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Leiden  
The Netherlands

**Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France**

Oehmichen, A.

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## Part II

### A National and Historical Comparison of Anti-Terror Legislation

We have seen that in many cases of state terrorism totalitarian rulers gained their power incrementally, by gradually conferring more powers to the executive, and simultaneously, little by little, reducing the individual rights and freedoms of their citizens. They were able to do this because of the existence of a 'common enemy', be it a communist, be it a terrorist, or a rebel, in any case a person or a group of whom the population was sufficiently afraid of in order to voluntarily sacrifice their fundamental freedoms. The question is now: can a similar tendency be observed in today's democracies when confronted with terrorism? How have modern democracies reacted to terrorism? Are they developing into totalitarian states of surveillance, like in other historical examples? When we look at the examined countries, the United Kingdom, Spain, France and Germany, we note that the events of September 11<sup>th</sup> have dramatically changed the law and politics of these states:<sup>1</sup> the question seems legitimate: are we *now* on the way towards a situation of state terrorism? In contrast to the examples of state terror from the first part of the twentieth century (such as those in Germany, Russia, and China), we now have domestic and supranational human rights protection. But what is the role of the institutions protecting human rights? How much influence and how much power do they have in relation to counter-terror legislation? In the present Part, we will explore the counter-terror legislation of different western societies from past to present, in order to illustrate at which state we are now, and if, as feared by many, we are indeed heading towards a totalitarian state of absolute control. While this Part focusses on describing the situation as it has developed over the past forty years in the four different countries, the answers to the previously mentioned questions will be discussed in Part III.

We shall start by looking at the country which had the relatively strongest terrorist threat, the UK, subsequently examine Spain, which still suffers from ETA terrorism. An overview on the counter-terror legislation of Germany, which adopted many anti-terror laws in the 1970s in fighting the RAF, but also after September 11<sup>th</sup> will follow, and finally France, which only started to adopt legislation directed at terrorism in 1986.<sup>2</sup>

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<sup>1</sup> See, e.g.: Eden and O'Donnell (2005).

<sup>2</sup> Leaving alone the laws concerning 'state security' adopted in the context of the Algerian crisis.

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### **1. Anti-Terror Legislation in the United Kingdom**

**I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. (...)The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.<sup>3</sup>**

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<sup>3</sup> Lord Hoffman in House of Lords, *A (FC) and others (FC) v Secretary of State for the Home Department*, [2005] UKHL 71, at 96 and 97.

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### 1.1. Introduction

The United Kingdom (the UK) is the oldest democracy of the examined countries, and has one of the longest traditions of human rights, dating back as early as 1215.<sup>4</sup> However, as we have seen in Part I, the UK has been confronted with terrorism for a longer period than any of the other countries of examination. For about 30 years, the conflict in Northern Ireland provoked the adoption of special legislation. This was achieved mainly through the adoption of Prevention of Terrorism (Temporary Provisions) Acts (PTA) for the mainland, and Emergency Provisions Acts (EPA) for Northern Ireland. The UK pursued the goal of dealing with terrorist acts so far as possible through a criminal justice process, albeit a process somewhat modified to make it respond better to problems posed by the secret nature of terrorist groups and their ability to intimidate the community, witnesses or jurors.<sup>5</sup> Since September 11<sup>th</sup> Islamic terrorism has concerned British legislators, and the London bombings in 2005 as well as the burning car driven into Glasgow airport on 30 June 2007<sup>6</sup> seem to have confirmed their concerns. These attacks triggered the passage of further reaching laws to respond to the increased level of danger.

### 1.2. Relevant legal sources

The UK belongs to the group of countries where case-law<sup>7</sup> has developed and promoted legislation (the common law tradition). It has three main legal sources: case-law, developed by the courts, statutory law, adopted by parliament, and conventions.<sup>8</sup> There is no criminal code as such.<sup>9</sup> Statutes are adopted in a thematic manner (for example the *Theft Act 1968*, or the *Police and Criminal Evidence Act (PACE) 1984*, amongst others), and complemented by codes of practice.<sup>10</sup> For the criminal procedure, the most important Acts adopted are PACE 1984, the *Criminal Justice and Public Order Act of 1994*, and the *Criminal Procedure and Investigation Act (CPIA) of 1996*, which mostly concern the collection and production of evidence. Moreover, two statutes have recently considerably reformed English criminal justice: the *Criminal Justice Act (CJA) 2003* and the *Serious Organised Crime and Police Act (SOCPA) 2005*. With respect to

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<sup>4</sup> The *Magna Carta*, which provided already the *habeas corpus* rule, was adopted in 1215. See above, Introduction, 1.2.2.1.

<sup>5</sup> Bonner (2000), at 40.

<sup>6</sup> BBC News (online edition) (30 July 2007): *Blazing car crashes into airport*.

<sup>7</sup> Case-law is defined by Elliot / Quinn as the body of decisions made by the higher courts, which the lower ones must respect, cf. Elliott and Quinn (2006), at 10.

<sup>8</sup> These are non written rules the juridical value of which is not clear, but which are usually respected in practice (Spencer and Padfield (2006), at 537).

<sup>9</sup> In spite of the efforts carried out by the Law Commission who drafted a model criminal code in 1989, the code is, at the most, used for interpretative purposes in applying the existent (statutory or common) law, but has not enjoyed too much attention. See also Ashworth (2006), at 57 et seq.

<sup>10</sup> Even classical concepts of offences may be defined by case-law. E.g., the definition of murder is still the one created by Edward Coke (1552-1634), *Institutes of the Laws of England*, 1797: "When a man of sound memory and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in *rerum natura* under the King's Peace, . . . so as the party wounded, or hurt, *et cetera*, die of the wound or hurt, *et cetera*, within a year and a day after the same."

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terrorism legislation, most of it is adopted through written statutes or Acts. The UK ratified the ECHR in 1950. In 1998 the *Human Rights Act (HRA) 1998* was adopted, which put most of the guarantees of the ECHR on a statutory basis.<sup>11</sup>

### 1.3. Anti-terror legislation prior to September 11<sup>th</sup>

#### 1.3.1. Early special laws

The first important statute concerning Northern Ireland was the *Civil Authorities (Special Powers) Act (Northern Ireland, NI) of 1922*, adopted during the Irish War of Independence. It was by far the most wide-sweeping Act adopted in the United Kingdom; at the same time, it became instrumental in maintaining Unionist control of Northern Ireland.<sup>12</sup> Among other offences 'against the regulations' (a very broad term that could be applied whenever convenient), the Act provided for special offences with increased punishment.<sup>13</sup> It also regulated special trials without jury.<sup>14</sup> Further, it empowered the Northern Ireland Parliament to impose a curfew; proscribe organisations; censor printed, audio, and visual materials; ban meetings, processions, and gatherings; restrict the movement of individuals to within specified areas; and detain and interview suspects without bringing charges.<sup>15</sup> The Act had an intended duration of one year, but was continuously re-adopted and amended, ultimately remaining in force until 1973, when it was replaced by the *Northern Ireland (Emergency Provisions) Act (EPA) 1973*. Likewise, the EPA 1973 was constantly renewed and amended (1975, 1978, 1987, 1991, 1996, and 1998).<sup>16</sup> As Donohue notes, the government's rationale for maintaining the legislation shifted: whilst initially it was enacted as an interim measure to establish peace, the legislation turned into a necessity for maintaining Northern Ireland's constitutional position.<sup>17</sup>

Of historical importance for the UK is the adoption of the *Emergency Powers (Defence) Act 1939*. By virtue of this statute, the detention of persons ('whose detention appears to the Secretary of State to be expedient in the interests of the public safety or

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<sup>11</sup> Furthermore, with respect to terrorism, it may be useful to know that an updated status of the UK's applicable counter-terrorism legislation is online available on the Home Office's site: <http://security.homeoffice.gov.uk/legislation/current-legislation/>. Proposed new legislation can be viewed at: <http://security.homeoffice.gov.uk/legislation/proposed-new-legislation/>. Moreover, all Acts with their explanatory notes are available on the UK government's website (<http://www.opsi.gov.uk/acts>), both last visited 19 September 2008.

<sup>12</sup> Donohue (2000), at 4.

<sup>13</sup> "The regulations" were regulations laid out in the schedule and regulations issued by the civil authority. S.2.4 provided to deem guilty of an offence against the regulations 'any person [who] does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations'.

<sup>14</sup> S.3 of the Act.

<sup>15</sup> Donohue (2000), at 4.

<sup>16</sup> See also below at 1.3.3.

<sup>17</sup> Donohue (2000), at 4.

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the defence of the realm') without charge, also known as *internment*, was authorised. The Act was passed just prior to the outbreak of World War II. Its main purpose was to enable the British Government to pursue the war more effectively. The introduction of internment, one of the most criticised counter-terrorism measures in the history of the UK, would be re-introduced for Northern Ireland<sup>18</sup> from 1971 to 1975, in response to the civil unrest that reigned during this period.

At the beginning of World War II, the IRA started the so-called *Sabotage Campaign*, which were bombings in different places in England with the aim to undermine the English victory in the war.<sup>19</sup> This event triggered the adoption of the *Prevention of Violence (Temporary Provisions) Act 1939*. The Act was aimed towards persons who were suspected of complicity in 'acts of violence designed to influence public opinion or Government policy with respect to Irish affairs' and gave the police powers to expel, exclude or arrest these people without warrant.

### 1.3.2. Beginning of the 'Troubles'

The late 1960s and the early 1970s were marked by severe civil disturbances and rising tensions, which culminated in gunfights between protestants and British troops in Northern Ireland (for example the *Battle of the Bogside* of August 1969, or the battle following the *Falls Road Curfew* in July 1970). Special legislation concerning a variety of subject-matters within Northern Ireland were adopted during this period, including the *Community Relations Act (NI) 1969* which established a commission to 'encourage harmonious community relations',<sup>20</sup> the *Police Act (NI) 1970* which created a special police authority for Northern Ireland, the *Criminal Justice (Temporary Provisions) Act (NI) 1970* which declared a state of emergency for Northern Ireland, the *Prevention of Incitement to Hatred Act (NI) 1970*, and the *Housing Executive Act (NI) 1971* establishing a Northern Ireland Housing Executive to carry out housing transfers, *inter alia*.<sup>21</sup>

### 1.3.3. Special legislation in Northern Ireland

As to the laws governing the fight against terrorism, a distinction should be made between legislation governing exclusively Northern Ireland<sup>22</sup> and that governing either the rest of the UK or the whole of the UK including Northern Ireland.

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<sup>18</sup> Please note that internment had already been in place in Northern Ireland in 1922 (s.23 of the schedule to the Civil Authorities (Special Powers) Act (NI) of 1922).

<sup>19</sup> See also above, Part I, 2.3.1.

<sup>20</sup> s.1 (3) (a) of the Act.

<sup>21</sup> The distribution of housings was a major concern of the Civil Rights Campaign that was carried out during this period. Many protests were directed against the discriminatory distribution or occupation of houses. For more information on this campaign, please consult <http://cain.ulst.ac.uk/events/crights/index.html> (visited on 2 October 2008).

<sup>22</sup> An elaborate account of special anti-terror legislation in Northern Ireland can be found, *inter alia*, at Dickson (2005), at 192-205.



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In the historical chapter, we have already seen that the history of terrorism in the UK was, until recently, mainly<sup>23</sup> dominated by the conflict concerning the independence of Ireland. This may explain why, when examining the legislative history of the UK in parallel to the special laws against terrorism adopted for the UK as a whole, significant statutes (of particular note are the *EPAs 1974-1998*) were passed with exclusive reference to the situation of Northern Ireland, and their provisions were geographically restricted to this region. The first of these Acts, the EPA 1974, was prompted by the Birmingham bombing.<sup>24</sup> The laws exclusively governing Northern Ireland were generally characterised by broader police and particular military powers when compared to those affecting the UK mainland. Moreover, they showed a different judicial organisation and some procedural modifications. Some major provisions applicable solely to Northern Ireland include:

- A special criminal process following the Diplock Report<sup>25</sup>
  - o Special courts without a jury ('Diplock Courts', see below at 0)
  - o Executive detention<sup>26</sup>
  - o Special procedures, including restrictions on the powers to grant bail (unless a scheduled offence is to be tried summarily)<sup>27</sup>
  - o Special evidence rules:
    - Reversed onus of proof in offences of possession of terrorist articles<sup>28</sup> (however, with the passing of the Terrorist Act (TA) 2000, this reversal of the burden of proof has become also possible, albeit in a more limited scope, in the rest of the UK, see s.57 (3) of this Act)
    - Spouses compellable to appear as witnesses<sup>29</sup>
    - Restrictions of the right to silence<sup>30</sup> (this modification was also later adopted for the rest of the UK)<sup>31</sup>
- Special powers (such as stop and search) for police and soldiers<sup>32</sup>

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<sup>23</sup> Besides the special legislation adopted for the territory of mainland Britain and Northern Ireland, the laws adopted in response to colonial violence (in Palestine, Kenya, Malaysia, Cyprus and Aden) should not remain unmentioned, but would go beyond the scope of this study. For further information please consult Walker (2006), 1, for further references.

<sup>24</sup> Walker (1997); Warbrick (2004), at 392.

<sup>25</sup> Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd. 5185, London, 1972.

<sup>26</sup> EPA 1973 s.10(3) and Sch. 1; 1978 s.12 and Sch. 1; 1991 s.34 and Sch. 3; 1996 s.36 and Sch. 3, see also below, 1.3.5.

<sup>27</sup> S.67 of the Terrorism Act (TA) 2000 (previously s.3 of the EPA 1996); see Walker (2002).

<sup>28</sup> S.7 of the EPA 1973, s.9 of the EPA 1978, s.12 of EPA 1991, s.13 of EPA 1996, s.77 of the TA 2000.

<sup>29</sup> S.79 PACE NI Order 1989.

<sup>30</sup> e.g. see Criminal Evidence (NI) Order 1988, s.3, 5 and 6.

<sup>31</sup> See Criminal Justice and Public Order Act 1994 ss.34-9, ss.1 and 2 of the Criminal Justice (Terrorism and Conspiracy) Act 1998, s.108 TA 2000. For more information on this issue, read Jackson (1991), Jackson (1993); O'Reilly (1994).

<sup>32</sup> Soldiers have enjoyed an enhanced policing function in Northern Ireland since many years. E.g. s.12(1) EPA 1973 allowed a member of Her Majesty's forces on duty to arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or

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### - Scheduled offences<sup>33</sup>

The equivalents of the EPAs in Northern Ireland were, for the rest of the UK, the *Prevention of Terrorism Acts (PTA) 1974-1989*. They gradually extended many of the special Northern Irish counter-terrorism measures to the remainder of the UK. However, major differences remained; the laws applicable in Northern Ireland were generally characterised by stronger police and, in particular, also military competences.

Efforts to unify the different systems were carried out, to a limited extent, at first, by virtue of the *EPA 1987* (bringing the Northern Irish provisions on proscribed organisations into line with those that apply to the rest of the UK under the PTA 1984), and later, more expansively, by the *Terrorism Act (TA) 2000* which abolished all previous legislation and regulates a common legal framework against terrorism, restricting temporarily only one part of the Act (Part VII) exclusively to Northern Ireland.

Two of the special measures initially only applicable in Northern Ireland, but later also extending to the mainland, will be examined more closely: the Diplock courts (1.3.3.1.), and the special stop and search powers of the security forces (1.3.3.2.).

