committee considered the United Kingdom’s first periodic report on the steps it had taken to fulfil its obligations under the Covenant. Further reports were considered in 1985, 1991, 1995, 2001 and 2008. In 1991 the Committee against Torture considered the first periodic report submitted by the United Kingdom, detailing that state’s efforts at compliance with the Convention. Further reports were considered in 1995, 1998 and 2004. In addition, the Human Rights Council conducted its first reviews of the United Kingdom in 2008 and 2012. In addition, delegations from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visited the United Kingdom in 1993, 1999, 2002, 2004, twice in 2005, in 2007 and 2008\textsuperscript{1647}. Since the late 1970s, the Human Rights Committee\textsuperscript{1648}, the Committee against Torture\textsuperscript{1649} and the European Committee for the Prevention of Torture\textsuperscript{1650} have increasingly drawn attention to and questioned the United Kingdom’s various emergency counter-terror laws. Together, these bodies have contributed to a growing chorus of voices recommending that the United Kingdom’s anti-terror laws be dismantled and calling upon that state to fulfil its international law obligations in its efforts to meet the terrorist threats.

\textsuperscript{1647} In 1993 and 1999, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, visited the prisons and detention centres of Northern Ireland. Based on these visits, the Committee published reports in which it recommended, \textit{inter alia}, that i) all detainees be granted access to legal advice from the outset of their detention; ii) all detainees be granted the right to have access to another, independent, lawyer when access to a specific solicitor was delayed; iii) those provisions which permitted delaying access to a lawyer for successive periods of 48 hours be repealed; and iv) detainees be entitled to have a lawyer present during police interrogations.

\textsuperscript{1648} In responding to the United Kingdom’s various reports, members of Human Rights Committee regularly questioned i) the workings and need for a number of that state’s executive emergency powers; ii) the lawfulness of such measures, in light of the United Kingdom’s obligations under the ICCPR; and iii) the necessity of the United Kingdom’s various derogations from the ICCPR.

\textsuperscript{1649} In responding to the United Kingdom’s various reports, members of Committee against Torture regularly questioned i) the workings and need for a number of that state’s executive emergency powers; ii) the lawfulness of such measures, in light of the United Kingdom’s obligations under the ICCPR; and iii) the alleged ill-treatment of detained terror suspects.

\textsuperscript{1650} In its reports following its various visits to the United Kingdom, the European Committee for the Prevention of Torture regularly questioned i) the workings and need for a number of that state’s executive emergency powers; ii) the lawfulness of such measures, in light of the United Kingdom’s obligations under the ICCPR; and iii) the alleged ill-treatment of detained terror suspects, in contravention of the Convention.
From 2001 onwards, the United Kingdom became subjected to increased levels of scrutiny surrounding its counter-terror laws. For instance, it was widely criticized by various international law bodies for the powers it introduced by way of the ATCSA. Many treaty bodies also expressed concern over elements of the PTA 2005, including the fact that the body established to judicially review control orders was empowered to consider secret evidence in closed session. Various provisions of the TA 2006, including i) the introduction of the offence of encouraging terrorism; and ii) the extension of pre-trial detention have been criticised by international law bodies. In addition, prior to the enactment of the CTA 2008, a variety of international treaty bodies expressed concern over the United Kingdom’s plans to expand its arsenal of counter-terror laws, by, inter alia, extending pre-trial detention without charge to 42 days. Ultimately, the government elected not use the CTA 2008 as a means by which to increase pre-trial detention periods.

In 2004, the Committee against Torture considered the United Kingdom’s Fourth Periodic Report and noted a number of reservations regarding the United Kingdom’s observance of the Convention. The Committee expressed its concern over the incomplete factual and legal grounds advanced to the Committee justifying the emergency powers set out in Part IV of the Anti-terrorism, Crime and Security Act 2001. The Committee also suggested that the United Kingdom should re-examine its review processes with a view to strengthening independent periodic assessment of the ongoing justification for emergency provisions of both the Anti-terrorism, Crime and Security Act 2001 and the Terrorism Act 2000. The Committee also recommended that the United Kingdom should review the alternatives available to indefinite detention under the Anti-terrorism, Crime and Security Act 2001. At the Fifty-ninth Session of the United Nations Human Rights Commission the Special Rapporteur on the independence of judges and lawyers, also expressed concern over ACTCSA. Following its 2002 and 2004 visits to the United Kingdom, the CPT expressed concern over the fact that the SIAC could consider evidence against a person without disclosing it and could exclude the interested parties and their lawyer from hearings.

Following its second 2005 visit to the United Kingdom, the CPT expressed a view that the cumulative effect of obligations imposed by control orders on a given individual might in certain circumstances be considered as a deprivation of liberty.

