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# THE REASONABLE SUSPICION TEST OF NORTHERN IRELAND'S EMERGENCY LEGISLATION: A VIOLATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

*Elizabeth Kondonijakos*<sup>†</sup>

## INTRODUCTION

As the leader of the political wing of the Irish Republican Army (IRA), Gerry Adams' primary hope for Northern Ireland is to receive England's guarantee to protect the people of Northern Ireland's basic human and civil rights, Catholics and revolutionaries included.<sup>1</sup> Adams' demand for this guarantee is the latest event in the long, violent strife between Great Britain and Northern Ireland. This longstanding struggle for Irish independence and unity began in 1610, when King James I of Britain encouraged Scottish Presbyterians and English Episcopalians to settle in Ireland on confiscated lands as a means of ensuring the region's loyalty to the crown.<sup>2</sup> A conflict between the two countries has existed ever since.<sup>3</sup>

### I. FOCUS: PRETRIAL RESTRICTIONS ON THE NORTHERN IRISH

This article focuses on the pretrial restrictions which the Northern Ireland (Emergency Provisions) Act (Provisions)<sup>4</sup> and The Prevention of Terrorism (Temporary Provisions) Act (PTA)<sup>5</sup> impose

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<sup>1</sup> Tracy L. Miller, *Gerry Adams' Vision for a New Ireland*, UNITED PRESS, Sept. 29, 1994.

<sup>2</sup> James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM INT'L L.J. 317, 320 (1992).

<sup>3</sup> *Id.*

<sup>4</sup> Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, (Eng.) [hereinafter the Provisions.]

<sup>5</sup> The Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4, (Eng.) [hereinafter the PTA.]

upon the individual liberties of Northern Irish citizens. For example, both the Provisions and the PTA empower police officers in Northern Ireland to arrest citizens, with or without a warrant,<sup>6</sup> if they have reasonable suspicion that the citizen is involved in terrorist activity.<sup>7</sup> The officer may effectuate the arrest by conducting a

<sup>6</sup> *Id.* at §14, The Provisions, *supra* note 4, §17.

<sup>7</sup> The Provisions, *supra* note 4, §§ 17, 18; The PTA, *supra* note 5, § 14(1)(b).

**§ 17 of the Provisions reads as follows:**

**CONSTABLE'S GENERAL POWER OF ARREST AND SEIZURE**

- (1) Any constable may arrest without warrant any person who he has reasonable grounds to suspect is committing, has committed or is about to commit a scheduled offence or an offence under this Act which is not a scheduled offence.
- (2) For the purpose of arresting a person under this section a constable may enter and search any premises or other place where that person is or where the constable has reasonable grounds for suspecting him to be.
- (3) A constable may seize anything which he has reasonable grounds to suspect is being, has been or is intended to be used in the commission of a scheduled offence or an offence under this Act which is not a scheduled offence.

**§ 18 of the Provisions reads as follows:**

**POWERS OF ARREST AND SEIZURE BY MEMBERS OF HER MAJESTY'S FORCES**

- (1) Any member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person who he has reasonable grounds to suspect is committing, has committed or is 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 there are reasonable grounds for suspecting that that person is a terrorist or has committed an offence involving the use or possession of an explosive substance or firearm, where there are reasonable grounds for suspecting him to be.
- (4) Any member of Her Majesty's forces may seize, and detain for not more than four hours, anything which he has reasonable grounds to suspect is being, has been or is intended to be used in the commission of an offence.

**§ 14(1)(b) of the PTA reads:**

**ARREST AND DETENTION OF SUSPECTED PERSONS**

- (1) Subject to subsection (2) below [defining acts of terrorism], a constable may

warrantless search of any premises where he believes the suspect is located.<sup>8</sup> As a result, warrantless and groundless arrests have the potential to occur very often.

This article first discusses the general limits on personal liberties that the emergency legislation imposes upon the people of Northern Ireland, followed by an analysis of the role of the European Court of Human Rights (ECHR) in protecting these rights through Article 5(1)(c)<sup>9</sup> of the European Convention of Human Rights and Fundamental Freedoms (Convention).<sup>10</sup> The second section discusses the ECHR's recent decisions regarding the reasonable suspicion standard of the Provisions. It also addresses the PTA and explains the ECHR's definition of what constitutes reasonable suspicion. The lack

arrest without warrant a person whom he has reasonable grounds for suspecting to be.