#### 1.3.3.1. Diplock trials in Northern Ireland

On the basis of the *EPA 1973*, another important feature would be introduced in Northern Irish anti-terrorism legislation on the recommendation of Lord Diplock's Report:<sup>34</sup> the so-called Diplock courts. It was experienced that in cases relating to terrorism members of the jury tended to be partial either because of intimidation or because of jury bias. Therefore, it was concluded that terrorist cases in Northern Ireland should be judged by special courts consisting of a single professional judge without a jury.<sup>35</sup> The proposal to set up these trials turned out to be highly controversial.<sup>36</sup> On the one hand, the lack of a jury in terrorist trials was considered, by many, as contrary to the fair trial principles.<sup>37</sup> Moreover, the right to a jury trial is considered an important safeguard in common law systems.<sup>38</sup> The Irish Constitution presents it as a constitutional right,<sup>39</sup> and some even claim that clause 29 of the Magna Carta ("judgment of his peers or the law of the land") contains a guarantee of trial by jury,

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being about to commit any offence. These powers were granted until very recently. Even the TA 2000 still provided for them (see, e.g. s.83, repealed by s.112 (1) TA 2000). For other special Northern Irish policing powers, see Walker (2002), at 197 et seqq. and Dickson (2005), at 192 et seqq.

<sup>33</sup> EPA 1973 s.27; 1978 s.30; 1996 s.1.

<sup>34</sup> Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd. 5185. London, H.M.S.O. (1972), online available see above, note 78.

<sup>35</sup> See, e.g., Jackson and Doran (1993); For a comprehensive analysis of the development and success of the Diplock Courts, see: Jackson and Doran (1995); see also Vercher (1992), at 120-157.

<sup>36</sup> See Jackson and Doran (1993), at 506, with further references to parliamentary debates and academic writings.

<sup>37</sup> Ibid. at 510.

<sup>38</sup> Ibid. at 509.

<sup>39</sup> Constitution, Art. 38.5 (Ir.).

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although this cannot possibly have been the original intention of the clause, as at the time the provision was drafted trials by jury had not yet taken place in England.<sup>40</sup>

The arguments raised against trials without juries have to be viewed in light of the common law tradition in which a jury trial is considered the 'most potent symbol', the 'fulcrum of the adversarial trial system'.<sup>41</sup> Defendants argue that the cumulative effect of the stop and search powers, wide powers of arrest, pro-longed detention, limitations on the right of silence, restrictions on access to a solicitor, questionable interrogation practices, weak restrictions on the admissibility of confessions, and juryless courts produce a criminal justice system significantly weighted against the accused.<sup>42</sup> In practice, this view is supported by the significantly higher number of guilty pleas in Diplock trials compared to jury trials in England and Wales.<sup>43</sup> The higher number of acquittals by jury trials may be explained by the lack of experience inherent in laymen, who must be convinced of the guilt of the accused *beyond reasonable doubt* before convicting the person. Moreover, they do not know what consequences their conviction will bring about, since the sentencing decision is left, albeit deliberately, exclusively to the presiding judge.<sup>44</sup> Against this background, the high acquittal rate is quite understandable: When deciding on the fate of another, who would not hesitate to give a negative judgment, without even knowing the exact consequences of this decision?

On the other hand, the Diplock trials proved to be quite efficient, as more convictions could be accomplished, intimidations of jury members were avoided, and the decisions were made by professionals who generally motivated their decisions appropriately. In particular cases where members of the security forces, not terrorists, were accused of offences committed in the course of anti-terrorist actions, the absence of a jury probably resulted in convictions of soldiers who might otherwise have been acquitted.<sup>45</sup>

Non-jury trials have continued in Northern Ireland even after the TA 2000.<sup>46</sup> Their abolishment (together with the repeal of all special counter terrorism measures for Northern Ireland) was announced in 2005, following the IRA's declaration to end their

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<sup>40</sup> Spencer (2004), at 146.

<sup>41</sup> Jackson and Doran (1995), at 1.

<sup>42</sup> Jackson and Doran (1993) Jackson and Doran (1995), at 510, citing Paul Hunt & Brice Dickson, *Northern Ireland's Emergency Laws and International Human Rights*, 1993 Netherlands Quarterly Human Rights, at 173.

<sup>43</sup> While, between 1984 and 1993, in jury proceedings in England and Wales the percentage of guilty pleas ranged from 64 to 72 per cent, in Diplock proceedings it ranged from 73 to 89 per cent. However, it should be noted that within Northern Ireland, the guilty plea rate did not differ so significantly in jury and non-jury trials (jury proceedings: 71-87 per cent, non-jury proceedings: 73 to 89 per cent). See Jackson and Doran (1995), at 41.

<sup>44</sup> Unlike in France, in the UK the jury may only decide upon guilt or innocence of the accused. See Spencer (2004), at 157 et seq.

<sup>45</sup> See the case of Clegg [1995] 1 AC 482.

<sup>46</sup> Warbrick (2004), at 372.

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campaign. Since the summer of 2007, Diplock courts have ceased to exist. However, in exceptional cases, non jury trials are still possible.<sup>47</sup>

### 1.3.3.2. Stop and search powers in Northern Ireland

In addition, the security forces in Northern Ireland had special powers: they could stop any person for so long as was necessary in order to identify him or question him with respect to a recent terrorist incident. Further, the random search of persons and vehicles in public places for munition was authorised. Searches of premises (other than dwelling houses – for these, reasonable suspicion was needed) for munitions could also be carried out randomly.<sup>48</sup> Following the PIRA campaign of bombing British cities in 1994 and 1996, the British Parliament extended stop and search powers to the mainland. Through the passage of the *Criminal Justice and Public Order Act 1994* (s.81) and the *Prevention of Terrorism (Additional Powers) Act 1995*, the police were authorised to stop and search vehicles and people on a random basis for the purpose of preventing terrorism. They could also cordon off areas in connection with a terrorist investigation and, without judicial authorisation, search premises within that cordon.<sup>49</sup>

### 1.3.4. Wider powers of arrest, extended detention, and derogations under the European Convention of Human Rights

The police have been equipped with special arrest and detention powers that, with respect to terrorism, deviate considerably from those conferred in other serious non-terrorist criminal investigations. Under the 'ordinary' regime, individuals can only be arrested on the reasonable suspicion of a specific offence, and they may only be held without charge for up to 36 hours (extendible up to 96 hours with the approval of a magistrates' court in an *inter partes* hearing).<sup>50</sup> In contrast, under the *Prevention of Terrorism Act (PTA 1989)*, for instance, individuals could be arrested with 'reasonable cause to suspect that the person was or had been concerned in the commission, preparation or instigation of acts of terrorism, or after being stopped at a port or airport'.<sup>51</sup> The latter especially concerns people travelling between the UK and Ireland, since these countries form a Common Travel Area with no immigration control, independent of the EC regime of free movement.<sup>52</sup> For example, under the PTA 1989, a person arrested could be held for up to 48 hours on police authorisation, which could be extended by up to a further five days with the approval of the secretary of state.<sup>53</sup> These long detention periods were in most cases not criticised by the Strasbourg Court for one

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<sup>47</sup> See Justice and Security (Northern Ireland) Act 2007 (see also below at 1.4.8.).

<sup>48</sup> See e.g. Part II of the EPAs of 1991 and 1996, Part IV of PTA 1989 concerning only Northern Ireland.

<sup>49</sup> See also Bonner (2000), at 41.

<sup>50</sup> See PACE 1984, ss.41-3.

<sup>51</sup> Bonner (2000), at 43. See, e.g., PTA 1989, s.14(1), sch. 5.

<sup>52</sup> *Ibid.*

<sup>53</sup> S.14 PTA 1989.

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main reason: the UK on three occasions derogated from the rights conferred under Art. 5 of the ECHR, as can be seen when on 20 August 1971 the UK declared its derogation from Arts. 5 and 6 of the ECHR under Art. 15 of the ECHR.<sup>54</sup> The derogation was upheld until 1984. The Strasbourg court ruled on the derogation in *Ireland v UK*, finding that the requirements of Art. 15 of the ECHR were met.<sup>55</sup> Promptly after the derogation had ceased to have effect, the application of s.12 of the then adopted *PTA 1984* (regulating the detention of terrorist suspects for a maximum duration of seven days) was challenged before the ECtHR which subsequently established a violation of Art. 5 (3) of the ECHR (cf. the case *Brogan and others v the UK*).<sup>56</sup> The Strasbourg Court found that even the shortest period of detention, namely four days and six hours, fell outside the strict constraints permitted by Art. 5(3) of the ECHR. The Court further held that the undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not on its own sufficient to ensure compliance with the specific requirements of Art. 5(3).

Following the Brogan Decision in 1988, the UK derogated a second time under Art. 15 of the ECHR.<sup>57</sup> The existence of a 'public emergency' in the UK was confirmed for both derogations by the ECtHR.<sup>58</sup> In *Brannigan and McBride*,<sup>59</sup> the Strasbourg Court found by majority decision (22 : 4) that the derogation was conform to the ECHR, as a 'public emergency threatening the life of the nation' existed at the relevant time both 'in

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<sup>54</sup> For an extensive overview of derogations in cases of states of emergency, consult Loof (2005b).

<sup>55</sup> See *Ireland v UK*, Judgment of 18 January 1978 (application no. 5310/71). With a focus on the UK's derogations, see also Warbrick (2004).

<sup>56</sup> *Brogan and others v the UK*, Judgment of 29 November 1988 (application no. 11209/84; 11234/84; 11266/84; 11386/85). See also the case commentary by Roche (1989-90).

<sup>57</sup> Part of the Derogation reads as follows (cited from ECtHR, *Marshall v UK*, Judgment of 10 July 2001 (application no. 41571/98):

"... Following [the Brogan and Others judgment], the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government was examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view. Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge, for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government have availed themselves of the right of derogation conferred by Art. 15 § 1 of the Convention and will continue to do so until further notice..."

<sup>58</sup> *Ireland v UK*, Judgment of 18 January 1978, (application no. 5310/71), para. 205; and *Brannigan and McBride v UK*, Judgment of 26 May 1993 (application no. 14553/89), para. 47.

<sup>59</sup> In this case, the applicants were arrested pursuant to s. 12(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984, for total periods of six days, fourteen hours and thirty minutes (Brannigan), respectively four days, six hours and twenty-five minutes (McBride).

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Northern Ireland and elsewhere in the United Kingdom' (para. 47). However, it must be noted that the Court based this assessment on the situation of Northern Ireland in the beginning of the 1970s and statistic data on the number of deaths attributed to terrorism in Northern Ireland between 1972 and 1992 (over 3,000). Thus, the specific situation of threat existing at the time of the derogation in the United Kingdom, particularly in Great Britain excluding Northern Ireland, was not analysed by the Strasbourg Court.<sup>60</sup> The judgement in *Brannigan* was further criticised as it was opposed to the policy of the Council of Europe towards Central and Eastern European states which strived for membership to the ECHR.<sup>61</sup> In the case of *Marshall*, the Strasbourg Court confirmed its earlier assessment, reiterating that it was the government's responsibility to judge whether an emergency situation under Art. 15 ECHR still persisted.<sup>62</sup> This was surprising as the arrest in question, which lasted seven days, had been carried out in February 1998. Thus, a mere two months before the Belfast Agreement was adopted and when the Northern Irish peace process had already been initiated for quite some time. With this in mind, it may be assumed that the political situation was more relaxed than ten years earlier. However, the possibility to detain a suspected terrorist for up to seven days without bringing him before a judicial authority continued to be provided for by special legislation.<sup>63</sup>

The second derogation was abolished with the adoption of the *TA 2000*.<sup>64</sup> However, only one year later, in the aftermath of the terrorist attacks on the World Trade Center and the Pentagon, the UK notified the Secretary General of the Council of Europe that the UK would again be derogating from Art. 5 "to the extent necessary to ensure that the detention of foreigners without trial or removal was not in breach of the obligations of the UK under the Convention."<sup>65</sup> This derogation order was issued in view of the new s.21 of the Anti-Terrorism, Crime and Security Act (ATSCA) 2001, which enabled the Home Secretary to issue a certificate in respect of a person if the Secretary of State reasonably believed that this person was an international terrorist. Such a certified person could be indefinitely detained under s.23 of the same Act. This derogation of Art. 5, ECHR, has been considered as illegal by Kühne, who argues that the requirements of derogations enshrined in Art. 15 of the ECHR (in particular the existence of 'time of war or other public emergency threatening the life of the nation')

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<sup>60</sup> Loof (2005)Loof (2005a), at 410. See also the Dissenting Opinion of the Irish Judge Walsh in *Brannigan & McBride*, who stressed that there was no evidence that the life of the rest of the United Kingdom, vz. the island of Great Britain, was threatened by 'the war or public emergency in Northern Ireland', which was separated by sea from Great Britain and of which it did not form a part (para. 2 of the Dissenting Opinion of Judge Walsh).

<sup>61</sup> Loof (1993), at 803-10.

<sup>62</sup> *Marshall v UK*, Judgment of 10 June 2001 (application no. 41571/98).

<sup>63</sup> S.14 of the PTA 1989.

<sup>64</sup> When the TA 2000 came into force, the power under Sch. 3 of the HRA 1998 was used to withdraw the derogation from ECHR (Article 5) then in force, as the new provisions of Sch. 8 of the TA 2000 were now compatible with Article 5 of the ECHR (cf. Human Rights Act 1998 (Amendment) Order 2001, SI 2001 No. 1216, which came into effect on 1 April 2001).

<sup>65</sup> Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644.

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were not present.<sup>66</sup> The UK government also derogated from Art. 9 of the ICCPR.<sup>67</sup> However, the last derogation order regarding Art. 15 of the ECHR was eventually quashed by the House of Lords' Decision of 16 December 2004.<sup>68</sup> The House of Lords declared that the requirements of Art. 15 were not satisfied. They argued that it could not be justified to "detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of Art. 14. It was also a violation of Art. 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of Art. 15 of the European Convention."<sup>69</sup> They made a declaration under s.4 of the HRA 1998 that s.23 of the ATCSA 2001 was incompatible with Arts. 5 and 14 of the European Convention insofar as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.<sup>70</sup> Subsequently, no derogation has been enacted.<sup>71</sup>

### 1.3.5. Internment and in-depth interrogations

In 1971, at the same time as the first derogation under Art. 15 of the ECHR took place, the practice of internment<sup>72</sup> was extensively used by the authorities to combat uprisings between Protestants and Catholics in Northern Ireland arresting, within four months alone, 990 people (508 of whom were later released).<sup>73</sup> At the same time, so-called in-depth interrogations took place, meaning interrogations which used five particular techniques (sometimes termed 'sensory deprivation' or 'disorientation' techniques): (a) wall-standing,<sup>74</sup> (b) hooding,<sup>75</sup> (c) subjection to noise,<sup>76</sup> (d) deprivation of sleep, (e) deprivation of food and drink.<sup>77</sup> However, these methods were not continued for long. Following the Parker Report in 1972,<sup>78</sup> they were declared unlawful and were stopped

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<sup>66</sup> Kühne (2006), at 639.

<sup>67</sup> This second derogation seemed necessary not only to forestall a possible breach of the UK's obligations under the Covenant, but also in order to protect the derogation under the ECHR from challenge: under Art. 15 ECHR derogation measures are only allowed, among other things, if they are consistent with the other obligations of the Member State under international law.

<sup>68</sup> *A & Others v Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>69</sup> *Ibid.*, at para. 68.

<sup>70</sup> *Ibid.*, at para. 73.

<sup>71</sup> Walker (2006), 5.

<sup>72</sup> On internment, see Vercher (1992), at 9-31.

<sup>73</sup> Bishop (1978), at 160.