In its concluding observations of the United Kingdom’s Sixth Periodic Report, the Human Rights Committee stated that this practice could infringe on Articles 9 and 14 of the ICCPR. The Committee recommended that the United Kingdom review the control order regime established under the Prevention of Terrorism Act 2005 in order to ensure that it is in conformity with the provisions of the Covenant.

Switzerland referred to the 2006 Terrorism Act, and recommended that United Kingdom strengthen its guarantees associated with police custody, and not to extend but shorten the length of time of pre-trial detentions.

In its concluding observations of the United Kingdom’s Sixth Periodic Report, the Human Rights Committee noted with concern that this offence had been had been defined in Section 1 of the Terrorism Act 2006 in very broad and vague terms. The Committee recommended that the United Kingdom consider amending that part of Section 1 of the Terrorism Act 2006 to bring it in line with the State’s obligations to protect freedom of expression.

In its concluding observations of the United Kingdom’s Six Periodic Report, the Human Rights Committee expressed its concern over the United Kingdom’s planned extension of the maximum period of detention without charge of terrorist suspects from 14 days to 28 days under the TA 2006 and the proposed extension of this period under the counter-terrorism bill to 42 days. The Committee recommended that the United Kingdom ensure that any terrorist suspect arrested be promptly informed of any charge and tried within a reasonable time or released. Similar concerns were raised...
The period under review also saw the United Kingdom’s counter-terror legislation being subjected to ever increasing scrutiny from the ECtHR. The passing years saw an increase in the number of occasions on which the Court held that various aspects of the United Kingdom’s counter-terror policies and procedures were incompatible with its obligations under the ECHR, including those contained in Article 3\textsuperscript{1657}, Article 5(1)\textsuperscript{1658}, Article 5(3)\textsuperscript{1659}, Article 5(5)\textsuperscript{1660}, Article 6\textsuperscript{1661}, Article 6(1) read with Article 6(3)(c)\textsuperscript{1662}. For instance, in the case of Gillan & Quinton v the United Kingdom, the ECtHR held that the operation of Sections 44 through 47 of the TA 2000\textsuperscript{1663} had infringed the applicants’ Article 8 rights to respect for private and family life, home and correspondence. In addition, in the case of A & Ors v The United Kingdom, the ECtHR held, inter alia regarding complaints by the first, 3rd and 5th through 11th applicants, that their Article 5(1) rights had been infringed following their detention under Section 21 of the ATCSA, that the United Kingdom was not actively pursuing their deportation, and that therefore their detention did not fall within the exception to the right to liberty set out in Paragraph 5(1)(f)\textsuperscript{1664} of the Convention. The case of A and Ors also represents a further progression in the United Kingdom’s relationship with international law treaties in that the Grand Chamber held that that state had not validly derogated, under Article 15\textsuperscript{1665}, from its obligations under the Convention. It

\textsuperscript{1657} Ireland v The United Kingdom Application no 5310/71.
\textsuperscript{1658} Fox, Campbell & Hartley v The United Kingdom Application no. 12244/86; 12245/86; 12383/86.
\textsuperscript{1659} Brogan & Ors v The United Kingdom Application no. 11209/84; 11234/84; 11266/84; and 11386/85.
\textsuperscript{1660} Fox, Campbell & Hartley v The United Kingdom Application no. 12244/86; 12245/86; 12383/86; and Brogan & Ors v The United Kingdom Application no. 11209/84; 11234/84; 11266/84; and 11386/85.
\textsuperscript{1661} John Murray v The United Kingdom Case no 41/1994/488/570.
\textsuperscript{1663} These provisions set out the State’s stop, search and powers.
\textsuperscript{1664} That provision permits the detention of a person with a view to deportation only in circumstances where ‘action is being taken with a view to deportation’.
\textsuperscript{1665} 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.
was held that there had indeed been a breach of the first, 3rd and 5th through 11th applicants’ rights under Article 5(1)\textsuperscript{1666}.

It is thus evident that the United Kingdom’s engagement with international human rights treaties since the beginning of the 20\textsuperscript{th} Century has evolved in a discernable pattern. Prior to 1945, internal governance issues, were considered beyond the scope of international law. In the years immediately following the Second World War, the United Kingdom took its first steps towards engaging with international human rights treaties. From 1968 onwards there was an appreciable acceleration in the level of interaction between the United Kingdom and international human rights laws. The state increasingly committed itself to protecting various human rights and subjected itself to ever greater scrutiny by various treaty bodies. In addition, the last 40 years have witnessed the United Kingdom’s counter-terror laws coming under growing scrutiny by the ECtHR. It is thus evident that since the middle of the 20\textsuperscript{th} Century, the United Kingdom has increasingly become enmeshed with international human rights treaties and their related enforcement mechanisms.