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

<sup>8</sup> This power has been called "one of the most offensive provisions in the entire situation." C. RICE, *DIVIDED IRELAND- A CAUSE FOR AMERICAN CONCERN* 24 (1985); *The Provisions*, *supra* note 4, § 16; the PTA, *supra* note 5, § 14 (Supp 1993).

**§ 16 of the Provisions reads:**

**ENTRY AND SEARCH OF PREMISES FOR PURPOSE OF ARRESTING TERRORISTS**

For the purpose of arresting a person under section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (arrest of persons suspected of being concerned in acts of terrorism) a constable may enter and search any premises or other place where that person is or where the constable has reasonable grounds for suspecting him to be.

<sup>9</sup> Article 5 of the Convention reads:

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, art. 5(1)(c) (1953) [hereinafter the Convention.]

<sup>10</sup> *Id.*

of safeguards available to protect the personal liberties of the people of Northern Ireland will then be discussed and will stress the need for ECHR intervention to resolve Northern Ireland's particular problems.

The final section of this article examines the possible effects of the enforcement of a favorable ECHR decision. A decision strongly rebuking England may not have the effect of domestic law, but may still in fact lead to significant changes. This prospect is evidenced by the effects in England of earlier negative decisions by the ECHR. Lastly, England's state of emergency defense will be discussed, revealing the excuse to be ruinous in the face of international law.

#### A. A Brief History of Northern Ireland

As a political entity, Northern Ireland was born out of the First World War.<sup>11</sup> Following the war, the IRA led a guerilla campaign, causing the British Parliament to conclude that autonomy for Ireland was in Great Britain's best interest.<sup>12</sup> The Parliament's solution was a partition of the island into two parts.<sup>13</sup> The partition granted twenty-six counties independence within the British Commonwealth in the form of dominion status, to be collectively known as the Irish Free State.<sup>14</sup> "This overwhelmingly Catholic state adopted a new Constitution in 1937 and subsequently left the British Commonwealth, becoming the Republic of Ireland."<sup>15</sup>

"Parliament established six remaining counties, part of the historic northern province of Ulster, as a self-governing unit within the

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<sup>11</sup> Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case Against Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 93 (1994).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The Republic is comprised of the counties of Carlow, Dublin, Kildare, Kilkenny, Laoighis, Louth, Longford, Meath, Offaly, Westmeath, Wexford, Wicklow, Clare, Cork, Kerry, Waterford, Limerick, Tipperary, Galway, Leitrim, Mayo, Roscommon, Sligo, Cavan, Donegal and Monaghan. *Id.*

<sup>15</sup> *Id.*

United Kingdom."<sup>16</sup> The Northern Ireland Parliament began operation in 1922, and eventually became known as "Stormont."<sup>17</sup> For fifty years, Stormont exercised jurisdiction over all governmental functions except for taxation and defense.<sup>18</sup> Protestant politicians overwhelmingly controlled Stormont.<sup>19</sup> With this uncontrolled majority power, the Stormont's Protestant leaders consistently used its majority power to pursue discriminatory policies against Catholics in employment, housing and voting rights.<sup>20</sup> Much of the Catholic populace "either could not or would not participate in Northern Ireland's governance."<sup>21</sup>

This non-violent resistance led to mild protests, which eventually escalated to violence.<sup>22</sup> The IRA, dormant since 1922, resurfaced and loyal paramilitary groups reappeared as well.<sup>23</sup> The British deployed troops to respond to the ever-increasing violent situation in August 1969 and have remained in Northern Ireland ever since.<sup>24</sup>

The conflict culminated with the British Parliament's enactment of the Northern Ireland (Emergency Provisions) Act of 1972 (Provisions).<sup>25</sup> Emergency legislation has governed Northern Ireland since its creation.<sup>26</sup> Legislative developments framed the United Kingdom's "response to political violence, radically altering

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<sup>16</sup> *Id.* Northern Ireland is comprised of the counties of Antrim, Londonderry, Tyrone, Fermanagh, Armagh and Down.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, (Eng.).