<sup>74</sup> I.e. forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers".

<sup>75</sup> I.e. putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation.

<sup>76</sup> I.e. pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise.

<sup>77</sup> See *Ireland v UK*, 18 January 1978 (application no. 5310/71), at para. 96.

<sup>78</sup> Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism, Cmnd. No. 4901. This and other legislation reports are online available at <http://cain.ulst.ac.uk/hms0>.

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by the British Government, "but the resentment caused was intense, widespread and persistent."<sup>79</sup> With the adoption of the *EPA 1973*, the practice of internment would be legalised. Nonetheless, internment was eventually abolished in 1975 by virtue of the *NI (Emergency Provisions) (Amendment) Act 1975*, on the recommendation of the Gardiner Report.<sup>80</sup> The harshly criticised detention and interrogation methods were later investigated by the Compton Report.<sup>81</sup> They were, together with the discriminatory use of special powers mainly against IRA members, ultimately challenged by the Irish Government before the Strasbourg Court. In *Ireland v UK*, the Strasbourg Court eventually in 1978 condemned the UK for a breach of Art. 3 of the Convention, however, not referring to torture, but to inhuman and degrading treatment.<sup>82</sup> As Warbrick notes, the importance of this case lies in the fact that it shows what is apparent on the face of Art. 15 of the ECHR: "*that there are some things which infringe human rights that a State may not do even for good and compelling reasons and even in what is a 'public emergency'*".<sup>83</sup>

In theory, internment still existed Northern Irish legislation in the 1990s in the sense that the law still provided for the theoretical possibility to enforce the respective provisions that allowed internment. The relevant regulations, however, were not in force.<sup>84</sup>

### 1.3.6. Direct rule

In 1972, following the devastating events of Bloody Sunday<sup>85</sup> (as investigated by the Widgery Report),<sup>86</sup> the British Government introduced direct rule from Westminster, by virtue of the *NI (Temporary Provisions) Act 1972* (s.1). Hence, from 1972 until 1998 (the year in which the Good Friday Agreement was adopted), Northern Ireland was to be governed by Westminster.

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<sup>79</sup> Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, Cmnd. No. 5847 ("Gardiner Report"), at para. 20 (online available, see above, note 78).

<sup>80</sup> Ibid.

<sup>81</sup> Report of the enquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971 (online available, see above, note 78).

<sup>82</sup> *Ireland v UK*, Judgment of 18 January 1978 (application no. 5310/71), online available at <http://www.law.qub.ac.uk/humanrts/ehris/ni/icase/intcaseA.htm> (visited on 13-11-2006).

<sup>83</sup> Warbrick (2004), at 371.

<sup>84</sup> In the EPA 1991 - part IV, s.34, in conjunction with sch. 3 - internment of suspected terrorists was still foreseen, but the respective regulations were subject to enforcement by the Secretary of State (see s.69 (4) of the Act). Critical on this provision: Dickson (1992), at 614 et seq.

<sup>85</sup> On Sunday, 30 January 1972, British troops opened fire on a crowd of protesters in the Bogside district of Londonderry, killing 14 civilians. Due to public pressure from the part of the victims, a new enquiry has been opened in January 1998, under the then Prime Minister Tony Blair, chaired by Lord Saville. Its results are currently (January 2007) awaited. For updated information on this issue, please consult the web site of the enquiry: <http://www.bloody-sunday-inquiry.org/> (visited on 31 January 2007). See also the film by Greengrass (2003).

<sup>86</sup> Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day, by The Rt. Hon. Lord Widgery, O.B.E., T.D. (H.L. 101, H.C. 220, April 1972, online available see above, note 78).



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### 1.3.7. PTA's and exclusion orders

One year after the introduction of the Diplock Courts and in immediate response to the Birmingham bombings of November 21, the UK government adopted the *Prevention of Terrorism (Temporary Provisions) Act (PTA) 1974*, and thereby extended many of the laws already in force for Northern Ireland to the rest of the UK (e.g. powers to stop and search pedestrians on a random basis,<sup>87</sup> arrest and detention powers, and proscriptions of certain organisations).<sup>88</sup> Similarly, the PTA was also adopted as emergency legislation in Northern Ireland, but experienced several re-enactments (1976, 1984, 1989).

Moreover, exclusion orders (orders to prohibit certain terrorist suspects to enter the UK territory) were introduced by the PTA 1974.<sup>89</sup>

Vercher notes in his analysis that it is difficult to find explanations for the continued existence of exclusion orders, since there was no evidence that the orders were of any help in solving problems in Northern Ireland.<sup>90</sup> Furthermore, Sir Cyril Philips, the chair of the Police Complaints Board, who was appointed by the government to annually review the workings of the PTA, indicated in his 1986 review: "This power is objectionable in principle as being inconsistent with the right of the citizen to reside in and travel freely throughout the territory of the state of which he is a citizen and is operating to deprive a person of an important civil right without a judicial hearing."<sup>91</sup> Furthermore, it should be noted that the exclusion orders were perhaps effective in removing terrorists from circulation in a particular community, but they were less satisfactory than a criminal justice procedure as they allowed interferences with a person without having to prove anything against him. People could be excluded from a territory on the basis of secret intelligence which could not be revealed, and further, not admitted in a criminal process. So these suspects were not criminally tried but were still subjected to special detrimental measures. The exclusions ought to have been subject to judicial review, but they were not. Moreover, the exclusion of citizens from one part of the United Kingdom to the other could be counter-productive. It served to emphasise that Northern Ireland was a place apart to which the government was less committed than to the mainland; this only fueled the existing conflict between the two territories.<sup>92</sup> Finally, it has been argued that the detention of citizens pending the making or the execution of an exclusion order constituted a breach of Art. 5 of the ECHR, in the absence of a valid public emergency derogation.<sup>93</sup>

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<sup>87</sup> See above, 1.3.3.2.

<sup>88</sup> See below, 1.3.8.

<sup>89</sup> For more details on exclusion orders, see Vercher (1992), at 32-52.

<sup>90</sup> Ibid. at 51.

<sup>91</sup> Cited by Ibid.

<sup>92</sup> Bonner (2000), at 47.

<sup>93</sup> Ibid. at 48, with further references.

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Legislation under the PTA 1976 gave rise to a complaint before the European Commission of Human Rights in the case of *McVeigh, O'Neill and Evans v UK*.<sup>94</sup> The applicants, on their return from the Republic of Ireland, were arrested and interrogated by British police for forty-five hours, without the wives of the two married applicants being informed of their detention.<sup>95</sup> The Commission (the decision of which was subsequently confirmed by the Committee of Ministers) held that the detention did not constitute a breach of Art. 5 of the ECHR, but that the fact that the two of them had not been able to contact their wives during the detention had indeed violated their right to Art. 8 of the ECHR, that of a right to respect for family life.

Also in the case *O'Hara* the applicant, an Irish national and prominent member of Sinn Fein, challenged before the ECtHR the lawfulness of his arrest and detention of six days and thirteen hours under s.12 of the PTA 1984.<sup>96</sup> O'Hara argued that domestic law, by restricting the courts' examination to the arresting officer's mind instead of the objective facts, provided virtually no protection against arbitrary arrest. He contended that he was not promptly brought before a judge or other judicial officer and that he did not have an enforceable right to compensation in respect of these matters. He relied on Art. 5(1),(3), and (5) of the ECHR. The Strasbourg Court held that the arrest was not arbitrary as it was based on a reasonable suspicion, but that the duration of arrest could not be considered "prompt", within the meaning of Art. 5(3) of the ECHR, so that this provision was violated. As domestic law did not provide any enforceable right to compensation, the Strasbourg Court also found that Art. 5(5) of the ECHR was breached.

In March 1998, parliament rendered non-operational the exclusion order process, although powers remain in the statute book capable of rapid executive reintroduction (if subsequently approved by Parliament).<sup>97</sup>

### 1.3.8. Proscribed organisations

Both in Northern Ireland and the UK mainland, the relevant terrorist legislation<sup>98</sup> has contained lists of 'proscribed organisations', which were or still are believed to serve terrorist purposes. The membership and the support of these organisations are a criminal offence. These lists have been continuously extended. On 19 October 1988, the British Home Secretary issued two notices, one addressed to the British Broadcasting Corporation (BBC) and the other to the Independent Broadcasting Authority (IBA). The Notices prohibited the broadcasting of any words spoken by a person representing or purporting to represent a proscribed organisation (for the purposes of the PTA 1984 or the (NI) EPA 1978), Sinn Fein, Republican Sinn Fein or

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<sup>94</sup> Application nos. 8022/77, 8025/77, 8027/77.

<sup>95</sup> See the comment on this case by Warbrick (1983).

<sup>96</sup> *O'Hara v UK*, Judgment of 16 October 2001 (application no. 37555/97).

<sup>97</sup> Bonner (2000), at 48.

<sup>98</sup> E.g. see Part I, sch. 1 of the PTA 1989, Part I, sch. 1 of the EPA 1991, Part II, sch. 2 of the TA 2000; see also Part II of the Terrorism Act 2006.

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the Ulster Defence Association. The BBC and the IBA challenged the Notices, first before domestic courts, and later before the European Commission. The House of Lords held that for lack of incorporation into domestic law the Convention rights were incapable of being directly enforced by the English courts. Applying the Convention either directly or by reference to the principles developed in the Convention organs' case-law would amount to a judicial usurpation of the legislative function. Judicial review was confined to examining whether the Home Secretary had acted unreasonably in issuing the directions. Under these premises, the House of Lord found it impossible to say that the Secretary of State exceeded the limits of his discretion.<sup>99</sup> The concerned journalists invited the House of Lords to apply a test of proportionality as developed by the ECtHR for the purpose of interpreting Art. 10(2) of the ECHR. Rejecting this approach as being outside the scope of judicial review, Lord Ackner held:

"The European test of whether the "interference" complained of corresponds to a "pressing social need" ... must ultimately result in the question "Is the particular decision acceptable?" And this must involve a review of the merits of the decision. Unless and until Parliament incorporates the Convention into domestic law, (...) there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country."

This ruling demonstrates the little interest of the Law Lords in the European Convention, as well as the pressing need to implement it into domestic statutory law. Following the dismissal of the case by House of Lord's, the journalists complained to the Strasbourg Court on the grounds that the Home Secretary's directions caused unjustified interference with their right to receive and impart information and ideas, as protected under Art. 10 of the Convention. The Commission found "bearing in mind the margin of appreciation permitted to states, the limited extent of the interference with the applicants' rights and the importance of measures to combat terrorism, that the interference with the applicants' freedom of expression could not be considered disproportionate to the aim sought to be pursued".<sup>100</sup>

### 1.3.9. Supergrasses

Another method that evolved during the 1980's and that was of major significance in the fight against Northern Irish terrorism is the so-called 'supergrass' strategy, the use of information provided by arrested paramilitaries (the so-called 'supergrasses') in exchange of inducements such as the dropping of charges pertaining to usually minor and often non-political offences, offers of money, threats and blackmail based on intelligence gleaned from surveillance and information supplied by other informers.

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<sup>99</sup> *Brind and others v Secretary of State for the Home Department*, 7 February 1991, [1991] All ER 720, [1991] AC 696.

<sup>100</sup> *Brind and Others against the UK*, Decision of 9 May 1994 (application no. 18714/91). See also the parallel case (also dismissed by the Commission): *McLaughlin against the UK*, Decision of 9 May 1994 (application no. 18759/91).

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This method was mainly used during the 1980s and was harshly criticised<sup>101</sup> as the accuracy and reliability of informers who expected benefits for their information was subject to serious doubts.<sup>102</sup> Although the supergrass strategy proved, at first sight, effective in the sense that it led to the identification of up to 300 IRA members, this result was soon overshadowed by the fact that many of the convictions based entirely on the information of a supergrass would be easily quashed when challenged before an appeal court.<sup>103</sup> In addition, the PIRA reduced the supergrasses' effect by developing an amnesty system for those supergrasses who withdrew their statements and evidence.<sup>104</sup> Despite these deficiencies, the method of promising legal benefits to informers has been re-applied recently in the context of Islamic Terrorism.<sup>105</sup>

### 1.3.10. "Shoot to kill" policy and the right to life

In the context of terrorism, the notion of 'shoot to kill' has given rise to two distinct discussions. The first refers to allegations that security services shoot terrorists deliberately dead, in order to avoid having to prosecute and try them. Allegedly, this policy was adopted by security forces during the Troubles. During the entire Northern Irish conflict, in excess of 350 people were killed by security forces, mostly by the army. According to Livingstone a significant number of these have occurred in circumstances that cast suspicion on claims that the force used was reasonable.<sup>106</sup> There are more than a few cases where members of either the Special Air Service (S.A.S.) or the Royal Ulster Constabulary (RUC) were alleged to have deliberately shot suspected members of the PIRA. For instance, these allegations were raised in the case of *Kelly and Others*, where in the course of a gunfight in Loughgall, County Armagh (Northern Ireland), the S.A.S. killed nine people (at least three of whom were unarmed) in 1987. The case was referred to the Strasbourg Court.<sup>107</sup> The applicants alleged, invoking Art. 2 of the ECHR, that their relatives had been unjustifiably killed and that there had been no effective investigation into the circumstances of their death. They further invited the Court to find a practice of killing rather than arresting terrorist suspects, an allegation that was emphatically denied by the Government.<sup>108</sup> The ECtHR stated that the

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<sup>101</sup> A concise overview on the arguments brought in favour and against the technique is provided by Bonner (1988), at 31 et seq.

<sup>102</sup> See e.g. *Ibid.*; Vercher (1992), at 86-119. An extensive research of this strategy is provided by Greer (1995).

<sup>103</sup> E.g.: Of the 22 convictions which were based on the information given by the first so-called supergrass, Christopher Black, 18 were quashed in later trials. See BBC on this day (5<sup>th</sup> August 1983), [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/5/newsid\\_2527000/2527437.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/5/newsid_2527000/2527437.stm), visited on 16-11-06.

<sup>104</sup> Bonner (2000).

<sup>105</sup> See The Times (online edition) (16 September 2005): *Sentences slashed for terrorist supergrasses*, and BBC news online (24 March 2006): *Supergrass tells of terror fight*.

<sup>106</sup> Livingstone (2001), at 150.

<sup>107</sup> *Kelly and Others v UK* (application no. 30054/96).

<sup>108</sup> *Ibid* at 88.

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proceedings for investigating the use of lethal force indeed violated Art. 2 of the ECHR.

Without judgement on the merits, the European Commission also admitted a case for a possible breach of Art. 2 of the ECHR, where soldiers had shot dead three people who had attempted to rob two other men who were leaving money in a bank's night safe.<sup>109</sup> The soldiers had been stationed there covertly as a terrorist attack was expected on the named bank.

There are a few other terrorism-related cases that were brought before the ECtHR in which Art. 2 of the Convention was invoked. In *Shanaghan v the UK*<sup>110</sup> as well as in *Finucane v the UK*,<sup>111</sup> the ECtHR held that the investigations concerning the death of Shanaghan and Finucane, who had both been killed by loyalist paramilitaries, the authorities had also failed to comply with the requirements of Art. 2 of the ECHR. Similarly in the case of *McShane*,<sup>112</sup> the UK was criticised for violating Art. 2 of the ECHR for having failed to comply with its requirements in the investigations concerning his death.