3. The Relationship between International Human Right Law and the United Kingdom’s counter-terror policies and procedures

Looking at the trends sketched above, it becomes clear that there is a strong correlation between, on the one hand, the United Kingdom’s evolving counter-terror laws, and on the other hand, that states’ developing relationship with international human rights treaties. In other words, it is apparent that the development of international human rights law midway through the 20\textsuperscript{th} Century and the United Kingdom’s subsequent ratification of a number international human rights treaties, coincided with a proliferation of human rights-orientated safeguards, checks and balances in that state’s counter-terror laws. In addition, over time, the United Kingdom’s increased involvement in international human rights law, coincided with a narrowing of the executive powers available to that state to counter terrorism. In summation, the United Kingdom’s enmeshment with international human rights

\textsuperscript{1666} The Court also held, that the operation of Section 25 of the ATCSA had infringed the Article 5(4) rights of the first, 3\textsuperscript{rd}, 5\textsuperscript{th} and 10\textsuperscript{th} applicant. The applicants’ complaints had centred around, \textit{inter alia}, the SIAC’s use of ‘closed’ material and Special Advocates.
treaties in the years following the Second World War seems incontrovertibly linked with the parallel evolution of that state’s domestic counter-terror laws.

4. Questioning the Dualist Nature of the United Kingdom’s Relationship With International Treaties

Clear though the link between international human rights treaties and the United Kingdom’s counter-terror laws is, it is nonetheless a controversial conclusion to reach. This is due to the traditional Dualist understanding of the relationship between unincorporated treaties and the United Kingdom’s municipal law. In the United Kingdom the power to conclude treaties with other nations rests with the Queen\(^{1667}\). Parliament plays no role in treaty making\(^{1668}\). Consequently treaties do not automatically become part of the United Kingdom’s domestic law\(^{1669}\). If this were not the case, so it is said, the supremacy of Parliament would, by implication, be undermined\(^{1670}\). Treaty provisions thus only become part of the United Kingdom’s municipal law if and when they are included in an Act of Parliament\(^{1671}\). As was pointed out in Chapter 4, prior to October 2000, none of the international human rights treaties ratified by the United Kingdom had been directly incorporated into that nation’s domestic law\(^{1672}\). The unambiguous connection uncovered in this thesis between unincorporated human rights treaties and the United Kingdom’s evolving domestic counter-terror laws, casts doubt on traditional Dualist assumptions.

This thesis has also revealed a general trend in relation to the United Kingdom’s domestic case law, which tends to add credence to the conclusion reached above. It has been shown that in the 21st Century, aside from becoming more comfortable with the role given to them by the 1998 HRA, the courts have begun to discuss and

\(^{1667}\) Akehurst (1997) at 44; Starke (1989) at 82; Wallace (2002) at 41; O’Connell (1965) at 60.
\(^{1668}\) Akehurst (1997) at 44; Wallace (2002) at 41.
\(^{1670}\) Akehurst (1997) at 44; Wallace (2002) at 42.
\(^{1671}\) Akehurst (1997) at 44; Janis (2003) at 101; Wallace (2002) at 41. This rule against the self-execution of treaties was reaffirmed in 1989 when the House of Lords stated in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418; [1989] 3 W.L.R. 969, *inter alia*, that the Royal Prerogative, which includes the power to make treaties, did not extend to altering the law or conferring or depriving individuals of rights. The United Kingdom’s approach to international treaty law thus appears to be Dualist in nature.
\(^{1672}\) In 2000, the Human Rights Act 1998 incorporated elements of the ICCPR into the United Kingdom’s domestic law.
reference international law, including unincorporated treaties\textsuperscript{1673}. This development approximates the ‘creeping Monism’ identified by Waters in her study of various common law jurisdictions\textsuperscript{1674} and casts further doubt on the conventional Dualist label applied to the United Kingdom.

5. *International Law as Real Law*

The conclusions reached in this thesis also add significantly to the debate concerning the status of international law. For as long as the notion of ‘international law’ has existed, commentators from a wide variety of backgrounds, have questioned whether it is really constitutes law, in the true sense of the word. One of the grounds on which the status of international law is often challenged, is its lack of enforcement mechanisms. Others have pointed out, however, that the core objection levelled at international law is not that it lacks enforcement mechanisms, but rather that it does not work\textsuperscript{1675}. In other words, detractors argue that while international law may have certain instruments of compliance, it lacks the power to bring the norms and values which it espouses into existence\textsuperscript{1676}. This thesis has shown that over time, international human rights treaties have meaningfully impacted on the United Kingdom’s changing counter-terror laws and thereby successfully enforced the norms they espouse. To an extent, therefore, this thesis contributes to the school of thinking, which holds that international law is indeed real law.