<sup>26</sup> Flaherty, *supra* note 11, at 96. "Such legislation began with the Civil Authorities (Special Powers) Act (Northern Ireland) in 1922, which itself replaced the Restoration of Order Act of 1920."

previously settled criminal processes.”<sup>27</sup> In March 1972, as Northern Ireland's violence peaked with 467 political fatalities, “Britain suspended parliamentary government within Northern Ireland.”<sup>28</sup> Great Britain originally intended the suspension as a temporary measure.<sup>29</sup> The resulting system of direct rule, however, with the English government administering Northern Ireland from London, remains Northern Ireland's governing framework.<sup>30</sup> The British Parliament also enacted several pieces of emergency legislation that radically altered Northern Ireland's criminal justice system.<sup>31</sup> The British Parliament renewed the two major acts subsequently since their creation and are still in effect today.<sup>32</sup>

The first direct act of Parliament is the Northern Ireland (Emergency Provisions) Act (Provisions) of 1991, which replaces the earlier Provisions passed in 1972, 1975, 1978 and 1987.<sup>33</sup> The second is the Prevention of Terrorism (Temporary Provisions) Act (PTA) of 1989, which follows upon the earlier Prevention of Terrorism acts enacted in 1974, 1976 and 1984.<sup>34</sup> While the Provisions apply only to Northern Ireland, the PTA operates throughout the United Kingdom.<sup>35</sup>

The Provisions are a direct result of the recommendations of the Diplock Commission,<sup>36</sup> a commission created to consider legal

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<sup>27</sup> *Id.* at 95.

<sup>28</sup> *Id.* at 94; Kelly, *supra* note 2, at 325.

<sup>29</sup> Kelly, *supra* note 2, at 325.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> The Provisions, *supra* note 4; The PTA, *supra* note 5.

<sup>33</sup> The Provisions, *supra* note 4; The PTA, *supra* note 5; Flaherty, *supra* note 11, at 95.

<sup>34</sup> Flaherty, *supra* note 11, at 95.

<sup>35</sup> *Id.*

<sup>36</sup> Charles Carlton, *Judging Without Consensus: The Diplock Courts in Northern Ireland*, L. & POL'Y Q. 225, 230 (April 1981). Prime Minister Heath of Great Britain appointed Lord Justice Diplock, one of their most prominent jurists, to head the commission, after he realized that the province's courts were unable to deal with the increased level of violence. *Id.*

procedures to deal with terrorist activities in Northern Ireland.<sup>37</sup> The Provisions have been described as "the most Draconian measure[s] to be put before Parliament at Westminster."<sup>38</sup> These Provisions, along with the PTA, constitute the basis for the level of personal rights and freedoms the citizens of Northern Ireland possess today.<sup>39</sup>

### B. Restrictions on Personal Liberty

Both the Provisions and the PTA impose procedural and substantive restrictions on individual liberty in Northern Ireland, with the purpose of preventing terrorist activity in both countries. The two acts work in tandem to form a system designed to garner easier convictions.<sup>40</sup> Together, these two provisions allow, *inter alia*, a police officer or army personnel to make a warrantless arrest, as well as search and seize possessions based on the security officer's reasonable suspicion<sup>41</sup> that the person is a terrorist.<sup>42</sup>

The Provisions grant security forces further powers of arrest where they suspect non-terrorist criminal activity.<sup>43</sup> Police officers, unlike army personnel, have the right to seize anything they find during their warrantless search if they believe the object to be connected to a crime.<sup>44</sup> All of these situations require a very low standard of suspicion for a police or army officer to arrest, search and

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<sup>37</sup> W.L. Twining, *Emergency Powers and the Criminal Process: The Diplock Report*, 1973 CRIM. L. REV. 406 (1973).

<sup>38</sup> *Id.* at 407.

<sup>39</sup> Kelly D. Talcott, *Questions of Justice: U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME L. REV. 474, 478 (1987).

<sup>40</sup> Flaherty, *supra* note 11, at 95.

<sup>41</sup> The Provisions, *supra* note 4, § 16; The PTA, *supra* note 5, § 14. ("reasonable grounds for suspecting" requires not only that the person in question has reasonable grounds for suspecting, but also that he actually does suspect).

<sup>42</sup> The Provisions, *supra* note 4, §§ 16-18; The PTA, *supra* note 5, § 14.

<sup>43</sup> The Provisions, *supra* note 4, § 17; Talcott, *supra* note 39, at 480.