However, in *W v UK* the Commission dismissed the application of W, whose husband was shot dead by IRA gunmen in the Republic of Ireland. The Commission stated that the UK was not required under the Convention "to protect the applicant's brother by measures going beyond those actually taken by the authorities in order to shield life and limb of the inhabitants of Northern Ireland against attacks from terrorists".<sup>113</sup> In *Stewart v UK*,<sup>114</sup> the Commission found that the use of force was no more than 'absolutely necessary in action lawfully taken for the purpose of quelling a riot', within the meaning of Art. 2(2)(c), ECHR. In this case the applicant's thirteen year-old son had been hit by a British soldier serving in Northern Ireland, and died as a result of his injuries.<sup>115</sup>

Also labelled under the 'shoot to kill policy', a distinct issue has recently been brought to the public's attention, that of the policy of shooting to kill, when disabling the terrorist is the only way to stop him committing a grave crime (e.g. letting off the bomb he is carrying). An example of this concerned the shooting of three unarmed IRA members in Gibraltar in 1988. The responsible S.A.S. wrongly thought them to be armed and on the point of detonating a bomb. The matter was taken to the ECtHR. The Court found that the anti-terrorist operation was not planned and controlled so as to minimise recourse to lethal force, and therefore constituted a violation of Art. 2 of the

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<sup>109</sup> EComHR, *Farrell v UK*, Decision of 11 December 1982 (application no. 9013/80).

<sup>110</sup> Judgment of 4 May 2001 (application no. 37715/97).

<sup>111</sup> Judgment of 1 July 2003 (application no. 29178/95).

<sup>112</sup> Judgment of 28 May 2002 (application no. 43290/98).

<sup>113</sup> Decision of 28 February 1983 (application no. 9348/81).

<sup>114</sup> *Stewart v UK*, Decision of 10 July (application no. 10044/82).

<sup>115</sup> Strasbourg's case-law, extending the right to life beyond the use of lethal force, to the planning of such use of force and to its subsequent effective investigation, is discussed by Ní Aoláin (2002).

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ECHR.<sup>116</sup> Another case in this context is that of *Hugh Jordan v the UK*.<sup>117</sup> Jordan, who was unarmed, was shot dead by a police officer who believed him to be at the point of shooting. The Court held that there has been a failure to comply with the procedural obligation imposed by Art. 2 of the ECHR. Concerning the killings of three unarmed men in their car by members of the RUC, the ECtHR arrived at the same conclusion (*McKerr v the UK*).<sup>118</sup>

More recently, in the immediate aftermath of the July 2005 bombings, police men killed the Brazilian Jean Charles de Menezes, on suspicion that he was a suicide bomber. As it turned out, de Menezes was not a terrorist, and subsequently the justification of the 'critical headshot' became widely questioned. After the killing of de Menezes, it became publicly known that the Metropolitan police had apparently followed guidelines that allowed a 'critical headshot' if an imminent explosion was feared. This secret shoot-to-kill policy was called *Operation Kratos*. However, due to the covert character, its contents are highly speculative.<sup>119</sup>

### 1.3.11. Inferences from the silence of the accused

Through the introduction of the *Criminal Evidence (Northern Ireland) Order 1988* the right to silence was restricted in terrorist cases in Northern Ireland. The Order was widely understood to be aimed at political violence, although it was presented as 'ordinary' law. In essence, it limited the accused's 'right to silence' by providing that the failure of a suspect to provide explanations or replies in certain circumstances could lead to inferences being drawn at trial thereby facilitating conviction. Following this fundamental legislative change, defence counsels raised the question before the House of Lords<sup>120</sup> of whether a person arrested under s.14 of the PTA 1989 had (i) a right at common law to be accompanied and advised by a solicitor during interviews with the police or (ii) if such right did not exist at common law, could it now be said to exist in the light of the provisions of The Criminal Evidence (Northern Ireland) Order 1988 and in particular Art. 3 thereof. The House of Lords answered in the negative, on the grounds that it was "the clearly expressed will of Parliament that persons arrested under s.14(1) of the PTA should not have the right to have a solicitor present during interview," and that it was "impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament."

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<sup>116</sup> *McCann and Others v UK*, Judgment of 27 September 1995 (application no. 18984/91).

<sup>117</sup> Judgment of 4 May 2001 (application no. 24746/94).

<sup>118</sup> Judgment of 4 May 2001 (application no. 28883/95).

<sup>119</sup> See, e.g., Jimmy Burns, Met adopted secret shoot-to-kill policy in the face of a new and deadly threat, Financial Times Online, at: <http://www.ft.com/cms/s/08207b18-fca8-11d9-8386-00000e2511c8.html> or Gaby Hinsliff, Anger over Shoot-to-kill policy grows, Guardian Unlimited, online, at <http://www.guardian.co.uk/attackonlondon/story/0,16132,1539879,00.html> (both visited in January 2006).

<sup>120</sup> *Chief Constable of the RUC, Ex Parte Begley and R v McWilliams* [1997] UKHL 39.

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The restriction of the right to silence in Arts. 4 and 6 of the Criminal Evidence (NI) Order 1988 has been challenged before the Strasbourg Court.<sup>121</sup> In *John Murray* the Court regarded the right to silence as an internationally recognised right that, although not explicitly mentioned in the Convention, formed an essential part of the fair trial principle stipulated under Art. 6 of the ECHR. The Court accepted that "under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. 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. Under such conditions the concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6)."<sup>122</sup> Surprisingly, in spite of this, the judges admitted inferences from the silence of the accused as long as they were coherent and in line with the principle 'common sense'.<sup>123</sup> This argument however does not cure concerns with respect to both the presumption of innocence and the principle of fair trial satisfactorily.<sup>124</sup> The judgment was confirmed in *Averill*<sup>125</sup> where the Court held that inferences drawn from the silence of the accused did not amount to a breach of Art. 6(1) of the ECHR, because "the decision to draw adverse inferences was only one of the elements upon which the trial judge found that the charges against the applicant had been proved beyond reasonable doubt."<sup>126</sup> However, in the case of *Condron*,<sup>127</sup> the ECtHR ruled that the judges were obliged to inform the jury precisely about the requirements which permitted them to make inferences from the silence of the accused. If the judge failed to inform them properly, he infringed the fair trial principle guaranteed by Art. 6(1) of the ECHR.<sup>128</sup> Also the case of *Magee*<sup>129</sup> deserves to be mentioned here. In this case the accused was arrested and access to a lawyer was denied for more than the initial 48 hours. During the first two days of his arrest, Magee was put into a coercive situation (solitary confinement, police interrogations four times a day, etc.) to make him break his initial silence. At the same time, he was cautioned pursuant to Art. 3 of the Criminal Evidence (Northern Ireland) Order 1988. Although in this case the competent national

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<sup>121</sup> *John Murray v UK*, Judgment of 8 February 1996 (application no. 18731/91); *Averill v UK*, Judgment of 6 June 2000 (application no. 36408/97).

<sup>122</sup> *Ibid.* at para. 66.

<sup>123</sup> *Ibid.* at para. 54.

<sup>124</sup> Critical on this decision: Kühne (1996).

<sup>125</sup> *Averill v UK*, Judgment of 6 June 2000 (application no. 36408/97).

<sup>126</sup> *Ibid.* at 51.

<sup>127</sup> *Condron v UK*, Judgment of 2 May 2000 (application no. 35718/97).

<sup>128</sup> Kühne (2006), at 655 et seq.

<sup>129</sup> *Magee v UK*, Judgment of 6 June 2000 (application no. 28135/95).

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court had not drawn any inferences from Magee's silence, the Strasbourg Court found that "the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under Art. 3 of the 1988 Order, it cannot be denied that the Art. 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention." It concluded that Art. 6(1), read in conjunction with Art. 6(3)(c), ECHR, had been violated.

Concerns have been expressed about the danger of false confessions and possible miscarriages of justice.<sup>130</sup> The increased pressure on the suspect to speak may result in unreliable convictions with detrimental effects on public confidence in the administration of justice.<sup>131</sup>

Despite this criticism, by means of the *Criminal Justice and Public Order Act 1994*, a similar provision was introduced for the UK mainland, which extended to any crime. Amongst others,<sup>132</sup> this Act allows the courts to draw adverse inferences from the silence of the accused in certain situations.<sup>133</sup>

### 1.3.12. Repeal of the (NI) EPA 1978 following ECtHR rulings

The legislation under the (NI) EPA 1978, in particular the provisions regulating arrest (ss.11 and 14), gave rise to condemnation of the UK by the Strasbourg Court, which eventually led to the repeal of the Act on 27 August 1991.

S.11 (1) of the Act provided that 'any constable may arrest without warrant any person whom he suspects of being a terrorist'. In the case of *Fox, Campbell & Hartley*, the ECtHR, when examining the concrete application of the relevant provision, held that the requirement of 'reasonable suspicion' for an arrest was not met in the given

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<sup>130</sup> Greer (1995), at 207-12; Bonner (2000), at 46-7.

<sup>131</sup> Ibid.

<sup>132</sup> The Act also introduced various crimes aimed at penalising trespassers on land and illegal camping. A few exceptional offences did exist before, but the 1994 Act went much further by criminalising aggravated trespass on land with intent to disrupt lawful activities thereon (s.68), by extending the police power to order trespassers of land, with associated offences for non-compliance (ss.61 and 69), and by creating a new offence of unauthorized camping (s.77) (Ashworth (2006), at 24). The effect s.77 (offence of illegal camping) of the Act on Gypsies has been considered by the ECtHR in *Chapman v UK* (Judgment of 18 January 2001, application no. 27238/95; see, to same effect, *Beard v UK*, Judgment of 18 January 2001, application no. 24882/94), the Court rejecting the argument that this was an interference with the applicants' right to respect for their private life that was not 'necessary in a democratic society', and maintaining that Art. 8 'does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the public interest'.

<sup>133</sup> See s.34-7 of the Act. Since 1994 suspects must be cautioned before being questioned in the following terms: "'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.'" (PACE Code C 2008, paragraph 10.5.).



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case, as a suspicion going beyond that of an 'honestly held suspicion', which was required under Northern Irish law, could not be established.<sup>134</sup> Consequently, the Court declared a violation of Art. 5(1) of the ECHR.<sup>135</sup>

In another case before the European Commission of Human Rights (the EComHR) and the ECtHR<sup>136</sup> the Court found that in this specific case, the arrest under s.11 of the Act conformed to the requirements of Art. 5(1) of the ECHR, as in the given case, 'reasonable suspicion' of the commission of a criminal offence had been established, although the Northern Irish law itself required a lower level of suspicion.<sup>137</sup> The government argued that they disposed of reliable but confidential information supporting their suspicion. The European Commission assessed this case in the same way as *Fox, Campbell & Hartley* had been judged and found that the governments' reasons on which the suspicion was grounded were insufficient to satisfy the minimum standard set by Art. 5(1)(c) of the ECHR. However, the Strasbourg Court held that unlike in *Fox, Campbell & Hartley*, in the case of Mrs Murray there existed indeed sufficient facts or information which would provide a plausible and objective basis for a suspicion that she might have committed the offence in question.<sup>138</sup> This case not only concerned an arrest performed under s.14 of the Act (which authorised the entrance and search of premises for the purpose of arrest),<sup>139</sup> but also the taking of photographs of the arrested person authorised under Art. 11(4) of the Act,<sup>140</sup> so that also Art. 8 of the

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<sup>134</sup> *Fox, Campbell & Hartley v UK*, Judgment of 30 August 1990 (application no. 12244/86), at para. 31, 33: 'The Court accepts that the arrest and detention of each of the present applicants was based on a bona fide suspicion that he or she was a terrorist, and that each of them, including Mr Hartley, was questioned during his or her detention about specific terrorist acts of which he or she was suspected. The fact that Mr Fox and Ms Campbell both have previous convictions for acts of terrorism connected with the IRA (see paragraph 12 above), although it could reinforce a suspicion linking them to the commission of terrorist-type offences, cannot form the sole basis of a suspicion justifying their arrest in 1986, some seven years later.'

<sup>135</sup> Also, their right to compensation under Art. 5(5) was considered to be violated.

<sup>136</sup> *Murray v UK*, Judgment of 28 October 1994 (application no. 14310/88).

<sup>137</sup> This time, the ECtHR found that "on the particular facts of the present case (...) notwithstanding the lower standard of suspicion under domestic law, Mrs Murray can be said to have been arrested and detained on "reasonable suspicion" of the commission of a criminal offence, within the meaning of subparagraph (c) of Article 5 para. 1 (art. 5-1-c)" (ibid at 63).

<sup>138</sup> Mrs Murray was arrested on suspicion of involvement in the collection of funds for the Provisional IRA.

<sup>139</sup> S.14 of the Act read as follows:

"(1) A member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.

(2) A person effecting an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty's forces.

(3) For the purpose of arresting a person under this section a member of Her Majesty's forces may enter and search any premises or other place –

(a) where that person is, or

(b) if that person is suspected of being a terrorist or of having committed an offence involving the use or possession of an explosive, explosive substance or firearm, where that person is suspected of being."

<sup>140</sup> S.11(4) reads as follows:

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ECHR was affected. The ECtHR considered the applied measures in this context as "having been necessary in a democratic society for the prevention of crime" (Art. 8(2) of the ECHR), thus Art. 8 was not violated.

After the (NI) EPA 1978 had been repealed, *(NI) EPA 1991* was adopted. *Inter alia*, this Act provided under s.45(11) for the possibility that an arrested person could only exercise his or her right to see a solicitor in the presence of a uniformed police officer. In the case of *Brennan*,<sup>141</sup> the applicant had only been allowed to see his lawyer after three days and during their first meeting a police officer was present. The Strasbourg Court held that the presence of the police officer within hearing distance during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defence rights and that there had been, in that respect, a violation of Art. 6(3)(c), when read in conjunction with Art. 6(1) of the ECHR.

### 1.3.13. Developments in the 1990s

In Northern Ireland, increased political efforts during the 1990s to conciliate the tensions finally proved to be fruitful. The peace process once initiated, culminated in a ceasefire in July 1997<sup>142</sup> and the subsequent Good Friday Agreement in 1998.<sup>143</sup> The agreement abolished direct rule from Westminster. Moreover, it provided for release within two years of prisoners convicted by Diplock courts.<sup>144</sup>

Unfortunately, the Northern Irish peace process was overshadowed by yet another terrorist attack: on 15 August 1998, a group called the real IRA bombed Omagh. They demonstrated their rejection against the peace process and the Good Friday agreement by killing 28 people and injuring at least 220.<sup>145</sup> In the same month, related bombings in Kenya and Tanzania occurred. In the wake of these events, the *Criminal Justice (Terrorism and Conspiracy) Act 1998* was adopted. The Act was speedily enacted: Parliament was recalled for a special hurried sitting, thus short-circuiting normal standards of parliamentary scrutiny.<sup>146</sup> The Act largely operated through amendment to

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"Where a person is arrested under this section, an officer of the Royal Ulster Constabulary not below the rank of chief inspector may order him to be photographed and to have his finger and palm prints taken by a constable, and a constable may use such reasonable force as may be necessary for that purpose."

<sup>141</sup> *Brennan v UK*, Judgment of 16 October 2001 (application no. 39846/98).

<sup>142</sup> The previous ceasefire of 1994 had broken down in 1996. In response, the British Government appointed a review led by Lord Lloyd to consider whether there would be any need for specific counter-terrorism legislation in the UK in the event of a lasting peace in Northern Ireland. (Lloyd Report, Inquiry into Legislation against Terrorism, Cm 3420.)

<sup>143</sup> The agreement can be retrieved online at: <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm> (last visited on 2 October 2008).

<sup>144</sup> Northern Ireland (Sentences) Act 1998. The Act was controversial, as many people were offended by the privilege some convicts of serious crimes enjoyed merely because of the political nature of their crimes. Warbrick (2004), at 375.