Naturally, I am not suggesting that unincorporated, ratified treaties automatically become part of the United Kingdom’s municipal law. Clearly, such a suggestion would be indefensible. What is apparent, however, is that there has been a mechanism at work, which has resulted in some of the norms and values contained in international human rights treaties, seeping into the United Kingdom’s counter-terror laws. While an attempt to identify and study this process is beyond the scope of this thesis, I nonetheless wish to refer to a phenomenon described by Koh, referred to as ‘transnational legal processes’, which that author believes is responsible for the

\textsuperscript{1673} In Chapter 2 it was demonstrated that in the previous century the Courts adopted a markedly more conservative, Dualist oriented approach.
\textsuperscript{1674} Waters (2007) at 635.
\textsuperscript{1675} Kleinfeld (2011) at 305.
\textsuperscript{1676} Ibid.
enforcement of international human rights laws\textsuperscript{1677}. This process involves three steps, namely i) institutional \textit{interaction}, which produces debates around human rights norms; ii) \textit{interpretation} of these laws; and iii) lastly the internalisation of norms by municipal legal systems\textsuperscript{1678}. The process of internalisation is said to happen when ‘transnational norm entrepreneurs’, together with ‘governmental norm sponsors’, such as the United Nations Human Rights Commissioner and others, seek the declaration and interpretation of human rights norms, by approaching, \textit{inter alia}, law declaring forums, such as regional and international Courts\textsuperscript{1679}. These norms are then internalised by governments, via a process whereby, \textit{inter alia}, legal advisers and other lawyers working in government departments seek to ensure that policies conform to international norms, and where this is not desirable, seek to justify non-compliance\textsuperscript{1680}. In this way, municipal decision-making structures become enmeshed with international legal norms, so that institutional arrangements for the maintenance of international commitments become part of domestic legal and political processes\textsuperscript{1681}. This ‘transnational legal process’ is thus one way of explaining how unincorporated treaties can have impacted on the United Kingdom’s domestic counter-terror laws.

One further explanation, can be drawn from an observation commonly made concerning international law. It has been pointed out that in practice, states accept that international law constitutes actual law\textsuperscript{1682} and that on most occasions states interact with one another in a lawful manner\textsuperscript{1683}. For instance, Franck has observed that states often obey international law, even where such compliance is not in line with their short term self-interest. One could argue that this is exactly what has been observed in this thesis. The United Kingdom’s counter-terror powers have evolved in a manner, which, considering the level of the terrorist threat, seems to be counter to the United Kingdom’s self-interest. Frank provides an interesting hypothesis as to how such a situation materialises. He argues that in societies organised by rules, compliance is partly secured where those to whom the rules are directed find them to be legitimate.

\textsuperscript{1677} Koh (1999) at 1399.
\textsuperscript{1678} Ibid.
\textsuperscript{1679} Id at 1410.
\textsuperscript{1680} Ibid.
\textsuperscript{1681} Koh (1999) at 1411; Koh (1997) at 2599.
\textsuperscript{1682} Akehurst (1997) at 2; Wallace (2002) at 2; Oppenheim (2009) at 12.
\textsuperscript{1683} Franck (1988) at 705; Reeves (1915) at 81; Brown (1945) at 534.
Franck states that this perceived legitimacy becomes a crucial factor in relation to compliance where, as in international law, there are few coercive forces. It is thus possible, that the reason why unincorporated human rights treaties have been able to impact meaningfully on the United Kingdom’s counter-terror laws is that on the whole, Westminster has perceived the norms encompassed in those treaties as legitimate.

# ABBREVIATIONS

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<td>A.J.Int’l.L.</td>
<td>American Journal of International Law</td>
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<td>Akron L.Rev.</td>
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<td>Ann. Surv. Int’l &amp; Comp. L.</td>
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<td>ATCSA</td>
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<td>BTP</td>
<td>British Transport Police</td>
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<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CJPA</td>
<td>Criminal Justice and Public Order Act 1994</td>
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<td>CPTP</td>
<td>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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<td>CTA</td>
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<td>DORA</td>
<td>Defence of the Realm Act</td>
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<td>IRA</td>
<td>Irish Republican Army</td>
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<td>Italian Y.B.Int’l L.</td>
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<td>JIJIS</td>
<td>Journal of the Institute of Justice and International Studies</td>
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<td>MDP</td>
<td>Ministry of Defence Police</td>
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<td>PEACE</td>
<td>Planning &amp; Preparation; Engage &amp; Explain; Account; Closure; Evaluation investigative interviewing model</td>
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<td>UDHR</td>
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<td>Atomic Energy Authority</td>
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<td>UNODC</td>
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United Nations Charter (1945)
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