<sup>44</sup> The Provisions, *supra* note 4, § 17(3).

seize a suspect and his possessions.<sup>45</sup> The officer bases his suspicion on his subjective belief, with the result that almost any Irish citizen is susceptible to arbitrary arrests, searches and seizures at any time.<sup>46</sup>

Catholic Northern Irish political leaders and civilians have historically protested that the low standard of reasonable grounds required of the English domestic police and military, results in arbitrary criminal procedures.<sup>47</sup> They claim that these procedures violate basic human rights afforded by international law.<sup>48</sup> To ensure basic human rights for the people of Northern Ireland, including the right to be free from arbitrary arrests, searches and seizures, Great Britain has the option to willingly review and repeal the emergency legislation. Many Catholic Irish political leaders and non-partisan civil rights groups recently called for England to roll back its emergency powers.<sup>49</sup> However, with the current wave of conservatism pervading the British political climate it was highly unlikely that they would repeal the emergency legislation.<sup>50</sup> For example, Parliament responded in 1994 to public pressure to take a tougher stance toward criminals by passing the Criminal Justice and Public Order Bill, a pro-law enforcement bill that went into effect in Spring 1995.<sup>51</sup> However, Northern Ireland is not without legal recourse. An alternative to the voluntary repeal of the Provisions and the PTA may be found in the power of the Convention.<sup>52</sup>

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<sup>45</sup> Flaherty, *supra* note 11, at 95.

<sup>46</sup> *Id.*

<sup>47</sup> *British Abusing Rights, Sinn Fien Leader Says*, THE RECORD (BERGEN), October 6, 1994, at A28.

<sup>48</sup> *Id.*

<sup>49</sup> Jim Cusack, *Rolling Back "Emergency" Powers with Origins in Mid-Eighteenth Century*, THE IRISH TIMES, October 18, 1994, at 6; Richard Norton-Taylor & Duncan Campbell, *Liberty Calls for Human Rights 'Peace Dividend'*, THE GUARDIAN, September 3, 1994, at 4; Dick Grogan, *Call for Emergency Legislation to be Repealed, North and South*, THE IRISH TIMES, September 9, 1994, at 7.

<sup>50</sup> Michael Zander, *Silence Isn't Just for Crooks*, THE TIMES (LONDON), August 20, 1994 at

<sup>51</sup> *Id.*

<sup>52</sup> The Convention, *supra* note 9 and accompanying text.

### C. Pretrial Restriction Cases In Recent ECHR History

The Convention guarantees the citizens of its signatory states the protection of their basic, fundamental human rights as defined by international law.<sup>53</sup> The United Kingdom has recognized and has agreed to respect those rights and freedoms listed in the Convention.<sup>54</sup> The ECHR may conduct hearings regarding violations of the Convention.<sup>55</sup> A state party may refer a violation to the ECHR and most states accept the right of individuals to sue governments for a breach of the Convention.<sup>56</sup> The ECHR's decisions are binding, although the degree of the force of the law depends on the particular country.<sup>57</sup>

Recently, the ECHR ruled on whether England's pretrial actions toward citizens of Northern Ireland violated the Convention.<sup>58</sup> Specifically, citizens petition the Court to adjudicate instances whether England's actions violated Article 5(1)(c) of the Convention, which guarantees a person's right to liberty except when the lawful arrest is

<sup>53</sup> Jane S. Jensen, *The Impact of the European Convention for the Protection of Human Rights on National Law*, 52 U. CIN. L. REV. 760 (1983).

<sup>54</sup> Talcott, *supra* note 39, at 485.

<sup>55</sup> Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments*, 33 AMER. U. L. REV. 9, 16 (1983).

<sup>56</sup> *Id.*

<sup>57</sup> Member states have the option of recognizing the jurisdiction of the ECHR as compulsory, pursuant to Article 46 of the Convention. Jensen, *supra* note 53, at 762 & n.8. Most countries have done so. *Id.* Article 46 of the Convention provides:

(1) Any of the High Contracting Parties may at any time declare that it recognizes as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

Convention, *supra* note 9, art. 46.