<sup>145</sup> Campbell (1999) Walker (1999), at 880.

<sup>146</sup> Campbell (1999), at 942.

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the EPA and the PTA. It was subject to annual renewal. Basically it augmented the existing legislation against terrorism (the EPA 1996 and the PTA 1989). The legislators pursued two purposes. They wanted to target those paramilitary groups undermining the peace process in Northern Ireland, and also those persons engaged in "conspiracy to commit offences outside the UK". The impact of this law was officially admitted to be, indeed intended, 'draconian'.<sup>147</sup> To this end, an additional list of proscribed organisations was added to the already existing one, signalling which organisations were seen to oppose the peace process (the so-called 'specified organisations').

One of the most criticised provisions of the Act was s.1, which provides that the opinion of a police officer that the defendant was a member of a terrorist organisation could be admitted as evidence in court,<sup>148</sup> a provision that is dubiously compatible with the Convention, Art. 6(3)(d), as noted by Spencer.<sup>149</sup> Also, the idea to admit police opinions had been rejected as unduly conflicting with the concept of a 'regular' criminal trial already in the Diplock Report.<sup>150</sup> S.1 of the Act may have been adopted in light of the Lords' decision in *O'Hara v Chief Constable of the Royal Ulster Constabulary*.<sup>151</sup> This case involved the issue of whether an arrest without a warrant in the context of terrorist investigations was justified, if the requisite 'reasonable grounds' could be based on the arresting constable's briefing by a superior officer. The House of Lords concluded "that the reasonable suspicion has to be in the mind of the arresting officer..." which in turn can be based on "the information given to the officer..." by a superior. The 'reasonable suspicion' in itself is already a rather indefinite term that may be interpreted diversely, and that may greatly depend on the personal opinion of the officer in charge. Against this background, it is particularly problematic that the case of *O'Hara*, instead of specifying the indefinite legal term of 'reasonable suspicion', broadens its interpretation even more, by admitting not only the police officer's assessment of the situation, but also his superior's assessment, who is, contrary to the arresting officer, not obliged to give any reasons for his suspicion.

S.1 of the 1998 Act also allowed inferences of guilt to be drawn from the refusal to mention any material facts to a police officer whether before or after charge.<sup>152</sup> Interestingly, the then leader of the opposition, Tony Blair, stated during parliamentary debates about the Bill that "any reasonable person could see that that approach [a provision allowing to draw inferences from the silence of an arrested person during his

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<sup>147</sup> Walker (1999), at 879.

<sup>148</sup> S.1 and 2 (amending PTA and EPA respectively) provide that where an accused is charged with the offence of membership of a proscribed organisation, a statement of opinion from a police officer of or above the rank of Superintendent that the accused is or was a member of a specified org. shall be admissible as evidence. They also provide that where the question of whether the accused belonged to a specified organisation is being considered, certain inferences may be drawn from the accused's failure to mention, when being questioned or charged, any material fact which he could reasonably have been expected to mention. Read Campbell (1999).

<sup>149</sup> Spencer (1999), at 676.

<sup>150</sup> Walker (1999), at 888.

<sup>151</sup> House of Lords, 12 December 1996.

<sup>152</sup> Dickson (2005), at 193; Walker (1999), at 885.

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first police interrogations] is open to potential injustice.”<sup>153</sup> Others also uttered serious doubts as to the compliance of ss.1 and 2 of the Act with the fair trial principle and the presumption of innocence under Art. 6 of the ECHR.<sup>154</sup>

Finally, during the 1990s the deportation of foreign terrorist suspects to their home countries gave rise to rulings in Strasbourg. In *Vilvarajah and others*,<sup>155</sup> as well as in *Chahal*,<sup>156</sup> the applicants challenged a deportation order to their home country on the grounds that they would be subjected to torture and inhuman or degrading treatment (Art. 3 of the ECHR) if returned. In the first case of a Sri Lankan involved in activities of the tamil tigers, the Court found that a violation of Art. 3 of the ECHR could not be established. In the second case, the Home Secretary had decided that the Indian national Chahal should be deported because his continued presence in the United Kingdom was uncondusive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. In this case, the ECtHR admitted Mr. Chahal’s argument and held that the deportation order, if executed, would give rise to a violation of Art. 3 of the ECHR.<sup>157</sup> Most importantly, the Strasbourg Court ruled that the prohibition to deport persons to third countries where they risked to be subjected to torture (principle of non-refoulement) as enshrined under Art. 3 ECHR was an absolute principle, and could hence not be subjected to national security exceptions. Despite severe criticism against this judgment by part of the UK government in relation to suspected terrorists posing a threat to national security, the ECtHR reasserted the absolute nature of the principle of non-refoulement again in *Saadi v Italy*.<sup>158</sup> The UK reacted to the Chahal Decision by creating the Special Immigration Appeals Commission in 1997, a special body before which foreigners can appeal the decision on their deportation.<sup>159</sup>

### **1.3.14. Human Rights Act 1998, Terrorism Act 2000, and Regulations of Investigatory Powers Act 2000**

The Northern Ireland peace process, in conjunction with the adoption of the *HRA 1998*,<sup>160</sup> brought about a significant shift in the evolution of terrorism legislation, evident in the subsequent adoption of the *TA 2000* (*inter alia*). The TA 2000 was based on a substantial report produced by Lord Lloyd of Berwick, assisted by Mr Justice Kerr in respect of Northern Ireland aspects of the laws and by a survey of terrorist threats

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<sup>153</sup> Cited after Walker (1999), at 888.

<sup>154</sup> *Ibid.*, with further references.

<sup>155</sup> Judgment of 30 October 1991 (application no. 13163/87).

<sup>156</sup> Judgment of 15 November 1996 (application no. 22414/93).

<sup>157</sup> *Ibid.* at para. 107.

<sup>158</sup> Judgment of 28 February 2008 (application no. 37201/06). See also: De Londras (2008).

<sup>159</sup> Special Immigration Appeals Commission Act 1997.

<sup>160</sup> See above, Introduction, 1.2.2.1.

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produced by Professor Paul Wilkinson.<sup>161</sup> The Act presents a compilation of all previous special Acts, and took in consideration many provisions of the HRA 1998. In opposition to the previous legislation, which was mostly adopted hastily in response to a sudden public need and which consequently was of provisional character, the TA 2000 was intended to be mainly<sup>162</sup> of a permanent nature, constructed in a more considered, principled and comprehensive fashion. The major changes are that:

- most of the provisions apply to all kinds of terrorism,<sup>163</sup> and are made available permanently throughout the UK
- the definition of terrorism was considerably expanded to cover religiously motivated international terrorism,<sup>164</sup> thus also including terrorist organisations without any link to Northern Ireland
- the power to make exclusion orders has been dropped
- the power of extended detention now requires judicial rather than administrative authorisation.<sup>165</sup>

Moreover, under s.41(2) of the TA 2000 the right of an arrested person to see a solicitor can be postponed for up to 48 hours (while for other indictable offences this right can only be postponed for up to thirty-six hours).<sup>166</sup> Such a regulation presents a significant restriction to the right to defence, since it is particularly during these first hours of arrest that a person is in need of legal assistance. The situation is even worse if, as is the case in the UK, in addition to the delayed access, the right to silence is restricted during these first hours, as the arrestee is cautioned that adverse inferences may be drawn from his silence. We have already seen earlier that in such a case, the Strasbourg court held that denying access to a lawyer for the first forty-eight hours of police questioning was incompatible with the rights of the accused under Art. 6 ECHR.<sup>167</sup>

The definition of terrorism provided by the TA 2000<sup>168</sup> causes some concern; the category it creates is indeed very broad, to an extent where the provisions may also

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<sup>161</sup> Inquiry into Legislation against Terrorism, Cm. 3420, London, 1996. The government responded broadly supporting the report; see Legislation Against Terrorism (Cm. 4178, London, 1998).

<sup>162</sup> All provisions (except the ones referring to Northern Ireland - Part VII – that should be of a limited duration of seven years) were to be permanent. However, due to the events of 11 September 2001 and the subsequent adoption of new, stricter and more authoritarian laws, many of the provisions of the TA 2000 were doomed to be of very short duration.

<sup>163</sup> S.1 of the TA 2000.

<sup>164</sup> S.112.

<sup>165</sup> S.41 and sch.8.

<sup>166</sup> PACE 1984, s.42(2).

<sup>167</sup> *John Murray v UK*, Judgment of 8 February 1996 (application no. 18731/91), at 66; see also above at 1.3.11.

<sup>168</sup> S.1 of the TA 2000 reads as follows:

- (1) In this Act “terrorism” means the use or threat of action where—
  - (a) the action falls within subsection (2),
  - (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.
- (2) Action falls within this subsection if it—

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be applied in cases that do not justify the use of specialised powers and offences.<sup>169</sup> The breadth of the new definition was openly recognised by the government during legislative debates.<sup>170</sup>

Furthermore, the TA 2000 continues with the tradition of reversing the burden of proof in certain cases. S.118 TA 2000 deals in generalised terms with the cases in which the defence is charged with the burden to prove a particular matter.<sup>171</sup> Also, the general offence for possession of terrorist articles contained within s.57 TA 2000 deserves further scrutiny: Under this provision, the possession of an article is considered an offence if the circumstances give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. As Walker points out, no proof of a *terrorist purpose* in the mind of the possessor is required, nor any proof of linkage to proscribed organisations, thus animal rights activists seeking to attack a laboratory could even be included.<sup>172</sup> Besides the wide range of items falling within the definition of ‘article’,<sup>173</sup> subsection (3) seems particularly worrying as it allows the court to assume that the accused possessed a certain article if it was established that the said article was on any premises at the same time as the accused or was on premises either occupied by the accused or habitually used by him. At first sight, it seems that in contrast to the presumption of innocence, the guilt of the accused is hence presumed. The possible breach of Art. 6 (2) of the ECHR has been examined by the House of Lords,<sup>174</sup> but opinions on this issue were divided as

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- (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.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
- (a) “action” includes action outside the United Kingdom,
  - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
  - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
  - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

<sup>169</sup> Talbot (2003), at 138 et seq.

<sup>170</sup> Ibid., citing House of Commons Debates, 1999-2000, vol. 341, col.152.

<sup>171</sup> S.118 provides for two situations: first, the situation that it is a defence for the accused to prove a particular matter, such as in ss.12(4) or 39 (5) (a) TA 2000 (s.118 (1) and (2)), and second, the situation where the court may make assumptions or accept a fact as sufficient evidence unless a particular matter is proved, such as in ss.57 (1) and (3) (s.118 (3) and (4)). In total, s.118 is applicable to ss.12 (4), 39 (5) (a), 54, 57, 58, 77 and 103 TA 2000 (and, until they were repealed, also to ss.13, 32 and 33 of the EPA 1996). (See Walker (2002), at 274).

<sup>172</sup> Ibid. at 171.

<sup>173</sup> Walker refers to ‘wires, batteries, rubber gloves, scales, electronic timers, overalls, balaclavas, agricultural fertilizer and gas cylinders, see Ibid.

<sup>174</sup> In the case, reference was made to the then applicable s.16A of the PTA 1989. *R v Director of Public Prosecutions, ex parte Kebilene* [1999] UKHL 43.

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it can be argued that the burden of proof regarding the possession of a certain item is a mere *evidential* burden. It requires the defence to merely raise a doubt as to the question of possession, and to still leave the *persuasive* burden of persuading the jury of the guilt or innocence of the accused to the prosecution.<sup>175</sup>

The conformity of ss.44-7 of the Terrorism Act 2000 (which grant powers to stop and search even in the absence of terrorist suspicion) with the ECHR and the HRA 1998 were examined by the House of Lords in *R (on the application of Gillan (FC) and another (FC)) v Commissioner of Police for the Metropolis and another*.<sup>176</sup> The Lords found that the respective provisions did not violate Art. 5 or 8 of the ECHR and dismissed the appeals.

The conformity of the proscription of organisations (Part II, sch. 2 of the Act) with the ECHR was challenged under national jurisdiction (of the England and Wales High Court).<sup>177</sup> Three organisations designated as proscribed organisations under the TA 2000 contended that they were entitled to immediate judicial review of their designations, instead of appealing to the Proscribed Organisation Appeal Commission (POAC). The Lords dismissed the applications, holding that the POAC was the appropriate course to be followed to challenge the legality of the proscription.

Together with the TA 2000, the ***PACE Code H*** should be noted, which deals with those detained under s.41 of, and sch.8 to the TA 2000. For instance, the Code regulates that the detainee's right to a solicitor and to have a named person informed of the detention may be delayed for terrorist suspects for up to forty-eight hours.<sup>178</sup>

A last piece of legislation adopted before September 11<sup>th</sup> that influenced counter terrorism investigations was the ***Regulation of Investigatory Powers Act (RIPA) 2000***.<sup>179</sup> The Act was a response to the judgment by the House of Lords in *Regina v Khan*,<sup>180</sup> where it emerged that the police had the habit of illegally breaking into houses in order to plant listening devices, on the basis of advice given in a Home Office circular.<sup>181</sup> This practice was also condemned by the Strasbourg Court in the case of *Halford*,<sup>182</sup> where the Court held that Ms Halford's right to a private life and correspondence enshrined in Art. 8 of the ECHR had been violated as her private

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<sup>175</sup> See Walker (2002), at 172/173, citing the speech of Lord Hope in the Judgement *R v Director of Public Prosecutions, ex parte Kebilene* [1999] UKHL 43, at 992-993.

<sup>176</sup> [2006] UKHL 12.

<sup>177</sup> *The Queen (on the application of the Kurdistan Workers Party, the People's Mojahedin of Iran and Nisar Ahmed) and the Secretary of State for the Home Department*, EWHC 644.

<sup>178</sup> Annex B(A)(6) of PACE Code H.

<sup>179</sup> On the RIPA 2000, see Akdeniz, Taylor and Walker (2001).

<sup>180</sup> [1997] AC 558.

<sup>181</sup> An immediate legislative reaction to *Khan* was Part III of the Police Act 1997 which made it legal for the police to interfere with property, or with wireless telegraphy, where an appropriately senior officer believed that this was likely to be of substantial value in the prevention or detection of serious crime and the object of the action could not reasonably be achieved by other means (s.93). See also Spencer (2004), at 188 et seq.

<sup>182</sup> Judgment of 25 June 1996 (application no. 20605/92); see also Kühne (2006), at margin no. 1203.

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telecommunication was unlawfully intercepted, in the absence of any legal provision regulating such interception.<sup>183</sup> The lack of a legal basis for covert surveillance gave rise to a number of cases in Strasbourg against the UK stating a violation of Art. 8 of the ECHR (see, for instance, *Malone*,<sup>184</sup> *Khan*,<sup>185</sup> *Taylor-Sabori*,<sup>186</sup> *Allan*,<sup>187</sup> *Chalkley*,<sup>188</sup> *Lewis*,<sup>189</sup> and *Perry*<sup>190</sup>). However, it should be noted that the situation was different with respect to secret service surveillance, as the Security Service Act 1989 provided a statutory basis to install electronic devices at the home of private individuals when it was believed necessary to obtain certain information. An application of the actress Vanessa Redgrave to the European Commission challenging the installation of such devices was dismissed.<sup>191</sup>

By replacing the former Interception of Communication Act 1985 entirely, the RIPA 2000 updated the law regarding the interception of communications. Interestingly enough, unlike other invasive methods to gather evidence (and unlike the way in which these measures are regulated in Germany,<sup>192</sup> for instance), this technique does not need to be authorised by a judge, but rather by the Home Secretary.<sup>193</sup> The combination of this state of affairs with the evidential rules governing telephone-tapping is extremely worrying. Under s.17 of the RIPA 2000, telephone-tap evidence, however lawfully obtained, is categorically inadmissible. This rule is particularly striking when considered against the background of English evidence law, under which evidence is generally admissible in court, as long as it is relevant.<sup>194</sup> At first sight, one might see

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<sup>183</sup> The then existing *Interception of Communication Act 1985* only applied to public, not to private telecommunication (Ibid.).