<sup>58</sup> Fox, Campbell and Hartley v. United Kingdom, 13 Eur. Ct. H.R. Rep. at 157 (1991); Murray v. United Kingdom, 19 Eur. Ct. H.R. Rep. at 193 (1995).

based upon reasonable suspicion.<sup>59</sup> The ECHR found such a violation in the 1990 case of *Fox, Campbell and Hartley v. United Kingdom*<sup>60</sup> in which the British police detained and arrested three men under suspicion of being terrorists.<sup>61</sup> The Court was unconvinced by the reasons cited by England to satisfy its reasonable suspicion standard.<sup>62</sup> Most recently, in *Murray v. United Kingdom*,<sup>63</sup> the ECHR ruled that British troops acted within the law when they arrested a Belfast woman suspected of fundraising for the IRA under the 1978 Provisions.<sup>64</sup> At the time, the Provisions only called for a "sincere and authentic" military suspicion; whereas, today the Provisions require a standard of reasonable suspicion.<sup>65</sup> The ECHR in effect issued the message to the United Kingdom that an even lower standard than reasonable suspicion is acceptable to arrest Northern Irish citizens.<sup>66</sup> While these two cases are factually analogous, it appears that the ECHR came to two different conclusions on the same issue of reasonable suspicion: in *Fox*, the ECHR found that the arrests were unjustified<sup>67</sup>, while in *Murray* the ECHR held that the arrest was within Article 5(1)(c).<sup>68</sup> These issues will be explained and discussed in more detail in the following sections.

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<sup>59</sup> The Convention, *supra* note 9, art.5(1)(c); *Murray*, 19 Eur. Ct. H.R. Rep. at 193 (1995).

<sup>60</sup> *Fox*, 13 Eur. Ct. H.R. Rep. at 1567.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 29-32.

<sup>63</sup> *Murray*, 19 Eur. Ct. H.R. Rep. at 193.

<sup>64</sup> *Id.*

<sup>65</sup> Northern Ireland (Emergency Provisions) Act, 1978, ch. 5, § 14.

<sup>66</sup> *Fox*, 13 Eur. Ct. H.R. Rep. at 157.

<sup>67</sup> *Id.* at 29-32.

<sup>68</sup> *Murray*, 19 Eur. Ct. H.R. Rep. at 193.

subsequent search and seizure at any point.<sup>160</sup> The military and paramilitary forces are in effect their own judge and jury on whether the arrest was founded on reasonable suspicion or otherwise, since the law does not require a warrant.<sup>161</sup> The citizens of Northern Ireland are left to argue their case in court after the event in question took place, with the burden of proof falling on them.<sup>162</sup> The burden of proof rests solely on the petitioner to disprove that the officers had a good faith reasonable suspicion to arrest.<sup>163</sup> Furthermore, the ECHR has set forth a confusing standard by which the domestic courts are supposed to judge the reasonableness of the arrest.<sup>164</sup> This unclear mandate can only serve to hinder potential petitioners.

Second, the fact that few arrests result in charges being filed,<sup>165</sup> as in *Fox*,<sup>166</sup> demonstrates that the security forces abuse the arrest powers granted by the EPA and infringe on the Northern Irish citizens' civil rights in the process.<sup>167</sup> Unfortunately, periodic arrest and interrogation is a fact of life for many Northern Irish citizens.<sup>168</sup> The fact that these periodic arrests rarely result in charges being filed illustrates that the arrests further the objective of suppression and intimidation and not of efficient law enforcement.<sup>169</sup>

Finally, the ECHR needs to come to a clear and stringent decision rebuking the British for their standard for determining reasonableness because a strong decision may protect the Northern

<sup>160</sup> The Provisions, *supra* note 4, §§ 16-18; the PTA, *supra* note 5, § 14.

<sup>161</sup> The Provisions, *supra* note 4, §§ 16-18; the PTA, *supra* note 5, § 14.

<sup>162</sup> See generally *Fox*, 13 Eur. Ct. H.R. Rep. at 157 (1991)(stating that the petitioner must disprove the existence of reasonable suspicion); *Murray*, 19 Eur. Ct. H.R. Rep. at 193 (1995).

<sup>163</sup> *Fox*, 13 Eur. Ct. H.R. Rep. at 157 (1991); *Murray*, 19 Eur. Ct. H.R. Rep. at 193 (1995).

<sup>164</sup> See generally *Fox*, 13 Eur. Ct. H.R. Rep. at 157 (discussing the inconsistency between the ECHR's decisions in *Fox* and *Murray*).

<sup>165</sup> Talcott, *supra* note 39, at 481.

<sup>166</sup> *Fox*, 13 Eur. Ct. H.R. Rep. at 157.

<sup>167</sup> Talcott, *supra* note 39, at 481.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Irish citizens against the mentality that pervades the police and security forces of Northern Ireland. The security forces in Northern Ireland completely control the inhabitants of the country. One could conclude that the British forces are manipulating the rules of the Convention in order to intimidate and suppress the citizens of Northern Ireland, supposedly their own people.

#### IV. SCOPE AND IMPACT OF A FAVORABLE DECISION BY THE ECHR

There is no question that the Convention, because it is a treaty, is binding on those states that have ratified it.<sup>170</sup> The United Kingdom is one of those states.<sup>171</sup> The United Kingdom has agreed to protect and respect these freedoms listed in the convention.<sup>172</sup>

The relationship of the Convention to the domestic law of England is the focus of this section. If the ECHR was to reach a favorable decision, mandating that England must raise its reasonable suspicion standard in order to protect Northern Irish citizens, the next query becomes how England would implement this decision into their domestic law. The question presented is whether legislative implementation of an ECHR directive is feasible in order to enforce an ECHR decision as domestic law.

The domestic courts in the United Kingdom do not view the Convention as automatically applicable to their jurisdiction.<sup>173</sup> Rather, the United Kingdom requires additional action for the Convention to have the force of municipal law.<sup>174</sup> To date, such action has not been taken in the United Kingdom.<sup>175</sup> Thus, the next inquiry focuses on the legislative prong of domestic law. Legislative implementation of an

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<sup>170</sup> Jensen, *supra* note 53, at 773.

<sup>171</sup> Talcott, *supra* note 39, at 485.

<sup>172</sup> *Id.*

<sup>173</sup> Jensen, *supra* note 53, at 774.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

ECHR directive would be a more feasible route to take.

The Convention is likely to have its greatest impact upon the legislature rather than upon the courts.<sup>176</sup> Many judges are not familiar with the Convention and do not accept the ECHR rulings as binding upon them.<sup>177</sup> As a result, applying human rights principles via the legislature will generally have a greater impact upon national law.<sup>178</sup> Furthermore, governments must coordinate their particular statutory law with the Convention when they first become signatories, because the Convention requires governments to review the applicable legislation and explicitly seek exemption from any provision of the Convention which conflicts with their domestic laws.<sup>179</sup>

Instances of legislative modification in the United Kingdom as a result of decisions under the Convention exist. These instances include the 1973 ruling that the United Kingdom had violated the rights of thirty one East African Asians under Article 3 of the Convention.<sup>180</sup> The ruling caused the British government to liberalize its immigration quotas to allow all thirty-one individuals to migrate to the United Kingdom.<sup>181</sup> These changes caused England to declare this issue closed in 1977.<sup>182</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 776; *See also* The Convention, *supra* note 8, at art. 64. Pursuant to Article 64, "any state may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision."

<sup>180</sup> The report of the Human Rights Commission in the East African Asians case has never been published officially, but extracts of the report are published in 3 Eur. H. R. Rep. 76, 77 (1981). Article 3 reads, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," The Convention, *supra* note 8, art. 3.

<sup>181</sup> Jensen, *supra* note 53, at 777; *See* 1971 Y.B. Eur. Conv. on H.R. 956 (debate in Parliament concerning immigration control problems caused by the Court's decision in East African Asians cases).

<sup>182</sup> Jensen, *supra* note 53, at 777; Committee of Ministers, *Resolution DH(77)2*, 1977 Y.B. Eur. Conv. on H.R. 642 (Oct. 21, 1977).

The ECHR decided in the 1975 case *Golder v. United Kingdom*<sup>183</sup> that the United Kingdom had violated Articles 6(1) and 8 of the Convention by restricting communications between a detained person and his lawyer.<sup>184</sup> This decision led the British government to abolish such restraints.<sup>185</sup> The United Kingdom also amended its marriage laws as a result of two complaints from prisoners whose right to marry while in jail had been denied.<sup>186</sup> Finally, the mere threat of a court case led to a negotiated settlement between Great Britain and Greece.<sup>187</sup> The British government repealed certain ordinances relating to Cyprus, ordinances the Greek government protested in the first two interstate applications presented to the ECHR in May 1956 and July 1957.<sup>188</sup>

These past instances of legislative modification seem to

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<sup>183</sup> 1975 Y.B. Eur. Conv. on H.R. 290.