<sup>184</sup> *Malone v UK*, Judgment of 2 August 1985 (application no. 8691/79).

<sup>185</sup> *Khan v UK*, Judgment of 12 May 2000 (application no. 35394/97). See also Kühne and Nash (2000).

<sup>186</sup> *Taylor-Sabori v UK*, Judgment of 22 October 2002 (application no. 47114/99).

<sup>187</sup> *Allan v UK*, Judgment of 5 November 2002 (application no. 48539/99).

<sup>188</sup> *Chalkley v UK*, Judgment of 12 June 2003 (application no. 63831/00).

<sup>189</sup> *Lewis v UK*, Judgment of 25 November 2003 (application no. 1303/02).

<sup>190</sup> *Perry v UK*, Judgment of 17 July 2003 (application no. 63737/00).

<sup>191</sup> Cf. *Redgrave against the UK*, Decision of 1 September 1993 (application no. 20271/92).

<sup>192</sup> In Germany, the Constitution (Art. 10) requires independent judicial control of the surveillance. See the Judgments of the Constitutional Court, Decision of 15 December 1970, case no. 2 BvF 1/69, 2 BvR 629/68 und 308/69 (BVerfGE 30, 1 paras. 23 et seq, 30 et seq); Decision of 15 December 1983 ('the Census Decision', see below, Part II, Chapter 3 "Germany", section 3.3.2.1.) case nos. 1 BvR 209, 269, 362, 420, 440, 484/83 (BVerfGE 65, 1 para. 46); Decision of 20 June 1984, case no. 1 BvR 1494/78 (BVerfGE 67, 157 para. 185) and Decision of 5 July 1995 ('*Rasterfahndung*'), case no. 1 BvR 2226/94 (BVerfGE 93, 181 para. 171).

<sup>193</sup> The reason is historical: Before 1985, Home Secretaries issued already warrants for telephone tapping without any legal basis. This situation led to a condemnation in the *Malone* case (see above, note 184), where the European Human Rights Court held that tapping telephones without a legal basis was contrary to Art. 8 of the Convention. The UK government responded to this decision with the Interception of Communications Act 1985. Under this Act, the authorisation by the Home Secretary was given a legal framework, and a network of rules was established to make sure that his authorisations would not be examined in the ordinary courts. See Spencer (2005).

<sup>194</sup> It should first be noted that under English and Northern Irish law, the basic rule is that evidence is admissible if it is relevant (SIAC in Court of Appeal, *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh, Jamal Ajouaou v Secretary Of State for the Home Department*, August 2004, [2004] EWCA 1123., at 242). The English ordinary criminal law gives the judges a broad scope of discretion as to whether certain evidence



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the advantage of this rule as it seems to reduce the amount of privacy-infringing wire-tapping investigations carried out by the police. If the evidence will not be admitted, why bother to gather it? However, as previously mentioned, unlike in Germany, the telephone taps under English and Northern Irish law are not authorised by judges, but by the Home Secretary. This means that the only way to review the legality of their application would be by admitting them as evidence in court. As this is not possible under the current legal framework,<sup>195</sup> there practically exists no means of judicial control of telephone interceptions. Another consequence of this inadmissibility is arguably even more worrying: presumably, some of this evidence may prove the guilt of a number of dangerous suspects who cannot be tried as the only evidence against them is that which is not admissible. As Spencer puts it, referring to the wide detention powers granted temporarily under the ATCSA in 2001,<sup>196</sup> this "little problem" the Home Secretary wanted to solve "not by abolishing the ban, but by abolishing the need for trials – and giving himself the legal power to put them under house arrest without one."<sup>197</sup>

The Act also put other intrusive investigative techniques (i.e. some forms of covert investigation,<sup>198</sup> for example, under cover agents and covert surveillance) on a statutory basis for the first time. Spencer notes that although the law is an improvement on the legal vacuum that existed before, it is regulated "astonishingly – and surely quite needlessly –" complicated.<sup>199</sup>

### 1.4. Post September 11<sup>th</sup> anti-terror legislation

The UK had just adopted the TA 2000, which was aimed at putting anti-terrorism legislation on a permanent footing, when the planes crashed in New York and Washington in September 2001. The UK therefore faced a particular problem: since the TA 2000 had been intended as a final regime for counter terrorism legislation, there was little space left for new laws. Nonetheless, the government considered that the events of September 11<sup>th</sup> had shown a new level of threat, which required new legislative actions.<sup>200</sup>

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should be admitted to trial. Likewise, s.78 of the PACE 1984 provides that the court *may* refuse to allow evidence if it appears to the court that, 'having regard to all the circumstances, including the circumstances under which the evidence was obtained, the admission of evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Thus, illegally obtained evidence may be excluded, if the fair trial principle is jeopardised, but may also be admitted, as was the case, e.g., in *Khan v UK* [1997] AC 558 (HL). In the case, the police attached an aural surveillance device to the home of the defendant without his consent or knowledge, thus unlawfully trespassing his premises. The recording they obtained by this way confirmed that Khan was involved in drug trafficking, and it was admitted as evidence. The Strasbourg Court held that the admission of this evidence did not violate the fair trial principle of Art. 6(1) ECHR, see *Khan v UK* (application no. 35394/97) [2000] Crim. LR 684.

<sup>195</sup> RIPA 2000, s.17.

<sup>196</sup> See below at 1.4.1.

<sup>197</sup> Spencer (2005).

<sup>198</sup> Extensively on covert investigation methods, see Sharpe (2004).

<sup>199</sup> Spencer (2004), at 190.

<sup>200</sup> Warbrick (2004), at 392.

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In the aftermath of September 11<sup>th</sup>, the UK has adopted so far<sup>201</sup> three major anti-terror laws, thus amending considerably their legislation further on this matter. These laws are the *Anti-Terrorism, Crime and Security Act 2001*, the *Prevention of Terrorism Act 2005*, and the *Terrorism Act 2006*. In addition, the *Criminal Justice Act 2003* introduced substantive changes to the UK's criminal justice system, some of which considerably affect counter terrorism legislation. Moreover, the *Serious Organised Crime and Police Act 2005* was adopted, which also partially covers terrorist offences. With respect to Northern Ireland, the *Justice and Security (Northern Ireland) Act 2007* was recently adopted, which provides for non-jury trials. Presently, another anti terror bill is being discussed in Parliament.

### 1.4.1. Anti-Terrorism, Crime and Security Act 2001

Only a year after the adoption of the human rights sensitive TA 2000, British counter terrorism legislation again took another direction: in impressively little time a large package of new anti terrorism laws were adopted. The *Anti-Terrorism, Crime and Security Act (ATCSA) 2001* was rushed through Parliament: the time taken for scrutiny and debate of the Bill in the House of Commons was limited to a total of sixteen hours, after it had taken the government more than two months to prepare the Bill. In the House of Lords, where all the major concessions on the legislation were extracted from the Government, the Bill completed all of the legislative stages in less than ten days.<sup>202</sup> When logically considering the length of the Act, it seems rather likely that in fact more than two months were needed to draft such legislation, and that it had actually already been partly prepared prior to the attacks of September 11<sup>th</sup>.

The Act operates both by amendment to and in conjunction with the TA 2000. The most draconian measure adopted by the ATCSA 2001 was certainly the indefinite detention of a certified suspected foreign terrorist (please refer to 1.3.4), which was abolished in 2005 following the House of Lord's Decision of 14 December 2004.

Besides this provision concerning indefinite detentions, along with the derogation under Art. 15 of the ECHR referred to earlier, the ATCSA 2001 introduced a number of other important changes, among those:

- (1) new provisions regarding the suppression of financing of terrorism;<sup>203</sup>
- (2) provisions regarding the retention of communication data;<sup>204</sup>
- (3) new offences (in particular regarding nuclear, biological and chemical weapons);<sup>205</sup>
- (4) extended police powers;<sup>206</sup> and

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<sup>201</sup> As of 1 October 2008. At the present, another bill is discussed to be adopted, see below at 1.5.

<sup>202</sup> see: Tomkins (2002 ); Fenwick (2002).

<sup>203</sup> Part 1 and 2 (s.1-16) and sch.1.

<sup>204</sup> Part 11 (ss.102-7).

<sup>205</sup> Part 6-8, and s.113, 114, 120, and sch. 5 and 6.

<sup>206</sup> Part 10 (s.89-101).

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- (5) implementation of EU obligations (*inter alia* implementation of the EU Council Framework Decisions on Combating Terrorism<sup>207</sup> and on the European Arrest Warrant<sup>208</sup>).

### 1.4.2. Admissibility of evidence obtained by torture

In August 2004, the Court of Appeal had to decide upon the issue of evidence statements obtained under torture, with the particularity that the statements were made by a third party when tortured by officials of a third country.<sup>209</sup> Under English evidential law, the court has a discretionary power to reject illegally or improperly obtained evidence (PACE 1984, s.78), thus it is not obliged to reject such evidence unless the evidence concerns the confession obtained by oppression (PACE 1984, s.76). Against this background, it is less surprising that the question was subject to discussion. While the Court of Appeal held with a two-to-one majority that such evidence could be admissible, this judgment was quashed by the House of Lords in their decision in December 2005. The Lords unanimously held that information obtained by torture could not be used in English Courts including in situations where British officials had no prior involvement in the torture and where the torture was perpetrated outside of the territory or control of the United Kingdom.<sup>210</sup> In modern times where allegations of torture in the context of terrorism combat are frequently raised, and often with regard to foreign secret agents, this judgment can only be welcomed. It should serve as a precedent for other countries.

### 1.4.3. Criminal Justice Act 2003

In 2003 the British government overhauled the criminal justice system through the adoption of the *Criminal Justice Act (CJA) 2003*.<sup>211</sup> The reform was based on recommendations of several previous reports,<sup>212</sup> as well as the Home Office's White

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<sup>207</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, online available at [www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_164/l\\_16420020622en00030007.pdf](http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf) (visited on 30-11-06). Although the Framework Decision was only adopted in June 2002, it was already proposed in September 2001 (see *Proposal for a Council Framework Decision on combating terrorism*, presented by the Commission, of 19.9.2001 (COM (2001) 521 final, 2001/0217 (CNS)), online available at: [http://ec.europa.eu/external\\_relations/cfsp/doc/com\\_01\\_521.pdf](http://ec.europa.eu/external_relations/cfsp/doc/com_01_521.pdf), last visited 26 February 2009). It was in view of its upcoming adoption that the UK government saw the need to change the law.

<sup>208</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, online available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML> (visited on 30-11-06).

<sup>209</sup> *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh, Jamal Ajouaou v Secretary Of State for the Home Department*, August 2004, [2004] EWCA 1123.

<sup>210</sup> House of Lords, *A (FC) and others (FC) v Secretary of State for the Home Department*, [2005] UKHL 71.

<sup>211</sup> Online available at <http://www.opsi.gov.uk/acts/acts2003/20030044.htm> (visited on 30-11-06). It should be noted that the act concerns primarily England and Wales, and only rudimentary affects Scottish and Northern Irish law.

<sup>212</sup> Sir Robin Auld's Review of the Criminal Courts of England and Wales, published on 5 September 2001; John Halliday's Making Punishment Work: report of a review of the sentencing framework of

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Paper 'Justice for All'.<sup>213</sup> Although adopted as general legislation, and not specifically directed at terrorism, the fight against terrorism certainly affected its contents. Moreover, it has a considerable impact on terrorism proceedings as it brings about significant changes to police powers,<sup>214</sup> bail<sup>215</sup> and caution<sup>216</sup> conditions, charging,<sup>217</sup> disclosure,<sup>218</sup> trial proceedings,<sup>219</sup> and evidence law.<sup>220</sup> For example, retrial for serious offences is introduced on the basis of new incriminating evidence.<sup>221</sup> This measure goes against the principle of *ne-bis-in-idem*, also known as 'autrefois rule' or prohibition of double jeopardy. It is questionable whether the double jeopardy and the therewith raised risk of a conviction for the accused are actually outweighed by the greater possibility to avoid wrongful convictions.<sup>222</sup> It should be noted that the right of the defence to re-open a case on the basis of new evidence *in favour* of the defendant has already existed since the creation of the Criminal Cases Review Commission in 1995.<sup>223</sup> What is new is the allowance to re-open a case on basis of new *incriminating* evidence.

Another significant change concerns the rules of evidence which are being relaxed by admitting, , evidence of 'bad character'<sup>224</sup> (s.98-113) and hearsay evidence (s.114-36) to a greater extent. In addition, the sentencing system has been significantly changed, including a whole chapter being dedicated to 'dangerous offenders'. Under the term 'dangerous offender', both sexual and serious offences punished by life imprisonment can be comprised so that the possibility for aggravated punishment in cases of terrorism is included.

The Act also introduced modifications to the law governing the national DNA database.<sup>225</sup> S.10 amended the PACE 1984, as amended by the Criminal Justice and

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England and Wales, published on 16 May 2000; and the Law Commission reports: Evidence of Bad Character of Criminal Proceedings (LC273), published on 9 October 2001, Evidence in Criminal Proceedings: Hearsay and Related Topics (LC245), published on the 19 June 1997, and Double Jeopardy and Prosecution Appeals (LC267), published on the 6 March 2001.

<sup>213</sup> Cm 5563, online available at [image.guardian.co.uk/sys-files/Politics/documents/2002/07/17/Criminal\\_Justice.pdf](http://image.guardian.co.uk/sys-files/Politics/documents/2002/07/17/Criminal_Justice.pdf) (visited on 29-11-06).

<sup>214</sup> Part 1 of the CJA 2003 (s.1-12).

<sup>215</sup> Part 2 of the CJA 2003 (s.13-21).

<sup>216</sup> Part 3 of the CJA 2003 (s.22-27).

<sup>217</sup> Part 4 of the CJA 2003 (s.28-31).

<sup>218</sup> Part 5 of the CJA 2003 (s.32-40).

<sup>219</sup> Part 7 of the CJA 2003 (s.43-50).

<sup>220</sup> Part 11 of the CJA 2003 (s.98-141).

<sup>221</sup> Part 10 of the CJA 2003 (s.75-97).

<sup>222</sup> Roberts (2002), at 401, who reaches the conclusion that "the medicine is worse than the disease" (at 420). See also Fitzpatrick (2003), as well as Kühne (2006), at 646.

<sup>223</sup> See Criminal Appeal Act 1995, s.8 and sch. 1.

<sup>224</sup> An analysis of these new provisions are provided by: Spencer (2006).

<sup>225</sup> The national DNA database was created in 1995. It is world-wide the largest DNA database, covering 5,2 % of UK's population. (see information provided by the Home Office, at <http://www.homeoffice.gov.uk/science-research/using-science/dna-database/>, visited on 26 March 2008). Prior to 2001, s.64 of the PACE 1984, as amended by the Criminal Justice and Public Order Act 1994, specified that if a person was either acquitted or the charges were dropped, any DNA sample and data derived from the sample had to be destroyed. S.82 of the Criminal Justice and Police Act 2001 amended PACE, removing these requirements, with the consequence that now also the data of innocents can be

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Public Order Act 1994, in order to allow police to take a DNA sample from all persons arrested for a recordable offence and detained at a police station, regardless of the outcome of the case.<sup>226</sup>

It is important to note that under Part VII (ss.43 et seqq.) of the CJA 2003, trials on indictment without jury are again provided for, in the case of complicated fraud as well as in a situation of jury tampering. The latter may be of vital relevance for terrorist proceedings as a danger of jury tampering may often be established in the context of terrorism.