<sup>184</sup> *Id.*; The Convention, *supra* note 9, arts. 6(1), 8. Article 6(1) provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties to require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>185</sup> Jensen, *supra* note 53, at 778.

<sup>186</sup> *Id.*; *Draper v. United Kingdom*, 1981 Y.B. Eur. Conv. on H.R. 462; *Hamer v. United Kingdom*, 1981 Y.B. Eur. Conv. on H.R. 464.

<sup>187</sup> Jensen, *supra* note 53, at 778.

<sup>188</sup> Jensen, *supra* note 53, at 778; *Greece v. United Kingdom*, No. 176/56 (1956), and No. 299/57 (1957) (state applications).

provide hope that England would change their practices and standards of the Provisions if the ECHR so mandated. However, a problem still lies in the enforcement of the Court's mandate. For example, in *Ireland v. United Kingdom*,<sup>189</sup> the Court held that the combined use of certain interrogation techniques by United Kingdom officials on Northern Irish citizens suspected of IRA activities, constituted a breach of Article 3 of the Convention.<sup>190</sup> However, no charges were ever brought against those responsible.<sup>191</sup> The ECHR held that it had no power to direct the United Kingdom to institute criminal or disciplinary proceedings against those members of the security forces who had committed the breaches of Article 3 and against those who tolerated or condoned such a breach.<sup>192</sup> Thus, it could follow that the ECHR may rule against Great Britain, but may not initiate any enforcement procedures against the violators of Article 5.

Strong support exists for a change in the standards, although one could argue that the United Kingdom has an incredible stake in keeping the standard an inferior one. Its great flexibility in carrying out the arrests and subsequent searches and seizures is apt to comprise a tremendous amount of its power in being the dominant force between itself and the IRA. To give up this weapon could compromise its position of power. Therefore, by maintaining its power base of intimidation as its motivation, it is very unlikely that the British Parliament would sanction or initiate any change in the Provisions.

On the other hand, the United Kingdom has changed the standards in the past, as the ECHR discussed in *Fox and Murray*.<sup>193</sup> The ECHR raised the standard in 1987 from a genuine and honestly

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<sup>189</sup> 1978 Y.B. Eur. Conv. on H.R. 602.

<sup>190</sup> *Id.*

<sup>191</sup> Lysaght, *supra* note 55, at 17.

<sup>192</sup> *Id.* at 18.

<sup>193</sup> See generally *Euro Rights Court Upholds Britain on Northern Ireland*, THE REUTER EUROPEAN COMMUNITY REPORT, Oct. 28, 1994 (analyzing the ECHR's decision in *Murray*).

held suspicion to a reasonable suspicion standard.<sup>194</sup> In addition, Great Britain changed their interrogation techniques, the techniques so criticized in *Ireland v. United Kingdom*, due to public pressure.<sup>195</sup> Furthermore, on August 31, 1994 the IRA declared a cease fire to all the terrorist activity.<sup>196</sup> Gerry Adams has toured the United States since, gathering support for his peace plan among both American citizens and politicians.<sup>197</sup> Thus, great international pressure from America and its allies may provide England with some incentive to change its laws.

Additionally, the peace plan itself could be perceived as evidence itself that such stringent laws are no longer necessary. Under the standards of the Convention, an emergency situation has existed in Northern Ireland since 1957.<sup>198</sup> The existence of a protracted state of emergency in Northern Ireland has, in the eyes of the ECHR, justified the United Kingdom's breaches of the Convention in the years since 1957.<sup>199</sup> However, the fact that the emergency situation is now in its thirty-eighth year suggests that which was once an emergency has now become the status quo.<sup>200</sup> As a result, the Parliament of the United Kingdom cannot use the excuse of an emergency situation anymore to delay advancements and continue infringing on the civil rights of the people of Northern Ireland.

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<sup>194</sup> *Id.*

<sup>195</sup> Lysaght, *supra* note 55, at 17.

<sup>196</sup> See Francis Costello, *Many Miles to Peace in Ireland; Cease-fire only the End of the Beginning*, THE BOSTON HERALD, Sept. 18, 1994, at 27 (discussing the potential for peace in Northern Ireland).

<sup>197</sup> See Miller, *supra* note 1 (explaining Gerry Adams' methods of garnering international support for the IRA's peace plan).

<sup>198</sup> Talcott, *supra* note 39 at 490 & n. 111. "On July 15, 1957, the government of Northern Ireland put into force extraordinary powers to secure public peace and order. The Secretary-General of the Council of Europe was informed of these measures by a letter dated July 20, 1957."

<sup>199</sup> *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1976). The Court held that the internment practiced in the *Lawless* case appeared to be a "measure strictly required by the exigencies of the situation". *Id.* at 59; Talcott, *supra* note 39, at 490 & n.112.

<sup>200</sup> Talcott, *supra* note 39, at 490.

## V. CONCLUSION

1994 was an extraordinary year for Northern Ireland. All eyes remain on Northern Ireland to live up to the promise of lasting peace. The IRA's change in approach to the conflict between Great Britain and Northern Ireland could be the occasion that England needs to prompt a complete review of all Northern Irish emergency legislation. A review of emergency powers would illustrate a renewed commitment to human rights in Northern Ireland. This review has not occurred as of yet.

Failure to acknowledge and protect the rights of Northern Irish citizens led to 25 years of war.<sup>201</sup> The government of Great Britain cannot espouse its protection of inalienable individual human rights when its own citizens in Northern Ireland are being subjected to arbitrary arrests, searches and seizures.<sup>202</sup> When confronted, England has invoked the circumstances of the Northern Ireland conflict for excuses and the ECHR has accepted that reason.<sup>203</sup>

The United Kingdom uses terrorism as a justification for the imposition of draconian powers in Northern Ireland, and the ECHR has accepted this defense.<sup>204</sup> The IRA has now initiated a cease fire, however.<sup>205</sup> If the cease fire holds, the political climate could change, no longer the climate that made it difficult to oppose any aspect of anti-terrorist legislation.

The ECHR cannot claim ignorance when confronted with evidence that the reasonable suspicion standard of the United Kingdom's emergency provisions violates the mandates of a Convention it ratified.<sup>206</sup> However, the ECHR is wavering between protecting Northern Irish citizens' rights or protecting Britain's

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<sup>201</sup> Flaherty, *supra* note 11.

<sup>202</sup> Talcott, *supra* note 39, at 481.

<sup>203</sup> *Supra* note 199 and accompanying text.

<sup>204</sup> *Supra* note 199 and accompanying text.

<sup>205</sup> Costello, *supra* note 196.

<sup>206</sup> Bassiouni, *supra* note 83.

military power while innocent people on the streets of Northern Ireland pay for the Court's indecisiveness.

Article 19 of the Convention creates a European Court of Human Rights to "ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention."<sup>207</sup> This present Court is renegeing on that duty. Since ECHR decisions are binding upon England, a decision criticizing England and ordering a change in their standards could likely result in some change in Great Britain.<sup>208</sup> The combined factors of international pressure,<sup>209</sup> the IRA's apparent willingness to work for a lasting peace,<sup>210</sup> and the legislature's obligation to follow the directives of the Court will all work together to ensure fundamental human rights in Northern Ireland.<sup>211</sup>

The leaders of Great Britain and Northern Ireland have earnestly agreed to reach an agreement on the political future of Northern Ireland.<sup>212</sup> In the meantime, before a final solution regarding Northern Ireland is reached, the ECHR has the chance to contribute to the ending of centuries of violence between these two cultures. More importantly, it has the opportunity to ensure the fundamental human rights assured to all world citizens to the people of Northern Ireland. The potential for lasting peace that presently exists gives the ECHR the perfect opportunity to make an ultimate decision protecting the human rights of the citizens of Northern Ireland. The moment the very name of Ireland is mentioned, the English seem to bid adieu to common feeling, common prudence, and common sense, and to act with the barbarity of tyrants, and the fatuity of idiots.<sup>213</sup>

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<sup>207</sup> The Convention, *supra* note 9, at art. 19.

<sup>208</sup> *Supra* notes 170-172 and accompanying text.

<sup>209</sup> Miller, *supra* note 1.

<sup>210</sup> Costello, *supra* note 196.

<sup>211</sup> *Supra* notes 176-179 and accompanying text.

<sup>212</sup> William Miller, *British, Irish Agree to Speed Party Talks; Move Centers on Laying Groundwork*, THE BOSTON GLOBE, Dec. 21, 1994, at 20.

<sup>213</sup> SYDNEY SMITH, THE LETTERS OF PETER PLYMLEY (Ayer 1972) (1929).