Besides those general amendments, one section explicitly deals with terrorist suspects. According to s.306, the duration of a warrant for detention without charge can be extended for a period of up to 14 days.<sup>227</sup> Thereby, the UK has become the country with the longest duration of arrest without charge European-wide.

### 1.4.4. Prevention of Terrorism Act 2005

As outlined earlier, the *Prevention of Terrorism Act (PTA) 2005* repealed the provisions regulating indefinite detention of foreign terrorist suspects, and replaced them with a new regime of **control orders**. This legislation was adopted in an extraordinarily little amount of time. The reason being that under s.29 of the ATCSA 2001, the detention without trial provisions could remain in force only if renewed annually by an order approved by resolution of both legislative chambers. As the government, for security reasons, wanted to avoid the situation that the detained persons were released unconditionally, it had to enact new legislation before the old provisions lapsed on 14 March 2005.<sup>228</sup>

The orders can be divided into derogating or non-derogating orders,<sup>229</sup> depending on the level of impact they have on the rights provided by Art. 5 of the ECHR. Non-derogating orders are adopted by the Home Secretary, whereas derogating

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retained. These amendments have been challenged by way of judicial review, but in July 2004 the House of Lords found in the case of *R v Chief Constable of South Yorkshire (ex parte S and Marper)* [2004] UKHL 39 that they were proportionate and justifiable and not in breach of the European Convention on Human Rights. The case of *S and Marper* has recently been decided by the ECtHR (*S. and Marper v the UK*, judgment of 4 December 2008, application nos. 30562/04 and 30566/04), which established a violation of Article 8 of the ECHR. The Court was "struck by the blanket and indiscriminate nature of the power of retention in England and Wales" (ibid at para. 119), which included the storage of suspected but not convicted persons. It concluded that there the UK had failed to strike a fair balance between the competing public and private interests and that the respondent State had overstepped any acceptable margin of appreciation in this regard.

<sup>226</sup> See Lake (2005-2006).

<sup>227</sup> This period has been further extended by the Terrorism Act (TA) 2006 (see *infra*) to up to 28 days (s.23(7)).

<sup>228</sup> Statutory Instrument 2004/751, Anti-Terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004. For further details on the legislative process, see Elliott (2007), at 15.

<sup>229</sup> Derogating control orders are those that require a previous derogation from Art. 5 ECHR. Such orders can only be made by the High Court, upon application by the government. See Aksu, Buruma and van Kempen (2006).

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orders are issued by a court, on application of the Home Secretary.<sup>230</sup> They have a very broad scope of application. They can include, amongst others, a house arrest, a curfew, electronic tagging, restrictions on the use of certain items (e.g. computer), restrictions on the use of certain communications (such as the internet or phone) restrictions on visitors and meeting others, and travel bans. The breach of a control order is a criminal offence punishable upon conviction by up to five years imprisonment and/or an unlimited fine.<sup>231</sup>

The compatibility of control orders with the HRA 1998 has been questioned in several cases. In *Secretary of State v JJ and others*, a non-derogating order obliging the defendants to remain within their residences, a one-bedroom flat, at all times save for a period of six hours, was quashed by the competent judge on the grounds that it amounted to a deprivation of liberty contrary to the HRA 1998, Sch. 1 Part I Art. 5 (identical to Art. 5 of the ECHR). The appeal against the decision by the Home Secretary was dismissed.<sup>232</sup> The House of Lords confirmed the Decision of the Court of Appeal, likewise dismissing the Home Secretary's second appeal.<sup>233</sup>

In *Secretary of State v MB*,<sup>234</sup> the legality of the special procedures under s.3 of the PTA 2005 concerning the judicial review of the lawfulness of non-derogating control orders was questioned in the light of a fair hearing as requested under HRA 1998, sch. 1 Part I Art. 6(1) (which is identical to Art. 6(1) of the ECHR). In this case, the Court of Appeal found no violation of the fair trial principle, but ordered the reconsideration of the validity of the order.<sup>235</sup> Following the appeal to the House of Lords, the Lords held that "s.3(13) of the Prevention of Terrorism Act 2005 may on occasions produce a result which was incompatible with Art. 6 of the ECHR. However, the procedures can be made to work fairly and compatibly in many cases and it was not appropriate to make a declaration of incompatibility."

In another case<sup>236</sup> the control orders were not quashed, as they were not as restrictive as those seen in *Secretary of State v JJ and others*, and hence, in the Lords' view, did not amount to a breach of Art. 5 of the ECHR. In particular, the curfew was not of eighteen but only of twelve hours' duration, the applicant lived with his family, was free to attend a mosque of his choice, and was not prohibited from associating with named individuals.<sup>237</sup>

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<sup>230</sup> S.1(2) of the Act.

<sup>231</sup> S.9 of the Act.

<sup>232</sup> CA, Judgment of 1 August 2006, [2006] EWCA Civ 1141.

<sup>233</sup> [2007] UKHL 45.

<sup>234</sup> [2007] UKHL 46.

<sup>235</sup> CA, Judgment of 1 August 2006, [2006] EWCA Civ 1140.

<sup>236</sup> *Secretary of State for the Home Department v E and another* [2007] UKHL 47.

<sup>237</sup> *Ibid* at 7.

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### 1.4.5. Serious Organised Crime and Police Act 2005

The Serious Organised Crime and Police Act<sup>238</sup> (SOCPA) was primarily concerned with the creation of the Serious Organised Crime Agency (SOCA)<sup>239</sup>, which is in charge of gathering, storing, analysing, and disseminating information relevant to the prevention, detection, investigation or prosecution of offences or the reduction of crimes (s.3). The Act applies only to England and Wales except for the provisions made under s.179, extending and, in some cases, limiting the application to Scotland and/or Northern Ireland. Part II, Ch. 2 of the Act allows the prosecutor to grant immunity or offer reductions in sentences to offenders in return for their assistance in criminal investigations. Police powers of arrest, search, taking of photographs and fingerprints were further modified by the Act (Part III). Thus, the powers of arrest have been extended from 'arrestable' to *any* offences.<sup>240</sup> Supposedly a new Code of Practice ensures that this extension of powers will not be abused in practice.<sup>241</sup> The grounds that authorise the arrest are clearly and exhaustively defined by the law.<sup>242</sup>

The Act provoked particular controversies as it restricts the right to demonstrate within a zone of up to one kilometre from any point in Parliament Square (Part IV, ss.132-8).

Finally, s.117(7) of the SOCPA has further broadened the application of the national DNA database, by now allowing DNA samples taken from any deceased person to be checked against the database for identification purposes, irrespective of whether there is any suspicion of their involvement in a crime.<sup>243</sup>

### 1.4.6. Terrorism Act 2006

The period for police detention without charge has been further extended, by virtue of the *Terrorism Act (TA) 2006*<sup>244</sup> (s.23 (7) of the TA 2006), to up to 28 days. Before the adoption of the respective Bill, it had been discussed in the House of Commons to prolong the detention without warrant for up to 90 days,<sup>245</sup> which caused an outcry in the media and general public. However, this proposal was defeated by 322 votes to 291.<sup>246</sup>

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<sup>238</sup> 2005 c.15, online retrievable at [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050015\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050015_en_1) (last visited on 19 September 2008).

<sup>239</sup> On the SOCA, see Ülgen (2007).

<sup>240</sup> See RIPA 2005, ss.110-1.

<sup>241</sup> See Explanatory Notes 236 and 237 to the Act.

<sup>242</sup> See s.24 PACE as substituted by SOCPA 2005 c. 15 Pt 3 s.110(1).

<sup>243</sup> Lake (2005-2006), at 8.

<sup>244</sup> A comprehensive overview on this Act including information in relation to the still effective provisions of the TA 2000 and the ATCSA 2001 can be found at Jones, Bowers and Lodge (2006).

<sup>245</sup> The public reacted strongly against this idea. See e.g. The Guardian (13 October 2005): *British police powers toughest in Europe*; See also the concerns of Lord Carlile on the planned provisions in his report: *Report by the Independent Reviewer Lord Carlile of Berriew Q. C.* (October 12, 2005), para. 64.

<sup>246</sup> See BBC News of 9 November 2005: Blair defeated over terror laws. Online available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4422086.stm](http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm) (visited in January 2007).

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The TA 2006 must be viewed in the context of the July 2005 bombings in London.<sup>247</sup> The Bill was introduced in October of the same year and came into force on 30 March 2006. The main change brought about by this Act, next to the further extensions of police powers, concerned the introduction of new criminal offences.<sup>248</sup> The most debated of those is certainly the criminalisation of the 'encouragement of terrorism'<sup>249</sup> going as far as including indirect inducement such as glorification of terrorism, and providing for a maximum sentence for such offence of seven years imprisonment.<sup>250</sup> The offence has been introduced to implement the requirements of Art. 5 of the Council of Europe Convention on the Prevention of Terrorism. This provision requires state parties to criminalise 'public provocation to commit a terrorist offence'. The new offence supplements the existing common law offence of incitement to commit an offence.<sup>251</sup> The serious restriction on the freedom of speech connected to this offence is obvious. It is therefore questionable whether the offences under the TA 2006 can be considered proportionate in the light of the freedom of speech (s.1(1)(b) HRA 1998 in conjunction with Art. 10 of the ECHR).<sup>252</sup> However, Home Secretary Charles Clarke certified the law as compatible with the HRA 1998.<sup>253</sup> Also the independent reviewer appointed by the government to review anti-terrorism law, Lord Carlile, held that the new offences (in their eventually adopted version) were in compliance with the HRA 1998. He deemed them proportionate.<sup>254</sup> The purpose, to prevent the recruiting of young Muslim followers for terrorist purposes, is certainly legitimate. However, the principle of proportionality also implies that the law in question must be capable of effectively preventing the expected damage. As Roach rightly points out, Lord Carlile's conclusion is "flawed in its assumption that the criminalisation of speech is rationally preventing terrorism."<sup>255</sup> The potential counterproductive effects, i.e. the possibility that prosecuting the glorifiers of terrorism could result in greater attention and sympathy for their cause, should not be ignored.

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<sup>247</sup> On 7 July 2005, 4 suicide bombers exploded in 3 underground trains and one double-decker bus, in the centre of London, causing the death of 52 people. Only two weeks later, 4 bombs that failed to explode were found on 3 trains and one bus, again in central London. On 15 January 2007, the trial against six suspects began, charging them with conspiracy to murder and conspiracy to cause explosions likely to endanger life, see *Six On Trial Over Failed London Bombings*, in: *Guardian Unlimited*, 15 January 2007 (online available at <http://www.guardian.co.uk/attackonlondon/story/0,,1990718,00.html>, visited on 29 January 2007).

<sup>248</sup> Note that most of these offences have no geographical limits, see s.17 of the Act. In consequence, a person in Afghanistan may be charged under s.1 of the Act for online publishing matter in relation to conflict in Mexico.

<sup>249</sup> S.1.

<sup>250</sup> Other new offences regard the dissemination of terrorist publications (s.2), the preparation of terrorist acts (s.5) (the maximum penalty in this case is life imprisonment), and training for terrorism (s.6), to name a few.

<sup>251</sup> See explanatory note 20 to the TA 2006.

<sup>252</sup> The conflict with the freedom of speech has been addressed by many. See, e.g., Barendt (2005); Roach (2006), at 2181 et seq.; Barnum (2006).

<sup>253</sup> See Roach (2006), at 2181.

<sup>254</sup> Lord Carlile, Interim Report P 23 (Oct. 10, 2005).

<sup>255</sup> Roach (2006), at 2181.



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Moreover, in view of the complex causal determinants of terrorism, particularly terrorism by suicide, it seems simplistic to believe that the prohibition of some speech may effectively prevent terrorism.<sup>256</sup> Also, it may be questioned whether criminalisation is really the last and least damaging of all available means (*ultima ratio*). Social control measures such as publicly criticising and condemning glorifications of terrorism may be less harmful and furthermore effective. A strong argument against the need of this new offence is that the same crimes already can be, and have been successfully prosecuted within the pre-existing law, as highlighted by the case of the glorifier / inciter Abu Hamza in 2006.<sup>257</sup> Finally, the overwhelming amount of information available in our modern times casts serious doubts on the effectiveness of the measure.<sup>258</sup>

### 1.4.7. Racial and Religious Hatred Act 2006

In a similar vein the *Racial and Religious Hatred Act 2006*,<sup>259</sup> makes it an offence to incite or "stir up" hatred against a person on the grounds of their religion. The Act was the Labour Government's third attempt to introduce this offence. Provisions were originally included as part of the Anti-Terrorism, Crime and Security Bill in 2001, but were later dropped after objections from the House of Lords. The measure was again brought forward as part of the Serious Organised Crime and Police Bill in 2004-5, but was again dropped in order to get the body of that Bill passed before the 2005 general election. It met substantial protest from the public, including British celebrities,<sup>260</sup> for being contrary to freedom of speech, and for creating rather than avoiding tensions between different religious communities.<sup>261</sup>

### 1.4.8. Justice and Security (Northern Ireland) Act 2007

In July 2007 the tradition of Diplock courts to try terrorists was abandoned. Instead, jury trials are to become the rule.<sup>262</sup> However, according to the new Act, in exceptional cases, the Director of Public Prosecutions for Northern Ireland will have a discretionary power to issue a certificate stating that a trial is to take place without a jury if certain conditions are met. These conditions are either related to a proscribed organisation or to

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<sup>256</sup> Ibid., at 2181 et seq.

<sup>257</sup> For his (unsuccessful) appeal, see [2006] EWCA Crim 2918. See also Roach (ibid). For another case where a young Muslim leader was convicted under the former legislation see *R v EL-Faisal*, 2004 WL 413053.

<sup>258</sup> See again Roach (ibid).

<sup>259</sup> 2006 c. 1, online retrievable at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2320532> (last visited 20-11-08).

<sup>260</sup> E. g. "Mr. Bean" actor Rowan Atkinson (The Independent (online edition) (7 December 2004): *Atkinson takes fight with religious hatred Bill to Parliament*).

<sup>261</sup> BBC News (online edition) (11 October 2005): *Protest over religious hate Bill*.

<sup>262</sup> BBC News (online edition) (11 August 2006): *Jury trials 'to become the norm'*.

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'religious or political hostility', so that in essence, these non-jury trials will take place often, but not exclusively, in terrorist cases.

### 1.5. Current developments

On 30 June 2007, a burning car was driven into Glasgow Airport.<sup>263</sup> One day before, car bombings had been unsuccessfully attempted in London. The national threat level was subsequently raised to "critical".<sup>264</sup> It was discussed to further tighten anti-terror legislation and on 24 January 2008, the Home Secretary brought forward a new counter-terrorism Bill.<sup>265</sup> The House of Commons voted in favour of the Bill on 11 June 2008 and is currently (as of September 2008) being discussed in the House of Lords.<sup>266</sup> The Bill provides a voluminous set of new changes. One of the key elements is an extension of 'pre-charge detention' (i.e. detention without charge) from 28 to 42 days.<sup>267</sup> Moreover, post-charge questioning is intended to be introduced, thus giving police the possibility to question a suspect under terrorism charges.<sup>268</sup> Further, the drawing of adverse inferences from silence shall be further enabled.<sup>269</sup> The Bill also foresees that 'a terrorist connection' shall become an obligatory aggravating factor for the determination of the sentence.<sup>270</sup> Further, the Bill imposes a special notification procedure<sup>271</sup> on convicted terrorist offenders under which convicts have to surrender certain personal data, such as address, national insurance number etc. to the authorities.<sup>272</sup> The data will be stored for a period of ten years for convicts sentenced to less than

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<sup>263</sup> BBC News (online edition) (30 July 2007): *Blazing car crashes into airport*.

<sup>264</sup> guardian.co.uk / The Observer (online edition) (1 July 2007): *Terror threat 'critical' as Glasgow attacked*. The UK Home Office has provided a system of different threat levels, ranging from low (an attack is unlikely) to critical (an attack is expected imminently). The current threat level (as of 18 June 2008) is estimated as severe - an attack is highly likely (one step below "critical"). See <http://www.homeoffice.gov.uk/security/current-threat-level/> (last visited 19 September 2008).

<sup>265</sup> The current status of the bill can be retrieved on the website of the Central Government of the UK, at <http://services.parliament.uk/bills/2007-08/counterterrorism.html> (visited on 10 March 2008). A summary of the key provisions can be found at BBC News (online edition) (2008): *Terror bill: Key elements* (last visited on 10 March 2008).

<sup>266</sup> The Independent (online edition) (12 June 2008): *Brown triumphs on terror – but then he is stopped in his tracks*.

<sup>267</sup> See s.22, sch. 1(42) of the Bill.

<sup>268</sup> See s.23-26 of the Bill.

<sup>269</sup> See Part II of the Bill.

<sup>270</sup> See s.29-31 of the Bill.

<sup>271</sup> Part IV, s.38-55 of the Bill.

<sup>272</sup> S.44 (2) requires the concerned person to submit the following information:

- '(a) date of birth;
- (b) national insurance number;
- (c) name on the date on which the person was dealt with in respect of the offence (where the person used one or more other names on that date, each of those names);
- (d) home address on that date;
- (e) name on the date on which notification is made (where the person uses one or more other names on that date, each of those names);
- (f) home address on the date on which notification is made;
- (g) address of any other premises in the United Kingdom at which, at the time the notification is made, the person regularly resides or stays;

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five years of imprisonment, and for an indefinite period with respect to data of convicts sentenced to higher punishment. The Bill also introduces the so-called 'specially appointed coroner'.<sup>273</sup> At the present, a coroner, in charge of investigating deaths, usually calls upon a jury if a death has occurred in controversial circumstances. Under the new Bill, the Home Secretary shall be authorised to issue a certificate requiring the inquest to be held without a jury, if this is in the interests of national security, the relationship between the UK and another country, or 'otherwise' in the public interest.<sup>274</sup> Further, under certain conditions the Bill allows the admittance of intercept evidence in court, which was previously prohibited in the UK.<sup>275</sup> Forfeiture of terrorist property is provided for in ss.32-7 of the Bill, as well as the freezing of terrorist assets (Part V). Finally, the Bill confers further powers to gather and share information on counter-terrorism and other purposes (Part I).

The provision extending pre-charge detention to 42 days gave rise to severe criticism. A number of leading figures of arts and academia<sup>276</sup> opposed the prolonged detention in an open letter to Gordon Brown. They argued that no convincing case had been made justifying such a length of pre-charge detention. They also warned that "community relations could suffer if the Muslim community appears to be ... targeted for prolonged pre-charge detention". They predicted that such legislation might "damage intelligence gathering and policing and ...efforts to engage with Muslims in the UK".<sup>277</sup>

The Bill was also harshly criticised by the UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, who feared that it would set a negative precedent for other states.<sup>278</sup>

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(h) any prescribed information.'

('Prescribed' means prescribed by regulations made by the Secretary of State.)

<sup>273</sup> A coroner is a judicial officer in charge of investigating deaths, particular those happening under unusual circumstances, and shall determine the cause of death.

<sup>274</sup> See Part VI of the Bill.

<sup>275</sup> See s.60, 66 and 67 of the Bill.

<sup>276</sup> Among them: the spy-writer John Le Carré, the actors Colin Firth and Patrick Stewart, the novelist Iain Banks, fashion designer Vivienne Westwood and professor of philosophy A C Grayling.

<sup>277</sup> The Independent (online edition) (31 March 2008): *Leading cultural figures attack folly of 42-day detention limit*.

<sup>278</sup> Scheinin stated: "'The United Kingdom has a long standing history of effective human rights protection, however I am concerned that this Counter-Terrorism Bill, if adopted, could prompt other states to copy the provision into their own counter-terrorism legislation, without reflecting on the importance of effective judicial review" (UN Press Release 10 June 2008, online available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B29EDB9F1B38BB0DC1257464003873C6?open&document>; for further information on the mandate of the Special Rapporteur, please visit the website: <http://www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm>, both sites last visited 19 September 2008).

## 1.6. Summary

### 1.6.1. Main developments

In the UK, especially in Northern Ireland, special anti-terror laws have been in place for a long time. Special laws were adopted as early as 1922 (for Northern Ireland) and 1939 (for the UK as a whole). In the 1960s and 1970s, during the Troubles, conflicts between Loyalists and Republicans escalated in Northern Ireland, and were responded to with draconian police measures, which initially did not even have a legal basis (internment, in-depth interrogations). Due to harsh criticism, these measures were eventually abandoned. From 1972 to 1998, direct rule from Westminster was introduced for Northern Ireland due to the difficult situation. During these years, special legislation exclusively concerning Northern Ireland was adopted with respect to terrorism, the most important of which were the Northern Ireland (Emergency Provisions) Acts. Under this legislation, police and military powers were broadened, and following the Diplock report, the criminal process was modified in the case of terrorism, by introducing special procedures and trials without juries. These Diplock courts were a constant source of controversy. In 2005, their abolishment was announced. However, in 2007, trials without jury are again possible in Northern Ireland, but only under narrowly prescribed conditions.<sup>279</sup> Under the CJA 2003, trials without jury are also possible throughout the whole of the UK in complicated fraud cases and situations of jury tampering. In view of this special legislation for Northern Ireland, which conferred, inter alia, wide detention powers for police, the UK derogated several times from Art. 5 under Art. 15 of the ECHR. These derogations were sanctioned by Strasbourg (cf. *Ireland v UK*). However, at times when such a derogation order was not in place the UK received criticism from the Strasbourg Court for violating Art. 5 of the ECHR. In several cases, arrested applicants were not brought promptly before a judge, within the meaning of Art. 5.<sup>280</sup> Subsequently to Strasbourg rulings, the UK again issued a derogation order under Art. 5, together with special legislation allowing the prolonged police detention. For the rest of the UK, Prevention of Terrorism Acts (PTAs) were continuously enacted, in which the measures already applicable in Northern Ireland were often subsequently also adopted for the mainland. Further, exclusion orders were adopted.

Another characteristic of counter terror legislation in the UK were the so-called "proscribed organisations" (or, in the aftermath of the Good Friday Agreement in 1998: "specified organisations"), those organisations which were suspected to be pursuing terrorist ends, and which were put on special lists and could be banned. Belonging to such organisations was a criminal offence. In the context of this, we should recall that in the 1990s, the Home Secretary issued two notices to the BBC and to the IBA, in

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<sup>279</sup> See Justice Security (Northern Ireland) Act 2007.

<sup>280</sup> E.g. in *Brogan and Others v UK*, *O'Hara v UK*, loc. cit.

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which he prohibited the broadcasting of any words spoken by a person representing or purporting to represent a proscribed organisation. When these notices were challenged in court by the concerned journalists, the House of Lord refused to apply the European Convention of Human Rights and therefore could not find any illegality of the notice. The European Commission held that the notices did interfere with the applicants' freedom of expression, but that this interference was not disproportionate to the aim sought to be pursued.

In the UK fight against terrorism, informers ("supergrasses") were also used to obtain certain information on terrorist networks and operations. In spite of criticism these measures encountered in view of the low level of reliability and accuracy of the obtained information, a similar measure has been re-introduced in 2005, allowing for sentence reductions and remissions of sentences for offenders who collaborate with justice.<sup>281</sup>

In the context of the Northern Ireland conflict, there have been allegations that British police shot terrorists deliberately dead in order to avoid having to prosecute them,. In some cases (such as those of Kelly, Shanaghan, Finucane and McShane), the ECtHR held a violation of Art. 2 of the Convention on the grounds that the investigations into the use of lethal force had not been carried out with the required thoroughness. In *W v UK*, however, the Court dismissed the application that police had not sufficiently protected the life of the applicant.

The UK was also condemned in Strasbourg in several cases involving the killing of suspected terrorists by the police when the latter had presumed that the targeted person was about to detonate a bomb. In the cases of *McCann*, *Hugh Jordan* and *McKerr*, the UK was criticised by Strasbourg for not controlling the police operation as to minimise the recourse to lethal force. Also in these cases a violation of Art. 2 was established. In this context, the shooting of the Brazilian citizen Jean Charles de Menezes at the hands of British police in 2005 should also be recalled, where police suspected him to be wearing a suicide belt.

Another feature of British counter-terror legislation is the possibility of the court to draw adverse inferences from the silence of the accused. The respective provision for such was first introduced in 1988.<sup>282</sup> Since 1994, a similar provision has been introduced to mainland UK.<sup>283</sup> It considerably restricts the right to silence and consequently was challenged in Strasbourg by the cases of *John Murray* and *Averill*. In both cases, the Court did not find that the inferences amounted to a breach of Art. 6(1). However, in a different case, that of *Magee*, the Court established a violation of Art. 6, because unlike in the previous two cases, this case was aggravated since the applicant

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<sup>281</sup> See Serious Organised Crime and Police Act 2005, Part II.

<sup>282</sup> By virtue of the Criminal Evidence (Northern Ireland) Order 1988 (Art. 3).

<sup>283</sup> See Criminal Justice and Public Order Act 1994, s.34-37.

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was not only cautioned pursuant to Art. 3 of the 1988 Order, but he had additionally been denied the access to legal assistance for the first two days.

Moreover, condemnations by the Strasbourg Court regarding the low level of suspicion required for arrest under the (Northern Ireland) EPA 1978 led to the repeal of the Act in 1991. However, in the same year a new EPA 1991 was adopted, which provided for the possible presence of a police officer during the first meeting of the arrested person with his solicitor; a provision that, in the eyes of the Strasbourg Court, infringed the arrested person's right to an effective defence under Art. 6, ECHR (see the case of *Brennan*).

During the 1990s, condemnations by the ECtHR also concerned deportation orders for foreign terrorists to countries in which they ran the risk to be tortured or subjected to degrading or inhuman treatment (see *Vilvarajah and Others, Chahal*). These rulings eventually led to the creation of the Special Immigration Appeals Commission in 1997, before which foreigners can appeal their deportation decision.

In the 1990s political efforts to establish peace in Northern Ireland finally had success and culminated in a cease fire and the Good Friday Agreement. However, shortly after, the Omagh Bombing showed that not all participants agreed with the reached compromise. Following the Omagh incident, the Criminal Justice (Terrorism and Conspiracy) Act 1998 was speedily enacted. This again augmented existing counter terror legislation, added a new list of "specified organisations", and introduced a provision that allowed to use as evidence in court the opinion of a police officer that a defendant was a member of a terrorist organisation, a provision harshly criticised for being incompatible with the fair trial principle and the presumption of innocence, as protected by Art. 6 of the ECHR.

In 1998, with the adoption of the Human Rights Act, human rights received more attention in UK's anti-terror legislation. In consequence, the Terrorism Act 2000 was adopted, serving as a compilation of all previous legislation, which should be, unlike the previous Acts, of a permanent nature. An important novelty of this Act was the wider definition of terrorism to include international and religiously motivated terrorism.

In reaction to several negative rulings from Strasbourg (see *Halford, Malone, Khan, Taylor-Sabori, Allan, Chalkley, Lewis, and Perry*) in which the Court held that Art. 8 of the ECHR was violated because covert surveillance measures had been carried out without any legal basis, the UK put these measures on a legal footing through the adoption of the Regulation of Investigatory Powers Act 2000.

Although the UK already disposed of a mass of special anti-terror legislation, after September 11<sup>th</sup> the government deemed it necessary to adopt new legislation quickly to

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respond to the new perceived threat. The most draconian of the post September 11<sup>th</sup> laws adopted so far was Part IV of the ATCSA 2001, which allowed for indefinite detention of foreign suspects who were certified by the Home Secretary as "international terrorists". The respective provisions were quashed by the House of Lords in 2004 for being incompatible with the principle of non-discrimination, as they only applied to foreign terrorists. Following the Lord's decision, the legislator replaced the criticised provisions by a regime of derogating and non-derogating control orders (PTA 2005). Some of these orders were subsequently quashed in rulings before the House of Lords for being incompatible with Arts. 5 and 6(1) of the ECHR as implemented in the Human Rights Act 1998.

Another important ruling of the House of Lords concerned the admissibility of evidence of statements obtained (in a foreign country, by foreign officials) under torture. There the House of Lords ruled that such information could not be used in English Courts even if the torture was perpetrated outside of the territory or control of the UK.

After 2001 the taking of DNA samples has also been further extended by the Criminal Justice Act 2003, and by the Serious Organised Crime and Police Act 2005. Moreover, detention without charge has been successively extended, and systematically doubled, from originally seven days, to fourteen days (CJA 2003), to currently 28 days (TA 2006 following the London Bombings, when the attempt to allow a ninety-days-detention failed). In the pending anti-terrorism Bill, forty-two days of pre-charge detention are being discussed. Arrest without charge is one of the most problematic measures of UK's counter-terrorism efforts.

The London Bombings of 2005 provoked the introduction of new offences related to speech, such as "encouragement of terrorism" (TA 2006), and "incitement or stirring up of hatred against a person on grounds of their religion" (Racial and Religious Hatred Act 2006).

In 2007, a car driven into Glasgow Airport again triggered new legislative efforts. Besides the extremely long pre-charge detention envisaged by the current anti-terror Bill, the draft legislation provides for changes to enable the post-charge questioning of terrorist suspects and the drawing of adverse inferences from silence, notification obligations for terrorist convicts, enhanced sentencing for terrorism-related offenders, and provisions for inquests and inquiries to be heard without a jury.

### **1.6.2. General observations**

When looking at the development of anti-terror legislation in the UK as a whole, we note that some special anti-terror measures have been used at different times in history, such as trials without jury, prolonged pre-charge detention of terrorist suspects,

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extended police powers in general, as well as the adoption of temporary, provisional legislation that has subsequently been re-enacted in most cases. When scrutinising the court's rulings on anti-terror measures, it becomes clear that at least until the adoption of the Human Rights Act 1998 parliamentary sovereignty ruled over international human rights obligations. Courts were reluctant to apply the Articles of the ECHR if British statutory law was unambiguous. Moreover, several examples of special measures have shown that the home secretary has quite far-reaching powers when it comes to combat terrorism, powers that in other countries are rather conferred to the judiciary.<sup>284</sup>

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<sup>284</sup> E.g. it was the home secretary who was competent to enforce the regulations concerning internment in Northern Ireland. Also, under the Investigatory Powers Act 2000 the home secretary, not a judge, authorises invasive methods to gather evidence. Further, under Part IV of the ATCSA 2001 it was again the home secretary who issued certificates that allowed the indefinite detention of suspected foreign international terrorists. Under the subsequent PTA 2005, again the home secretary is in charge to issue non-derogating control orders or to lodge an application with the competent court for derogating control orders.